

The Beauty Bias

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THE INJUSTICE OF APPEARANCE
IN LIFE AND LAW

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CHAPTER ONE

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Introduction



“Tenth circle. Ladies’ shoes.”

Figure 1.1 Glen Le Lievre, *New Yorker*, September 24, 2007, 124. Reprinted with permission.

“IT HURTS TO be beautiful” is a cliché I grew up with. “It hurts not to be beautiful” is a truth I acquired on my own. But not until researching this book did I begin to grasp the cumulative cost of our cultural preoccupation with appearance. Over a century ago, Charles Darwin concluded that when it came to beauty, “[n]o excuse is needed for treating the subject in some detail.”¹ That is even truer today; our global investment in appearance totals over \$200 billion a year.² Yet when it comes to discrimination based on appearance, an excuse for discussion does seem necessary, particularly for a scholar specializing in law and gender. Given all the serious problems confronting women—rape, domestic violence, poverty, inadequate child care, unequal pay, violations of international human rights—why focus on looks? Most people believe that bias based on beauty is inconsequential, inevitable, or unobjectionable.³

They are wrong. Conventional wisdom understates the advantages that attractiveness confers, the costs of its pursuit, and the injustices that result. Many individuals pay a substantial price in time, money, and physical health. Although discrimination based on appearance is by no means our most serious form of bias, its impact is often far more invidious than we suppose. That is not to discount the positive aspects of appearance-related pursuits, including the pleasure that comes from self-expression. Nor is it to underestimate the biological role of sex appeal or the health benefits that can result from actions prompted by aesthetic concerns. Rather, the goal is to expose the price we pay for undue emphasis on appearance and the strategies we need to address it.

What compounds the problem is our failure to recognize that it *is* a significant problem and one to which law and public policy should respond. Compared with other inequities that the contemporary women’s movement has targeted, those related to appearance have shown strikingly little improvement. In fact, by some

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measures, such as the rise in cosmetic surgery and eating disorders, our preoccupation with attractiveness is getting worse.

Injustices related to appearance fall along a spectrum, and involve everything from debilitating discrimination and social stigma, to the costs of conformity in time, expense, and physical risk. Even relatively minor inconveniences can cumulatively exact a substantial price, which is partly what launched this book.

THE PERSONAL BECOMES POLITICAL: THE TROUBLE WITH SHOES

It started with shoes. Like many American women, I have had more issues with appearance than I care to recall. Happily, however, I have landed in an occupation with undemanding standards. As this book's Preface noted, academics are known for relentlessly unattractive apparel.⁴ I am a case in point. My fashion instincts veer toward frumpy, but one compensation is that they have freed me from the footwear fetishes of many otherwise sensible women. In many professional contexts, I am surrounded by colleagues tottering painfully on decorative footwear. Some of the nation's most distinguished female leaders hobble about in what we described in high school as "killer shoes." During my term as chair of the American Bar Association's Commission on Women in the Profession, I was struck by how often some of the nation's most prominent and powerful women were stranded in cab lines and late for meetings because walking any distance was out of the question.

But inconvenience is the least of the problems. High heels are a major contributor to serious back and foot problems, and four-fifths of women eventually experience such difficulties.⁵ In an interview with the *Wall Street Journal*, one owner of a marketing firm acknowledged that her taste in footwear was partly responsible for her herniated disk. But about half of her clothes only "look[ed] good" when accompanied

by four- to five-inch heels, so she had become resigned to pain: “There is a price to pay for beauty and high heels is one of them.”⁶ Now that designers are offering stilettos topping out at six inches, and several models wearing them have fallen on Milan runways, some stores have started to offer “Heel Walking Workshops.”⁷

