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SHOULD THE EQUALITY ACT 2010 BE EXTENDED TO PROHIBIT APPEARANCE DISCRIMINATION?

Abstract: The UK Equality Act 2010 prohibits direct and indirect discrimination with respect to nine characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. We argue that the best way of understanding the Act is to see it as protecting those who are vulnerable to systematic disadvantage, partly in virtue of being at risk of experiencing discrimination that violates what we call the meritocratic principle. If this is a key principle underpinning the Act, then there is a compelling case for extending the legislation to include the protection of at least one further characteristic, namely, *appearance*. We consider but reject various difficulties that might be raised with extending the Act in this way, including the objection that those vulnerable to forms of appearance discrimination that violate the meritocratic principle could be adequately protected by treating them as disabled.

The UK Equality Act 2010

The UK Equality Act, which came into force in 2010, was designed to bring together various pieces of anti-discrimination legislation into a single framework.¹ It prohibits both direct and indirect discrimination in relation to a specified set of protected characteristics. But the legislative framework, and the guidance that the Equality and Human Rights Commission (EHRC) provides for interpreting it, does not explain why this particular set of characteristics is designated as protected, and nor does it make explicit the moral basis of the framework. Understanding the moral framework behind the Act is important for assessing whether the legislation achieves its ends, and for

determining whether there should be more protected characteristics than those designated.

We argue that there is at least one further characteristic that should be protected by the legislation, namely, *appearance*. By a person's appearance, we mean the physical attributes of his or her body and how it is adorned or modified that are perceivable by others who possess the normal range of visual capacities together with relevant cultural knowledge. Appearance includes attributes that we are born with (for example, a cleft lip), attributes that we have as a result of what happens to us (for example, disfigurements that are the result of accidents), and attributes that are a product of our choices (for example, clothing, tattoos, piercings, and hairstyles). Some of these attributes are such that they change of their own accord over time or can be altered at will, whereas others are immutable or can be altered only with great cost or difficulty (for instance, through strict dieting, demanding exercise, or cosmetic surgery).

Appearance discrimination occurs when a person is treated better or worse on the basis of one or more of these physical attributes, in virtue of the visual perceptions they cause and the meaning or significance that is attached to them. In other words, it is discrimination on the basis of a person's *looks*, also known as "lookism", a term that echoes other (better known) forms of discrimination, such as racism, sexism, or ableism (Minerva, 2013). There is evidence that appearance discrimination is widespread and affects various realms of life, including social interactions, healthcare assistance, and romantic relationships, as well as job opportunities and income. Numerous studies in economics and psychology have shown that, across different cultures and geographic areas, those regarded as attractive do better not only with respect to dating and social interactions more generally, but also in the job market,

that is, they are more likely to be interviewed, hired and promoted (Maestriperi et al., 2017). As a result of these social dynamics, people regarded as attractive earn significantly higher incomes on average than those who are regarded as unattractive or as less attractive. In the US it has been estimated that the “beauty premium” for women with above average looks is 12% whilst for men it is 17%, when compared to the earnings of those of each sex with below average looks (Hamermesh, 2011: 45-46).

But this evidence is not enough to demonstrate that people regarded as below average looking are the victims of *wrongful* discrimination. Before we are entitled to reach that conclusion, we need to know more about why they experience discrimination, and we need an account of what makes discrimination wrong (when it is wrong) in order to assess whether the discrimination they experience is morally permissible or not. But the best data currently available raises the spectre, at least, that those regarded as unattractive, or as less than averagely attractive, are the victims of wrongful discrimination, and prompts the question of whether, if they are, the Equality Act should be extended to include appearance as a protected characteristic. Indeed, is there a case for treating as a protected characteristic not only physical attributes over which people have limited control in virtue of which they are judged to be attractive or unattractive, but also chosen features of appearance that may disadvantage a person because they are regarded as unconventional, such as tattoos, piercings, and brightly coloured hair? It is these issues that we propose to address.

1. The Normative Basis of the Act

The Equality Act prohibits discrimination on the basis of nine characteristics that are described as ‘protected’: *age; disability; gender reassignment; marriage and civil*

partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. It prohibits both direct discrimination and indirect discrimination with respect to these characteristics in a number of contexts, including when making employment decisions, when providing services, when disposing of or renting premises, and when allocating educational places. In relation to *direct* discrimination, section 13(1) of the Act stipulates that ‘a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.’ Employers may discriminate directly even if they do not intend to do so and even if they are mistaken in thinking that a person possesses the protected characteristic which is at stake.

Section 19 of the Act holds that applicants suffer *indirect* discrimination in the recruitment process when the selection criteria that are used have a worse impact on them as a result of possessing one or more of these protected characteristics (except for pregnancy and maternity). The Act prohibits indirect discrimination in the context of employment unless it can be shown to be “objectively justified”, that is, to be a proportionate means of achieving a legitimate aim. In the case of disability, employers are also required to show that there are no “reasonable adjustments” that could be made to the job or the selection process to prevent these from having a worse impact on people who are disabled (Equality and Human Rights Commission, 2014: 10, 57-74).

1.1 The protected characteristics

The Act does not explain why the specified characteristics are designated as protected, and indeed the choice of this particular limited set of characteristics has already been challenged. For instance, it has been suggested that the Act should

include characteristics such as caste (Waughray and Dhanda, 2016), body mass, and accent (Nachmias, Ridgway, and Caven, 2019).

