THE UGLY TRUTH ABOUT APPEARANCE DISCRIMINATION AND THE BEAUTY OF OUR EMPLOYMENT DISCRIMINATION LAW

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Bessie Braddock: "Sir, you are drunk."
Sir Winston Churchill: "And you, madam, are ugly. But in the morning, I shall be sober."[1]

President Abraham Lincoln, a master storyteller, considered himself physically unattractive, and he used his homeliness in his humorous stories. He told of an ugly man, some say he referred to himself, riding in the woods, when he encountered a woman riding on the narrow road. "As she passed, the woman looked at him intently and finally observed: 'Well, you are the ugliest man I ever saw.' 'Perhaps so,' admitted the unfortunate fellow, somewhat crestfallen, 'but I can't help that, madam.' 'No, I suppose not,' agreed the woman, 'but you might stay at home.'"[2]

I. A CONFERENCE IN THE FUTURE

In the not-so-distant future, imagine a conference sponsored by a law journal, dedicated to the twenty-fifth anniversary of the enactment of the federal law that prohibits employment discrimination based on physical appearance. The keynote speaker for the conference begins by reminding the audience that a mere quarter of a century earlier there was no federal law that expressly prohibited discrimination in employment based on physical appearance. All the people attending the conference shake their heads in disbelief and disdain at that benighted state of the law. The speaker sets the stage for the conference by reciting the well-known history of how appearance-based discrimination in employment came to be banned.

At the beginning of the twenty-first century, American society was obsessed with physical appearance. Tanned, slim, muscular, svelte movie stars and "supermodels" adorned and dominated magazine covers, television screens, and websites. Moreover, the curvaceous became loquacious, and presumptively and presumptuously sagacious, as these icons of society

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1. Variants of this dialogue are attributed to Prime Minister Churchill and Ms. Bessie Braddock. *E.g.*, Wikipedia.com, Winston Churchill, http://en.wikiquote.org/wiki/Winston_Churchill#Anecdotal_dialogue (last visited Nov. 1, 2006).

2. Benjamin P. Thomas, *Lincoln's Humor: An Analysis*, 3 J. ABRAHAM LINCOLN ASS'N 28, 39 (1981), *available at* http://www.historycooperative.org/journals/jala/3/thomas.html (last visited Sept. 17, 2006).

pontificated on politics, religion, philosophy, science, and various other weighty subjects. High school and college kids sought to emulate these beautiful people by working out, eating little, taking fat-burning supplements, and applying all sorts of creams and gels to their bodies. Older folks, who had more money and more need of drastic help, did all the things the younger kids did, but they also paid surgeons to tuck, raise, tighten, increase, decrease, and otherwise alter whatever needed modification.[3] Some people were endowed by their Creator with beauty, but nothing justified a failure to pursue that holy grail; to be beautiful (or at least as beautiful as you could be), you just had to spend your time and money and devote your life to it. There was no greater calling.[4]

People began to realize that, in this Sodom and Gomorrah, so utterly consumed with physical appearance, employers were discriminating—that is, making employment decisions—based on physical appearance. Perhaps it had been occurring for years, but as the nation's collective consciousness and conscience became more sensitized, thinkers and policy makers became more concerned with this iniquity. Clothing stores were hiring young, shapely, beautiful people who had "the look" to be sales associates. Bars and restaurants were hiring pretty people. Beautiful customers who ventured into business establishments were at risk of being accosted by management and hired on the spot.[5] Some employers tried remediation when they had made the mistake of hiring people who were not particularly gifted in appearance, but who against all odds turned out to be good employees, by imposing grooming, clothing, and appearance standards.[6] Businesses were convinced that customers would buy what they had to sell if their employees were attractive. There were even tales of attractive law school graduates beating out the less physically gifted graduates for jobs as attorneys. Imagine: Lawyers thinking that attractive lawyers would be better lawyers. In American society, all worshiped physical attractiveness. For women, demands and expectations seemed to be greater than for men.[7] Women tried to starve themselves into the supermodel paradigm.[8]

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3. This phenomenon has been depicted in *Nip/Tuck*, a popular television show on the FX network about plastic surgeons in Miami, whose catch phrase is, "Tell me what you don't like about yourself." For episode descriptions and plot outlines, see http://www.imdb.com/title/tt0361217/.

4. For useful background information on modern American society's obsession with physical appearance and people's efforts to improve their appearance, see the website of the University of Pennsylvania Health System's Center for Human Appearance. http://pennhealth.com/cha/psych.html ("Today's society spends millions of dollars to improve appearance—from cosmetics and fashion to gym memberships. In addition, the societal and cultural pressures to be young looking, thin and beautiful have contributed to the current popularity of cosmetic surgery."). *See also* ALEX KUCZYNSKI, BEAUTY JUNKIES: INSIDE OUR $15 BILLION OBSESSION WITH COSMETIC SURGERY (Doubleday 2006) (*New York Times* Styles writer's book about the business of cosmetic enhancement).

5. *See, e.g.*, Steven Greenhouse, *Help Wanted: But Only the Young, Hip and Blue-Eyed Need Apply*, INT'L HERALD TRIB., July 12–13, 2003, at 1.

6. *See, e.g.*, Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc) (involving claim based on employer's "Personal Best" program).

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

8. *See generally* Kate Sablosky, *Probative "Weight": Rethinking Evidentiary Standards in Title VII Sex Discrimination Cases*, 30 N.Y.U. REV. L. & SOC. CHANGE 325 (2006).

What was the law doing to address this sordid state of society? Not much. A few statutes[9] and municipal ordinances[10] banned employment discrimination based on physical appearance or some aspect thereof, such as height or weight. Additionally, some plaintiffs successfully pursued claims under then-existing laws if the appearance-based discrimination could be characterized as sex-based, race-based, or age-based.[11] These plaintiffs only succeeded when the attractive look the employer was seeking was not just pretty, but pretty and *white*, or not just attractive, but *young* and attractive. In the midst of this environment, enlightened people began to point out that appearance-based discrimination was morally wrong and pervasive. The movement to prohibit appearance-based discrimination began to gain momentum in the first decade of the twenty-first century, as aggrieved employees struggled to fit their appearance-based discrimination claims within existing prohibitions. Most plaintiffs lost, but a few won, and scholars and employee rights advocates began elucidating that these cases actually were about the broader evil of appearance-based discrimination. Proponents of legislation to ban appearance-based discrimination argued that the law should not force aggrieved employees to characterize their claims as something else in order to redress the wrong perpetrated against them. When asked about employment discrimination based on physical appearance, almost every politician would say that it was wrong, but few went so far as to support federal or state legislation to ban it. The societal change also began to be manifested in popular culture. The ABC television network debuted a television show entitled *Ugly Betty*,[12] in which a woman who is a good worker and a good person—but "not pretty"—rocks the world of high fashion.

At the turn of the twenty-first century, there also was no federal law prohibiting employment discrimination based on sexual orientation. Although federal legislation had been proposed many times prohibiting discrimination based on sexual orientation, it had never been passed by Congress.[13] Finally, a bill to prohibit employment discrimination based on sexual orientation, the

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9. D.C. CODE ANN. §§ 2-1401.02(22), 2-1402.11 (LexisNexis 2001) (personal appearance); MICH. COMP. LAWS § 37.2202 (2006) (height and weight). *See generally* Baron, *supra* note 7, at 379–80 (surveying state and local laws).

10. URBANA, IL., CODE OF ORDINANCES §§ 12-37, 12-62 (1998) (personal appearance); MADISON, WIS., GEN. ORDINANCE § 3.23 (2)(bb) (2006) (physical appearance); SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, 9.83.020(13) (2004) (physical characteristic). *See generally* Baron, *supra* note 7, at 379–80.

11. *See infra* Part III.

12. *See* ABC.com, *Ugly Betty*, http://abc.go.com/primetime/schedule/2006-07/betty.html (last visited Nov. 9, 2006); IMDb.com, Ugly Betty Pilot (2006), http://www.imdb.com/title/tt0496240/ (last visited Nov. 9, 2006).

13. For example, the Employment Non-Discrimination Act (ENDA), which would amend Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination based on sexual orientation, was first introduced in Congress in 1994. H.R. 4636, 103d Cong. (2d Sess. 1994); S. 2238, 103d Cong. (2d Sess. 1994). It was reintroduced for several years thereafter. *See, e.g.*, Mary Ann Connell & Donna Euben, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J.C. & U.L. 193, 224 n.317 (2004); *ENDA Will be Re-Introduced in Congress on July 31*, Daily Lab. Rep. (BNA) No. 145, at A-8 (July 30, 2001); Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA With a Certification Mark*, 104 MICH. L. REV. 1639 (2006).