This is not, of course, a new problem. As chapter 2 notes, Chinese footbinding is the most obvious, but by no means the only case in point. Although comfortable choices have clearly improved, shoe design may be the last politically acceptable haven for closet misogynists. Typical fashion profiles feature not a single item suitable for actual movement. Most have spindly heels and flesh-biting designs, on the apparent assumption that “if the shoe pinches, wear it.”⁸ All around me, smart accomplished women are doing just that, and ignoring the risk that heels this high will catch in grates, flatten arches, breed blisters, and hurt like hell on any extended walk. A startlingly large number of women are even willing to undergo painful and risky foot surgery for the sake of better “toe cleavage” that will fit fashionable styles.⁹ Women account for about 80 percent of all foot surgery, much of it related to high heels.¹⁰

Some years ago, in a fit of pique, I wrote a semisatirical *New York Times* op-ed on footwear as a feminist issue.¹¹ Never have I touched such a responsive chord on issues involving gender; my mail box was swamped. Podiatrists sent supportive research, progressive shoe manufacturers sent catalogs, women shared tales of woe, and men vented their frustrations with wives’ dysfunctional choices. Not all responses were, however, complimentary. Some readers questioned why I had squandered this rare media opportunity on such a trivial problem. In a country where four million women annually are victims of domestic violence and twenty million live in poverty, why put the height of heels at the top of the women’s agenda? The short answer was that I hadn’t. I have been peddling earnest policy-oriented editorials on more serious topics for decades. This was the column

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the *Times* was interested in printing. But my broader point, then and now, has been to expose how appearance-related practices, even some that seem petty or benign, can cumulatively limit our lives. If men manage to be sexy without help from their footwear, why can't women? And why have we made so little headway, in law, politics, and public education, in addressing the injustices of appearance?

The chapters that follow take up these questions. Chapter 2 begins the discussion by surveying the consequences of attractiveness and the costs of its pursuit. That appearance matters comes as no surprise. What is less obvious is the extent of its influence on employment, income, self-esteem, and personal relationships. We often understate the price of our preoccupation, not just in money but also in physical and psychological well being, and in gender, class, and racial inequalities. Chapter 3 explores what drives this fixation, including biological, market, technological, and media forces. Efforts to counteract these pressures and to challenge the corrosive influences of appearance are the focus of chapter 4. Why have efforts by the women's movement been so divisive, and so often ineffectual? Chapter 5 considers why it matters. What exactly is wrong with discrimination based on appearance and what, if anything, could the law do to address it? To further explore those questions, chapter 6 examines the limitations of current legal frameworks and the effect of the few statutes here and abroad that explicitly prohibit appearance discrimination. Chapter 7 concludes with a road map for reform. In an ideal world, what would be the role of appearance and what individual, legal, and political strategies might help bring us closer?

THE COSTS AND CONSEQUENCES OF APPEARANCE

A threshold question is why we should care about any of these questions. What are the social consequences of physical appearance?

Chapter 2 looks at the significance of attractiveness and the price it exacts. Although most of us realize that looks matter, few of us realize how much, or how early its influence starts. Beginning at birth, those who are viewed as physically appealing are also more likely to be viewed as smart, likeable, and good. The ridicule and ostracism that unattractive children experience can result in lower self-confidence and social skills, which leads to further disadvantages in later life. Appearance also influences judgments about competence and job performance, which, in turn, affect income and status. Résumés get a less favorable assessment when they are thought to belong to less attractive individuals. These individuals are also less likely to get hired and promoted, and they earn lower salaries, even in professions such as law where appearance has no demonstrable relationship to ability.¹²

Given these advantages, it makes sense for individuals to be concerned about their appearance. Still, the extent of that concern is striking, as the overview in chapter 2 makes clear. In representative surveys, 90 percent of women consider looks important to their self-image, and over half of young women reported that they would prefer to be hit by a truck than be fat; two thirds would rather be mean or stupid.¹³ More than a third of obese individuals are willing to risk death in order to lose just 10 percent of their weight; three quarters will assume the risk for 20 percent.¹⁴

