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## Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials Comment.

David L. Wiley

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**BEAUTY AND THE BEAST: PHYSICAL APPEARANCE  
DISCRIMINATION IN AMERICAN CRIMINAL TRIALS**

**DAVID L. WILEY**

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## I. INTRODUCTION

Beauty is the first step of a ladder leading to God.<sup>1</sup>

Physical appearance discrimination, or corporeal attribution,<sup>2</sup> the process of judging a person's disposition on the basis of his or her physical appearance, is one of the most commonly practiced forms of discrimination in the world.<sup>3</sup> Physical appearance discrimination pervades cul-

1. CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 121 (1990).

2. Social psychologists claim that, as a matter of psychology, people quite naturally make judgments about others depending upon the actions and characteristics of other people. See FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 5 (1958) (claiming that "we interpret other people's actions and we predict what they will do under certain circumstances"). Because "[p]hysical attractiveness is the most visible and most easily accessible trait of a person," it follows that people judge others on the basis of other people's physical attractiveness. GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 1 (1985). This judgment process is commonly called attribution. See GIFFORD WEARY ET AL., *ATTRIBUTION* 3 (1989) (defining attribution). Attribution is defined as "an inference about why an event occurred or about a person's disposition." JOHN H. HARVEY & GIFFORD WEARY, *PERSPECTIVES ON ATTRIBUTIONAL PROCESSES* 6 (1981). "Corporeal" is a Latin-based term which means "of the body." *THE AMERICAN HERITAGE DICTIONARY* 195 (3d ed. 1994). This Comment defines corporeal attribution as the psychological process of judging a person's disposition or past actions based on that person's physical appearance.

3. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 11 (1985) (noting that "[d]iscrimination based on physical attractiveness probably excels prejudicial discrimination based on sex, race, or religion"); see also RITA FREEDMAN, *BEAUTY BOUND* 99–106 (1986) (describing various historical instances of beauty biases and their inordinate impact on women). Charles Darwin implied that the very survival of the human species depends, in part, upon physical appearance discrimination. See CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 216 (photo. reprint 1974) (1874) (describing role of facial attractiveness in evolutionary process). In fact, physical appearance discrimination may account for the very survival of a great many species. See CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* 174 (Morse Peckham ed., 1959) (1859) (noting that "a hornless stag or spurnless cock would have a poor chance of leaving offspring"). In addition, some researchers have concluded that there are universal, or cross-cultural, standards of physical appearance by which people judge others' personal characteristics. See LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 59–65 (1992) (discussing conflicting views of sociobiologists and socioculturalists concerning universal standards of attractiveness by which people attribute personal characteristics); David M. Buss & Michael Barnes, *Preferences in Human Mate Selection*, 50 *J. PERSONALITY & SOC. PSYCHOL.* 559, 559–70 (1986) (conducting cross-cultural study and concluding that attractiveness is important in all cultures); Judith H. Langlois & Lori A. Roggman, *Attractive Faces Are Only Average*, 1 *PSYCHOL. SCI.* 115, 115 (1990) (contending that "cross-cultural data suggest[s] that ethnically diverse faces possess both distinct and similar structural features; these features seem to be perceived as attractive regardless of the racial and cultural background of the perceiver"); Richard A. Price & Steven G. Vandenberg, *Matching for Physical Attractiveness in Married Couples*, 5 *PERSONALITY & SOC. PSYCHOL. BULL.* 398, 398–400 (1979) (study-

ture,<sup>4</sup> employment,<sup>5</sup> and religion,<sup>6</sup> and is practiced by all types of people,

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ing married couples in different societies and concluding that people in different cultures select mates on basis of physical attractiveness). *But see* CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 568–79 (photo. reprint 1974) (1874) (theorizing that, while physical attractiveness plays major role in natural selection, no universal standards of beauty exist by which people are judged).

4. *See* ELLEN BERSCHIED & ELAINE H. WALSTER, *INTERPERSONAL ATTRACTION* 89–90 (1969) (describing cultural manifestations of physical appearance discrimination in mate selection); Thomas F. Cash, *The Psychology of Physical Appearance: Aesthetics, Attributions, and Images* (describing cultural significance of physical appearance discrimination in various contexts), in *BODY IMAGES* 51, 51–60 (Thomas F. Cash & Thomas Pruzinsky eds., 1990); *see also* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 59 (1991) (claiming that western, male-dominated culture has sought to oppress women since biblical times by creating false standards of beauty).

