Mirror, Mirror On the Wall, Who Are You to Say Who is Fairest of Them All?

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INTRODUCTION

II. BACKGROUND: LOOKISM DEFINED AND THE ADVANTAGES/DISADVANTAGES IT ENTAILS

A. Reality Bites: Lookism, the Innate Bias

B. It Hurts Not to Be Beautiful: Advantages of Lookism

C. It Hurts To Be Beautiful: Disadvantages of Lookism

III. LEGAL REMEDIES FOR LOOKISM

A. Federal Law
   1. Constitutional Safeguards
   2. Title VII of the Civil Rights Act of 1964
   3. Federal Laws with Fewer Safeguards against Lookism: The Age Discrimination and Employment Act (ADEA), and the Americans with Disabilities Act (ADA)
   4. Gender Bias

B. State Law
   1. The District of Columbia
   2. Santa Cruz

IV. THE REALITY OF TELEVISION

A. The Beauty of Reality Television: The Roots and Evolution

B. Beauty Everywhere in Reality Television, Even if its Not The Subject Itself

C. The Boiling Point: Bachelor Rejects Say No More

CONCLUSION: WHY LEGAL REFORM INCORPORATING LOOKISM WILL NEVER BE “LEGAL”

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INTRODUCTION

“Beauty is in the eye of the beholder.” “Don’t judge a book by its cover.” Our society is saturated with these cliché idioms that attempt to bestow comfort that appearance is not everything, but when Botox injections have become a routine visit to the doctor’s office, it is quite obvious that beauty is not only skin deep. Society’s infatuation with beauty manifests itself in popular culture, and is reinforced by television.\(^2\) However, while the media is undoubtedly a reflection of our society’s obsession with beauty, it is also a source of fuel that drives this behavior.\(^3\) This reality extends into all aspects of the media, even into the news. Television news reporters have become exponentially more attractive and “it is now virtually impossible to find a man or woman reading news copy to a camera who could not be described as attractive or good-looking,” and anyone who does not live up to this ideal is quickly shamed from the industry.\(^4\) In *Craft v. Metromedia, Inc.*, Kansas City, Missouri KMBC-TV co-anchor, Christine Craft, received a demotion after polls reflected an “overwhelmingly negative” perception of her appearance.\(^5\) Craft’s employer attributed recent poor ratings to this negativity and instituted “intensive . . . wardrobe oversight” which at one point included a clothing calendar laying out what outfit she were to wear each day.\(^6\)

\(^2\) See Kate Fox, *Mirror, Mirror*, SOCIAL ISSUES RESEARCH CENTRE (1997), [http://www.sirc.org/publik/mirror.html](http://www.sirc.org/publik/mirror.html) (“Advances in technology and in particular the rise of the mass media has caused normal concerns about how we look to become obsessions.”). See also GORDON L. PATZER, *LOOKS: WHY THEY MATTER MORE THAN YOU EVER IMAGINED*, 4 (2008) for the notion that “[j]ust as the rise of the mass media shaped public perceptions on the parameters of physical attractiveness, PA [physical attractiveness] has reshaped the media itself.”

\(^3\) PATZER, supra note 2, at 4. (“Fueled by an explosion of media images that glorify youth and beauty, millions of Americans have turned their waking lives into endless quests for enhanced PA. . . .”).

\(^4\) Id.

\(^5\) Serafina Raskin, Note, *Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN’S L.J. 247, 252-53 (Summer 2006).

Craft filed suit against her employer under a claim of gender discrimination, alleging that she was subject to more stringent standards than her male co-workers. Craft’s image consultant testified that she advised “Craft to not wear the same outfit more than once every three-to-four weeks,” whereas her male counterparts “could wear an outfit every week, and a suit even twice the same week if combined with a different tie.” The Eighth Circuit concluded that the station’s harsh appearance requirements were critical to its’ economic prosperity based upon focus groups and telephone survey results. While the court recognized KMBC’s “overemphasis on appearance” they did not delve further into the issue because they concluded that a court of law was not the “proper forum in which to debate the relationship between newsgathering . . . and considerations of appearance . . . i.e. questions of substance versus image—in television journalism.”

Although the court ultimately validated the network’s hiring practices based upon the statistical support, this decision begs the question whether the public’s desires are really the driving force behind hiring decisions in the entertainment field, or whether the media is to blame for broadcasting an image from which people have come to view anything less as undesirable.

It is indisputable that appearance plays an important role in our society. It is the first thing others notice, and within 20 seconds of meeting someone, judgment is passed. Although our global economy is at its worst, the world’s investment in appearance has not faltered, totaling

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7 Raskin, supra note 5, at 253.
8 Yuracko, supra note 6, at 22.
9 Raskin, supra note 5, at 253.
10 Craft v. Metromedia, 766 F.2d 1205, 1215 (8th Cir. 1985).
11 See Daily Mail Reporter, First thing women notice about other women is how FAT they are, MAIL ONLINE (22:13 EST, 27 May 2011), http://www.dailymail.co.uk/femail/article-1391477/Women-pass-judgement-20-seconds-meeting-them.html (Study shows that women pass judgment on someone within 20 seconds of meeting them); See also Karen Zakrzewski, Comments, The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace, 7 U. PA. J. LAB. & EMP. L. 431, 432 (Winter 2005).
over $200 billion a year. Appearance “shapes our life . . . from cradle to grave.” These stereotypes are engrained in our minds from the time we are young children with fairytales such as Cinderella in which the good princess is always beautiful, and the evil stepsisters never fair quite as well.

This Note explores the nature of this ever-evolving form of discrimination and aims to provide a different, unbiased perspective of its consequences in society. Overall, people believe more attractive individuals have a greater advantage, however, this paper examines the weaknesses of this argument, and questions the source of this behavior. Ringing in this millennium with ever-growing popularity and increasing sensationalism, reality television is a reflection of the growth and prevalence of beauty in American culture. Close examination of this form of entertainment yields the ultimate conclusion that legislative reform is not the proper avenue to achieving change. This coupled with an analysis of various factors reveals that any sort of reform would be too great of a diversion from our system of government, as any sort of uniform application of the law would be impossible.

Part II provides an overview of lookism, beginning with its definition, and moving into the advantages and disadvantages those subject to this discrimination face. Part III explores the legal remedies, or lack thereof, that are currently available to victims of appearance discrimination. The ineffectiveness of any current legal protections against appearance discrimination, coupled with conflicting legal principles shows that legal reform on appearance discrimination would be an improper extension of current anti-discrimination statutes. Part IV explores the impact of reality television and further examines the obstacles to reform and how

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13 PATZER, *supra* note 2, at 3.
the media may pose an impossible barrier to its accomplishment. Finally, Part V concludes the discussion with a look at whether reform is, or will ever be, possible.