The most plausible starting point for explaining why the nine characteristics are designated as protected is that possession of them places a person in a group the members of which are vulnerable to being wrongly disadvantaged through no fault of their own, in such a way that discrimination on the basis of these characteristics is worthy of prohibition. But this prompts the further question of what it is for the members of a group to be *wrongly* disadvantaged in this way. One tempting answer is that a person is wrongly disadvantaged through no fault of her own in virtue of possessing a characteristic if and only if she is made worse off than others as a result of that characteristic *and* her possession of it is beyond her control, that is, it is immutable. But if that is the deeper principle that underpins the Act, it is hard to make sense of why, for example, pregnancy and maternity, gender reassignment, and marriage and civil partnership are counted as protected characteristics. If disadvantages accrue to people in virtue of possessing characteristics such as these, they are not being disadvantaged as a result of factors beyond their control.

It might be thought that a more plausible rationale is to be found in the idea that discrimination is wrongful, and worthy of prohibition, when it is based *either* on an immutable characteristic *or* on a feature that is a matter of fundamental choice (Wintemute, 1995; Fredman, 2011: Ch. 3). This would now seem to cover each of the protected characteristics. But if this is the rationale for the Act's list of protected characteristics, it faces the challenge of defining what counts as a *fundamental* choice in the relevant sense given that people are likely to disagree on this matter. Some choices that many people *regard* as fundamental might not be worthy of protection through legislation, for example, the choice concerning which football team to

support. The immutability criterion is not without difficulty either, for disfavouring those who lack the talents or skills required for a job may be, in part, to discriminate against them on the basis of a characteristic over which they lack control. We need a further explanation, or another explanation, for what makes the discrimination that is suffered on the basis of one or more of the protected characteristics, but not on the basis of football allegiance or lack of talent, wrongful in a way that justifies legislation to prohibit it.

1.2 The meritocratic principle

In the light of the guidance on interpreting the Act that the EHRC provides to employers, we propose that the best way of understanding the Act is to see it as underpinned, in part, by a commitment to what is sometimes called *the meritocratic principle*, that is, the principle that the best-qualified candidate should be appointed or promoted. According to this principle, when during a recruitment or promotion process a person's qualifications are given less weight (or discounted altogether) as a result of possessing some characteristic that is irrelevant to satisfying the job requirements, then they are wrongly disadvantaged. This can play a role in explaining why the Act prohibits direct discrimination on the basis of the protected characteristics in the context of employment.² The Act prohibits the most egregious violations of the meritocratic principle that occur in the context of employment, namely, violations that involve selecting on the basis of characteristics that have nothing to do with a person's ability to do the job (such as, in many cases, immutable characteristics and characteristics that are a product of choices regarded as fundamental) *and* that lead to, or are likely to lead to, a group of people being disadvantaged in a systematic way. But the legislation permits violations of the

principle which, although they involve wrongful discrimination, are unlikely to result in the victims experiencing *systematic* disadvantage, such as, in most circumstances, selecting on the basis of allegiance to a particular football club.

On this interpretation of the Equality Act, how would the prohibition on *indirect* discrimination in employment be justified? In cases of indirect discrimination, the selection criteria that are used for appointments or promotions have a worse impact on those with a protected characteristic. Either the selection criteria pick out genuine qualifications, that is, qualifications that can be objectively justified, or they do not. If they do not, then there is a clear potential violation of the meritocratic principle. Those with the relevant protected characteristic are disadvantaged by these criteria and are liable to be rejected even when they are the best-qualified. If the selection criteria do pick out genuine qualifications, then there may still be a potential violation of the meritocratic principle. Suppose, for example, that a workplace is badly designed for those with disabilities, such as wheelchair users, or that a division of labour has been adopted that effectively excludes those with some protected characteristic (such as a requirement that employees take turns working on Saturdays, which may exclude those of Jewish faith), but the workplace or tasks associated with a role could be modified at no great cost. When there is resistance to changing these things solely because of prejudice against those with a protected characteristic, then this counts as direct discrimination, and can justifiably be regarded as a violation of the meritocratic principle. Direct discrimination of this kind may be hard to prove, so a prohibition on indirect discrimination when the selection criteria cannot be objectively justified, and a requirement that employers make reasonable adjustments to the selection process or the job to prevent them from

having a worse impact on people with disabilities, can serve to reduce it (Arneson, 2013: 105).

The Equality Act prohibits not just direct and indirect discrimination in recruitment and promotion, but also in relation to other aspects of employment, such as employment contracts and decisions about whether to terminate them. In addition, the Act prohibits discrimination in a range of other contexts, such as when providing services, when managing or disposing of premises, when allocating educational places, and when admitting people to associations. Furthermore, it prohibits the harassment and victimisation of members of protected groups in various contexts including employment. The meritocratic principle is relevant in some of these areas but not in all of them, for example, it applies to university admissions and the allocation of places at selective secondary schools, but it has no relevance to the provision of services, or to rental decisions, or to victimisation or harassment, or to aspects of employment such as employment contracts and decisions about terminating them. With respect to these other areas, we can think of the Act as bracketing the meritocratic principle and being focused simply on preventing the systematic disadvantages that are likely to be suffered by people when, through no fault of their own, the groups to which they belong are vulnerable to discrimination, victimisation, or harassment. (These disadvantages would not have to be understood as solely material in character; they might include stigmatisation and social subordination.)