Employment Non-Discrimination Act (ENDA), was working its way through Congress and seemed destined for passage. On the floor of the United States Senate, an opponent of ENDA proposed an amendment which would add physical appearance as a prohibited ground of discrimination. The senator intended this as a "poison pill" which would kill ENDA. Much to his surprise, the proponents of ENDA embraced the amendment, and the amended law passed.[14] The President vetoed the bill, declaring that the bill was intended to give unattractive people jobs in direct proportion to their representation in the population. In a surprising turnabout, the very next year the bill passed and the President signed it, declaring it morally necessary to put an end to employment discrimination against persons who are appearance-challenged.[15] In the ensuing years, there was much litigation, and case law fleshed out how to prove that an employer had discriminated because of physical appearance. Whereas in the past circumstantial evidence of discriminatory motive had been used, those primitive methods were gradually replaced with hard science such as brain scans of employment decision-makers.[16]

The other speakers and audience all listen to the recitation of the remarkable history of how appearance-based discrimination in employment came to be banned as a matter of federal law. After enthusiastic applause for the keynote speaker, the next speaker is introduced, rises, and begins:

> The twenty-fifth anniversary of the passage of the federal law prohibiting appearance-based discrimination is a cause for celebration and reflection, but it is also a time to turn our attention to the next area of coverage for employment discrimination law. We all recognize that not all people are born with exceptional intelligence; indeed, most people have only average intelligence. Yet, many employers have discriminated in favor of those whom they believe to be intellectually gifted. Intelligence is no more relevant to many jobs than is physical appearance, and yet the law has turned a blind eye as employers have favored intellectually gifted people for jobs, promotions, raises, and other employment advantages. It is time for the law to address this type of invidious discrimination. Although I am not one of them, I stand up for the intellectually challenged.

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14. Of course, the allusion here is to the history of inclusion of sex as a protected characteristic in Title VII of the Civil Rights Act of 1964. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 n.9 (1989).

15. This is reminiscent of the passage and Presidential signing of the Civil Rights Act of 1991 after the same President had vetoed a version of the bill in 1990. *See, e.g.*, Charles A. Sullivan, *The World Turned Upside Down? Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1536–37 (2004).

16. *See generally* RICHARD DOOLING, BRAIN STORM (Random House 1998). Although Dooling's book is a work of fiction, one can readily imagine the application to employment discrimination litigation of the science and technology described in Dooling's book.

II. STARTING POINTS

A. A Startling Prediction

I hope my hypothetical conference has suggested several propositions on which I wish to build. First, in our contemporary society, appearance matters, and physical beauty or attractiveness is favored,[17] and the relatively unattractive (aesthetically challenged,[18] if you please) lose out on opportunities and benefits that are generously bestowed on the attractive.[19] Second, in such a society, many employers care very much about the physical appearance of their employees, and some make employment decisions based, at least in part, on the physical appearance of employees and applicants.[20] Additionally, some employers try to maximize or improve upon the physical attractiveness of their employees by imposing grooming, dress, or appearance codes.[21] It seems that appearance matters in our society today more than it ever has before.[22] One can posit several causes for this mindset. The increased emphasis on appearance might be attributable to media, computers, and technology and the ease with which images are transmitted and the quality of the images transmitted. It also might be a result of advances in science and medicine that have made alterations of

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17. *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 7 (2000) (discussing studies of "undeserved" benefits bestowed on the attractive); Michael Starr & Adam J. Heft, *Employment Law: Appearance Bias*, NAT'L L.J., June 20, 2005, at 16.

18. Baron, *supra* note 7, at 386.

19. *See generally* Recent Development, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987) ("The most physically unattractive members of our society face severe discrimination. . . . [A]ppearance, like race and gender, is almost always an illegitimate employment criterion, and . . . it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit.") (alteration added).

20. *See, e.g.*, Post, *supra* note 17, at 7; Recent Development, *supra* note 19, at 2040–41; Karen Zakrzewski, Comment, *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, 431 (2005); Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195 (2000).

21. *See, e.g.*, Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (involving claim based on employer's "Personal Best" program).

22. Some might object that there are several styles or fashions in vogue that are not very attractive. I am not commenting on styles here, but on the appearance of the body. I have at least one reservation regarding my assertion that physical appearance matters in our society now more than ever because I am aware that studies also suggest that more Americans are obese than at any other time. Obesity in America.org, Obesity Trends, http://www.obesityinamerica.org/trends.html (last visited Nov. 9, 2006). Still, what sells in our society and what we watch and want is physical attractiveness, regardless of whether we possess that trait ourselves. *See generally* SHARLENE JANICE HESSE-BIBER, AM I THIN ENOUGH YET?: THE CULT OF THINNESS AND THE COMMERCIALIZATION OF IDENTITY (1996).

physical appearance possible and more accessible[23] than at any other time—what was once thought to be immutable has now become mutable.[24]

There has been a substantial volume of litigation involving appearance-based employment discrimination in recent years, and many of the lawsuits have attracted considerable media attention. Alas, plaintiffs have not shown well in most appearance-based lawsuits, which must be fit within existing employment discrimination laws.[25] The existing federal employment discrimination laws prohibit discrimination based on the following characteristics: race, color, sex (including pregnancy), religion, and national origin (Title VII of the Civil Rights Act of 1964);[26] age (the Age Discrimination in Employment Act)[27]; and disability (the Americans With Disabilities Act).[28] When can we expect a new federal employment discrimination law that bans discrimination based on physical appearance? My startling answer is, "Never!" I believe that federal employment discrimination law will never prohibit appearance-based discrimination, and few if any state discrimination laws will add appearance as a protected characteristic. Instead, it seems that appearance-based discrimination will continue to be on the periphery, with cases being pulled under existing categories when arguably viable.

Despite the risk in predicting that something never will occur, I think most would agree with me, although proposals for such a law are not unheard of.[29] If I am correct both that appearance discrimination law never will be enacted and that most would agree with that prediction, I am in danger of appearing to build a straw person just to knock it down. The question I wish to explore, however, is not whether we will have such a law, but instead why we will not have such a law and what that tells us about our body of law prohibiting employment discrimination based on specified characteristics.

Professor Robert Post and others have explained that some of the core theory of employment discrimination law would lead one to believe that a law prohibiting appearance-based discrimination flows naturally from our model of employment discrimination law.[30] The argument runs something like this: The

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23. *See, e.g.*, Theresamarie Mantese, Chrisitne Pfeiffer & Jacquelyn McClinton, *Cosmetic Surgery and Informed Consent*, 85 MICH. B. J. 26 (Jan. 2006) (providing data on increase in number of various types of cosmetic procedures). A quick Internet search establishes the availability and accessibility of various types of cosmetic procedures.

24. Zakrzewski, *supra* note 20, at 459–60 (describing some of the means and methods available to improve physical appearance).

25. *See. e.g.*, cases discussed *infra* notes 47–67.

26. 42 U.S.C. §§ 2000e–2000e-15.

27. 29 U.S.C. §§ 621–633a.

28. 42 U.S.C. §§ 12111–12117.

29. Recent Development, *supra* note 19, at 2052 (prior to passage of the ADA, proposing coverage of appearance under the Rehabilitation Act of 1973); Zakrzewski, *supra* note 20, at 461 (proposing expansion of Title VII). *See generally* Adamitis, *supra* note 20 (proposing passage of state and local law to provide coverage); Lynn T. Vo, Comment, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law*, S. ILL. U. L.J. 339, 358–59 (2002) (proposing narrow state laws).