II. BACKGROUND: LOOKISM DEFINED AND THE ADVANTAGES/DISADVANTAGES IT ENTAILS

A. Reality Bites: Lookism, the Innate Bias

“Lookism is the distinct form of discrimination or prejudice on the basis of an individual’s appearance . . .” that “occurs both inside and outside of classes of sex and race.”14 It is society’s standard for beauty or attractiveness, and the resulting biases that ensue as a result of stereotypes and generalizations about how an individual measures up to them.15 It is the way people are “biased by their perceived individual level of physical attractiveness,” and it has fascinated social scientists for decades.16 This form of discrimination is unique because it is not easily identifiable and frequently overlaps other sources of injustice.17

Originating at birth, the roots of this bias are strong and well matured before most even understand what it means.18 It impacts the level of care nurses provide newborn babies and jury verdicts are often unconsciously swayed based upon a witness’s appearance.19 As the “single most important factor in employee selection for a wide variety of jobs,20 lookism influences all facets of life, from the selection of role models to the election of officials.21 Appearance is a mechanism that is used to judge and compare people, and there are various stereotypes that ensue

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16 PATZER, *supra* note 2, at 3.
19 PATZER, *supra* note 2, at 3.
20 See Mila Gumin, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1773 (May 2012), “In a survey of interviewers, appearance emerged as the ‘single most important factor in employee selection for a wide variety of jobs.’”
21 Id. at 6.
as a result of this judgment. Although most would agree that they can identify beauty, defining what it means exactly can be quite challenging and poses an additional barrier to legal reform.

In her book, The Beauty Bias: The Injustice of Appearance in Life and Law, Deborah L. Rhode describes the elements of the appearance standard based upon a “continuum” ranging from easily ascertained characteristics, such as height and weight, to “voluntary characteristics” which she classifies as clothing and grooming.

B. It Hurts Not to Be Beautiful: Advantages of Lookism

Generally, lookism serves as a considerable advantage and results in preferential treatment of people who are perceived as attractive. These individuals are viewed as more intelligent, likeable, honest, and sensitive. They more easily obtain employment and are presented with greater opportunities, which lead to a superior earning potential. For example, research shows that ‘average-looking’ individuals earn three to eight percent less than ‘good-looking’ people. Attractive employees are often perceived as performing their job at a higher quality then they actually are, further reinforcing this earning gap by enabling them to advance in ranking, and therefore salary, more readily.

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22 See Heather R. James, Note, If You are Attractive and You Know it, Please Apply: Appearance Based Discrimination and Employers’ Discretion, 42 VAL. U. L. REV. 629, 637 (Winter 2008) (“Undoubtedly, people make decisions based on exterior stereotypes and frequently form opinions supported solely by prejudices.”).
23 See Michael Newman & Faith Isenbath, Appearance: A New Protected Class Under Title VII?, 57-DEC FED. LAW. 17 (2010) (“There is no objective measure for attractiveness, because beauty is very much in the eye of the beholder. As one judge noted, ‘[n]o Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal.’”).
24 Id. at 25.
26 Zakrzewski, supra note 11, at 433.
27 Id.
29 Stossel & Mastropolo, supra note 25.
The legal world is no exception. “In such a competitive field, only attractiveness breaks the tie between those lawyers that are equally competent and qualified.” As a result, top corporate lawyers are typically more attractive than their inferior colleagues. Law firms are proponents of this consensus, maintaining that a lawyer’s appearance “contributes to their presence, and therefore success, in the courtroom.” Additionally, attractive people often receive superior medical attention from doctors and lighter sentencing in the criminal justice system. Age is of no barrier when it comes to this bias. Disparities widen during childhood, evidenced by the fact that less attractive children often exhibit lower self-confidence and inferior social skills. Furthermore, studies show that attractive children are more popular, both with classmates and with teachers who tend to give these students higher marks. As children witness these inequalities they quickly adopt them, “ascribing better personality traits to good-looking individuals,” and this inclination only strengthens with age.

C. It Hurts To Be Beautiful: Disadvantages of Lookism

Even though an attractive appearance has its benefits, it also has its limitations. A 2006 “20/20 In Touch” special, “Beauty Trumps All” discussed the findings of a study by top university researchers that quantified these precise limitations. This study, entitled “Judging a Book by Its Cover: Beauty and Expectations in the Trust Game,” revealed a ‘beauty penalty’ that

31 Id.
32 Id.
33 Id.
34 See RHODE, supra note 12, at 6 (Showing that bias is present as soon as children can express their opinions).
35 Id.
36 See Fox, supra note 2 (discussing results from studies that show that ‘attractive children are more popular, both with classmates and teachers. Teachers give higher evaluations to the work of attractive children and have higher expectations of them (which has been shown to improve performance)’).
37 Rhode, supra note 12, at 1037.
38 Stossel & Mastropolo, supra note 25.
attractive individuals are often subjected to.\textsuperscript{39} People generally have higher expectations of beautiful people, and when these individuals fail to measure up, they face greater consequences for their failure.\textsuperscript{40} They may also face adversity in hiring and promoting because their intelligence is often doubted and people of the same sex have less of a desire for future interaction with attractive people of their own sex.\textsuperscript{41}

Attractive women are more likely to be subjected to stereotypes, harassment, and scrutiny,\textsuperscript{42} and are often pigeonholed in jobs that encourage them to use their looks for gain without regard to any other skills they possess.\textsuperscript{43} They often face difficulty sustaining platonic relationships with members of the opposite sex, as men often feel uncomfortable around attractive women and have difficulty maintaining a professional relationship.\textsuperscript{44} The Supreme Court of Iowa’s recent decision in \textit{Nelson v. James H. Knight DDS, P.C.} has gained national attention in the media, shining a spotlight on this issue. Melissa Nelson, the “best dental assistant” her employer, Dr. James Knight, ever had, was terminated after ten-and-a-half years of diligent service\textsuperscript{45} “for being too ‘irresistible’ and a ‘threat’ to her employer’s marriage.”\textsuperscript{46} Although Nelson and Dr. Knight never engaged in a sexual relationship, nor desired one, Dr. Knight “worried he was getting too personally attached to her” and “feared he would try to have

\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} See William R. Corbett, \textit{Hotness Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law}, 60 CATH. U. L. REV. 615, 643 (Spring 2011); See also, Sam Sommers, \textit{STUDY: When Being Beautiful Backfires}, HUFFINGTON POST (08/03/11 09:15AM ET), \url{http://www.huffingtonpost.com/sam-sommers/beauty-advantage-study_b_906392.html} (describing the “pretty penalty” for job and college applicants with same-sex evaluators as “. . . less desire for future interaction with attractive people of their own sex. The men seemed threatened by the idea of having good-looking men around, and same for the women when it came to attractive women. . .”).
\textsuperscript{42} James, \textit{supra} note 22, at 637.
\textsuperscript{43} Corbett, \textit{supra} note 41, at 643.
\textsuperscript{44} Alyssa Newcomb & Tanya Rivero, \textit{Melissa Nelson: Dental Assistant Fired For Being ‘Irresistible’ is ‘Devastated’}, ABC (Dec. 23, 2012), \url{http://abcnews.go.com/blogs/headlines/2012/12/melissa-nelson-dental-assistant-fired-for-being-irresistible-is-devastated/}.
\textsuperscript{46} Newcomb & Rivero, \textit{supra} note 44.
III. LEGAL REMEDIES FOR LOOKSIM