It is not our purpose to defend the meritocratic principle, but we shall make some brief observations about how this might be done. Philosophical defences of this principle that draw upon ideas of desert or respect for persons are highly controversial (for relevant discussion, see Dobos, 2016; Kershnar, 2003; Mason, 2006: 56-64; Miller, 1999: Ch. 8; Segall, 2012; Sher 1988). But a *prima facie* justification of it that

has broader appeal can be constructed on the basis of efficiency considerations instead. Everyone benefits in one respect when jobs are allocated to the best-qualified candidates because this is likely to result in higher quality goods and services. Even though not everyone benefits to the same extent – indeed some are made worse off in other respects because they lack the level of skills and abilities required to be successful in competitions for jobs – the principle is justified overall because of the benefits provided by a practice of appointing the best-qualified candidates.

There are a range of different theories of what makes discrimination wrong (when it is wrong). For example, some argue that discrimination is wrong when it expresses disrespectful attitudes or when it conveys a demeaning message concerning the moral inferiority of the victims (Hellman, 2008; Eidelson, 2015). Others argue that an act of discrimination is wrong if it fails to maximise well-being, perhaps giving additional weight to the well-being of people who are worse off, or people who are worse off through no fault of their own (Arneson, 2013; Lippert-Rasmussen, 2014: Ch. 6.6). It is also possible to defend a pluralist theory that allows that discrimination may be wrong for any of several reasons or indeed for more than one reason (Moreau, 2020). As we have argued, the Equality Act seems to involve a commitment to the meritocratic principle that the best-qualified candidate should be appointed or promoted, so it must regard discrimination as wrong when it violates this principle, and also to the principle that discrimination is wrong when it contributes to systematically disadvantaging the members of a group through no fault of their own. These might be regarded as independently justified principles in a pluralist theory, for example, the meritocratic principle might be grounded in considerations of desert or respect for persons, whereas the principle that discrimination is wrong when it contributes to systematically disadvantaging the members of a group through no fault

of their own might be grounded in the value of social equality, that is, the value of a society in which each member regards and treats every other as an equal.

Alternatively, these principles might be derived from some deeper monist theory, such as a theory that regards discrimination as wrong when it fails to maximise well-being. Bracketing these issues, we shall proceed on the basis of a presumption that the Act is underpinned in part by the meritocratic principle, whatever its status and ultimate justification. In the remainder of this section, we shall clarify the principle and explain what we regard as the Act's interpretation of it.

1.3 The notion of a qualification

In order for the meritocratic principle to be spelt out clearly, it requires an account of what constitutes a genuine qualification for a job. What we shall call 'the simple account' holds that a qualification is any characteristic that enables a candidate to do the job competently or to do it well. Interpreted in the light of this account, the meritocratic principle does not rule out the possibility that in some circumstances a person's race, sex or religion may be a genuine qualification for a job, for these may enable a person to do a job competently or well. This coheres with the Equality Act, for the Act allows that there may be times when a protected characteristic can permissibly be regarded as a genuine occupational requirement, for example, being female for a post in a women's refuge or being of the same sex as a person who needs to be cared for in an intimate way (Equality and Human Rights Commission, 2014: 15-16, 45). Indeed, the Guidance for Employers provided by the EHRC invokes the idea of an occupational requirement that can be justified by reference to the nature of the job, which on the simple account is equivalent to the idea of a necessary qualification. The Guidance also draws attention to the way in which biases may arise

in specifying what skills or features constitute necessary qualifications, in a way that leads to unlawful indirect discrimination. For instance, the Guidance points out that an employer who specifies that a job requires the ability to drive may be guilty of unlawful indirect discrimination against those who cannot drive because of a disability if it would be possible to use alternative means of transport in order to carry out the duties associated with the job.

The simple account of a qualification for a job is not without its difficulties, however. In the philosophical literature, some are sceptical of the very idea of a qualification (Hellman 2008: 98-101, Young 1990: 201-206. But see also Barry 2001: 98-103). Although we do not share these worries, it is worth mentioning them as a prelude to raising a difficulty with the notion of a qualification that we think has implications for the Act and its interpretation of the idea of an occupational requirement. A job can often be given different descriptions, and the qualifications for it may vary depending on which of these descriptions is adopted. Furthermore, there may be considerable leeway within firms and organisations for dividing up what needs doing in different ways, thereby creating different jobs with different tasks. But in order to avoid unjustifiable indirect discrimination, it may be necessary for firms and organisations to reject some ways of dividing up jobs. (This is recognised by the Act when it specifies that employers have a duty to make reasonable adjustments to the division of labour within their firms and organisations in order to avoid adversely affecting those with a disability.) In our view, once a particular division of labour has been settled upon that avoids unjustifiable indirect discrimination, there are limits to what descriptions can plausibly be given of the roles within it. The problem with the simple account of a qualification – and the difficulties it creates for the meritocratic

principle and for regarding it as the normative basis of the Act – seems to us to lie elsewhere.