30. *See* Post, *supra* note 17, at 7–8; *see also* Thomas C. Grey, *Cover-Blindness*, 88 CAL. L. REV. 65, 65 (2000) ("And if it is bigotry, it is a damaging kind; studies show that less attractive people do tend to

law should require employers to be blind to characteristics such as race, sex, etc., that are not relevant to job performance, foregoing action based on prejudice-infected judgments, and should require them instead to make employment decisions based on merit alone—meaning ability to do a job.[31] As Post explains, and as will be discussed below, this is a grossly simplified, incomplete, and therefore inaccurate description of employment discrimination law in the United States because it encompasses only one theory, model, or conception of discrimination law.[32] Indeed, it is the same misunderstanding and oversimplification of the law that leads some to decry affirmative action as a type of illegitimate discrimination,[33] and others to brand the requirement imposed by some courts in reverse discrimination cases that plaintiffs must prove more ("background circumstances") than plaintiffs in traditional discrimination cases as a form of discrimination in itself.[34]

B. Achieving a Better Understanding and Appreciation of Employment Discrimination Law

Post used appearance-based discrimination to probe common misunderstandings of discrimination law with an end to debunking the dominant conception of status-blind law and developing a sociological account of the law.[35] In this Essay, my goal is similar, but somewhat different. I use appearance-based discrimination (and my prediction that it never will be banned by federal or state employment discrimination law) to explore the complexity and—dare I say it—beauty of our existing employment discrimination law. I think this is an important undertaking, because employment discrimination law is popularly and commonly[36] understood or explained as a blunt instrument with a set of status-blind principles that must be applied equally to all forms of discrimination.[37] That misunderstanding or

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get fewer of the socially valued goods. So why don't we rally around laws aimed to combat appearance discrimination?").

31. Post, *supra* note 17, at 11–13.

32. *Id*. at 32 (describing the dominant conception of employment discrimination law as incomplete and inaccurate).

33. *Id*. at 38 (explaining the irony that many who would dismiss the Santa Cruz appearance ordinance as absurd also would reject affirmative action based on their adherence to the dominant conception of employment discrimination law).

34. *See, e.g.*, Lind v. Battle Creek, 681 N.W.2d 334. 335 (Mich. 2004) (holding that the lower court improperly applied the requirement from *Allen v Comprehensive Health Services*, 564 N.W.2d 914 (Mich. Ct. App. 1997), that reverse-discrimination plaintiffs must prove additional background circumstances, and overruling the *Allen* requirement as discriminatory in itself).

35. *See* Post, *supra* note 17.

36. Even occasionally by those who should know better—such as lawyers, judges, and scholars.

37. This can be seen most clearly in affirmative action. *See, e.g.*, Yafit Cohn, *Affirmative Action for Women in the Workplace at Home and Abroad: A Comparison of* Johnson v. Transportation Agency *and* Abrahamsson v. Fogelqvist, 37 COLUM. J. L. & SOC. PROBS. 277, 304 (2003). It also is seen in and reverse discrimination. *See, e.g.*, Lind v. Battle Creek, 681 N.W.2d 334 (Mich. 2004). Regarding the difficulties created by the equal treatment model of discrimination law in the contexts of affirmative action and reverse discrimination, see Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031 (2004).

mischaracterization leads to widespread dissatisfaction with the law and criticism from both proponents and opponents. Proponents of employment discrimination law often become dissatisfied with how little it accomplishes,[38] while opponents attack it either for impinging too much on the workplace and employer decision making[39] or for violating its own core principles by not remaining status-blind.[40]

I discuss three related points, which certainly are not original, but which I think are often overlooked. First, I discuss the reality that what employment discrimination law can achieve in changing society and regulating employment decisions is not unlimited and is not intended to be. If the goal of eradicating discrimination based on protected characteristics were given free reign, the law would not be long tolerated as it ran roughshod over other important societal objectives. Second, employment discrimination law is not monolithic, and it applies the different theories and principles to different characteristics in different ways. This body of law must continually make compromises, balancing the goal of regulating discrimination with achieving other important societal goals, such as minimizing interference with employers' decision making or respecting privacy concerns of individuals. Third, not all employment discrimination laws are equal, either when created or as applied and developed. Some employment discrimination laws pursue the goal of suppressing discrimination and subordinate other goals more than others. The question is not just whether to enact laws prohibiting discrimination based on a particular characteristic, but also how the various theories and principles should be deployed. How strong should the law be made?

Legislators and judges have recognized these three truths both implicitly and explicitly and developed a complex body of law, but we often do not discuss and appreciate the intricacy of this law. We would do well to educate the public on the limitations and complexities of the existing body of employment discrimination law. By exploring the challenges posed by prohibiting appearance-based discrimination, I am reminded both of the complexities and nuances of our existing discrimination law and of some of the criticisms and challenges that it has encountered thus far in its first four decades and will continue to encounter as it evolves in the future. As I consider the parallels between these attempts to prevent discrimination, I conclude that appearance-based discrimination shares many of the problems with the prohibition of discrimination based on disabilities. In fact, those challenges are even more daunting with respect to appearance discrimination. Specifically, I am thinking about the much-maligned Americans with Disabilities Act of 1990 (ADA).[41] It is a relatively weak discrimination law—it was created as a weak law

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38. Consider, for example, academic dissatisfaction with the courts' treatment of the Americans with Disabilities Act of 1990. *See generally* Linda Hamilton Krieger, Symposium, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

39. *See, e.g.*, WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (Free Press 1997).

40. Consider, for example, the criticisms of both affirmative action and variations in proof requirements in reverse discrimination cases. *See* sources cited *supra* note 37.

41. Pub. L. 101-336, 104 Stat. 328, codified at 42 U.S.C. §§ 12101–12213 (West Supp. 2006).

and has been developed as such. Nevertheless, I believe that our body of employment discrimination law *should* have laws that are weaker than the race- and sex-discrimination prohibitions of Title VII. I do not disagree with the majority of commentators who conclude that many judicial interpretations of the ADA could be and probably should be less restrictive,[42] but the weakness of the ADA compared with other employment discrimination statutes should not be surprising, given the practical limits on what behaviors the law can control. Unlike poor little former planet Pluto,[43] the ADA need not be downgraded because it is the weakest or smallest of discrimination laws. Even a weak discrimination law can prompt some significant changes in workplaces and society.

Although it should not be surprising that there are limitations to what employment discrimination law can accomplish, one must consider that employment discrimination law has been a powerful tool,[44] which had the goal of transforming society in significant ways, and which has achieved that goal to some extent. Indeed, employment discrimination law has become such a dominant type of employment law that it is looked to to accomplish regulation that is perhaps better assigned to other types of law, such as privacy law.[45] Much of the regulation of the workplace in the United States has been pushed under the umbrella of employment discrimination law—perhaps too much. The more that is brought under the ambit of discrimination law, particularly weak forms of discrimination law, the more susceptible the body of employment discrimination law becomes to discontent and ridicule. Consider, for example, the not uncommon highlighting of what are depicted as absurd disabilities discrimination cases in the media.[46]

Thus, I believe that appearance-based discrimination law will not be passed, and it is good that it will not. Nonetheless, considering why it will not and should not happen is a useful exercise in understanding, appreciating, and explaining the employment discrimination law of the United States. This will be the aim of the remainder of this paper.

Part III is a survey of several recent high-profile cases that implicated appearance-based discrimination issues as a way to examine the current state of

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42. *See generally* Symposium, *supra* note 38.

43. *See, e.g.*, Robert Roy Britt, *Scientists Decide Pluto's No Longer a Planet*, at http://www.msnbc.msn.com/id/14489259/ (last visited Dec. 4, 2006).

44. *See, e.g.*, Post, *supra* note 17, at 39; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 61 (2000) (calling equal protection and antidiscrimination law "[o]ne of the epic legal developments of the twentieth century"). There is some dissatisfaction, however, with the slowing or declining accomplishments of discrimination law. *See, e.g.*, Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U.L. REV. 1497, 1524–25 (2002) (discussing the early successes of Title VII, but questioning its current efficacy).

45. Consider, for example, genetic discrimination. Furthermore, Professor Catherine Fisk has argued for a change in emphasis in legal regulation of appearance-based discrimination to privacy law. *See* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006).

46. *See, e.g.*, Krieger, *supra* note 38, at 9–10 (2000); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans With Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

the law and the proliferation of appearance-based discrimination issues under other protected characteristics. Part IV discusses the complexity of employment discrimination law, positing that we have stronger and weaker discrimination laws, depending on the protected characteristic. There are a number of factors that contribute to a particular characteristic becoming covered by discrimination law. Depending on those factors, the need to reduce or deter discrimination can be rated; although we often speak of the goal as eradicating discrimination, this is not the objective of the laws. Depending on how compelling the case is for reduction of discrimination, the law enacted will mediate between that goal and other important goals favoring unregulated employer prerogative. Part IV also discusses the different theories, doctrines and principles that compose and shape our law; depending on how strong or weak the law is to be, these components will work in creative tension to produce the desired strength. Part IV also explores the similarities between disability-discrimination law and appearance-based discrimination. The future, then, of appearance discrimination is to continue living on the periphery of employment discrimination law. But thinking about why that is so can help us appreciate and explain the beautiful and intricate galaxy that is our employment discrimination law.