Currently, in most jurisdictions there is no legal foundation to bring an action based upon lookism alone. However, a 2004 class action lawsuit, brought by an Asian American along with several other minorities, against Abercrombie and Fitch serves as an example of a case in which a defense of lookism alone might have been successful. The parties in Gonzalez v. Abercrombie & Fitch alleged that they were not hired for the retailer’s visible positions because they did not fit “Abercrombie’s All-American” image of “mostly white, sporty males and females, with blond hair and blue eyes,” codified in the retailer’s “Look Policy.” Because there is no protection against lookism alone, individuals with grievances must attach their claim to a protected class of persons if they wish to seek a remedy at law. In light of these circumstances, the strongest argument in Gonzalez was that Abercrombie’s discriminatory policies were driven

47 Nelson, supra note 45, at *2.
48 Id.
50 Nelson, supra note 45, at *2.
51 Desir, supra note 14, at 633.
52 Id.; See also Corbett, supra note 41, at 624.
54 See Desir, supra note 14, at 634 (“A protected class describes characteristics which cannot be discriminated against under Title VII: “race, color, religion, sex, or national origin.”).
by racism; however, in reality they were aimed at achieving the retailer’s aesthetic goal: lookism.\textsuperscript{55} Ultimately, the retailer settled this lawsuit for $40 million.\textsuperscript{56}

There are very few safeguards in place within our legal system to prevent instances of lookism. Currently, only one state and six cities or counties prohibit some form of appearance discrimination.\textsuperscript{57} The remainder of the United States only deems it unlawful when it can be linked with a characteristic protected by other antidiscrimination laws.\textsuperscript{58} Generally, lookism is legal in the United States.\textsuperscript{59}

\section*{A. Federal Law}

The United States has no federal antidiscrimination law that specifically prohibits discrimination based on physical appearance.\textsuperscript{60} In order to receive the protection of the law, an individual must file their grievance so that it is protected by the “constitutional guarantees of free speech and religious expression”\textsuperscript{61} or complies with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA).\textsuperscript{62} These are important anti-discrimination laws that prohibit unwarranted bias based on race, color, religion, sex, national origin, disability, and age.\textsuperscript{63}

\subsection*{1. Constitutional Safeguards}

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} RHODE, supra note 12, at 92.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Corbett, supra note 41, at 624.
\textsuperscript{61} RHODE, supra note 12, at 118.
\textsuperscript{62} Newman & Isenbath, supra note 23, at 16.
\textsuperscript{63} See id. (“Challenges to appearances regulation based on freedom of speech generally have been unsuccessful except when religion is involved.”).
The Constitution has, for the most part, been an unsuccessful safeguard against lookism. Progress towards constitutional protection faces great limitations imposed by “the requirement of state action and by the deference that courts typically extend to those acting on the state’s behalf.” The most common claim asserted under the Constitution against allegations of appearance discrimination is a deprivation of liberty without due process of law, in violation of the Fifth and Fourteenth Amendments. However, this constitutional guarantee only protects liberty interests from regulation by the public sector, or the government. When evaluating a claim, courts must conduct a balancing test, weighing the impeded liberty interest against the public employer’s interest. In order to constitute a violation of the liberty guarantees of our Constitution, the scale must tilt heavily in favor of the plaintiff’s freedom of choice and the employer’s invasion must be “so irrational or motivated by bad faith.”

In regards to employment related appearance discrimination claims, the government’s interest typically prevails. The Supreme Court harps on the distinction between a public employee versus a private citizen in *Kelley v. Johnson*, explaining that “a member of a uniformed civilian service. . . can[not] be treated for constitutional purposes the same as a member of the general public.” In *Kelley*, the Plaintiff, a disgruntled police officer, challenged the constitutionality of a county regulation limiting the length of county policemen’s hair as an unacceptable regulation that “placed ‘an undue restriction’ upon his activities” within the

64 RHODE, *supra* note 12, at 119.
65 Id.
66 Id.; Rhode, *supra* note 12, at 1075.
69 Id.
70 Id.
community.\textsuperscript{72} The Court dismissed Kelley’s claim explaining that the fact that the majority of state and local are uniformed is testament to the desire for similarity in the appearance of police officers.\textsuperscript{73} Whether this inclination is to make police officers easily identifiable to the public, or to promote a spirit of comradely within the force itself, the Court determined, is irrelevant as either is sufficient justification “as to defeat the liberty guarantee of the Fourteenth Amendment.”\textsuperscript{74}

This pattern is seen again in \textit{Tardif v. Quinn}, brought by a public high school teacher who was fired by an official who took offense to the length of her skirt.\textsuperscript{75} Applying the balancing test to this case, the First Circuit had to weigh “the government’s interest in approving a public school teacher’s image. . . against the plaintiff’s interest in being free to choose her clothing.” The First Circuit failed to validate the teacher’s claim, upholding the trial court’s ruling with the conclusion that “the government’s interest in approving a teacher’s image outweighed her personal interest in defining her own appearance.”\textsuperscript{76} The First Circuit reached this decision despite finding that the teacher’s skirt was “within reasonable limits, . . . no shorter than outfits worn by other professional women,” and had no “adverse effect on her students or her teaching.”\textsuperscript{77}

Both \textit{Tardif} and \textit{Kelley} greatly impact an individual’s liberty interest. The Court, in both cases, “rejected the plaintiffs’ claims that government-propounded appearance regulations compromised their liberty interests.”\textsuperscript{78} The limited success of this argument, only available “in cases involving an employer that is a state actor,” provides public employees with little hope for

\textsuperscript{72} \textit{Id.} at 241.  
\textsuperscript{73} \textit{Id.} at 248.  
\textsuperscript{74} \textit{Id.}  
\textsuperscript{75} RHODE, \textit{supra} note 12, at 119.  
\textsuperscript{76} \textit{Id.}  
\textsuperscript{77} \textit{Id.}  
\textsuperscript{78} Baron, \textit{supra} note 68, at 369.
successfully seeking redress for alleged employee discrimination. In essence, these cases signify that the Courts have left “public employees with almost no protection against arbitrary and abusive treatment.”

The First Amendment poses an additional area of conflict and has come to resemble a safeguard for lookism – not protecting those discriminated against, but providing a scapegoat for the discriminators, especially in the entertainment field. As Americans, the freedom of speech, embodied in the First Amendment of the Constitution, is a right we have come to view as so basic and fundamental to our liberty. This guarantee is the foundation of our government and a pillar of our democracy. First Amendment protection is extended to various forms of artistic expression, “including entertainment, television programs, and dramatic works,” shielding them “from private litigation, as well as from statutory restrictions and criminal penalties.”