The problem is that the simple account, which maintains that a qualification is any characteristic that enables a person to do the job competently or well, seems to result in the meritocratic principle being too permissive. Suppose, for example, that a department store operates in a locality where most of its customers are white and have deeply racist attitudes towards black people. If the store employs black people to serve customers, then it will lose business. Under these circumstances, it is hard to resist the conclusion that, according to the simple account, one of the qualifications for being a sales assistant in this store is ‘being white’ (Singer, 1978). We might say that, on the simple account, ‘being white’ is a *reaction qualification* (Wertheimer, 1983). Reaction qualifications are genuine qualifications but they count as such in virtue of the responses of those with whom the successful candidate will interact in the course of performing the tasks that the job involves. In a deeply racist locality, one’s race may mean that one lacks a qualification for a job in virtue of the prejudiced responses of those who live there.

1.4 Reaction qualifications and the limits of the meritocratic principle

It seems that when the meritocratic principle is combined with the simple account of what constitutes a qualification for a job, it has unpalatable consequences. It entails that in determining who counts as the best-qualified candidate in the case we’ve described of the department store that trades in a racist area, ‘being white’ counts as a qualification. This would seem to raise doubts about whether the meritocratic principle – when combined with the simple account – could underpin the Equality Act, for the Act would clearly want to rule this out. But we see no reason to reject the

meritocratic principle or the simple account, or indeed to row back from our claim that this principle provides a foundation for the Act. Indeed, the same problem that arises with the simple account of a qualification besets the idea of an occupational requirement that is part of the Act itself. 'Being white' seems to be a genuine occupational requirement in the case described because black sales assistants will achieve fewer sales, and being effective at selling is part of the job description.

We think that the difficulty we have identified shows that the meritocratic principle needs to be restricted in scope if it is to be defensible and capable of underpinning the legislation. In particular, a distinction needs to be drawn between those reaction qualifications that are legitimate, that is, which there is no moral reason not to count, and those that are illegitimate, that is, which there is a moral reason not to count (Mason, 2017). In the example of the department store that operates in a deeply racist locality, there is a moral reason not to count 'being white' as a qualification for customer facing roles within it, so being white is an illegitimate reaction qualification for these roles. In contrast, in a society in which there is domestic violence against women, there is no moral reason not to count 'being female' as a qualification for a job in a women's refuge, so being female is a legitimate reaction qualification for it. The Act's notion of an occupational requirement, if it is to play the role for which it is needed, also has to be moralised in a parallel way to the notion of a legitimate reaction qualification: it must be specified in such a way that an occupational requirement grounded in the responses of customers and clients is a permissible legal basis for appointments only if there is no moral reason not to count it, accompanied by an account of what would constitute a moral reason not to count it for the purposes of the Act. In this way, the clarification

we have proposed to the meritocratic principle would enable it to provide a plausible normative basis for the Act.

1.5 When is it permissible to count reaction qualifications?

Why is there a moral reason not to count ‘being white’ as a qualification for customer facing roles in a strongly racist locality, but no moral reason not to count ‘being female’ as a qualification for a job in a women’s refuge? This is not the place to develop a full theory of legitimate reaction qualifications (for relevant discussion, see Lippert-Rasmussen, 2013; Mason, 2017; Wertheimer, 1983), but let us identify one important ground on which a reaction qualification might justifiably be regarded as illegitimate. When a reaction qualification is rooted in widespread prejudices about members with a particular characteristic, for example, the prejudice that those who belong to a particular racial group are untrustworthy, then there is a moral reason not to count it, that is, it is illegitimate, because counting it would run the risk of systematically disadvantaging, through no fault of their own, those with that characteristic. (By ‘a prejudice’ we mean any unwarranted belief or ‘psychological association’ concerning those who possess some characteristic. Prejudices about those who possess a particular characteristic may be internalised as stereotypes, that is, as sets of beliefs or associations relating to the “normal” member of that group, and may influence behaviour in non-conscious ways, leading to implicit biases.³)

There is a moral reason not to count reaction qualifications rooted in prejudices. There may also be moral reasons for not counting other types of reaction qualification, for example, there may be a reason not to count these qualifications when they are rooted in the non-rational reactions of customers or clients, that is, in non-cognitive feelings, attitudes, or responses for which customers or clients have no

reason (not even a bad one), for example, when customers or clients simply feel awkward in the presence of members of a particular racial group because they don't normally encounter them. But it is more controversial whether reaction qualifications rooted in these responses are illegitimate. In contrast, reaction qualifications rooted in prejudices are clearly illegitimate and are the most clear-cut case. They enable us to draw a plausible limit to the meritocratic principle and help us to see how it can underpin the Act.

2. The Moral Case for Extending the Act

What does the version of the meritocratic principle that we have argued is the most plausible normative basis of parts of the Equality Act imply with respect to appearance discrimination, and does that principle provide a moral case for extending the Act to prohibit it?

First, appearance discrimination is often a form of indirect discrimination with respect to one or more of the existing protected characteristics (Fleener 2005: IIB). Appearance codes compliance with which is made a condition of employment often have a worse impact on those with one or more of these characteristics. Sometimes, at least, a willingness to comply with these codes cannot be justifiably regarded as a genuine qualification, in which case their adoption is a clear violation of the meritocratic principle. Consider, for example, employers' appearance codes that forbid hairstyles such as dreadlocks or hair braids. These codes have a worse impact on black or mixed race men and women among whom such styles are more common. When there are no grounds for regarding a willingness to comply with them as a genuine qualification, treating it as one violates the meritocratic principle.⁴ Similarly, employers' appearance codes that forbid headscarves or turbans have a worse impact

on Muslim women or male Sikhs, and when there are no grounds for regarding a willingness to comply with them as a genuine qualification, treating it as one violates the meritocratic principle. But the cases we have described are already covered by the existing Act, at least potentially. They seem to count as unlawful indirect discrimination on the basis of either race or religion since these are protected characteristics and no objective justification can be given for making a willingness to comply with the codes a criterion of selection; no extension of the act would be required to forbid appearance discrimination in these sorts of cases.