III. THE APPEARANCE-BASED DISCRIMINATION CASES OF 2005–2006: A VERITABLE CAVALCADE

Appearance discrimination should be recognized as the new supermodel issue of employment law. The period of 2005–2006 had several high-profile, media-magnetic cases involving some aspects of appearance. A jaunt through the cases provides some idea of the range of issues.

A librarian at Harvard claimed that she was passed over for numerous promotions because she was perceived to be "just a 'pretty girl,'" who wore "sexy outfits" and was not taken seriously because she did not fit the image of a librarian.[47] She sued, alleging discrimination based on race and gender, and lost.[48] This is an interesting case in many respects. If the law prohibited appearance-based discrimination, this case might be characterized as a reverse discrimination case—a case in which a member of the historically favored group, the attractive, alleges discrimination based on the characteristic.[49] The law does not recognize reverse discrimination claims for all protected characteristics.[50] Would such a claim be recognized under an appearance discrimination law?

In a well-publicized California case, *Yanowitz v. L'Oreal USA, Inc.*, an employee disobeyed a supervisor's order to terminate a sales associate whom the supervisor did not deem to be sufficiently attractive and to "[g]et me

47. Goodwin v. Harvard Coll., No. 03-11797JLT (D. Mass. May 17, 2005); *Harvard Librarian Sues University*, N.Y. TIMES, Mar. 23, 2005, at A13; Diane E. Lewis, *Workplace: Suit Focuses Attention on Alleged Bias Against Attire, Beauty on the Job*, BOSTON GLOBE, Mar. 27, 2005, at G2.

48. *See Harvard Cleared In Bias Case*, N.Y. TIMES, Apr. 5, 2005, at A17.

49. *See generally* Sullivan, *supra* note 37, at 1035 (explaining meaning of traditional and reverse discrimination).

50. *See infra* notes 108–11 and accompanying text.

somebody hot."[51] The employee refused to carry out the order, even though it was repeated on several occasions.[52] She alleged that she was retaliated against for refusing to fire the associate and eventually left her job and sued, alleging that it was her noncompliance with the order that created the stress leading to her resignation.[53] She sued under the antiretaliation provisions of the California Fair Employment and Housing Act, which prohibits taking adverse employment action against an employee for opposing illegal activity.[54] The California Supreme Court held that the plaintiff could have reasonably believed that the order was illegal sex discrimination because it applied a different appearance standard to women and men.[55]

In *Cloutier v. Costco Wholesale Corp.* an employee who belonged to the Church of Body Modification refused to remove eyebrow rings during work to comply with the employer's prohibition of facial jewelry other than earrings.[56] The employee sued for religious discrimination—failure to make a reasonable accommodation[57]—but lost because the court recognized that employers have been permitted to adopt and maintain dress codes that appeal to customer preference and promote a professional public image.[58]

In *Jespersen v. Harrah's Operating Co., Inc.*, a longtime and effective employee refused to comply with her employer's newly-instituted "Personal Best" program that required female employees to wear facial makeup.[59] The plaintiff refused because she believed that wearing facial makeup conflicted with her self image.[60] When she was subsequently terminated, she sued under a claim of sex discrimination, contending that the employer imposed different employment terms on male and female employees and required females to conform to sex-based stereotypes as a condition of employment.[61] The Ninth Circuit held that the employer's appearance standards did not impose unequal burdens on males and females; therefore there was no sex discrimination.[62] The Court also rejected the gender stereotype theory, stating that if it recognized a claim under these facts, "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."[63]

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51. 116 P.3d 1123, 1145 (Cal. 2005) (Chin, J., dissenting).
52. *Id.*
53. *Id.* at 1146.
54. *Id.*
55. *Id.* at 1126 (majority opinion).
56. 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2940 (2005).
57. 42 U.S.C. § 2000e(j) (2000) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").
58. *Cloutier*, 390 F.3d at 136.
59. 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).
60. *Id.* at 1107–08.
61. *Id.* at 1108.
62. *Id.* at 1111.
63. *Id.* at 1112.

Goodman v. L.A. Weight Loss Centers, Inc. presented the case of a 350-pound man suffering from morbid obesity who was not hired as a sales counselor with a company that specialized in weight reduction plans.[64] The man sued under the Americans with Disabilities Act and state discrimination law, contending that he was denied employment because he was regarded as disabled.[65] However, the court dismissed his claim, holding that the plaintiff failed to plead that he was excluded from a broad class of jobs and therefore he had not pled that he was substantially limited in the major life activity of working.[66] The court also offered an alternative rationale:

> [I]t is well established that an employer is permitted to make hiring decisions based on certain physical characteristics. The mere fact that Defendant was aware of Plaintiff's weight and rejected his application for fear that his appearance did not accord with the company image is not improper. To hold otherwise would render an employer's ability to hire based on certain physical characteristics entirely void.[67]

The court in *Goodman* thus brought the issue into graphic relief: It is not illegal for employers to discriminate on the basis of certain physical characteristics. However, it is also true that it is illegal for employers to discriminate on the basis of some specific physical characteristics—those covered by existing discrimination laws. Thus, if an employer discriminates on the basis of wanting a certain "look," and that look is "young" or "white" or "American," then the discrimination is illegal under the existing employment discrimination laws.

The survey of the 2005–2006 cases involving appearance-based claims depicts the current law on appearance-based employment discrimination. In the absence of a statute or ordinance prohibiting appearance-based discrimination, plaintiffs are relegated to trying to characterize the basis for the adverse employment action as something else that is a protected characteristic—for example, race, sex, religion, or disability. Although there are a handful of state statutes and local ordinances,[68] they do not even approach the level of growth of sexual orientation law, as evidenced by bills introduced in Congress and passage of state laws.[69]

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64. No. 04-CV-3471, 2005 U.S. Dist. LEXIS 1455 (D. Pa. Feb. 1, 2005).

65. *Id.* at *4.

66. *Id.* at *6.

67. *Id.* at *7 (internal citation omitted).

68. *See supra* notes 9–10.

69. Regarding bills introduced in Congress, see *supra* note 13. There are now seventeen states and the District of Columbia that have laws prohibiting employment discrimination based on sexual orientation. Illinois became the fifteenth state in 2005. *Illinois Legislature Approves Bill to Ban Sexual Orientation Bias*, Daily Lab. Rep. (BNA) No. 8, at A-5 (Jan. 12, 2005). Maine became the sixteenth when voters in a referendum voted not to defeat the law. *Maine Voters Refuse to Nix Measure Adding Sexual Orientation to Bias Law*, Daily Lab. Rep. (BNA) No. 217, at A-6 (Nov. 10, 2005). Washington followed as the seventeenth in 2006. *Governor Signs Legislation Prohibiting Discrimination Based on Sexual Orientation*, Daily Lab. Rep. (BNA) No. 21, at A-11 (Feb. 1, 2006).

IV. DISCRIMINATING ABOUT DISCRIMINATION: NOT ALL DISCRIMINATION LAW IS EQUAL

A. Limitations on the Transformative Effect of Employment Discrimination Law

Congress,[70] the Supreme Court,[71] and other courts,[72] when expressing the grandest vision of antidiscrimination law, have proclaimed that the goal of Title VII and other employment discrimination laws is to transform society by eradicating discrimination based on race, sex, etc. A moment's reflection reveals that the law attempts no such radical transformation of society,[73] and that is good because the law is not capable of such reform, and such radically transformative law would not be long tolerated by society.[74] Indeed, the Supreme Court has, on occasion, more realistically assessed the transformative potential of the employment discrimination laws; for example, the Court recently referred to achieving the basic objective of Title VII if "all employment-related discrimination [were] miraculously eliminated."[75]

What has been developed instead is a complex body of discrimination law with different theories, doctrines, and principles that, both by their terms and as interpreted or applied, effect compromises between eradication of discrimination and other important societal objectives. Depending on the extent to which the law is intended to be transformative (i.e., the extent to which it seeks to reduce discrimination), the law is initially created and subsequently developed with these theories, doctrines, and principles as "strong" or "weak" anti-discrimination law. Those who idealize employment discrimination law as being directed solely toward the eradication of discrimination may agree with this description, but also be dismayed by it. Although I share many of the dissatisfactions with various aspects of discrimination law and would make many changes if I could, one of my goals in this essay is to argue that it is a beautifully-crafted body of law, designed and developed to do much of what can be done.