People also spend more on appearance than the results often justify. Americans invest \$40 billion annually on diets, which rarely result in significant or sustained weight loss. About 95 percent of dieters regain their weight within one to five years.¹⁵ Of the \$18 billion consumers spend on cosmetics, only 7 percent pays for ingredients. The rest subsidizes expensive packaging and marketing of products, including many that scientists find ineffectual.¹⁶ Even investments that result in high levels of individual satisfaction raise issues of social priorities. Although almost a fifth of the United

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States population lacks basic health care services, inessential cosmetic procedures have increased by 400 percent over the last decade and are the fastest growing area of medical expenditures. Liposuction is the world's most common form of surgery.¹⁷

Moreover, time and money are not the only costs. Substantial health risks accompany some appearance-driven practices, particularly those involving cosmetic surgery and yo-yo dieting. For many individuals, concerns about appearance also contribute to psychological difficulties such as depression and eating disorders. These difficulties are partly attributable to widespread stigma and discrimination. Bias based on attractiveness is largely unregulated and compounds other inequalities based on class, race, ethnicity, and gender. Prevailing beauty standards privilege those with white-European features and the time and money to invest in their appearance. Women face greater pressures than men to look attractive and pay greater penalties for falling short.

SURVEYING THE FOUNDATIONS: SOCIAL, BIOLOGICAL, ECONOMIC, TECHNOLOGICAL, AND MEDIA FORCES

What accounts for this premium on appearance? Chapter 3 begins exploring that question through theories of evolution. According to sociobiologists, we value attractiveness, especially in women, because it is a sign of health and fertility, which are key factors in reproductive success. Such theories help account for nearly universal preferences such as clear skin, facial symmetry, and hour-glass figures. But evolutionary imperatives alone cannot explain the variations over time and culture in what people perceive as attractive. The most obvious example is weight. Whether plumpness is prized or punished seems to depend largely on its role in signaling social status under different environmental conditions. Where food is

scarce, fatness is a mark of wealth and prominence. Where food is abundant, the reverse is true. Our current cult of thinness makes no sense from an evolutionary standpoint; low body weight is linked to reproductive dysfunction.¹⁸

Chapter 3 reviews other explanations for the importance of appearance and variations in cultural preferences. How someone looks can express religious and political values, as well as convey class and cultural identity. Particularly in today's consumer-oriented culture, dress, grooming, and figure are crucial signals, as well as sources, of wealth. The body is a prime site for what sociologist Thorstein Veblen famously described as "conspicuous consumption."¹⁹ Huge global industries turn on addressing problems that we haven't always known we have. Sags and bags that were once accepted as a normal consequence of aging now account for a multi-billion-dollar market in frequently ineffectual cosmetic responses.²⁰

Advances in science and technology have created new opportunities for "self-improvement" and corresponding pressures to take advantage of them. For example, the dramatic escalation in cosmetic surgery reflects both the growth in effective techniques and physicians' efforts to market services not subject to insurers' cost constraints. Other appearance-related products, now cloaked in a veneer of pseudo science, promise effortless perfection. "Space age slenderizer" and "poly-u collagen peptides" offer to shed consumers' unwanted pounds and wrinkles overnight.²¹ The media in general and advertisers in particular have played an important role in magnifying the importance of appearance and the pressures to enhance it. Women's magazines pitch an endless array of cosmetic advice and exhortation. Judging from their tables of contents, readers' most urgent concerns are on the order of "thinner thighs in thirty days." Televised makeovers and beauty pageants fuel implausible aspirations and unhealthy practices. "Reality" programs involving weight loss and cosmetic surgery are anything but realistic; careful editing

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omits anything inconsistent with a happily-ever-after ending. The public's repeated exposure to airbrushed, surgically enhanced fashion models and Hollywood celebrities further reinforces unrealistic standards. Only five percent of American women are in the same weight category as models and actresses, and efforts to replicate their figures often lead to eating disorders and related psychological dysfunctions.²²

The media's sexualized portrayals of prominent women, including everyone from athletes to politicians, also carries a cost. Overemphasis of their appearance deflects attention from their performance and reinforces sex-based double standards. That the highest paid member of Sarah Palin's vice presidential campaign was her makeup "artist" speaks volumes about our misplaced priorities.