The technological advancements of the media have challenged the reach of the safeguards of the First Amendment more than ever before, and the United States District Court for the Middle District of Tennessee’s recent ruling in Claybrooks v. American Broadcasting Companies, Inc., discussed in detail in Part IV, infra, is proof of the strength of the First Amendment. As Part IV will further explain, “anti-discrimination statutes of general

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79 Id.
80 Karl E. Klare, Power Dressing: Regulation of Employee Appearance, 26 NEW ENG. L. REV. 1395, 1404 (Summer 1992).
81 See Claybrooks v. American Broadcasting Companies, No. 3:12-cv-00388, 2012 WL 4890686, at *10 (M.D. Tenn. Oct. 15, 2012). Concluded from the fact Court’s conclusion that “whatever messages The Bachelor and The Bachelorette communicate or are intended to communicate—whether explicitly, implicitly, intentionally, or otherwise—the First Amendment protects the right of the producers of these Shows to craft and control those messages, based on whatever considerations the producers wish to take into account.”).
82 William C. Vandivort, Note, The Constitutional Challenge to “Saggy” Pants Laws, 75 BROOK. L. REV. 667, 676 (Winter 2009)“The Supreme Court has long established that the First Amendment protects symbolic speech and expressive conduct, as well as written and spoken speech.”)
83 Claybrooks, 2012 WL 4890686, at *5.
applicability must yield to the First Amendment,” therefore, any restriction of this creative process would be an unconstitutional violation of our civil liberties.\textsuperscript{84}

2. Title VII of the Civil Rights Act of 1964

The goal of Title VII of the Civil Rights Act of 1964 is to prevent employers from discriminating against current and prospective employees on the basis of “race, color, religion, sex, or national origin.”\textsuperscript{85} Because the Act encompasses such a wide range of sources of discrimination, for the purposes of lookism, they are often separated into two categories: (a) “gender,” and (b) “race, color, religion, and national origin.”\textsuperscript{86} A claim brought pursuant to this law is usually a question of fact to be determined by a jury, for which the plaintiff must either show direct evidence to establish the conclusion that discrimination was a motivating factor in the action, or, alternatively, provide circumstantial evidence that meets the requirements of a \textit{prima facie} case.\textsuperscript{87} A \textit{prima facie} case may be shown by satisfying the criteria established by the Supreme Court in \textit{McDonnell Douglas Corp. v. Green}, as (i) membership to a protected class; (ii) qualification for the job sought, and that the employer was indeed hiring; (iii) rejection despite qualification; and (iv) post-rejection, the position remained open and the employer continued to seek applicants from persons with similar qualifications.\textsuperscript{88}

As noted earlier in the \textit{Gonzalez} case, cited previously in this section, when a business elects to discriminate on the basis of race, color, religion, sex, or national origin, proof of discrimination does not always equate to evidence of wrongdoing.\textsuperscript{89} If the \textit{Gonzalez} case had proceeded to trial, Abercrombie would have most likely put forward an affirmative business

\textsuperscript{84} Id. at *7.
\textsuperscript{85} 42 U.S.C. §2000e-2(a)(1)-(2) (2006); See, e.g., Desir, supra note 14, at 634.
\textsuperscript{86} James, supra note 22, at 644.
\textsuperscript{87} Zakrzewski, supra note 11, at 435.
\textsuperscript{88} Id.; See, e.g., McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802 (1973).
\textsuperscript{89} Desir, supra note 14, at 634.
necessity defense, on the grounds that its policies were not racist because they were “designed to employ people in accordance with their attractiveness.” This argument would have served as an attempt to establish a bona fide occupational qualification (BFOQ), which if successful, would have affectively divorced the racism from lookism. An employer may enforce discriminatory policies in circumstances where the targeted discriminatory trait – whether religion, sex, or another protected class – is “a BFOQ reasonably necessary to the normal operation of that particular business or enterprise.” However, the BFOQ exception to Title VII is “not applicable to race or color,” therefore in Gonzalez, Abercrombie would have had to resort to customer preference. Although some “courts have held that customer preference may give rise to a BFOQ,” they “rarely allow discrimination based on this defense,” and would have failed in the Gonzalez case because BFOQs do not apply to race claims.

The BFOQ exception of Title VII is an affirmative defense that recognizes that there are circumstances in which membership to a protected class directly correlates to job performance and makes it possible for a business to discriminate on these bases if they can establish that it is “reasonably necessary to the normal operation of that particular business or enterprise.” To successfully assert a BFOQ defense, a business must provide proof that “the excluded group will be unable to safely and efficiently perform the duties of the job, or that it is impossible or impractical to deal with those persons on an individualized basis.” Through precedent, courts

90 Id.
91 Id.
93 Id. at 167.
94 Corbett, supra note 41, at 646.
95 James, supra note 22, at 642;
96 Corbett, supra note 41, at 646.
97 Zakrzewski, supra note 11, at 438.
98 42 U.S.C. §2000e-2(a)(1)-(2) (2006); See also Corbett, supra note 93, at 166.
99 45C AM. JUR. 2D Job Discrimination § 2492 (Nov. 2012).
have established a narrow, two-part test for evaluating a BFOQ defense that, historically speaking, employers have had little success satisfying.\textsuperscript{100} When a court elects to employ this test, it must first identify “the essence of the business” and then determine “whether that essence makes it necessary for the employer to discriminate on the basis of the protected characteristic.”\textsuperscript{101} Asserting a BFOQ based solely on appearance discrimination has been found to be an overextension of the defense because “a BFOQ cannot be based on stereotypical assumption about a particular class.”\textsuperscript{102}

3. Federal Laws with Fewer Safeguards against Lookism: The Age Discrimination and Employment Act (ADEA), and the Americans with Disabilities Act (ADA)

More recently, Title VII has been extended to protect another class of individuals.\textsuperscript{103} This safeguard is memorialized in the Age Discrimination and Employment Act (ADEA), which protects individuals over 40 years-old who are denied employment or promotion opportunities due to their age.\textsuperscript{104} Although the causal connection linking age to appearance discrimination may not seem overt, age is universally viewed as inversely proportional to physical beauty and therefore serves as another source of lookism.\textsuperscript{105} The ADEA operates much like Title VII, in that it requires a plaintiff to satisfy the \textit{McDonnell Douglas Corp.} framework in order to establish a \textit{prima facie} case.\textsuperscript{106} It is also similar to Title VII in that it permits employers to assert a BFOQ defense when they can show evidence of a pre-existing and “enforced seniority

\textsuperscript{100} Corbett, \textit{supra} note 41, at 645.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} Zakrzewski, \textit{supra} note 11, at 436.
\textsuperscript{103} See \textit{id.} at 435 (“The Age Discrimination in Employment Act (ADEA) extends the protection of Title VII to prevent employers from refusing to hire or promote individuals based on age.”).
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} Zakrzewski, \textit{supra} note 11, at 435.
system.”

In order for this defense to prevail, an employer must either establish that “(a) it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with the older employees on an individualized basis.” This BFOQ defense to a claim under the ADEA differs from its Title VII counterpart by going even further and permitting discriminatory action when that action was based on ‘reasonable factors other than age.”

The Americans with Disabilities Act (ADA) is an infrequently used, and for the most part, a loosely related safeguard against lookism because “mere unattractiveness will not qualify as a disability within the meaning” of the Act. In fact, survey results show that only 13% of complainants that received relief brought suit under this Act. In order to prevail under this Act, a plaintiff must establish that “his or her physical or mental impairment substantially limits at least one major life activity, that he or she has a record of that type of impairment, or that he or she is perceived as having such an impairment.” The most frequent appearance-related claims that arise under this Act relate to obesity, but courts have been inconsistent in their classification of being overweight. The First Circuit considers morbid obesity to have a substantial impact on an individual’s ability to deliver a successful performance in various jobs, and therefore classifies it as a “disability” within the meaning of the ADA. In contrast, the United States District Court for the Northern District of Florida found the reverse, holding

107 Gumin, supra note 20, at 1778.
108 Zakrzewski, supra note 11, at 437-438.
109 Gumin, supra note 20, at 1778.
112 Id.
113 Id.; RHODE, supra note 12, at 123.
114 Newman & Isenbath, supra note 23, at 16; RHODE, supra note 12, at 125.
“[o]besity, even morbid obesity ... does not constitute a physical impairment [under the ADA] unless it is the result of a physiological disorder or condition.”116

A claim of reverse discrimination is not plausible under the ADA because the Act only protects qualified individuals with disabilities.117 This exposes an uncertainty and additional risk if there were to be legislative reform for appearance discrimination, as existing discrimination law is not definitive on whether, in such a case, courts would permit attractive plaintiffs to recover for reverse discrimination.118 Therefore such reform would have the potential to result in a non-uniform application of laws, favoring one class of individuals and leaving the other vulnerable.