Second, there are cases of direct appearance discrimination not covered by the Act that fall foul of the meritocratic principle. When selectors simply act on their own aesthetic preferences (for example, their aesthetic preference for slim people), or their own moral or religious judgements (for example, their judgement that tattoos disrespect the body), or their own prejudices (for example, that overweight people are lazy), then they are giving weight to considerations that have nothing to do with the candidates' abilities to do the job, thereby violating the meritocratic principle. This does not involve denying that sometimes a person's appearance may justifiably be regarded as a qualification for a job, or justifiably be taken as evidence of the possession of characteristics that are qualifications for a job, for example, having a neat appearance may provide evidence of industriousness (Rhode, 2010: 108). But when no plausible case can be made for appearance being a qualification for a job, or for being regarded as evidence of the possession of a qualification for it, and discrimination occurs *merely* as a result of the aesthetic judgements, moral judgements, or prejudices of selectors, then this clearly violates the meritocratic principle. Since there are grounds for thinking that appearance discrimination of this

kind occurs in a systematic way, there is a prima facie case for extending the Act to prohibit it (Rhode, 2010: 27).

This seems to be true irrespective of whether the aesthetic judgement, or the moral judgement, or the prejudice, concerns an aspect of appearance over which the candidate exercised some degree of control or whether it is an immutable attribute. In response, it might be argued that when features of a person's appearance are under her control, for example, tattoos, beards, and brightly coloured hair, she should be required to bear the costs of them, including any disadvantages she faces in hiring decisions as a result of the prejudices, or aesthetic or moral judgements, of selectors. The idea that it is fair to require a person to bear the costs of her choices is at its most plausible when we have in mind the cost of the resources that she consumes in the course of pursuing her particular conception of how to live well. But the reactions that a person's appearance provokes in selectors is not a cost in *that* sense, and it is far from clear that it is fair to require her to suffer the consequences of being excluded from jobs as a result of those reactions.

Third, selectors sometimes treat an aspect of appearance as a legitimate reaction qualification, and give weight to this qualification, when there is in fact a strong moral reason not to do so because the qualification is rooted in the prejudices of customers, clients or co-workers. The clearest case is that of weight. There is evidence that there are widespread prejudices relating to those who are overweight, for example, that they are self-indulgent or lacking in self-discipline.⁵ Prejudices are also held about other aspects of appearance: for example, that short people, especially short men, have inferiority complexes and compensate for their lack of height by being pushy, or that those with tattoos are aggressive or anti-social. And there is evidence of a non-conscious association of facial unattractiveness with a range of

undesirable characteristics. Studies suggest that those with facial disfigurements are judged to be less honest, less trustworthy, less intelligent, and less capable than others (Rankin and Borah, 2003). There is a strong moral reason not to count reaction qualifications rooted in prejudices of these sorts; as a result, counting them would violate the meritocratic principle when it is understood in the way we have argued it should be. If we are correct that the meritocratic principle underlies the Act, there are moral grounds for extending the Act to prohibit appearance discrimination that is based on reaction qualifications that are rooted in the prejudices of customers, clients or co-workers.

3. Are There Any Compelling Reasons for Not Extending the Act?

There are powerful moral reasons for extending the Equality Act to cover some cases of appearance discrimination that are not already prohibited in virtue of being forms of indirect discrimination relating to the existing list of protected characteristics. But are there also powerful countervailing considerations for *not* extending the legislation that need to be weighed against them?

First, it might be argued that there is no need for such legislation, on the grounds that the most serious forms of appearance discrimination are already prohibited because they occur when it constitutes indirect discrimination on some other basis, such as race, sex, religion, or disability, and that in practice direct appearance discrimination is much less widespread and much less damaging. But the idea that appearance discrimination is a serious problem in practice when, and only when, it constitutes indirect discrimination on some other basis, fails to recognise that direct appearance discrimination in the context of employment is both systematic and consequential. Indeed, empirical research in the US provides evidence that some

forms of appearance discrimination are as systematic in the job market as discrimination against already protected groups. According to a study conducted by Rebecca Puhl, Tatiana Andreyeva, and Kelly Brownwell that took self-reported perceptions of discrimination as evidence of it, '[d]iscrimination due to weight/height is common among Americans, with prevalence rates among women close to the prevalence of race discrimination. Weight/height discrimination is the third most common type of discrimination among women, and the fourth most prevalent form of discrimination reported by all adults. Weight/height discrimination occurs in employment settings...virtually as often as race discrimination, and in some cases even more frequently than age or gender discrimination' (Puhl, Andreyeva, and Brownell, 2008: 998). With respect to the effects of appearance discrimination on earnings, Daniel Hamermesh notes that 'African American men's earnings disadvantage, adjusted for the earnings-enhancing characteristics that they bring to labor markets, is similar to the disadvantage experienced by below-average compared to above-average-looking male workers generally' (Hamermesh, 2011: 245).⁶ Similar results concerning the effects of physical attractiveness on earnings were obtained in a study in the UK (Harper, 2000). Since people regarded as physically unattractive suffer comparable economic disadvantages to those experienced by members of already protected groups, this provides a powerful argument for providing them with comparable protection against discrimination in the context of job appointments and promotions.