FEMINIST CHALLENGES AND RESPONSES

Chapter 4 reviews efforts to challenge these priorities. In the United States, the nineteenth-century social purity crusade against cosmetics, the African-American campaign against skin whiteners and hair straighteners, and the feminist struggle for dress reform all set the terms for modern debates. During the Victorian era, religious and community leaders insisted that "respectable" women did not rouge. Prominent African Americans denounced cosmetic and grooming practices designed to replicate white norms. And suffragists such as Elizabeth Cady Stanton and Amelia Bloomer attempted to popularize alternatives to the corsets and crinolines that endangered women's health and constricted their movement.

None of these efforts were particularly successful. It took the rise of the contemporary women's movement in the 1960s to mount a broader and more sustained challenge to the beauty industry. That campaign kicked off with the infamous "bra-burning" protest at the

1968 Miss America pageant. Although no lingerie was in fact incinerated, the label stuck and battle lines were drawn. In most media portrayals, the activists were frumpy fanatical feminists, unhappy about standards of attractiveness that they could not hope to meet.

Gradually, however, the mainstream women's movement supplied more tempered and influential critiques. Naomi Wolf's best-selling *Beauty Myth* exposed many products as what dermatologists labeled "cosmetic hoo-hah."²³ A cottage industry of commentary on eating disorders and cosmetic surgery has made clear the medical risks of other appearance-driven practices. As critics have noted, even physically harmless preoccupations divert time and money to self-improvement rather than social action. Sexualized portrayals of prominent women—Hillary Clinton's cleavage, Sarah Palin's beehive, Michelle O'Bama's upper arms—have underscored the double standard that channels attention to women's appearance instead of their accomplishments.

Responses to these critiques have taken several forms. Commentators within and outside the women's movement have defended appearance-related efforts as either a satisfying form of self-improvement and self-expression, or a necessary concession to cultural expectations. From their standpoint, the "personal may be political" but it is also personal. As long as women are subject to a double standard, they might as well do what they need to do and get on with their lives. The beauty industry has made analogous efforts to respond to feminist critiques by co-opting feminist principles. In the world of Madison Avenue marketers, diet and cosmetic products are a way for women to "be all they can be" and express who they "really are."²⁴

Yet what is it that women want to be and how much time and money do they want to spend to get there? For many women, there are no easy answers, and issues of appearance remain a source of anxiety and ambivalence. That is particularly the case for women of

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a certain age, when cosmetic procedures, hair tints, and weight loss regimes begin to seem like necessary alternatives to “letting themselves go.” Even feminists who see these options as oppressive often feel shamed by their inability to escape them, or discomfited by the trade-offs. After all, as Susan Brownmiller ruefully notes, “sensible shoes aren’t sexy.”²⁵

Chapter 4 concludes with some ways around this standoff. Whatever their other differences concerning appearance, most women would agree on several key points. The pursuit of beauty should be a source of pleasure, not a response to shame or social pressure. Women should be able to choose whether or not to dye their hair or use Botox without being viewed as politically incorrect or professionally inadequate. They should neither be held to a higher standard of appearance than men, nor ridiculed as vain for their efforts to measure up. If men can seem eminent as they age without cosmetic enhancement, so too should women.

APPEARANCE DISCRIMINATION: SOCIAL WRONGS AND LEGAL RIGHTS

We are, however, a far distance from this ideal world, and chapter 5 explores what stands in the way. Discussion centers on two fundamental questions. Are any of the disadvantages resulting from discrimination based on appearance unjust? If so, do they call for some legal remedy?

The clearest argument for condemning appearance discrimination is that it offends principles of equal opportunity and individual dignity. As with other forms of prejudice, bias based on appearance often rests on inaccurate stereotypes. Assumptions that overweight individuals are lazy, undisciplined, or unfit are a case in point. Appearance-related discrimination also may stigmatize individuals

based on factors at least partly beyond their control, and may encourage unsafe cosmetic and dieting practices.