4. Gender Bias

As previously mentioned, for the purposes of lookism, gender is separated from the other forms of discrimination under Title VII.119 In the eyes of lookism, not all individuals are treated equally, and women generally feel a greater burden.120 This imbalance is prevalent throughout all aspects of life.121 For example, when it comes to dating, it is a tale as old as time, and even the beasts can get their Belle; in fact, less attractive men have been viewed more favorably when they are seen with a more attractive female.122 Women, however, do not receive the same advantage.123

116 Id.
117 Corbett, supra note 41, at 641.
118 Id. at 642.
119 Infra Part III.
120 Corbett, supra note 41, at 625.
121 See Gumin, supra note 20, at 1772 (“Research shows that appearance continues to be a major decision-making factor in all areas of life today.”).
122 RHODE, supra note 12, at 30.
123 Id.
Sex discrimination is the most common legal platform under which female plaintiffs seek redress for injustices they suffer resulting from their appearance.124 The airline industry constantly finds itself at the forefront of this type of litigation.125 Especially at its inception, the airline industry wished to convey a sense of privilege and prestige to its customers.126 Part of this message was accomplished with hiring practices that discriminated against employing male flight attendants.127 “In Diaz v. Pan American World Airways, the Fifth Circuit held that being a female is not a BFOQ.”128 Lookism has also been present in many of these cases. In Wilson v. Southwest Airlines, “the airline argued that ‘female sex appeal’ was a BFOQ, in order to justify their hiring of women with a certain appearance, whether it be attractive, sexy or slim.”129 The airline further contended that their practice was essential to the success of the company because businessmen “preferred the female image that was at the heart of the airline’s ‘Love’ market brand.”130 The Fifth Circuit, however, did not agree and held “that the essence of the airline’s business was transporting passengers safely and quickly.”131

When seeking employment for the same job, women are oftentimes held to more stringent requirements than men.132 Once the airlines were forced to amend their hiring practices to include the employment of men, they wanted to ensure that their new policies would not

124 McDonald, supra note 110.
125 See Baron, supra note 68, at 360 (“When courts addressed the airline industry’s systemic patterns of only hiring attractive, thing flight attendants in the late 1970s and early 1980s, attention surrounding the issue of appearance discrimination became amplified.”).
126 Id. (“As the service industries expanded during the 1980s . . . and a culture of consumerism began to define American life, a social obsession with looking at and commercializing the female body exploded.”).
127 Id. at 372 (“The litigation involving the airline industry’s attempts to impose strict beauty requirements of female flight attendants exemplifies the limits of claiming such an occupational qualification.”).
128 McDonald, supra note 110.
129 Id.; Corbett, supra note 41, at 644.
130 Corbett, supra note 41, at 645.
131 Id.
132 RHODE, supra note 12, at 96.
impact the “quality” of the individuals they hired. 133 These practices were challenged in Frank v. United Airlines, where the defendant airline “used weight tables based on body frames to set maximum body weights for flight attendants.” 134 This requirement was applied disproportionately to females who, in order to qualify, “had to be substantially lighter than males.” 135 The airline justified its methods arguing that they were a nondiscriminatory appearance standard. 136 The Ninth Circuit disagreed and found that “the airline’s standards placed a greater burden on women and were thus facially discriminatory.” 137 In its opinion, the court went on to explain that there is potential for such standards to receive the protection of a BFOQ defense in cases where there was “evidence of how weight affected the employees’ ability to provide physical assistance in an emergency.” 138

The Supreme Court’s interpretation of Title VII in Price Waterhouse v. Hopkins also addresses disproportionate standards that set stricter guidelines for women. 139 The plaintiff in this case was a female attorney who was allegedly “denied partnership in her law firm because of her appearance and mannerisms” after “partners suggested she take ‘a course at charm school’ and walk, talk and dress more femininely, in addition to wearing makeup, jewelry, and styling her hair.” 140 The Supreme Court found the source of this discrimination to be the plaintiff’s gender, and therefore concluded that she was entitled to the protections of Title VII. 141

133 Baron, supra note 68, at 373 (“Despite this holding, [Wilson] employers still may be able to impose ‘attractiveness’ requirements if the same standards are applied equally to men and women.”).
134 Corbett, supra note 41, at 645.
135 Id.
136 Id.
137 Id.
138 Id.
139 Alsgaard, supra note 30, at 147.
140 Id.
141 Id.
On December 21, 2012 the Supreme Court of Iowa took a different position in *Nelson v. James H. Knight DDS, P.C.*, as discussed earlier in Part II. Plaintiff, Melissa Nelson, brought suit against her former employer for wrongful termination putting forth a “but for” claim of sexual discrimination under Section 216.6(1)(a) of the Iowa Code. Nelson argued that she would not have been terminated “but for” her gender. The all-male Supreme Court of Iowa “failed to recognize the discrimination that women see routinely in the workplace,” issuing a 7-0 ruling that effectively allows employers to fire an employee if they see them “as an ‘irresistible attraction’ even if the employee[s] have not . . . otherwise done anything wrong.” Outraged, the plaintiff’s attorney elaborated upon the implications of this ruling stating that the “judges sent a message to Iowa women that they don’t think men can be held responsible for their sexual desires and that Iowa women are the ones who have to monitor and control their bosses’ sexual desires.” Although the Justices acknowledged the seemingly unfair nature of these types of firings, they explained that they are not ultimately an unlawful form of “discrimination under the Iowa Civil Rights Act,” as interpreted according to Title VII of the United States Civil Rights Act, “because they are motivated by feelings and emotions, not gender.”

**B. State Law**

Beginning as early as the 1970s, several state legislatures proactively sought to institute

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142 *Infra* Footnote 25.
143 *See* Nelson v. James H. Knight DDS, P.C., No. 11-1857, 2012 WL 6652747, at *3 (Iowa Dec. 21, 2012) (“When interpreting discrimination claims under Iowa Code chapter 216, we turn to federal law, including Title VII of the United States Civil Rights Act....”).
144 *Id.*
145 *Yelp users slam dentist who fired his assistant for being ‘irresistible’, supra* note 49.
146 *Id.*
147 *Id.*
reform in the realm of appearance discrimination. These laws have experimented, challenged, and tested the intersection of human predispositions and the law. Their aura is of social reform and innovation, but the reality of their ability to actually accomplish change has been repeatedly questioned. Seven jurisdictions have enacted some form of protection in connection with appearance discrimination, however there effectiveness is questionable, yielding as of 2012, no complaints in some localities.