Second, even if appearance discrimination, in general, is of serious moral concern, it might be argued that legislation against it will end up prohibiting trivial forms of it, leading to an explosion of court cases (Rhode, 2010: 111). In other words, we cannot ban the egregious cases of appearance discrimination without banning the

trivial cases. But this seems to us to be an unfounded worry. The extension of the Equality Act that we are proposing is limited in its ambitions. It is restricted to: discrimination that is based on employers' or selectors' preferences (including those that are a product of aesthetic judgements, moral judgements, or prejudices) where no case can be made that the aspect of appearance that forms the basis of the discrimination is a qualification for the job in question; and discrimination that is based on reaction qualifications rooted in customers' and clients' prejudices concerning appearance. Even when the discrimination that is prohibited is based on aspects of appearance, such as hair colour or tattoos, that may seem trivial, the adverse impact of such discrimination on people's interest in self-expression may be considerable.

Third, it might be argued that if legislation against appearance discrimination is going to include a prohibition on selectors choosing more attractive over less attractive candidates when no plausible case can be made for regarding attractiveness as a qualification, then we need criteria for distinguishing the more attractive from the less attractive, and since this is a subjective matter, we are unable to do so in a way that would be objectively justifiable (Tietje and Cresap, 2005). With the existing protected characteristics, there seem to be objective criteria for determining whether an individual possesses them, but it is not clear that there are such criteria for identifying the unattractive or the less than averagely attractive.

In response to this objection, we would reply that we do not need objective criteria for classifying people as attractive or unattractive. What matters is whether a person's appearance is treated as a basis for favouring or disfavouring them, when no case can be made that their appearance is a qualification for the job. For the purpose of enforcing the legislation, at least, it does not matter whether there are objective, or

even inter-subjectively shared, criteria for classifying people as attractive or unattractive. Of course, in order to motivate the idea that someone has been the victim of discrimination on the basis of their appearance when applying for a job or promotion, it may be relevant to point to inter-subjective assessments of their looks compared to similarly qualified but successful candidates. And it would be *prima facie* implausible to think that someone with the looks of Angelina Jolie or Brad Pitt has been discriminated against for a position because of their unattractiveness. But inter-subjective agreement in relation to whether someone is unattractive or unattractive is not a condition of being a victim of appearance discrimination, and indeed it is possible in principle for someone to suffer appearance discrimination because they are regarded as *too* attractive even though that does not affect their ability to do the job.

Still, it might be argued that even if we do not need criteria for judging whether one person is more or less attractive than another to determine whether appearance discrimination has taken place, we need criteria of this kind to establish that it is systematically disadvantaging some people in order to justify extending the Equality Act to cover it. But even if we lack objectively justified and easy to apply criteria for determining whether a person is unattractive or less attractive, there is nevertheless widespread inter-subjective agreement: studies show that people's judgements concerning who is attractive and unattractive are consistent across ethnic groups and geographical areas (Hamermesh, 2011: 24-28).

Fourth, it might be claimed that it is infeasible to use legislative means to prevent appearance discrimination. It might be regarded as impossible to enforce legislation against appearance discrimination because of the practical complexities involved in detecting when the prohibited forms of it have occurred. How do we tell

whether an employer has acted on mere preferences concerning appearance that have nothing to do with the candidates' abilities to do the job, as opposed to counting a reaction qualification rooted in the aesthetic preferences of their clients or customers? How do we tell whether customers' or clients' preferences concerning appearance are aesthetic preferences or whether they are based upon prejudices? Our response to this worry is to insist that the onus should be placed on *employers* to provide evidence that appearance-related selection criteria pick out genuine reaction qualifications rooted in their clients and customers' preferences rather than in their own preferences, and that the preferences of customers and clients are not based upon prejudices. If they claim that their clientele would prefer to deal with slim, attractive employees, they need to provide evidence that their clientele genuinely do have this preference, rather than it being a matter of indifference to them, and that their clientele's preference isn't based on prejudices about overweight people. This should be seen as part of what it is to show that employing appearance-related criteria for selection can be justified by reference to an occupational requirement. Once that guidance has been provided, the difficulties of enforcing legislation against appearance discrimination are no greater than those experienced in enforcing the other kinds of discrimination that are prohibited by the Act.

A case against the feasibility of prohibiting appearance discrimination might be developed in a different way. It might be argued that some of the appearance preferences that fuel discrimination are hard-wired: we prefer symmetrical faces and smooth unblemished skin, for example, because of the way our brains have come to be constituted, perhaps as a result of evolutionary processes (Etcoff, 2011). But even if this were so, it would not morally justify the discrimination, and indeed legislation against appearance discrimination will provide reasons for people not to act on their

hard-wired preferences. Even if preferences are hard-wired, it is implausible to claim that employers or selectors cannot help acting upon them in the workplace or the wider society. Here it is worth noting that we would not accept an analogous argument against legislating to forbid discrimination on grounds of race. Even if, implausibly, there was evidence that many of us have preferences to deal with members of our own racial groups that are hard-wired, we would not think that this was a sufficient reason to refrain from legislating against racial discrimination.