A related concern is that such bias reinforces other inequalities based on race, ethnicity, class, age, and gender. A widely publicized example of sex-based double standards in appearance involved the grooming policy at Reno's Harrah's Casino. It required female beverage servers to wear makeup and nail polish, and to have their hair "teased, curled, or styled." Male servers needed only short haircuts and fingernails that were "neatly trimmed."²⁶ Darlene Jespersen, a bartender with an outstanding performance record, challenged the policy on the grounds of sex discrimination. She felt that being "dolled up" was degrading and interfered with her ability to handle unruly customers. A federal appellate court rejected her challenge because she had not introduced proof that the standards imposed disproportionate burdens of time and expense on women, a fact that presumably would be obvious to reasonable jurors. Does anyone, except apparently some federal judges, really need expert testimony comparing the average time required for cleaning fingernails with applying makeup and styling hair? And as one dissenting judge pointed out, cosmetics "don't grow on trees."²⁷ Such makeup and manicure requirements may seem trivial, but the broader principle is not. As another dissenting judge noted, the assumption underlying the casino's policy was that "women's undoctored faces compare unfavorably to men's."²⁸ Holding only women to sexualized standards diverts attention from competence and perpetuates gender roles that are separate and by no means equal.

A final objection to discrimination based on appearance is that it restricts rights to self-expression. How individuals present themselves to the world may implicate core political values, cultural identity, and religious beliefs. Frequently litigated examples include hair length, hair styles, headscarves, and yarmulkes that employers have been unwilling to accommodate.

Although many individuals dismiss such discrimination as inconsequential, it occurs more frequently than they assume. Anywhere from 12 to 16 percent of workers believe that they have been subject to such bias, a percentage that is in the same vicinity, or greater, than those reporting gender, racial, ethnic, age, or religious prejudice. So too, almost half of surveyed Americans believe that obese workers suffer discrimination in the workplace, a figure that is higher than for other groups, such as women and minorities, who are protected by antidiscrimination laws. When asked about legal remedies, the public splits almost evenly for and against prohibitions, with a majority of women and minority groups favoring a ban.²⁹

What stands in the way? Chapter 5 reviews the major arguments against making appearance discrimination unlawful. One concern is that for some goods and services, employees' attractiveness can be an effective selling point. Many bars, restaurants, and department stores have imposed hiring and grooming standards that enforce a certain "brand" look: "slender," "hot" "young and trendy" or "not too ethnic."³⁰ As one Hooters spokesperson explained, "A lot of places sell good burgers. Hooters Girls, with their charm and all-American sex appeal, are what our customers come for."³¹

Yet that is an argument that courts have generally rejected in other discrimination contexts, and with reason. Consumer preferences often reflect and reinforce precisely the attitudes that society is seeking to eliminate. So, for example, unless sex is a business necessity, employers may not select workers on that basis. The same should be true of sexual attractiveness. Hooters' customers who want cleavage with their burgers are no more worthy of deference than the male airline passengers in the 1970s who preferred stewardesses in hot pants.³²

To some courts and commentators, however, a ban on appearance discrimination asks too much. From their perspective, even if such discrimination is unfair, the law is incapable of eliminating it and

efforts to do so will result in unwarranted costs and corrosive backlash. Stanford law professor Richard Ford voices a common objection: “a business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal.”³³ Many judges bristle at the prospect of clogging the courts with petty disputes over makeup, weight, and grooming standards. But it is by no means self-evident that prejudice based on appearance is harder to eradicate than other forms of bias. In fact, considerable evidence suggests racial, gender, and disability biases are also deeply rooted, but nonetheless subject to change through legal prohibitions. Moreover, as discussion below notes, none of the few local and state prohibitions on appearance discrimination currently in force have triggered the exorbitant costs or backlash that critics have predicted.