5. *See, e.g.*, Robert E. Carlson, *Selection Interview Decision: The Relative Influence of Appearance and Factual Written Information on an Interviewer's Final Rating*, 51 *J. APPLIED PSYCHOL.* 460, 460–68 (1967) (finding correlation between physical appearance and hiring decisions); Robert L. Dipboye et al., *Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resumé Evaluations*, 62 *J. APPLIED PSYCHOL.* 288, 288–94 (1977) (reporting that physical attractiveness is factor in management hiring decisions); Robert L. Dipboye et al., *Relative Importance of Applicant Sex, Attractiveness and Scholastic Standing in Evaluation of Job Applicant Resumés*, 60 *J. APPLIED PSYCHOL.* 39, 39–43 (1975) (indicating that attractiveness of applicant affects recommended starting salaries). *But see* Terry A. Beehr & David C. Gilmore, *Applicant Attractiveness as a Perceived Job-Relevant Variable in Selection of Management Trainees*, 25 *ACAD. MGMT. J.* 607, 614–16 (1982) (contending that attractiveness is almost negligible variable in hiring, and postulating that concept of job relevance may nullify interviewers' general judgments concerning physical appearance). *See generally* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 31–48 (1991) (enumerating various instances of employment-related physical appearance discrimination in 20th-century America).

6. *See* CLYDE A. HOLBROOK, *THE ICONOCLASTIC DEITY* 11 (1984) (noting curious fact that Christian theology and worship employ only select biblical images of God, thereby implying that Christianity itself may discriminate in its perception of God's appearance). Naomi Wolf implies that the very foundations of Judaism and Christianity foster physical appearance discrimination against women because the biblical story of Adam and Eve teaches that Adam's body was made in God's image, while Eve's body was "an expendable rib . . . twice removed from the Maker's hand." *See* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 93 (1991) (presenting view that Judeo-Christian tradition promotes physical appearance discrimination). Thus, according to Naomi Wolf, the Judeo-Christian tradition teaches that man's appearance is that of God's, while woman's appearance is imperfect and in constant need of improvement. *Id.* John Keats, the 19th-century poet and religious skeptic, sought to graft religiosity and beauty-based discrimination by defining beauty as that "which is life affirming." *See* RONALD A. SHARP, *KEATS, SKEPTICISM, AND THE RELIGION OF BEAUTY* 5 (1979) (describing Keats's fascination with beauty "which he regarded as holy not because it was part of some grand scheme of things, but simply because [like religion] it made life worth living").



including young,<sup>7</sup> old,<sup>8</sup> male,<sup>9</sup> and female<sup>10</sup> alike.<sup>11</sup> Notwithstanding its

7. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 12 (1985) (noting that children between ages of five and six tend to associate positive personality traits with physically attractive persons and negative personality traits with physically unattractive persons); Karen K. Dion & Ellen Berscheid, *Physical Attractiveness and Peer Perception Among Children*, 37 *SOCIOMETRY* 1, 9–10 (1974) (reporting that young children tend to discriminate against other young children on basis of physical appearance); Barbara L. Goebel & Valjean M. Cashen, *Age, Sex and Attractiveness as Factors in Student Ratings of Teachers: A Developmental Study*, 71 *J. EDUC. PSYCHOL.* 646, 651 (1979) (finding that children tend to assume that physically attractive adults will perform better as teachers than will physically unattractive adults); Judith H. Langlois & Lori A. Roggman, *Attractive Faces Are Only Average*, 1 *PSYCHOL. SCI.* 115, 115 (1990) (asserting that “even before substantial exposure to cultural standards of beauty, young infants display behavior that seems to be rudimentary versions of the judgments and preferences for attractive faces so prevalent in older children and adults”); Curtis A. Samuels & Richard Ewy, *Aesthetic Preferences During Infancy*, 3 *BRIT. J. DEVELOPMENTAL PSYCHOL.* 221, 221–27 (1985) (describing study in which infants as young as three months old preferred to look at physically attractive faces, rather than physically unattractive faces).

8. See Terrence W. Dushenko et al., *Generality of the Physical Attractiveness Stereotype for Age and Sex*, 105 *J. SOC. PSYCHOL.* 303, 303–04 (1978) (concluding that elderly, as well as young, “attribute socially desirable characteristics to physically attractive individuals”); see also Randy M. Jones & Gerald R. Adams, *Assessing the Importance of Physical Attractiveness Across the Lifespan*, 118 *J. SOC. PSYCHOL.* 131, 132 (1982) (finding that elderly perceive strong correlation between physical appearance and success in marriage selection, employment, friendship formation, and marital happiness). Middle-aged persons also practice physical appearance discrimination. See Gerald R. Adams & Ted L. Huston, *Social Perceptions and Middle-Aged Persons Varying in Physical Attractiveness*, 11 *DEVELOPMENTAL PSYCHOL.* 657, 657–58 (1975) (exploring ways in which middle-aged people judge personalities on basis of physical attractiveness).