In 1975, Michigan paved the way for reform by becoming the first locality to prohibit employer-based appearance discrimination on the basis of “religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.” Experts argue that this piece of legislation, known as the Elliot-Larsen Civil Rights Act, marks the statutory inauguration of legal reform on appearance discrimination. San Francisco also instituted protections to prevent injustice resulting strictly from these two sources.

1. The District of Columbia

The District of Columbia was more direct in its approach, expanding its civil rights law in 1982 to include appearance discrimination. The District of Columbia Human Rights Act was enacted in 2001 with the hopes of securing “an end in the District of Columbia to discrimination for any reason other than that of individual merit.” The Act prohibits employment discrimination on the basis of an individual’s “personal appearance,” which it defines as “the outward appearance of any person,” encompassing characteristics such as “style of dress,” and

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148 Rhode, supra note 12, at 1081.
149 Id. at 1095.
150 RHODE, supra note 12, at 126. Santa Cruz has had no complaints over 15 years.
151 Zakrezewski, supra note 11, at 445.
152 Id.; Rhode, supra note 12, at 1088.
153 Rhode, supra note 12, at 1081.
154 Id.
155 Desir, supra note 14, at 639.
“personal grooming.” Remedies for successful challenges are substantial in the District of Columbia, in comparison to other jurisdictions, and include reinstatement of employees, back pay, compensatory damages, and attorney’s fees. In addition, employer violators face fines “up to a maximum of $50,000 for repeat offenders.”

Similarly to Title VII, the Act is not without exceptions, which is partially the reason why it has only resulted in three findings of discrimination against employers in its 25-year history. The “prescribed standard” exception, like the BFOQ exception, provides employers with a defense to a claim under this statute if they can establish “(1) the existence of prescribed standards; (2) uniform application of the standards to a class of employees; and (3) a reasonable business purpose for the prescribed standards.” “Judges and juries have broadly interpreted this exception,” which has created uncertainty and inconsistency in its enforcement power. Another exception an employer may exercise is described as a “business necessity”. This defense is applicable when the employer can prove that “without such exception, such business cannot be conducted.” Certain evidence is impermissible to substantiate this defense. Sources of excluded evidence include “facts of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person.”

Atlantic Richfield Co. v. D.C. Commission on Human Rights is the only case brought

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156 Id. at 641.
157 RHODE, supra note 12, at 128.
158 Id.
159 RHODE, supra note 12, at 126.
160 Desir, supra note 14, at 641.
161 RHODE, supra note 12, at 126.
162 Desir, supra note 14, at 640.
163 Id.
164 DC ST § 2-1401.03
under this Act where judgment was entered on the basis of appearance discrimination alone.\(^\text{165}\) The victim in this instance was a discharged employee who the court concluded suffered discrimination due to her provocative work attire, which her supervisor repeatedly compared to that of “a prostitute”.\(^\text{166}\) The District of Columbia Intermediate Appellate Court did not find the existence of a “uniformly prescribed standard of dress” among employees and therefore, without a BFOQ exception to fall back on, the employer fell short of its defense, resulting in a finding for the plaintiff of discrimination.\(^\text{167}\) Although this case provides an example of the successful enforcement of anti-discrimination legislation, the rarity of the occurrence and limited scope of its protection serves as another reason why legislation is not an appropriate avenue to achieving reform.

2. Santa Cruz

Santa Cruz is the jurisdiction most frequently discussed and cited as a leader in appearance discrimination reform.\(^\text{168}\) In 1992, this municipality joined the District of Columbia in expanding its civil rights law “to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, pregnancy, gender or sexual orientation.”\(^\text{169}\) Santa Cruz was novel in its approach because it included “sexual orientation” and “physical characteristics,” in its list of traits with the goal of protecting the “uncontrollable aspects of a person’s physical presentation.”\(^\text{170}\) In 1998, Santa Cruz eased up on its legislative crusade and amended the 1992 ordinance to provide employers with a BFOQ

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\(^{165}\) Id. at 129; See, e.g., Atlantic Richfield Co. v. D.C. Commission on Human Rights, 515 A.2d 1095 (D.C. 1986).

\(^{166}\) RHODE, supra note 12, at 129.

\(^{167}\) Id.

\(^{168}\) Id. at 126.


\(^{170}\) Desir, supra note 14, at 640.
exception similar to that in Title VII. To successfully overcome an allegation, the amendment requires an employer to establish “(1) [t]hat the discrimination is in fact a necessary result of such a bona fide condition; and (2) [t]hat there exists no less discriminatory means of satisfying the bona fide requirement.” If a victim’s suit is victorious, the statutes’ built-in remedy allows for recovery of “reasonable compensatory damages, attorney’s fees, and injunctive relief.”

For advocates of reform, the Santa Cruz ordinance may seem like a step in the right direction but its effectiveness in practice is questionable. Years after its adoption, the ordinance had still not resulted in any litigation. Although commentators may respond cite this silence as evidence that “residents and businesses have positively accepted the ordinance,” its difficult to define subject matter may provide a more sound explanation.

IV. THE REALITY OF TELEVISION

Since its inception, the media’s “influence on both the importance and definition of attractiveness” has grown exponentially. More recently, the advent of reality television has further exploited society’s obsession with youth and beauty. Over the past decade this genre has monopolized prime-time television, “capturing the largest percentage of the audience watching the top 10 broadcast programs,” and rising in popularity to the point that it has become “the hottest fad in prime-time television.” In 2001 and 2003, at the height of Ally McBeal, and the launch of The O.C. and 24, reality television still triumphed as Fox’s highest rated programs

171 Id.
172 Santa Cruz, Cal., County Code §8.52.080(F) (2009).
173 RHODE, supra note 12, at 126.
176 Id. at 54.
177 Alex Bloom, Has Good Sense Been Voted Off the Island?, BRANDEIS MAGAZINE (Summer 2012), available at http://www.brandeis.edu/magazine/2012/summer/arts-and-culture/reality.html.
178 PATZER, supra note 2, at 4.
were *Temptation Island* and *Joe Millionaire*.179 This phenomenon began in the late 1990s due to broad-sweeping media consolidation which “forced networks to look for cheaper alternatives to scripted programming.”180 Reality television was this Hail Mary, but no one anticipated its success or predicted how quickly it would evolve. Today, “87 percent of all cable programming hours . . . is unscripted.”181

This genre, once confined to one single show on MTV called *The Real World*, has become a staple in the television industry and now even has its own Emmy category.182 This type of programming is appealing across the board. Networks find it attractive because it is “inexpensive to produce and rich with revenue-generating product placements.”183 As a result, these programs can sustain lower ratings than more costly scripted shows and still be deemed a success.184 Likewise, it captivates viewers with “raw emotion” and a “real, visceral, vicarious thrill . . . that they don’t get from scripted programming.”185 They “tune in to be revolted, to laugh, to see something frivolous or to see their lives reflected.”186 Although viewers are aware that these shows are not an “accurate depiction of reality,” there is still some level of humanity reflected in these programs that is relatable.187 Television critics taut reality television as a “guilty pleasure” that delivers maximum entertainment “because of the way the shows are set up and edited.”188 Even media executives are not immune to this genre’s appeal. “Friends” creator