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70. H.R.REP. No. 88-914, at 26 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

71. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989); Trans World Airlines , Inc. v. Hardison, 432 U.S. 63, 71(1977) (referring to Title VII's goal of "eliminating discrimination in employment").

72. *See, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated*, 514 U.S. 1034 (1995) (describing the goal of the laws "to wipe out the iniquity of discrimination in employment"); Griffith v. City of Des Moines, 387 F.3d 733, 747 (8th Cir. 2004) (Magnuson, J., concurring) (describing what Congress "always intended" in the employment discrimination laws as "the absolute elimination of discrimination in employment decisions").

73. Post, *supra* note 17, at 26–30; Grey, *supra* note 30, at 66 ("We pass antidiscrimination laws, then, not to abolish all stereotypes, but to reform selected aspects of the practices that mold our notions of gender and race.").

74. *Cf.* Post, *supra* note 17, at 18 (positing that it would be "astonishing" if employment discrimination law "transcend[ed]" the covered categories and "rendered them truly irrelevant."); *id.* at 26–27 (quoting case for proposition that if sex discrimination law is not realistically interpreted, it will be "ignored or displaced"). For a helpful discussion of the "antidiscrimination project," its objectives, and the necessary balancing of its values against other values, see ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (Yale University Press 1996).

75. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006).

Our society has many important goals, and abolishing discrimination based on particular characteristics is only one of them. A very strong goal at the other extreme is respecting employers' prerogatives to operate their businesses in ways they deem appropriate to create jobs, generate profits, and contribute to a robust economy. Perhaps the starkest example of recognition of and respect for employer prerogatives is the much-maligned employment-at-will "doctrine," which provides that employers can terminate employees for a good reason, a bad reason, or no reason at all.[76]

When the goal of reducing discrimination would encroach too much on other important goals, such as employers' autonomy of decision-making, some in society will speak up about the potential excesses of employment discrimination law. Sometimes people will even go so far as to say that resolving the conflict in favor of employment discrimination law produces an absurd result.[77] It is at those points of compromise between the goal of employment discrimination law and other societal goals that the delicate balance must be maintained, and sometimes that requires a subordination of the discrimination law.

One example of this compromise is the bona fide occupational qualification ("BFOQ") exception to Title VII.[78] The BFOQ defense in Title VII is applicable to religion, sex, or national origin, but not to race or color. The ADEA also includes a BFOQ defense for age discrimination.[79] The statutory language provides that it is not an unlawful employment practice for an employer to discriminate on the basis of the characteristic if the characteristic is a BFOQ "reasonably necessary to the normal operation of that particular business."[80] These exceptions suggest that Congress recognized that, although it wanted to reduce discrimination, there are circumstances in which sex, age, etc. is not only relevant to performance of a job, but there is no effective substitute criterion, and thus a compromise must be effected. The case law has developed a test for BFOQ that has made it a very narrow defense, on which employers rarely can rely. The test first identifies the essence of the business, as determined by the court, not the employer, and then asks whether the essence of the business makes it essential for the employer to discriminate on the basis of the protected characteristic.[81] Thus, by developing a narrow BFOQ defense, the case law has struck the

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76. *See* Payne v. W. & Atl. R.R., 81 Tenn. 507, 520 (1884) ("All may dismiss their employee[s] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.") (alteration added), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915). *See generally* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000).

77. *See, e.g.*, the court's closing comments in Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981), at *infra* text accompanying note 89.

78. 42 U.S.C. § 2000e-2(e)(1) (2000) (permitting an employer to discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").

79. 29 U.S.C. § 623(f)(1) (West Supp. 2006).

80. *Id.*

81. *See, e.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (interpreting BFOQ for sex under Title VII); W. Air Lines v. Criswell, 472 U.S. 400 (1985) (interpreting BFOQ for age under the ADEA).

compromise in favor of the goal of reducing discrimination. Given that BFOQ is a point of tension between conflicting goals, one would expect cases in which people will find the results unsatisfactory, and they may even characterize the results in some cases as absurd or silly.

Wilson v. Southwest Airlines Co.[82] helped clarify the parameters of the BFOQ defense under Title VII.[83] In that case, male plaintiffs sued Southwest Airlines, claiming that its refusal to hire males for the high-customer-contact positions of flight attendant and ticket agent, was illegal sex discrimination.[84] Southwest defended the case, arguing that being female was a BFOQ for those jobs.[85] Southwest argued that hiring females for those jobs fit the company's corporate image (love in the air), and it gave the company a competitive advantage because the predominantly male clientele preferred female flight attendants and ticket agents.[86] The court adopted a narrow test for BFOQ.[87] Applying that test, the court rejected application of the defense to the case and ruled for the plaintiffs.[88] After holding for the plaintiffs, however, the court wrote:

> One final observation is called for. This case has serious underpinnings, but it also has disquieting strains. These strains, and they were only that, warn that in our quest for non-racist, non-sexist goals, the demand for equal rights can be pushed to silly extremes. The rule of law in this country is so firmly embedded in our ethical regimen that little can stand up to its force except literalistic insistence upon one's rights. And such inability to absorb the minor indignities suffered daily by us all without running to court may stop it dead in its tracks. We do not have such a case here only warning signs rumbling from the facts.[89]

That closing paragraph always has struck me as an unusual conclusion. It suggests that although the court adhered to the narrow BFOQ defense, it recognized that the case was on a point of great tension. The court almost implied that maintenance of the narrow BFOQ and application of it to the case verged upon "silly." But not quite.

The BFOQ defense for sex discrimination also was the principal legal issue when the EEOC initiated litigation against Hooters in a series of cases because the restaurants refused to hire males for the position of "Hooters girls."[90] Hooters staked out a legal argument that being female was a BFOQ for being a

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82. 517 F. Supp. 292 (N.D. Tex. 1981).

83. Although *Wilson v. Southwest Airlines* was a sex discrimination case, the analysis developed therein also had been applied to the analysis of BFOQ under the Age Discrimination in Employment Act.

84. 517 F. Supp. at 293.

85. *Id.*

86. *Id.*

87. *Id.* at 304.

88. *Id.*

89. *Id.* at 304–05.

90. These cases also addressed sexual harassment based on the provocative climate of the restaurant chain. *See, e.g.*, Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 567–68 (1998); Gregory J. Kamer & Edwin A. Keller, Jr., *Give Me $5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335 (2003).

Hooters girl.[91] Although the EEOC had the better argument based on precedent, Hooters embarked on a public relations campaign apparently intended to make the EEOC's position look foolish.[92] Eventually Hooters reached a settlement with the EEOC, but the settlement permitted Hooters to continue its hiring practice.[93]

B. The Beautiful Galaxy of Diverse Employment Discrimination Laws

The view of employment discrimination law as a monolithic set of principles that apply equally to any covered characteristic is wrong. Understanding the diversity and complexity of employment discrimination law is facilitated by considering (1) how the theories, principles, and doctrines are used to create stronger or weaker laws and (2) how particular characteristics come to be protected. We may cover a characteristic even if we think it will pose numerous problems if the tools available can be used to fashion a law that effects appropriate compromises. For example, covering disabilities under employment discrimination law poses daunting challenges, as will be discussed more fully below, but the tools have already been used to craft the Americans with Disabilities Act of 1990.

My ranking of existing federal employment discrimination law for covered characteristics[94] from strongest regulation to weakest is as follows: (1) race (and color);[95] (2) sex;[96] (3) age; (4) religion;[97] and (5) disability. What is the relevance of this ranking to the prospect for passage of appearance-based discrimination law? Appearance shares too many problems with the weakest of our discrimination laws—the prohibition of disability-based discrimination in the Americans with Disabilities Act of 1990.

1. *Different Tools for Different Jobs: The Theories, Principles, and Doctrines of Employment Discrimination Law*

Post describes the quandary of a writer for the *New Republic* who thought that the logic of employment discrimination law argued for coverage of physical appearance, but also believed that such a state of the law was untenable.[98] As Post explains in his essay, the *New Republic* writer understood only the dominant (and popularly understood) part of the complex theory of

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91. Schneyer, *supra* note 90, at 567, 567 nn.64–66 (describing the course of multiple class action claims against Hooters).