9. See RITA FREEDMAN, *BEAUTY BOUND* 11 (1986) (noting that “[m]ales consistently place greater emphasis on good looks when choosing dates than females do”); LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 206–18 (1992) (finding that men react differently, and perhaps more strongly, to facial appearance, depending upon situational context, than do women); Robert H. Coombs & William F. Kenkel, *Sex Differences in Dating Aspirations and Satisfaction with Computer-Selected Partners*, 28 *J. MARRIAGE & FAM.* 62, 65 (1966) (relating results of study which found that women value social qualities such as intelligence, popularity, and religious compatibility in potential mates, while men place more emphasis on potential mate’s physical attractiveness); Elaine Walster et al., *Importance of Physical Attractiveness in Dating Behavior*, 4 *J. PERSONALITY & SOC. PSYCHOL.* 508, 508–16 (1966) (finding that date satisfaction among men is overwhelmingly product of date’s physical attractiveness).

10. See Terrance W. Dushenko et al., *Generality of the Physical Attractiveness Stereotype for Age and Sex*, 105 *J. SOC. PSYCHOL.* 303, 303–04 (1978) (finding that women tend to discriminate on basis of physical appearance).

11. See Gerald R. Adams, *Physical Attractiveness, Personality, and Social Reactions to Peer Pressure*, 96 *J. PSYCHOL.* 287, 295 (1977) (discussing theory that humans not only associate certain personality traits with physical appearance, but also internalize certain personality traits generally associated with their own physical appearance); Karen K. Dion et al., *What Is Beautiful Is Good*, 24 *J. PERSONALITY & SOC. PSYCHOL.* 285, 285–90 (1972) (conducting seminal psychological research on effects of physical appearance and conclud-

potentially detrimental effects,<sup>12</sup> physical appearance discrimination is a fostered and even favored form of discrimination in America<sup>13</sup> today.<sup>14</sup> American culture and industry thrive on the valuation of image over substance, or at least on the notion that image is an accurate indicator of substance.<sup>15</sup> Modern technology and communicative devices cultivate the American fixation with image.<sup>16</sup> Similarly, the evolution of American

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ing that humans tend to discriminate in favor of, and attribute positive characteristics to, physically attractive individuals); *see also* Ellen Berscheid, *The Question of Importance of Physical Attractiveness* (affirming that physical appearance plays role in virtually all people's lives), in 3 *PHYSICAL APPEARANCE, STIGMA AND SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM* 291, 297 (C. Peter Herman et al. eds., 1986); Rhoda K. Unger et al., *Physical Attractiveness and Assumptions About Social Deviance*, 8 *PERSONALITY & SOC. PSYCHOL. BULL.* 293, 293 (1982) (concluding that humans associate physical attractiveness with "social influence, ability to succeed, competence, and likability").

12. *See, e.g.*, NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 9–19 (1991) (describing physical appearance discrimination as means of oppressing modern American women); Leonard Berkowitz & Ann Frodi, *Reactions to a Child's Mistakes as Affected by Her/His Looks and Speech*, 42 *SOC. PSYCHOL. Q.* 420, 420 (1979) (suggesting that physically unattractive children are inordinately at risk for physical abuse because of widespread physical appearance discrimination); F.W. Masters & D.C. Greaves, *The Quasimodo Complex*, 20 *BRIT. J. PLASTIC SURGERY* 204, 209–10 (1967) (describing detrimental effects of physical appearance discrimination on unattractive individuals).

13. The terms America and American as used in this Comment refer to the United States of America.

14. *See* SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 245–47 (1993) (describing postmodern culture's role in increasing physical appearance discrimination); LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 56 (1992) (claiming that American culture places great value on physical appearance); *see also* RITA FREEDMAN, *BEAUTY BOUND* 43 (1986) (describing how modern American culture compounds physical appearance discrimination).

15. *See* DANIEL J. BOORSTIN, *THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM* 183–238 (1961) (explaining how image displaced ideals in American culture and delineating how American industries thrive on capitalistic notion of image as indication of substantive worth); RITA FREEDMAN, *BEAUTY BOUND* 43–46 (1986) (describing how modern American society thrives on valuation of beauty); *see also* JAMES R. GREGORY, *MARKETING CORPORATE IMAGE: THE COMPANY AS YOUR NUMBER ONE PRODUCT* 1–2 (1991) (describing role image plays in corporate strategy, regardless of whether that image is actually accurate indicator of reality).