Fifth, it might be argued that legislation against appearance discrimination would be unlikely to be effective because many victims of such discrimination would not make use of the legislation, either because they are not aware that they are victims of it, or because it would require admitting publicly that they have suffered discrimination because they are regarded as unattractive, which they may experience as humiliating (Wolff, 1988, 2010; Anderson, 1999: 305). Even if such an admission was followed by monetary compensation for being a victim of discrimination, it is unlikely that many people would be keen on making it. Indeed, as noted by Rhode, if we look at the amount of litigation related to appearance discrimination in regions where it is prohibited, it is clear that people are not keen to resort to litigation: ‘jurisdictions that have such laws report relatively few complaints. Cities and counties average between zero and nine cases a year, and Michigan averages about thirty’ (Rhode, 2010: 113). Nevertheless, we believe that even if only a small number of people ended up successfully prosecuting an employer for appearance discrimination, providing protection against it would help promote awareness of the issue and deter other employers who are inclined to engage in it.

Sixth, rather than introducing legislation against appearance discrimination, it might be thought that we should be trying to transform the demanding conception of

what it is to be beautiful that forms the basis of appearance norms (Widdows, 2018). We should be seeking to create a society in which less weight is given to appearance, and in which appearance norms are more inclusive so that a greater number of people can realistically aspire to be good-looking (Anderson, 1999: 335; Segall, 2010: 353). We agree that changing appearance-related attitudes and norms is a worthy goal, but it is a long term goal, just like the goal of changing racist or sexist attitudes and norms. Furthermore, it may be the case that there are limits to the extent to which these attitudes and norms may be changed. If some of them are underwritten by desires that are hardwired, we may simply have to live with them, and legislation against appearance discrimination may serve to counter their worst effects.

Seventh, as Hamermesh points out, given the limited resources available, treating appearance as a protected characteristic would necessarily take up resources that could otherwise be used to prosecute employers who discriminate against those with other protected characteristics, such as race or disability (Hamermesh, 2011). So it might be objected that appearance shouldn't be made a protected characteristic under the Act because this would have a detrimental effect on the enforcement of the Act with respect to these worse forms of discrimination. This is a serious concern, but if it is true, as we have argued, that the disadvantages that result from appearance discrimination are comparable to those experienced by the victims of discrimination on grounds of race or disability, then redistributing resources so as to reduce the impact of unjust appearance discrimination is defensible, even if on some occasions doing so would be detrimental to the protection of other groups.

4. How Should the Act Be Extended so as to Protect Those Regarded as Unattractive?

We have argued that there is a powerful moral case for extending the Act to prohibit appearance discrimination and that the arguments against doing so are not sufficiently strong to defeat it. But there are at least two different ways in which this might be done. First, appearance might be made a new protected characteristic under the Act. Second, an existing protected characteristic might be re-thought, or broadened, in such a way that it could be used as a basis for prohibiting appearance discrimination, or at least, for prohibiting the kinds of appearance discrimination that are especially objectionable from the point of view of the meritocratic principle. We favour the first strategy. But the second strategy is worth exploring, in particular, whether re-thinking or broadening the notion of disability might provide adequate protection for those vulnerable to appearance discrimination.

A number of legal theorists have discussed the merits of prohibiting appearance discrimination through legislation against discrimination on the basis of disability, particularly in the US (Note, 1987: 2042-48; Fleener, 2005: 1328; Rhode, 2010). Some appearance-related characteristics might readily be understood as disabilities. For example, morbid obesity might plausibly be regarded as a disabling impairment (Wang, 2008: 1921-1923). But it is not clear how many other appearance-related characteristics can be brought within this approach. The Equality Act treats severe disfigurement as a disability. It regards a person as disabled if they have a mental or physical impairment that has a substantial and long-term adverse impact on their ability to carry out their normal day-to-day activities, and declares that a severe disfigurement is to be treated as such an impairment (Equality Act 2010, Schedule 1, Article 3). Treating disability in this way requires us to adopt what is often called a social model of disability, according to which a disability may consist in a cognitive or physical impairment that is rooted wholly or in part in the social environment

inhabited, for in so far as a severe disfigurement does place an obstacle in the way of carrying out one's day-to-day activities it is in part because of the reactions of others, including the stigmatising effect of these reactions, and their debilitating impact on one's mental health. But does regarding severe disfigurement as a disability in the way that the Act does open up the possibility of treating 'being seen as ugly or unattractive' as a form of disability?

It is clear that merely being regarded as unattractive would not count as a severe disfigurement under the Act. Although the Act doesn't define the term "disfigurement", the guidance given by the Office for Disability Issues provides some clarification and significantly narrows down what can reasonably be considered as a severe disfigurement under the Act: '[e]xamples of disfigurements include scars, birthmarks, limb or postural deformation (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement which may involve taking into account factors such as the nature, size, and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face)' (Office for Disability Issues, 2010: B25). But these criteria for determining the severity of a disfigurement do not seem to track what ultimately matters from the point of view of the Act. As Hannah Saunders argues, the emphasis on the severity of the disfigurement within the Act cannot be defended on the basis of empirical evidence concerning the effect of more or less severe disfigurements on a person's ability to carry out her normal daily activities, for people with what the guidance would regard as minor disfigurements may experience worse psychological side-effects of appearance discrimination than those with more severe disfigurements (Saunders, 2019).