92. *Id.* at 568 nn.68–70.

93. Kamer & Keller, *supra* note 90, at 341.

94. I will not rank national origin because I do not think we have had sufficient development of that area to distinguish it from the other characteristics covered under Title VII.

95. *See, e.g.*, Post, *supra* note 17, at 37 ("[A]ntidiscrimination law seeks to exercise a far more sweeping transformation of race than of gender . . . .").

96. Grey, *supra* note 30, at 66 (calling the core of our civil rights law the prohibition of race and gender discrimination).

97. I recognize that one might disagree with my rankings of age and religion and reverse them. The Supreme Court's recent decisions on age discrimination, rejecting reverse age discrimination claims and applying the disparate impact theory but making it virtually impossible to satisfy, may indicate a weakening of age discrimination law.

98. Post, *supra* note 17, at 8 (discussing TRB, *The Tyranny of Beauty*, NEW REPUBLIC, Oct. 12, 1987, at 4).

employment discrimination law. Post describes the dominant conception of American discrimination law as having the purpose of eradicating all prejudice-infected stereotypes and generalizations associated with a status by requiring employers to be status-blind in their decision-making and making decisions on the basis of "pure instrumental reason."[99] Post then offers an alternative explanation or description of U.S. employment discrimination law, which he calls a sociological account, in which the law seeks to direct and manage the ways in which status-based stereotypes operate.[100] Thus, "the ambitions of the law vary depending upon the social practice at issue."[101] He gives as an example that the law has sought to achieve a more far-reaching transformation regarding race than sex.[102]

The view that employment discrimination law must make employers blind to protected characteristics fails to recognize the tensions between theories of discrimination inherent in employment discrimination law: formal equality theory versus protected-class or antisubordination theory, and assimilation versus accommodation. Although an in-depth discussion of these theories is beyond the scope of this Essay, it is important to recognize the theories because they shape our discrimination law, brokering compromises between the goal of eradicating discrimination and other important goals and fashioning a stronger or weaker brand of discrimination law, depending on the characteristic covered. Both formal equality and assimilation theories insist that the covered characteristics are not relevant to job performance and thus favor status-blind employment decision making. On the other hand, protected-class (anti-subordination[103]) and accommodation theories recognize that the characteristics may be relevant in some circumstances and do not always insist upon status-neutral decision making; indeed, in some circumstances, such as affirmative action and reasonable accommodation, they permit or require employers to take the characteristic into account in favor of a person who has the characteristic. On the other side, the defenses of BFOQ, affirmative action, direct threat, and religious curriculum and institution permit employers to take the characteristic into account in the employers' favor. These theories exist and manifest themselves to varying degrees among the various protected characteristics. However, as Post explains, the dominant conception is formal equality, requiring status-blind decision making.[104] The dominance of this conception in society leads to much of the discontent with employment discrimination law. For example, why is affirmative action, which requires discrimination based on protected characteristics, permissible under the law? Why can employers be held liable for disparate impact of facially neutral employment practices? Why do some courts require in reverse discrimination cases that plaintiffs (members

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99. *Id.* at 14.

100. *Id.* at 30–31.

101. *Id.* at 36.

102. *Id.* at 37.

103. *See, e.g.*, David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1775–76 (2002); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralisitc Understanding of Workplace Harassment*, 88 GEORGETOWN L. J. 1, 12 nn.41–42 (1999).

104. Post, *supra* note 17, at 30, 32, 37.

of historically favored classes) prove more than members of historically disfavored groups?

The theories and principles of discrimination law are applied (or not applied) to the various covered characteristics, and there is no perfect consistency or symmetry from one case to another. For example, by the express terms of Title VII, the BFOQ defense applies to all covered characteristics under Title VII except for race and color.[105] It is hard to explain the absence of a BFOQ exception for race and color, except that Congress, considering the historical record, was addressing the most pervasive and virulent form of discrimination in the nation and wanted to combat it with a very strong antidiscrimination law. There is a requirement of reasonable accommodation for only one protected characteristic under Title VII—religion[106]—but it has been interpreted as imposing so low a burden that plaintiffs seldom win.[107] Reverse discrimination is recognized for most protected characteristics under Title VII,[108] but the United States Supreme Court recently decided that the ADEA does not prohibit reverse age discrimination.[109] Because of the detailed, multi-pronged definition of "qualified individual with a disability,"[110] there can be no reverse discrimination under the ADA (although one court notably missed this point).[111] The ADA has more theories of discrimination than any other characteristic protected by federal law—disparate treatment,[112] disparate impact,[113] harassment,[114] failure to make a reasonable accommodation,[115] and associational discrimination.[116] Yet, because of the involved, multi-pronged definitions of both "qualified individual with a disability" and "disability" itself,[117] the win rate for plaintiffs under the ADA is shockingly low.[118] Although the ADA does not have a BFOQ defense, the "qualified individual" coverage requirement is inherently more favorable to employers because the qualification issue is built into the plaintiff's prima facie case.

The foregoing is only a sampling of the complexity and diversity of employment discrimination law. My point is this: What Post terms the "dominant conception"[119] is, as he says, far from an accurate understanding of

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105. 42 U.S.C. § 2000e-2(e)(1) (2000). *See* Post, *supra* note 17, at 37 n.169.

106. 42 U.S.C. § 2000e(j) (2000).

107. *See, e.g.*, Ansonia Bd. of Educ. v. Phillbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

108. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

109. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

110. 42 U.S.C. § 12111(8) (2000).

111. *See* Woods v. Phoenix Soc'y of Cuyahoga County, No. 76286, 2000 Ohio App. LEXIS 2100 (Ohio App. May 18, 2000).

112. 42 U.S.C. § 12112(a) (2000).

113. *Id.* § 12112(b)(6).

114. *See, e.g.*, Flowers v. S. Reg'l Physician Servs., Inc., 286 F.3d 798 (5th Cir. 2002).

115. 42 U.S.C. § 12112(b)(5)(A).

116. *Id.* § 12112(b)(4).

117. 42 U.S.C. §§ 12102(2), 12111(8) (2000).

118. *See, e.g.*, Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1809 n.12 (2005) (citing sources on the overwhelming win rate of defendants in ADA cases).

119. Post, *supra* note 17, at 30–32

the complexity of this body of law. As one ponders the issues to be worked out under appearance-based discrimination law, the difficulties become clear: (1) Would there be a BFOQ for appearance? Almost certainly so. If so, would it be the narrow version recognized under existing law? (2) Would there be reverse-discrimination claims for the appearance-gifted? (3) How would the coverage requirement be stated and applied? Although we have the tools to create stronger or weaker discrimination law and appearance-based discrimination could be addressed with weak law, for reasons developed in the next section, it would be hard to develop a weak law that both would provide a realistic prospect for recovery and would achieve the necessary compromises.

2. *Factors That Contribute to Passage of Laws and Coverage and that Help Determine the Strength of the Law*

How did specific characteristics come to be covered under a particular statute? If a characteristic is to be covered, how do we know whether the antidiscrimination law is intended to be stronger or weaker?

There is no comprehensive list of what circumstances lead to the passage of an antidiscrimination law or what factors help to determine the needed degree of strength of the law, but I will suggest the following, none of which are original to me: (1) moral objection to the type of discrimination; (2) a cohesive and identifiable group of people that would be covered; (3) a history of discrimination against those who have the characteristic; (4) immutability of the characteristic; and (5) irrelevance of the characteristic to job performance.[120] Obviously, other factors might be added, and one might make the more general observation that no law will be passed until there is sufficient political clout to achieve passage of the legislation, which may require the law's supporters to form coalitions.

a. *Moral Objection*

There is, of course, no perfect correlation between something being considered morally bad and being legally prohibited. Still, concern that something is morally wrong often leads to either passage or consideration of a legal regulation designed to prohibit or mitigate that wrong. Discrimination *against* other human beings is something that we readily label as wrong.[121] However, on more careful consideration, we must admit that we all discriminate *between* and *among* people every day of our lives.[122] Professor Larry Alexander, assessing the morality of discrimination, distinguished between bias or prejudice on the one hand, and use of proxies and stereotypes on the other.[123] He defined prejudice or bias as a person's regarding and treating a category or group of people as having less moral worth than others—as being less worthy of

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120. *See, e.g.*, Peggy R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 601 (2002) (listing immutability, relevance, history of discrimination, and political power).