16. *See* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 14–16 (1991) (describing technology and communicative devices that cultivate valuation of image); *see also* GENE WYCOFF, *THE IMAGE CANDIDATES: AMERICAN POLITICS IN THE AGE OF TELEVISION* 11–14 (1968) (explaining that American fixation with image, coupled with modern communicative devices, has changed American politics).

commercialism and materialism surrounding the burgeoning beauty industry serves to promote physical appearance discrimination.<sup>17</sup>

Despite the prevalent and arguably increasing practice of physical appearance discrimination in America,<sup>18</sup> American criminal law has done little to combat physical appearance discrimination.<sup>19</sup> In theory, American criminal law seeks only to regulate people's actions, rather than to punish them for the way they look or who they are.<sup>20</sup> In practice, how-

17. See RITA FREEDMAN, *BEAUTY BOUND* 43–44 (1986) (describing cosmetic industry's role in equating women's worth with physical appearance); Una Stannard, *The Mask of Beauty* (noting billion dollar beauty industry's role in emphasizing importance of physical appearance in society), in *WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS* (Vivian Gornick & Barbara K. Moran eds. 1971); see also NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 17 (1991) (castigating \$33-billion-per-year diet industry, \$20-billion-per-year cosmetics industry, and \$300-million-per-year cosmetic surgery industry for advocating valuation of image over substance).

18. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 233, 244 (1985) (noting that, although physical appearance discrimination is worldwide phenomenon, "the United States may be the leader," and claiming that "[a] futuristic society dominated by physical attractiveness is approaching"); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 20–30 (1991) (insisting that importance of beauty, as means of judging personal characteristics in American culture, increases as women gain economic prominence). *But see* LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 220–21 (1992) (predicting that importance of physical appearance as commodity for American women will decrease as American women gain economic power). Phenomena somewhat unique to American culture—increased divorce rates, greater geographic mobility, frequent job changes, and urbanization—lead to increased interaction with strangers. *America's Obsession with Beautiful People*, U.S. NEWS & WORLD REP., Jan. 11, 1982, at 60. This increased interaction with strangers leads to an increased reliance on first impressions. *Id.* Thus, because physical appearance "is the most visible and most easily accessible trait of a person," it follows that the increased reliance on first impressions in modern American culture leads to increased physical appearance discrimination. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 1 (1985) (noting accessibility of physical appearance).

19. See *Commonwealth v. McKinnon*, 620 N.E.2d 792, 796 (Mass. App. Ct. 1993) (refusing to overturn conviction involving prosecutorial references to defendant's physical appearance outside context of identification). *But see* *Holland v. State*, 588 So. 2d 543, 549–50 (Ala. Crim. App. 1991) (reversing defendant's conviction on grounds that trial court erred in failing to exclude juror who made pretrial remarks concerning her belief that defendant was guilty based on defendant's physical appearance).

20. See, e.g., *Powell v. State*, 392 U.S. 514, 533 (1968) (stressing that "criminal penalties may be inflicted only if the accused has committed some act, [or] has engaged in some behavior, which society has an interest in preventing"); *Robinson v. California*, 370 U.S. 660, 667–68 (1962) (holding that inflicting punishment for one's status is cruel and unusual punishment); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4–5 (1968) (theorizing that punishment has traditionally been warranted only for committing offense against legal rules); see also OLIVER W. HOLMES, JR., *THE COMMON LAW* 49 (1881) (acknowledging that "for the most part, the purpose of the criminal law is only to induce external conformity to

ever, the American criminal law system fosters and encourages the process of judging people on the basis of their physical appearance.<sup>21</sup> In fact, some major American cities actually impose fines on people whose appearance is deemed unattractive.<sup>22</sup>

Apparently sensitized by the increasing practice of physical appearance discrimination, some local government entities recently banned physical appearance discrimination.<sup>23</sup> However, American culture continues to embrace physical appearance discrimination, and such discrimination by

rule"); FRANCIS WHARTON, *PHILOSOPHY OF CRIMINAL LAW* 5 (photo. reprint 1989) (1880) (noting that "it is immoral to punish except for the purpose of vindicating right against wrong"). In *Donohue v. Shoe Corporation*, the court stated, "In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length and other superficial features. That tendency to stereotype is at the root of some of the social ills that afflict the country." 337 F. Supp. 1357, 1359 (C.D. Cal. 1972).

21. See *People v. Rader*, 532 N.E.2d 1367, 1370 (Ill. App. Ct. 1988) (holding that prosecutor's request for jury to picture defendant's appearance at time of crime instead of physical appearance at trial was proper); *McKinnon*, 620 N.E.2d at 797 (sustaining conviction involving prosecutorial remarks about defendant's physical appearance outside context of identification); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 203 (1966) (documenting instances in which judges commented upon defendants' physical appearance as if it were evidence).