Chapter 5 closes with examples of how bans on appearance discrimination could contribute to progressive social change. By expressing aspirations, establishing appropriate standards, deterring violations, and raising public awareness, such legal remedies could nudge us closer to a just society. In cases where victims of appearance discrimination have brought suit, the result has often been to raise public awareness of the costs of bias and to secure workplace or policy changes that help prevent it. Even litigants who lose in court may win in the world outside it. Harrah’s casino changed its policy after the lawsuit.³⁴ But Darlene Jespersen paid too high a price. She lost a job at which she excelled and was blacklisted when she sought another. As her lawyer noted, when it comes to the casino business, “Reno is a small town.”³⁵

LEGAL FRAMEWORKS

Jespersen’s experience is all too typical; the overview of law in chapter 6 suggests why. On the whole, the legal regulation of

appearance has an unbecoming history. Its Anglo-European foundations date to thirteenth-century sumptuary laws, which reserved certain fashions only for aristocrats. Early American legislation focused more on preventing “indecent” than reinforcing class privilege. To that end, some jurisdictions banned “unsightly” individuals or women without corsets from appearing in public.³⁶

Contemporary law has banished such archaic prohibitions, but it has also given wide latitude to businesses and employers to impose their own restrictive grooming requirements and to discriminate on the basis of appearance. In general, such discrimination is illegal only if it involves other characteristics that civil rights law protects, such as sex, race, religion, or disability. So, for example, weight and grooming standards can be struck down if they impose unreasonable, disproportionate burdens on one sex. Grooming codes may be impermissible if they fail to make reasonable accommodation for religious expression, or selectively target practices associated with a particular racial group. Disability law has been held to prohibit weight discrimination in a very small percentage of cases involving extreme obesity that has a biological basis and that appears to impair normal functioning.

Even in these contexts, however, many courts have taken a restrictive view of what counts as discrimination. A representative example is the Harrah’s casino decision, which found no disproportionate burden resulting from hair and makeup rules. Judges have also been unsympathetic to African American women’s desire to wear cornrows, and Sikh employees’ wish to wear turbans or beards, even when the employer presents no convincing business justification for banning them.³⁷ Narrow interpretations of state and federal disability law also exclude from protection the very individuals who need it most: those who are only moderately overweight and who are not impaired in their job performance. Such employees can be

dismissed at will even if employers can show no demonstrable competence or health-related reasons.

These dismissals seem particularly unjust when the job involves no customer contact. As an attorney for an obese man denied a job as a fast-food cook put it, “The only thing that should matter to McDonald’s... [is] how he cooks, not how he looks.”³⁸ Cases where individuals in such positions have lost their jobs occasionally have prompted public protests and policy responses, including some of the local ordinances that ban discrimination based on appearance. Chapter 6 provides the first systematic empirical evidence of how those ordinances work in practice.

One state and six cities or counties prohibit some form of appearance discrimination: Michigan, San Francisco, the District of Columbia, Santa Cruz (California) Madison (Wisconsin), Urbana (Illinois), and Howard County (Maryland). These laws vary in coverage and in the frequency of enforcement, but no jurisdiction has experienced the flood of frivolous claims that commentators have anticipated. Hypothetical examples such as Jewish deli owners forced to hire cashiers with swastika tattoos have made for provocative journalism, but they are nowhere to be found in reported cases.³⁹ Santa Cruz, the poster child for critics of appearance prohibitions, has had no complaints in fifteen years. Urbana has had none in seven, and San Francisco has had only two in eight years. The average number of annual complaints for the other jurisdictions has ranged between one (the District of Columbia) and thirty (Michigan). Most have included allegations of other forms of bias (race, sex, and religion). Although some of these claims seem frivolous, they could have been brought without an appearance law, so it is not clear that the law has added significantly to businesses’ legal expenses.