121. Larry Alexander, *What Makes Discrimination Wrong? Biases, Preferences, and Stereotypes*, 141 U. PA. L. REV. 149, 151 (1992).

122. *Id.*

123. *Id.* at 159–60.

moral concern in all contexts.[124] For example, if a Caucasian person says all African Americans are less than human, he is displaying prejudice. Most prejudice and bias, so defined, is thought to be morally wrong. In contrast, discrimination based on stereotypes and proxy traits is using a characteristic, such as race or sex, as a proxy for a trait that one is trying to measure but that may not be readily observable.[125] For example, a man may believe that women are not as adept at mathematics and science as men. This differs from bias or prejudice in that the man holding this belief does not regard women as inferior creatures, and he does not necessarily think that men are superior to women in all contexts. Use of stereotypes and proxy traits can be damaging to individuals and society, and employment law does attempt to address this type of discrimination. Still, in terms of morality, bias or prejudice seems more virulent and morally blameworthy. Although there are harmful stereotypes that the law means to prohibit, there are other stereotypes that are less harmful (or arguably not harmful at all). Moreover, stereotypes and proxy-based discrimination often operates cognitively and unconsciously rather than consciously.[126] In the United States, the history of discrimination against African-Americans reveals that bias or prejudice did exist on a large scale, often with legal imprimatur, before and at the time of the passage of the Civil Rights Act of 1964. On the other hand, although women were victims of stereotypes that disadvantaged them in the workplace and in other areas, they were not subjected to the same type of widespread prejudice as were African-Americans.[127] There were many Caucasians who detested African Americans and regarded them as sub-human, but such bias against women probably was not as prevalent. The Supreme Court has recognized this difference in the types of discrimination. In *Hazen Paper Co. v. Biggins*,[128] the Supreme Court distinguished Title VII from the ADEA: "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact."[129]

Evaluating this factor, race is the type of discrimination most strongly and pervasively rooted in categorical bias when the antidiscrimination law was passed. In contrast, I think that the other grounds (sex, religion, age, and disability) are more about discrimination based on proxy and stereotype, although not exclusively so. Again, I do not say that they are not morally wrong, but perhaps not as clearly so as race-based discrimination.

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124. *Id.* at 160.

125. *Id.* at 167.

126. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995).

127. *See, e.g.*, Caulfield v. Bd. of Educ., 486 F. Supp. 862, 885 (E.D.N.Y. 1979), *aff'd*, 632 F.2d 999 (2d Cir. 1980); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954–56 (2002); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79,153 n.435 (2003) ("I have argued elsewhere that disability-based discrimination stems in greater measure from pity and paternalism than from animus, and so is more analogous to sex than to race."). *But see* Grey, *supra* note 30, at 71 (noting the commonality that "race and sex were embodied in well-defined and legally sanctioned social hierarchies").

128. 507 U.S. 604 (1993).

129. *Id.* at 610–11 (citing EEOC v. Wyoming, 460 U.S. 226, 231 (1983)).

How do we evaluate the moral blameworthiness of appearance-based discrimination? To the extent that it is a response to actual or presumed customer preference, it seems to be more about stereotyping and proxy discrimination than bias. Yet, because physical appearance is a broad category, it may be that some people feel prejudice toward some people with particular physical appearances.

On the issue of morality, I think most people would say that it is morally wrong to discriminate against people based on physical appearance, but it does not present the compelling case of race-based discrimination. Moral objections to appearance-based discrimination are tied closely with immutability of appearance, which is discussed below.

b. *Cohesive and Identifiable Group*

This factor is obvious. If the plaintiffs, who are in fact covered by the law, cannot be identified as members of a protected group, then legal recognition of that coverage is unlikely because litigation is unmanageable—how can one claim the protections accorded a particular group if one's membership therein is unclear? Race and sex have not presented difficult problems here, and national origin is not likely to present many problems. Age, religion, and disability are less definite. Everyone has an age, but who is protected? Age has not posed many problems because the ADEA explicitly protects persons forty years of age and older.[130] Religion and disability are exemplars of characteristics that cause problems on this factor. What is religion? While religion is amorphous, the broad definition adopted by the EEOC[131] and many courts[132] has ameliorated the difficulties faced by plaintiffs in proving that they are covered. Not so with disability. What is a disability and who is a "qualified individual with a disability"? As discussed above, the Americans with Disabilities Act gives such a complex definition that many of the losses of plaintiffs in litigation under the ADA are due to their failure to satisfy the definition of a qualified individual with a disability (actual impairment, record of impairment, or regarded as having an impairment that substantially limits a major life activity).[133] The less cohesive and identifiable (and the more amorphous) a group characteristic is, the more it arguably intrudes on the freedom of employers to make decisions without fear of liability for violating an employment discrimination law. Consider an employer contemplating firing an employee. The employer may want to know whether it is likely to be sued and incur substantial cost in defending an employment discrimination lawsuit. For race, color, sex, and to some extent national origin, the employer can observe or discern the potential plaintiff's characteristics.[134]

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130. 29 U.S.C. § 631(a) (West Supp. 2006).

131. *See* 29 C.F.R. § 1605.1 (2005).

132. *See generally* Donna D. Page, Comment, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363 (2005).

133. 42 U.S.C. § 12102(2) (2000).

134. Sexual orientation may be another characteristic that concerns employers and policy makers because it is not readily observable, and thus it frustrates efforts to gauge potential liability when taking adverse employment actions

How would we define personal or physical appearance? Obviously, this was a concern in Santa Cruz[135] and Washington, D.C.[136] It is difficult to imagine a plaintiff suing and claiming coverage as being ugly, aesthetically challenged, or even relatively so. There may be obvious cases, but beyond those, how do we know? Line-drawing in this area seems difficult, at best.

On this factor, appearance resembles disability. The ADA did not limit the meaning of disability to particular mental and physical impairments, but the multi-part definition has generated much of the legal analysis in cases and spelled the defeat of many ADA plaintiffs.[137] Similarly, with appearance, the difficulty of defining the protected characteristic suggests coverage would produce much litigation in which the principal issue would be whether the plaintiff was covered. Many plaintiff losses would be likely.

c. *History of Discrimination*

Discrimination law is enacted in response to a history of discrimination against those with the characteristic. The "purpose" sections of the discrimination laws discuss the history and considerations underlying each statute. Indeed, the analyses by the Supreme Court in cases involving congressional abrogation of Eleventh Amendment immunity are based in part upon proof of a history of discrimination by the states.[138] Race and sex are the strongest cases of socially- and legally-sanctioned discrimination in the United States.[139] Age, religion, and disability do not present as compelling a record of historical discrimination because for none of them was discrimination practiced by society with legal imprimatur. Professor Thomas C. Grey explains:

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135. SANTA CRUZ, CAL., MUN. CODE § 9:83.020 (13) ("'Physical characteristic' shall mean a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.").

136. D.C. CODE ANN. § 2-1401.02(22) ("'Personal appearance' means the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.").

137. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 417 (1999); Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).

138. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1987).

139. Different societies will have different starting points for developing discrimination law. Whereas race was the impetus for Title VII, sex discrimination and inequality of wages based on sex was the impetus in the United Kingdom for the Equal Pay Act of 1970, which was the first discrimination law passed in the U.K. *See United Kingdom*, *in* 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 7-123–7-124 (Keller & Darby eds., 2003). It seems reasonable that many of the factors that lead to coverage of a characteristic also determine the strength of the law that develops. For example, the history of race-based discrimination in the United States made it the most urgent need and the law that would have to be most tightly drawn to radically reduce racial discrimination.

> [R]ace and sex discrimination were embodied in well-defined and legally sanctioned social hierarchies . . . . [N]o similar first stage can be identified with respect to contemporary laws prohibiting discrimination on the basis of age, sexual orientation, and disability, which are not generally enacted in response to a history of legally formalized status hierarchy.[140]

For both age and disability, the Supreme Court has found insufficient support of a history of discrimination by states to find that Congress could have abrogated the states' Eleventh Amendment immunity in the ADEA[141] and ADA,[142] respectively.