22. See COLUMBUS, OHIO, GEN. OFFENSE CODE § 2387.04 (1972) (making it illegal to be unsightly in public); OMAHA, NEB., MUN. CODE § 25 (1967) (allowing police officers to arrest persons for being "unsightly" in public). In 1974, the city of Omaha actually arrested a person for being "unsightly." James Fogerty, '41 Begging Law Punishes Only the Ugly, OMAHA WORLD HERALD, Apr. 21, 1974, at B1.

23. See D.C. CODE ANN. § 1-2512(a) (1993) (outlawing physical appearance discrimination in employment); see also, e.g., Dan Beyers, *Rights Nominee Challenged in Howard Minister-Led Anti-Abortion Protest, Called Homosexual Acts 'Immoral, Ungodly'*, WASH. POST, Nov. 22, 1991, at C3 (mentioning Howard County, Maryland's human rights law that bans discrimination on basis of physical appearance); Marci Dunn, *Majorette Wins Battle over Weight: School Board Ends Rule that Put Limit on Twirlers*, PHILA. INQUIRER, Feb. 18, 1984, at B3 (discussing school district's decision to ban physical appearance discrimination in all decisions affecting students); Peter H. King, *On California: When the Going Gets Weird*, L.A. TIMES, May 9, 1993, at A3 (examining Santa Cruz's municipal ordinance that bans physical appearance discrimination); Michele L. Norris, *Pr. George Passes Gay-Rights Measure; County Joins Several Local Jurisdictions*, WASH. POST, June 5, 1991, at D1 (explaining Prince George County's civil rights code banning physical appearance discrimination in housing, employment, and credit); Molly Sinclair, *Disabled Group's Removal of Able-Bodied Man Upheld*, WASH. POST, Sept. 11, 1992, at D3 (describing Washington D.C.'s human rights act that bans employment discrimination on basis of physical appearance). The Philippines, presumably recognizing the inequities involved in appearance discrimination, considered national legislation to ban physical appearance discrimination. See *Bizarre Buzz: Cardboard Cop Causes Scare*, ATL. CONST., Dec. 4, 1992, at G2 (mentioning Philippines' congressional attempt to outlaw physical appearance discrimination in employment). Notably, California considers physical appearance discrimination to be an arbitrary form of discrimination that is banned by state law in some instances. *In re Cox*, 474 P.2d 992, 1000 (Cal. 1970).

government actors may now violate constitutional provisions.<sup>24</sup> Specifically, an American criminal law system that fosters or favors physical appearance discrimination as a means of determining guilt and imposing sentences may violate the United States Constitution's Due Process Clause,<sup>25</sup> Cruel and Unusual Punishment Clause,<sup>26</sup> Equal Protection Clause,<sup>27</sup> and Sixth Amendment right to an impartial jury.<sup>28</sup>

This Comment considers the problem of physical appearance discrimination by jurors in criminal trials and proposes remedial measures designed to eliminate such discrimination and effectuate the underlying purposes of jury trials. Part II of this Comment examines the psychological process of corporeal attribution, discusses the underlying philosophic dichotomy of image and substance, and surveys the role of modern American culture as an impetus for physical appearance discrimination. Part III assesses the unique consequences of physical appearance discrimination in the American criminal law system and discusses the parallel relationships between race, sex,<sup>29</sup> and physical appearance discrimination. Part IV explores the constitutional ramifications of fostering and promoting physical appearance discrimination in criminal trials. Finally, Part V presents remedies designed to ensure that criminal defendants are judged based on their alleged actions rather than their physical appearance.

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24. See *Weems v. United States*, 217 U.S. 349, 373 (1910) (stating that constitutional prohibitions may change along with cultural changes); Peter B. Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 118 n.295 (1988) (noting that as sensitivity to physical appearance discrimination deepens, so too does determination to expunge it); cf. Richard A. Posner, *What Has Pragmatism to Offer?*, 63 S. CAL. L. REV. 1653, 1667 (1990) (explaining how law adapts to cultural environment). See generally, Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 *passim* (1989) (discussing efficacy of theory of organic constitutionalism in which constitutional prohibitions change with culture).

25. See U.S. CONST. amend. XIV, § 1 (prohibiting states from denying life, liberty, or property without due process of law).

26. See U.S. CONST. amend. VIII (forbidding states from imposing cruel and unusual punishment).

27. See U.S. CONST. amend. XIV, § 1 (forbidding states from denying citizens equal protection of laws).

28. See U.S. CONST. amend. VI (granting criminal defendants right to impartial jury).

29. Because the term "gender" often refers to attitudinal and cultural characteristics of a person, in addition to physical characteristics, this Comment uses the term "sex discrimination," rather than "gender discrimination," when discussing discrimination based on a person's standing as a male or female. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting) (describing difference between sex and gender by stating that "gender is to sex as feminine is to female and masculine is to male").