Few appearance complaints have resulted in litigation or an unqualified victory for the complainant. For example, Michigan has

averaged fewer than one lawsuit a year, and no final judgments of discrimination. However, a substantial number of cases have ended up with reasonable negotiated settlements, and the existence of the laws may have deterred unjust bias. Moreover, the grievances that have obtained some legal remedy demonstrate the need for such protection. A representative example involved a waitress fired when she was six to seven months pregnant, despite a doctor's letter indicating that she was still able to work. The manager's professed concern for maternal health was inconsistent with statements that she made to other workers about the effect of the waitress's appearance on the restaurant's image.⁴⁰

Chapter 6 also places the American experience in a broader international context. European law is similar to that of the United States, and generally prohibits appearance discrimination only when it involves other forms of bias covered by human rights law (such as that involving race, gender, religion, age, disability, and sexual orientation). However, some countries, particularly France and Germany, extend greater protection to employee privacy, dignity, and self-expression; those interests prevail unless the employer can demonstrate a strong countervailing business justification.⁴¹ So too, in Germany, grooming codes are often established through "codetermination" between management and elected worker councils, a process that accords significant weight to employee interests. Based on the information available, the Australian state of Victoria is the only jurisdiction outside the United States that has an explicit ban on appearance-related bias. It experiences few complaints that require a formal hearing.⁴²

Part of the reason for the limited legal enforcement activity both here and abroad is that victims of appearance discrimination face significant costs and evidentiary obstacles; favorable decisions are unlikely in the absence of compelling undisputed facts. Many individuals are unwilling to assume the stigma and reputational damage

of publicly airing complaints about their unattractiveness. Particularly in jurisdictions that do not authorize attorneys' fees or substantial financial damages, victims also may lack sufficient economic incentives to pursue a claim. Another deterrent is the extreme deference that some courts and commissions give to employer regulations. So for example, Wisconsin discount stores and pet supply outlets have been allowed to ban earrings for male sales personnel. Employers' desire to ensure a "pleasant shopping experience," and their unsupported assumption that jewelry on men is inconsistent with that goal, have been found sufficient justification for the restrictions.⁴³

Yet despite these limitations, the existence of appearance discrimination laws can sometimes make a difference. Chapter 6 reviews examples in which victims of inaccurate stereotypes or invidious bias obtained reasonable remedies. When these cases also attracted significant publicity, they sent a message to employers, and raised public awareness of the costs of discrimination. A complaint before the San Francisco Human Rights Commission illustrates that potential. It involved Jennifer Portnick, a 240-pound aerobics instructor, who was denied a franchise by Jazzercise, a national fitness company. According to its lawyer, "One of the keys to success is extending franchises to instructors with a fit, toned body. Being able to portray this image inspires students... [and] is a necessary part of what students seek to achieve."⁴⁴ But Portnick was in fact fit. She worked out six days a week, taught back-to-back exercise classes, and had no history of performance problems or lack of students. She simply wanted to be "judged on my merits, not my measurements."⁴⁵ After a commission ruling in her favor and massive adverse publicity, the company changed its policy. The message that emerged in national media coverage was that full-bodied students can be inspired, not deterred, by an instructor their size who is fit and toned. Given recent evidence suggesting that fitness,

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rather than body mass, is the best predictor of health in most overweight individuals, that is an important social message.⁴⁶

Chapter 6 concludes by considering one final aspect in which more effective appearance-related laws and enforcement structures could make a difference: the regulation of false or misleading claims about beauty and weight-reduction products. Aggressive marketing of these products both encourages preoccupation with appearance and deludes consumers about effortless ways to enhance it. Although federal and state consumer agencies have authority to regulate fraudulent advertising, they lack the resources to keep up with the barrage of deceptive claims involving pseudoscientific “miracle methods.” If promises about these products sound too good to be true, it’s because they aren’t true. No one, outside the fantasy land of Madison Avenue marketing, can “eliminate” fat through seaweed patches and Chinese herbal creams (“no will power required”).⁴⁷ Yet consumers squander billions of dollars on such products, partly because a majority of the public wrongly assumes that manufacturers could not make these claims without solid scientific evidence for their validity.⁴⁸

A ROAD MAP FOR REFORM

None of these problems connected with appearance are readily remedied. Our prejudices and preoccupations run deep, and multi-billion dollar industries have a stake in perpetuating them. Yet neither are we helpless to address some of the worst injustices, and chapter 7 explores strategies that could push us in the right direction.