What of physical appearance? Most would agree that there is some history of discrimination, but due in large part to the amorphous nature of the characteristic, this history is difficult to chronicle.

d. *Immutability*

The popularly-held understanding of employment discrimination law is that it promotes fairness because it forbids consideration of immutable traits.[143] Of course, this is not exactly correct. Although race and national origin are immutable (and sex comes close), religion is not.[144] Disability may or may not be immutable, depending on the disability. Post posits that the underlying question behind antidiscrimination laws that better addresses the real goal is whether the stigmatizing attribute is essential or integral to a person.[145] Still, the concept of immutability is deeply entrenched in the law, and the more immutable a characteristic, the more unfair and immoral the discrimination is likely to be considered and the more urgent the need for law to address the unfairness and immorality.

Religion is probably the weakest of the currently protected characteristics on this factor, although Post's test of whether the trait is integral or essential gives it a boost. We do not believe, however, that a person should have to forsake religion in order to do a job, and this is indicated in the reasonable-accommodation requirement for religion in Title VII.

How does physical appearance score under this factor? Again, it ranks along with disability in that there are some appearance characteristics that can be ameliorated through procedures and others that cannot. As with disabilities, the issue becomes, in cases where improvement is possible, whether we think a person should be required to undertake the improvement to avoid discrimination. As more people in society undertake appearance improvement, it may be that a person who does not do so will be faulted for not doing so.

e. *Irrelevance to Work*

The perceived irrelevance of a characteristic to work is one of the most complex elements in employment discrimination law. Is appearance irrelevant

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140. *See* Grey, *supra* note 30, at 71.
141. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
142. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
143. *See, e.g.*, Post, *supra* note 17, at 8–9 (discussing and debunking this view).
144. *See id.*
145. *Id.* at 9.

to work? All work? Is race? Is sex? Of course, it depends on the job and how you define relevance. Does customer or coworker preference or reaction count? Regardless, it is hard to make broad generalizations about relevance of a personal characteristic to all types of jobs. The view of relevance that makes this seem a fair basis for prohibiting discrimination is to limit relevance to the actual performance of tasks in the job. In *Wilson v. Southwest Airlines*, for example, men could perform the duties of the jobs of ticket agent and flight attendant, even if Southwest's customers preferred women in those jobs.[146] Thus, the issue of relevance will constrain employers in how they may define the job, as it did in *Wilson*. Under the ADA's definition of "qualified individual with a disability," "qualified" means that the person can perform the essential functions of the job either with or without the aid of reasonable accommodations.[147]

The relevance of the characteristic to the job is the factor on which most of the compromises between the goal of discrimination law and other goals, including most significantly not impinging on employers' decision-making, must be struck. Thus, the law provides employers with the following defenses (not necessarily meaning affirmative defense): (1) the BFOQ exception for sex, age, religion, and national origin (but not for race and color);[148] (2) the requirement that an individual be qualified to perform a job and providing for a defense when a direct threat to others or oneself exists due to a disability;[149] and (3) the business necessity exception for all protected characteristics, except age, for which there is the stronger defense of reasonable factors other age.[150] On the other side of the coin, one can see the reasonable accommodation requirement for religion and disability as stemming in part from a recognition that the factor may be relevant, but requiring the employer to take steps to render it more or less irrelevant.

It is clear that sex and age and other characteristics are relevant in some sense to some jobs. Customers' or coworkers' personal preferences generally do not satisfy BFOQ—this attests to the difficulty that courts have with this factor. BFOQ has been drawn very narrowly, apparently for fear that a more lenient defense would swallow the rule prohibiting discrimination.[151] As narrowly as BFOQ has been interpreted, surely race and color could sustain a BFOQ defense without much change in the law. But Title VII did not include a BFOQ defense for them, probably for fear at the time of passage, that a broader interpretation

146. 517 F. Supp. 292, 303 (N.D. Tex. 1981) ("[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability.") (alteration added).

147. 42 U.S.C. § 12111(8) (2000).

148. 42 U.S.C. § 2000(e)-2 (e) (2000).

149. 42 U.S.C. § 12113(a)–(b) (2000); *see also* Chevron, U.S.A. v. Echazabal, 536 U.S. 73, 78 (U.S. 2002).

150. *See* Smith v. City of Jackson, 544 U.S. 228, 238–39 (2005) (discussing the application of the "reasonable factors other than age" provision of the ADEA). *See also* Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 140–41 (2d Cir. 2006) (same).

151. *E.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations.").

(particularly one permitting personal preference) would gut the prohibition of race discrimination in Title VII.

The absence of a BFOQ defense for race and color indicates that it is a very strong prohibition on discrimination. Disability, which seems the weakest discrimination law under other factors considered above, may at first appear to be stronger due to the absence of a BFOQ, but that is an illusion, as the issue of qualification is built into the plaintiff's prima facie case ("qualified individual with a disability"), and the direct threat defense is an additional defense under the ADA. Religion looks relatively weak under this factor with a BFOQ defense, a weak requirement of reasonable accommodation, and specific exemptions for religious institutions and religious curriculum.

How does appearance score on irrelevance to work? Although some say that it is irrelevant,[152] this depends on the job and how relevance is defined. If the BFOQ defense were incorporated into appearance-based discrimination law, as it almost certainly would be, courts would have to decide whether to interpret it as narrowly as they have for sex and age. Is appearance as irrelevant to jobs as sex and age? In Post's terms, consideration of appearance seems to be a deeply-entrenched social practice that the law is not likely to challenge, recognizing the limitations of discrimination law functioning within society.

C. The ADA: Pluto Maybe, But Not About to Be Thrown Out

Poor Pluto: a planet for so long and now declassified because it is too small and weak.[153] Fortunately, employment discrimination law is not like classification of planets. We don't throw out discrimination laws: If they made it, there was much to recommend them, and even if they are the weakest of discrimination laws, they still can do a lot of good in society. Although the ADA shares many of the weaknesses and problems of a potential appearance-based employment discrimination law, it will not be demoted like Pluto. Weak anti-discrimination laws, unlike weak planets, still have purpose and thus a place in the galaxy.

Considering the difficulty of crafting and enacting an appearance-based employment discrimination law should lead to a fuller appreciation of not only our employment discrimination laws generally, but also the Americans with Disabilities Act specifically. The abysmal win rate of defendants in ADA cases is well known, and the weakness of this law has disappointed scholars and civil-rights advocates. I suggest, however, that in view of the theoretical difficulties posed by developing disability discrimination law and its relative weakness on factors favoring passage, that it was no small feat to fashion the law and achieve its passage. There is more to employment discrimination law than plaintiffs' winning percentages. Even relatively weak employment discrimination laws may be worth passing. The ADA is providing a remedy in some cases, and perhaps more importantly, it is effecting changes in workplaces because

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152. *See, e.g.*, Adamitis, *supra*, note 20, at 196; Zakrzewski, *supra* note 20, at 433–34.

153. *See, e.g.*, *Solar System Shrinks with Pluto's Demotion*, at http://www.npr.org/templates/story/story.php?storyId=5703014 (last visited Dec. 4, 2006); *Pluto Demoted*, at http://harvardpress.typepad.com/hup_publicity/2006/08/pluto_demoted.html (last visited Dec. 4, 2006).

employers know the law and its requirement of reasonable accommodation. Thus, although the law has not acted to modify disability discrimination as thoroughly as it has to modify racial and sexual discrimination, it is changing society and American workplaces. Pluto is not Jupiter (or even Mercury), and so it gets thrown out; the ADA is not Title VII (or even the ADEA), but it stays. There is a place in the employment discrimination galaxy for some weaker members, but some will never qualify.

V. CONCLUSION

Appearance-based employment discrimination has attracted a great deal of attention in recent years. When appearance can be translated as meaning race, sex, age, or some other existing protected characteristic, plaintiffs may have a viable claim. Also, the grooming and appearance codes often invoke sex or another protected characteristics. There is also a looming notion that employment discrimination law should address the general issue directly by prohibiting appearance-based discrimination. Based on parts of employment discrimination theory and doctrine and popular conceptions of that body of law, the idea of an appearance-discrimination law has considerable appeal. I have tried to use the specter of such a law to explore some of the complexities and nuances of employment discrimination law which indicate to me that no such law will be passed. In the constellation of our current protected characteristics, not all laws are equally strong, and the problems posed by appearance suggest it will not be covered. That's the ugly truth about appearance-based employment discrimination law. It does, however, give us a lens through which to view the surprisingly beautiful galaxy that is employment discrimination law.