## II. GENERAL BACKGROUND OF PHYSICAL APPEARANCE DISCRIMINATION

He had but one eye, and the popular prejudice runs in favour of two.<sup>30</sup>

### A. *The Psychological Process of Corporeal Attribution*

In 1944, Fritz Heider developed a seminal theory in social psychology termed attribution theory.<sup>31</sup> Essentially, Heider suggested that humans observe other people's actions, draw inferences concerning those actions, and attribute meaning to those actions based on the inferences drawn.<sup>32</sup> In recent years, psychologists have used attribution theory to analyze the effects of a person's physical appearance.<sup>33</sup> In this context, researchers have concluded that humans observe a person's physical appearance, draw inferences concerning that appearance, and attribute meaning to that appearance based on the inferences drawn.<sup>34</sup> This method of corporeal attribution suggests that humans tend to judge a person's disposition

30. CHARLES DICKENS, *THE LIFE & ADVENTURES OF NICHOLAS NICKLEBY* 27 (Dodd, Mead, & Co. 1944) (1839).

31. JOHN H. HARVEY & GIFFORD WEARY, *PERSPECTIVES ON ATTRIBUTIONAL PROCESSES* 5 (1981). See generally FRITZ HEIDER, *THE PSYCHOLOGICAL PROCESS OF INTERPERSONAL RELATIONS passim* (1958) (discussing process of attribution).

32. See FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 1–5 (1958) (describing process of attribution as “naive psychology” and explaining that function of attribution is to “achieve in some measure what a science is supposed to achieve: an adequate description of subject matter which makes prediction possible”).

33. See LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 103–24 (1992) (discussing societal implications of attributions based on physical appearance); Karen K. Dion et al., *What Is Beautiful Is Good*, 24 *J. PERSONALITY & SOC. PSYCHOL.* 285, 285–90 (1972) (performing seminal research in applying attribution theory to physical appearance).

34. See Karen K. Dion et al., *What Is Beautiful Is Good*, 24 *J. PERSONALITY & SOC. PSYCHOL.* 285, 285–90 (1972) (hypothesizing that attribution leads people to attribute positive characteristics to physically attractive people); see also JOHN H. HARVEY & GIFFORD WEARY, *PERSPECTIVES ON ATTRIBUTIONAL PROCESSES* 5–6 (1981) (discussing basic tenets of attribution theory and its applications). Karen K. Dion, Ellen Berscheid, and Elaine Walster were some of the first researchers to find empirical support for the thesis that people attribute positive personality traits to physically attractive persons. See Karen K. Dion et al., *What Is Beautiful Is Good*, 24 *J. PERSONALITY & SOC. PSYCHOL.* 285, 285–90 (1972) (using 30 males and 30 females to support hypothesis that people tend to believe that “[w]hat is beautiful is good”). Dion, Berscheid, and Walster found that when test subjects were given photographs of people of varying physical attractiveness and were told to evaluate certain aspects of the photographed persons' personalities, the test subjects tended to attribute more desirable personality traits to the physically attractive persons. *Id.* at 285.

and personality based on that person's physical appearance.<sup>35</sup> Moreover, researchers have found that humans associate physical attractiveness with positive personal characteristics<sup>36</sup> and physical unattractiveness with so-

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35. See, e.g., Marshall Dermer & Darrel L. Thiel, *When Beauty May Fail*, 31 J. PERSONALITY & SOC. PSYCHOL. 1168, 1168–76 (1975) (acknowledging that people judge others on basis of physical appearance and hypothesizing that person's own physical appearance tends to influence process of attribution); Karen K. Dion et al., *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285, 289 (1972) (“Not only are physically attractive persons assumed to possess more socially desirable personalities than those of lesser attractiveness, but it is presumed that their lives will be happier and more successful.”); see also David Landy & Harold Sigall, *Beauty Is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness*, 29 J. PERSONALITY & SOC. PSYCHOL. 299, 299–304 (1974) (finding that test subjects evaluated task performance more favorably when performer was physically attractive). But see John Mills & John Harvey, *Opinion Change as a Function of When Information About the Communicator Is Received and Whether He Is Attractive or Expert*, 21 J. PERSONALITY & SOC. PSYCHOL. 52, 52–55 (1972) (finding no difference in test subjects' opinions concerning writer when subjects' perception of writers' physical appearance varied).