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179 JENNIFER POZNER, REALITY BITES BACK: THE TROUBLING TRUTH ABOUT GUILTY PLEASURE TV, 16.
180 Bloom, supra note 177.
181 Id.
182 POZNER, supra note 179, at 9.
183 Bloom, supra note 177.
184 POZNER, supra note 179, at 15.
185 Bloom, supra note 177.
186 Id.
187 Id.
188 Id.
David Crane, a fan of “American Idol” and “Top Chef,” “admits that he’s a sucker for any show where people can be voted off.”189

A. The Beauty of Reality Television: The Roots and Evolution

Reality television is a constant reinforcement of lookism and the importance of beauty; its industry prevalence is so substantial that some would even consider it to be a subcategory within reality television of its own. Starting with the Miss America pageant in 1921, the media’s obsession with beauty has skyrocketed, and “by the turn of the twenty-first century some 7,500 pageants were operating under franchises by Miss America or Miss USA.”190 These programs have not only increased public insecurities about body image, their history reads as a tale of constant struggle for equality leaving “a legacy of racial and ethnic bias” in its path.191 African Americans could not enter the competition until 1970, and in 1985 the first Hispanic winner underwent therapy to reduce her Spanish accent. 192 Responding to “critiques of sexual objectification,” the pageant’s creators have taken steps to re-mold the show’s message, changing the name of the swimsuit competition to a “physical fitness” competition and adding scholarship awards, a “talent” demonstration, and “a commitment to some widely accepted social cause.”193 Although these developments resemble change, further investigation reveals a façade that attempts to mask their true intent just to appease its protestors.

B. Beauty Everywhere in Reality Television, Even if its Not The Subject Itself

189 Id.
190 RHODE, supra note 12, at 56.
191 Id.
192 Id. at 57.
193 Id. at 56-57.
Lookism is not only evident in programs that center around beauty, but it permeates throughout all types and aspects of reality television. For example, when a new reality television show becomes successful the casting process for each following season often yields more and more attractive participants. Arguably, as a show gains notoriety the applicant pool grows exponentially in size, but one would think that this growth would provide a greater opportunity for producers to cast a wider diversity of individuals who actually represent the average American. Instead, as the seasons wear on, it seems that the show’s creators become more and more selective, leaving no room for the “average Joe.” In the article, *Confessions of a Layman: How a Regular Dude Can Get Cast on Big Brother*, previous contestant, Matt Hoffman, provides Big Brother 14 hopefuls with some words of wisdom on the casting process:

> If you’re super attractive and have skirted through life on your good looks, this write-up will not be for you. You don’t need my help. Just show up with your chiseled features, flash your dimpled smile, say a few things that aren’t really that funny but people will laugh politely at anyway because you’re so attractive, and the odds lay in your favor.

While Matt concedes his lack of casting expertise, his conclusion that “‘outstanding personality’ is not at the top of the list of casting requirements,” is not entirely unfounded. As he further explains, the winner of his season “was actually asked to take his shirt off during his casting process.” One thing is for sure, the individuals of reality television embody very little

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194 PATZER, supra note 2, at 4 (“‘Reality’ shows featuring young, attractive, and often scantily attired contestants competing for love and money.”).
195 Id.
196 Id.
197 Id.
198 Id.
resemblance to the average appearance; the common denominator of this genre is “sex appeal” and “contestants of average appearance are in short supply.”¹⁹⁹

Recently, there has been a new development in reality television, that some would argue has revolutionized the field. NBC’s latest singing competition, The Voice, gives contestants a bias-free opportunity at their dream, as they get to be judged based purely on their talent.²⁰⁰ Judges listen and evaluate each singer’s voice without ever seeing what they look like, defying human nature to pass judgment by “cutting them off from the psychological trick that beauty does to the brain.”²⁰¹ The Voice has grown to become one of the most popular and well-rated competition-based reality television programs, and it is evident that its ratings are not affected by the elimination of typecasting. The blind-auditions of The Voice reinforce the reality of the degree that appearance influences our decisions, as the judges, while “choosing some stunning voices . . . all expressed regret when a country singer they’d rejected was revealed to be blonde and beautiful.”²⁰²

Other shows have experimented with the incorporation of “blind” decision-making in attempt to eliminate human predispositions towards appearance.²⁰³ The television network FOX is set to take its stab at this new development in reality television with a dating show called The Choice, which is said to mimic the format of The Voice. Another dating show, Dating in the Dark, attempts to match potential partners, as the title would suggest, without ever being able to

¹⁹⁹ PATZER, supra note 2, at 4.
²⁰¹ Id.
²⁰² See id. (“It’s subliminal message is ‘we all judge by looks. It’s human nature. Let’s not even bother to try not to’. It is reality TV in more ways than one.”).
²⁰³ See id. (“Dating in the Dark’, ‘Please Marry My Boy’ and ‘Beauty and the Geek’ also aimed to use the obsession with the appearance as a television twist.”).
see what the other person looks like. The fact that it is necessary to cloak a person’s appearance in order to make an unbiased evaluation of his or her talent or personality is evidence of how greatly this factor impacts the casting process.

This reality was at the center of the recent ruling by the U.S. District Court for the Middle District of Tennessee in Claybrooks v. American Broadcasting Company, mentioned in Part III. The District Court’s opinion is a testament to the guarantees of the First Amendment, and is monumental because it was the first time a federal court has ever addressed how antidiscrimination laws square with the First Amendment in the casting process.

The background of this lawsuit is yet another example of the media’s role in perpetuating the norm of an above average appearance through reality television. Fox executive Mike Darnell, once ostracized for his outrageous programming suggestions, but now dubbed by The Washington Post as possibly “the most influential man working in television,” pioneered the reality television movement in February 2000 with Who Wants to Marry a Multi-Millionaire? The show brought fifty potential brides to Las Vegas to be “auctioned off” to multi-millionaire, groom-to-be, Rick Rockwell. Winner Darva Conger met her future husband only moments before they were wed in front of an audience of 23 millions viewers. Unfortunately the show was short lived. Rockwell’s violent past, which included a former girlfriend’s restraining order, came to light after the show aired. Darnell feared the end of his career as he knew it when any hope of Multi-Millionaire’s future was demolished when its’ executive producer turned down a

204 Id.
205 See infra note 202.
207 POZNER, supra note 179, at 9.
208 Id.
209 Id.
210 Id. at 10.
bid from UPN to develop the show into a series.\textsuperscript{211} Darnell was right about one thing – it was the end of his career as he knew it. Determined to reinvent the status quo of television, Darnell rebranded the show and pitched it as a “new” idea to ABC.\textsuperscript{212} This new series, entitled \textit{The Bachelor}, first aired March 2002 and soon became ABC’s highest-rated show among the 18-49 year-old demographic.\textsuperscript{213}