Even when a person does not have a severe disfigurement, her appearance could in principle be regarded as a disability under the Act when the reactions of others to it produces a psychological effect that seriously undermines her ability to carry out her normal daily activities over an extended period of time. It is well-documented that being regarded as unattractive, whether because of facial features, or height or weight, can have severe effects on a person's self-confidence, self-esteem, and general well-being, of a kind that may seriously undermine their ability to carry out those activities (van den Elzen et al., 2012; Singh and Moss, 2015: 5; Nuffield Council on Bioethics, 2017: 1.6-1.11). The Act allows that an aspect of one's appearance might justifiably be regarded as a disability in virtue of the way others respond to it, so it could in principle take into account the severely debilitating effects of body-shaming practices such as "fat shaming", or the stigmatising impact of prejudices about being overweight (Hervey and Rostant, 2016). But we think that, all things considered, regarding forms of unattractiveness as potential disabilities is not the best strategy for protecting those vulnerable to appearance discrimination, for at least two reasons.

First, in effect it protects only those whose appearance is such that the reactions elicited to it cause serious mental health problems that have a substantial and long-term adverse impact on their ability to carry out their normal day-to-day activities. It does not protect those who are subject to appearance discrimination in the labour market in a way that violates the meritocratic principle but does not seriously undermine their ability to carry out their normal daily activities. Nor would it protect those who suffer discrimination in the labour market as result of their unconventional looks, such as tattoos, piercings, or brightly coloured hair, when that discrimination violates the meritocratic principle. If we are correct that the Act is committed to that

principle, then these are serious shortcomings. Second, having to make the argument in court that being regarded as unattractive has rendered one unable to carry out one's daily activities as a result of the severe mental health problems it has caused would be potentially humiliating (Saunders, 2019; Wolff, 1988, 2010). It would require admitting that one has severe mental health problems as a result of the reactions of others to one's appearance.

Discrimination against the unattractive is not the same as discrimination against the disabled, and unattractiveness is not necessarily a form of disability, even if one endorses the social model of disability. In order to counter morally objectionable appearance discrimination, we propose that the Act should make appearance a new protected category. This category would protect not only people with disfigurements (including those with severe disfigurements currently protected under the disability category) but also people considered unattractive according to widely accepted beauty norms, and those with unconventional appearances. By making appearance a new protected category, the Act would be better able to provide redress to those who are the victims of wrongful appearance discrimination, judged from the perspective of the meritocratic principle, without them having to show that their appearance is a disability because they suffer from serious mental health problems as a result of the reactions of others to it. If the Act were extended to include appearance as a protected category, severe disfigurement would no longer need to be included within the category of disability.

The fact that being regarded as unattractive is not a form of disability doesn't mean those regarded as unattractive are less vulnerable to wrongful discrimination than those with disabilities. Indeed, since both being regarded as unattractive and being disabled vary in degree and in kind, we can expect some forms of perceived

unattractiveness to put one more at risk from wrongful discrimination than some forms of disability. This is not to deny that these two forms of discrimination are sometimes entwined: a person may be regarded as unattractive because of their particular physical disability. And in some cases, a person may be discriminated against both on grounds of appearance or grounds of disability, whether directly or indirectly.

5. Conclusion

We have argued that there is a powerful case for adding appearance to the list of characteristics that the Equality Act designates as protected. The Act ought to regard those with a disfavoured appearance as an unjustly disadvantaged group, given the most plausible interpretation of its normative basis, namely, the meritocratic principle. The Act should be extended in this way to prohibit discrimination that occurs on the basis of selectors' preferences concerning appearance when the appearance of candidates has nothing to do with their ability to do the job competently or well, and discrimination that occurs on the basis of reaction qualifications that are rooted in the prejudices of customers, clients or co-workers. If employers count appearance as a reaction qualification, then the onus should be on them to provide evidence that appearance, or an aspect of it, is a genuine reaction qualification, rooted in (say) their clients' aesthetic preference for dealing with employees that have this appearance, rather than in a prejudice. This should be seen as part of the process of demonstrating that appearance, or an aspect of it, as a genuine occupational requirement.

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NOTES

¹ In particular, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995.

² For evidence that the meritocratic principle is at work in the EHRC's guidance, see Equality and Human Rights Commission 2014, pp. 9, 24

³ There are wide-ranging debates among psychologists and philosophers concerning the best way of conceptualising implicit bias, and of explaining precisely how it operates in practice. For relevant discussion see Gendler 2008, Mandelbaum 2016, Leslie 2017.

⁴ When a willingness to comply with them is a genuine qualification, this is generally because it is a reaction qualification in virtue of the responses of customer or clients. In so far as the responses of customers or clients are rooted in racial prejudices, these reaction qualifications are illegitimate. As a result, discrimination based on reaction qualifications of this kind violates the meritocratic principle when it is interpreted in the way we have proposed, and the Act should regard it as unlawful on the grounds that it is not objectively justified.

⁵ Lucy Wang reports that '[f]at candidates are evaluated as less competent, productive, industrious, organized, decisive, and successful' (Wang, 2008). She draws upon evidence from J. Larkin and H. Pines (Larkin and Pines, 1979). We do not deny Wang's claim that weight discrimination is not reducible to appearance discrimination, but we nevertheless think that appearance is a significant element in weight discrimination.

⁶ Of course there may be ways in which racial discrimination is worse than discrimination against those regarded as unattractive. For example, racial membership

is transmitted from generation to generation in a more stable way than good looks, so members of racial groups are more likely to suffer from ‘generationally accumulated deprivation’ (Liu, 2017: 284).