36. See Ellen Berscheid & Elaine Walster, *Physical Attractiveness*, 7 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 157, 186–99 (1974) (describing various positive traits associated with physical attractiveness); Karen K. Dion, *Stereotyping Based on Physical Attractiveness: Issues and Conceptual Perspectives* (finding that people attribute positive personality traits and social skills to physically attractive people), in 3 PHYSICAL APPEARANCE, STIGMA, AND SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM 8 (C. Peter Herman et al. eds., 1986); Judith H. Langlois, *From the Eye of the Beholder to Behavioral Reality: Development of Social Behaviors and Social Relations as a Function of Physical Attractiveness* (examining relationship between perceived social skills and perceived physical attractiveness and finding that physically attractive people are almost always viewed as having more favorable personal traits than are physically unattractive people), in 3 PHYSICAL APPEARANCE, STIGMA, AND SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM 44–45 (C. Peter Herman et al. eds., 1986). Researchers have suggested that physically attractive people are also perceived as being more intellectually competent than physically unattractive people. See Rosemarie Anderson & Steve A. Nida, *Effect of Physical Attractiveness on Opposite and Same-Sex Evaluations*, 46 J. PERSONALITY 401, 409 (1978) (finding positive correlation between writers' perceived physical attractiveness and writers' perceived writing ability when rater and writer were of opposite sexes); Thomas F. Cash & Claire A. Trimer, *Sexism and Beautyism in Women's Evaluations of Peer Performance*, 10 SEX ROLES 87, 87 (1984) (concluding that physical attractiveness “enhanced evaluations of both male and female essayists”); Bruce Hunsberger & Brenda Cavanagh, *Physical Attractiveness and Children's Expectations of Potential Teachers*, 25 PSYCHOL. SCH. 70, 70 (1988) (finding positive correlation between grade school teachers' physical attractiveness and perceived teaching ability); David Landy & Harold Sigall, *Beauty Is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness*, 29 J. PERSONALITY & SOC. PSYCHOL. 299, 304 (1974) (describing correlation between task evaluation and task performer's physical attractiveness); Geoffrey Maruyama & Norman Miller, *Physical Attractiveness, Race, and Essay Evaluation*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 384, 388–89 (1980) (noting that perceptions of writing ability do not vary significantly according to perceived race of writer, but do vary significantly according to writer's physical attractiveness); Marcia J. Murphy & David T. Helkamp, *Attractiveness and Personality Warmth: Evaluations of Paintings Rated*

cially deviant behavior.<sup>37</sup> Interestingly, however, the process of attribution, like all things human, is often inaccurate.<sup>38</sup> Social psychology teaches that humans make false substantive assumptions about other people's dispositions based on image alone.<sup>39</sup>

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by *College Men and Women*, 43 *PERCEPTUAL & MOTOR SKILLS* 1163, 1163–66 (1976) (finding that perceived painting ability does not vary significantly according to sex of evaluator, but does vary significantly according to painter's physical attractiveness and "warmth of personality").

37. See Margaret M. Clifford & Elaine Walster, *The Effect of Physical Attractiveness on Teacher Expectations*, 46 *SOC. EDUC.* 248, 248–56 (1973) (finding that unattractive children are perceived as less intelligent and less likely to enter college); Robert O. Hansson & Beverly J. Duffield, *Physical Attractiveness and the Attribution of Epilepsy*, 99 *J. SOC. PSYCHOL.* 233, 233 (1976) (stating that people are "more likely to attribute neurological disorders to unattractive persons"); Warren H. Jones et al., *Physical Attractiveness and Judgments of Psychopathology*, 105 *J. SOC. PSYCHOL.* 79, 79 (1978) (noting that "psychological disturbance is more likely to be attributed to unattractive target persons"); Rhoda K. Unger et al., *Physical Attractiveness and Assumptions About Social Deviance: Some Sex by Sex Comparisons*, 8 *PERSONALITY & SOC. PSYCHOL. BULL.* 293, 298–99 (1982) (describing positive correlation between photographs of physically unattractive people and perceptions of political radicalism and homosexuality).

38. See JOHN H. HARVEY & GIFFORD WEARY, *PERSPECTIVES ON ATTRIBUTIONAL PROCESSES* 132–33 (1981) (summarizing findings of various researchers concerning inaccuracy of attributions); FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 96 (1958) (admitting that one flaw in attribution is that "under certain conditions, there is a tendency to attribute the outcome of an action to the person, even though its source may reside in the environment"); Edward E. Jones et al., *Observer Bias in the Attitude of Attribution Paradigm: Effect of Time and Information Order*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1230, 1238 (1979) (discussing inaccuracy of attributions due to subjective bias); Arthur G. Miller et al., *The Bias Phenomenon in Attribution: Actor and Observer Perspectives*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1421, 1428–31 (1979) (analyzing basic errors in process of attribution); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 173, 183 (1977) (charging that attributions are often erroneously made because people tend to "underestimate the impact of situational factors and overestimate the role of dispositional factors in controlling behavior"); cf. Harold H. Kelley & John L. Michela, *Attribution Theory and Research*, 31 *ANN. REV. PSYCHOL.* 457, 479 (1980) (stating that "it may be impossible to design a study to test unequivocally the accuracy of attribution"). But see John H. Harvey et al., *How Fundamental Is "The Fundamental Attribution Error"?*, 40 *J. PERSONALITY & SOC. PSYCHOL.* 346, 346–49 (1981) (concluding that attributional methods of judging disposition are fairly accurate).