As a threshold matter, we need greater clarity about our goals. At the cultural level, a central priority should be to promote more attainable, healthy, and inclusive ideals. Our standards of attractiveness

should reflect greater variation across age, weight, race, and ethnicity, and our grooming requirements should reflect greater tolerance for diversity and self-expression. Judgments based on appearance should not spill over to educational and employment contexts where they have no socially defensible role. More support should also be available for strategies that promote healthy lifestyles, which could also help reduce the weight-related concerns that prompt discrimination.

Law can assist that agenda by combating appearance bias and by providing greater protection from restrictive grooming regulations and misleading advertising claims. One obvious strategy would be to prohibit discrimination based on appearance that is not justified by substantial business needs. A fair and accessible dispute resolution process, with the potential for judicial review, could increase the likelihood that victims would raise concerns as well as minimize the cost of addressing them.

In the absence of specific prohibitions on appearance discrimination, some progress is possible through broader interpretations of current discrimination and disability law. When evaluating sex-specific grooming and dress codes, courts should take a realistic view of what constitutes disproportionate burdens on one sex, and should disallow rules that reinforce gender stereotypes, like the makeup requirement of Harrah's Casino. Customer preferences should not constitute a justification for discrimination unless sexual attractiveness is a business necessity. So too, disability law should be interpreted more broadly and should encompass discrimination based on weight whether or not it involves extreme obesity with a physiological cause.

Law is, of course, only one of the strategies necessary to promote cultural change, and it is most effective when joined with other approaches. Litigation and policy initiatives can often raise public awareness about the appearance discrimination as well as the broader societal efforts necessary to address it. To achieve such

reform, activists need to be strategic in how they coordinate legal, media, and political strategies. A textbook example is the work of fat activists in San Francisco after a local fitness center ran an advertisement featuring a space alien and a caption, “When they come, they’ll eat the fat ones first.” Protesters showed up at the center in alien costumes wearing signs that said “Eat Me” and “This Gym Alienates Fat People.” Activists also demanded hearings before the San Francisco Human Rights Commission to explore examples of discrimination. The result was enactment of the city’s ordinance prohibiting discrimination based on height and weight.

Another masterful coordination of legal and media tactics involved a sex discrimination suit by two former “Borgata Babes,” cocktail waitresses at the Atlantic City’s Borgata Hotel and Casino. As chapter 5 notes, two “Babes” agreed, as part of their employment contract to keep a hourglass figure, and be height and weight appropriate.” The policy contributed to widespread eating disorders and related mental and physical health difficulties.⁴⁹ Widespread media coverage led not only to a substantial settlement, but also to greater public awareness of the health issues at stake.⁵⁰ The terms were confidential, but the impact was not. Commentators drew analogies to another celebrated lawsuit involving the Sand Hotel. There, a cocktail waitress successfully sued for sex discrimination after being forced to wear a revealing uniform and high heels, and being told that her job was to “sell sex.” That litigation prompted other Atlantic City casinos except the Borgata to offer uniforms including pants and flat shoes.⁵¹

These cases, along with others described in chapters 5 and 6, underscore the possibilities for social change. Lawsuits, along with public protests, have made a difference. Workplace policies have been modified, legislation has been passed, and employees have been reinstated or compensated. Yet the full potential of law has yet to be realized. We need more explicit prohibitions of appearance-

related bias, and more expansive interpretations of existing antidiscrimination laws that could address it. Even if formal complaints remain infrequent, such legal mandates can play an important role in deterring and publicizing abuse, providing bargaining leverage for victims, and expressing social ideals.

Beauty may be only skin deep, but the damages associated with its pursuit go much deeper. Only through a better understanding of the injustices of appearance can we fashion more effective responses. The chapters that follow are a step in that direction.