\textbf{C. The Boiling Point: Bachelor Rejects Say No More}

After 23 seasons, the ever-popular show that offers participants a “shot at true love” has yet to feature a Bachelor or Bachelorette of a minority group.\textsuperscript{214} Although the show has cast these individuals as contestants throughout various seasons, they have never won the show, and the producers have yet to extend their participation to the primary character.\textsuperscript{215} This absence was the center of the class-action case, \textit{Claybrooks v. American Broadcasting Companies}, decided in late 2012. In their complaint, plaintiffs, Nathaniel Claybrooks and Christopher Johnson, accused the television network of denying them, and other minority applicants, “the equal opportunity to contract to be the Bachelor or the Bachelorette” prohibited by 42 U.S.C. §1981.\textsuperscript{216} They argued that the show intentionally refused “to cast non-white Bachelors and Bachelorettes, to avoid the possibility that a particular season could end with an interracial couple.”\textsuperscript{217} This tendency, the plaintiffs explain, has a profound ripple effect in society because the media plays an integral role

\textsuperscript{211} \textit{Id.}
\textsuperscript{212} POZNER, \textit{supra} note 179, at 10.
\textsuperscript{213} \textit{Id.}
\textsuperscript{215} Ryan Metheny, ‘\textit{The Bachelor’ Racial Discrimination Barred by First Amendment?}, CALIFORNIA ANTI-SLAPP PROJECT (Jun. 11, 2012), \texturl{http://www.casp.net/uncategorized/the-bachelor-racial-discrimination-suit-barred-by-first-amendment/}.
\textsuperscript{217} \textit{Id.}
in shaping peoples’ attitudes and opinions.\textsuperscript{218} As a result, these discriminatory practices suggest to viewers “that interracial or non-white relationships are undesirable or unworthy of the nationally broadcasted platform.”\textsuperscript{219} In response, the network argued that the claims were barred by the First Amendment of the Constitution and should therefore be dismissed with prejudice.\textsuperscript{220}

The ultimate question for the U.S. District Court for the Middle District of Tennessee was whether the casting process is “part and parcel of the creative process behind a television program,” and therefore protected by the First Amendment.\textsuperscript{221} “The parties agree[d] that the shows are expressive works that constitute speech protected by the First Amendment, . . . but disagree[d] as to whether the casting decisions behind those Shows are also protected by the First Amendment.”\textsuperscript{222} The court sided with the defendants finding that the casting process is a part of the creative process, and therefore entitled to “First Amendment protection against the application of anti-discrimination statutes.”\textsuperscript{223} Requiring the directors to follow the “race-neutral” provisions in 42 U.S.C. §1981, as the plaintiffs request, would be an unlawful regulation of the program’s creative content.\textsuperscript{224} Although the court recognized that the media is bound by general regulations, it found them to be subject to the guarantees of the First Amendment.\textsuperscript{225} The U.S. District Court for the Middle District of Tennessee looked to the Supreme Court’s decision in \textit{Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston}, to define these implications.\textsuperscript{226} In \textit{Hurley}, the Supreme Court “expressly found that the First Amendment can trump the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item Id. Complaint, \textit{supra} note 214, at 3.
\item \textit{Claybrooks}, 2012 WL 4890686, at *3.
\item \textit{Id.} at *5.
\item \textit{Id.} at *7.
\item \textit{Id.} at *5.
\item \textit{Id.} at *5.
\item \textit{Claybrooks}, 2012 WL 4890686, at *5.
\item See \textit{id.} (\textit{Hurley} explained “although media organizations are subject to laws of general applicability, the Supreme Court has expressly found that the First Amendment can trump the application of anti-discrimination laws to protected speech.”)
\end{enumerate}
\end{footnotesize}
application of antidiscrimination laws to protected speech.” Applying Hurley to the present case, the court determined that a finding to the effect of the one the plaintiff suggested would be in opposition to this holding.

Until Claybrooks no federal court has addressed how antidiscrimination laws square with the First Amendment in the casting process. This decision definitively mutes the possibility of the regulation of lookism in the casting process. Applying antidiscrimination law to casting decisions would “threaten the content of various television programs and television networks,” calling into question the “legality of any network targeting particular demographic groups,” such as, “the Lifetime Network (targeted to female audiences), the Black Entertainment Channel (targeted to African-Americans), Telemundo (targeted to Latinos), . . .” etc. the Jewish Channel, the Christian Broadcast Channel, the Inspiration Network (targeted to Protestants), and LOGO (targeted to gays and lesbians).

CONCLUSION: WHY LEGAL REFORM INCORPORATING LOOKISM WILL NEVER BE “LEGAL”

When it comes down to it, the entertainment business is a business of making money, and the creators are not the source of all evil. Scripts are crafted to attract as many viewers as possible; this is what measures the success and determines the fate of a production. “The American public wants idealized images to look up to,” which is why “average-looking

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227 Id.
228 See id. at *7 (“The Court in Hurley articulated a general principle that governs the court’s analysis in this case: under appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment.”).
229 Id.
individuals are rarely cast in the entertainment business.”

Claybrooks proves that lookism, when it comes to the entertainment industry and the casting process, can be validated as a form of artistic expression. One consequence that would result from implementation of such reform would be the infamous problem of the slippery slope. Artistic expression could be a defense to any anti-appearance-discrimination statute, where would the line be drawn as to what qualifies as artistic expression in this sense? “The entire business model of Hooters would become a failure if they were required to hire without any regard to looks.” Businesses, such as Hooters, use appearance to creatively brand their corporate image and distinguish themselves from competitors; one could argue this is a form of expression. Although current laws, such as those in Michigan, against appearance discrimination, provides Hooters with the option to assert a “business necessity” BFOQ defense and claim that “attractiveness is an absolutely necessary quality for its waitresses,” this countermeasure is less than ideal for a trait that does not even have a clear-cut definition.

This point leads to an additional barrier to reform – as we learned in Part II, there is no concrete definition of what constitutes an attractive appearance. How can an action be deemed “illegal” if there is no real consensus as to what that action is? Uncertainty in surrounding the meaning of government laws creates skepticism among constituents. Also, the less then overt nature of this form of bias means that employers may inadvertently discriminate

233 See Claybrooks, 2012 WL 4890686, at *10. (“Casting decisions are a necessary component of any entertainment show's creative content. The producers of a television program, a movie, or a play could not effectuate their creative vision, as embodied in the end product marketed to the public, without signing cast members.”).
234 See James, supra note 22, at 662. (“Another detriment of an appearance discrimination statute is that frivolous suits will be brought and the “floodgates” of litigation will be opened.”).
235 Gumin, supra note 20, at 1770.
236 See id. (“These businesses primarily sell food, clothing, or services, but use the image of the “sexy” employee to distinguish themselves.”)
237 Id.
238 See Part II, supra.
based on appearance due to our society’s subconscious predisposition towards attractiveness and the importance it places on beauty.

Additionally, research shows that it is not just the appearance impaired who suffer at the hands of this bias. How can the law protect individuals such as Melissa Nelson? The point of anti-discrimination statutes is to ensure equality among individuals, and as it is now, such protections, although they may protect some, would create wider disparities by further disadvantaging the Melissa Nelsons.

Further, laws aim to provide constituents with equal footing within society, and when are denied such treatment, provide a way to remedy the situation. It is unclear whether attractive plaintiffs would be allowed to recover for reverse discrimination, therefore, reform could potentially provide less attractive individuals with an unfair advantage. There are certain unjust actions that while all may be in agreement of their cruelty and unfairness, legal reform, for now at least, is just not the answer. At this point in time, due the current state of antidiscrimination legislation, legal reform is not a proper, or justifiable means to achieving change in the realm of appearance discrimination.