39. See HARRY C. TRIANDIS, *INTERPERSONAL BEHAVIOR* 24, 106–14 (1977) (stating that substantive dispositional assumptions based solely on image are form of stereotyping which may or may not be accurate).



### B. *The Traditional Dichotomy of Image and Substance*

Social psychology merely rediscovered the traditional dichotomy of image and substance.<sup>40</sup> However, social psychology also uncovered a human tendency to judge on the basis of image, rather than substance.<sup>41</sup> Logicians since Aristotle have recognized that a common fallacy in logical analysis is to judge a thought not on its substantive merits, but by assessing the image of the thought's source.<sup>42</sup> Sociobiologists since Darwin have suggested that a person's appearance is valued in the process of sexual selection as a basis for determining that person's substantive qualities, such as health, youth, and fitness for reproduction.<sup>43</sup> Likewise, philosophers have theorized that all human understanding can be deciphered along the lines of image and substance.<sup>44</sup> Thus, different fields of thought, throughout history, seem to confirm the relatively recent find-

40. See GEORGE SANTAYANA, *SOLILOQUIES IN ENGLAND AND LATER SOLILOQUIES* 131–32 (1924) (claiming that “images are like shells, not less integral parts of nature than are the substances they cover, but better addressed to the eye and more open to observation”); EDWARD J. SOJA, *POSTMODERN GEOGRAPHIES* 125 (1989) (noting that “image of reality takes epistemological precedence over the tangible substance and appearance of the real world”); see also ALLEN W. NORRIE, *LAW, IDEOLOGY & PUNISHMENT* 7 (1991) (presenting view that law “is locked within a discourse that takes the appearance of things to be their essence”). See generally Richard Stith, *Images, Spirituality, and Law*, 10 *J. L. & RELIGION* 33 *passim* (1993–94) (discussing importance of images in law).

41. See DANIEL J. BOORSTIN, *THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM* 184 (1961) (claiming that modern universities are judged, not by their substantive failure to pursue certain academic research, but “by whether they fit into a well-tailored ‘image’ of themselves”); ANTHONY QUINTON, *THE NATURE OF THINGS* 179 (1973) (discussing argument that in human judgments there are “no distinguishing mark[s] to separate the perception of reality from the perception of appearance”); IMMANUEL KANT, *LOGIC* 72 (Robert S. Hartman & Wolfgang Schwarz trans., 1974) (1800) (claiming that “[t]ruth is the objective property of cognition; the judgment through which something is presented as true”). As James Gregory noted in his work on marketing, “Perception is Reality.” JAMES R. GREGORY, *MARKETING CORPORATE IMAGE: THE COMPANY AS YOUR NUMBER ONE PRODUCT* 2 (1991).

42. See THOMAS CRUMLEY, *LOGIC: DEDUCTIVE AND INDUCTIVE* 270–73 (1926) (listing the common Aristotelian fallacies in logical reasoning that essentially ignore substantive issues themselves); IMMANUEL KANT, *LOGIC* 85 (Robert S. Hartman & Wolfgang Schwarz trans., 1974) (1800) (calling this type of logical fallacy “the prejudice of prestige”).

43. E.g., CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 58 (photo, reprint 1974) (1874); David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 *BEHAVIORAL & BRAIN SCI.* 1, 45 (1989); David M. Buss & Michael Barnes, *Preferences in Human Mate Selection*, 50 *J. PERSONALITY & SOC. PSYCHOL.* 559, 559–70 (1986).

44. See ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 73–74 (1974) (claiming that human understanding is best described in terms of classic understanding, which focuses on substance, and romantic understanding, which focuses on image).

ings of social psychologists—humans inherently make substantive judgments based on image even though those judgments may be inaccurate.<sup>45</sup>

### C. *The Rise of Corporeal Attribution in Modern American Culture*

#### 1. The Effects of Modern Technology

Recent developments in modern technology have enhanced the human process of making substantive judgments based on appearance.<sup>46</sup> In America's estimated 80 million households with televisions, the average amount of time viewers spend watching television continues to increase.<sup>47</sup> Television's rapid linear movement of images shortens viewers' overall attention spans.<sup>48</sup> While substantive personality and dispositional assessments demand relatively long-term concentration,<sup>49</sup> image-based judg-

45. See FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 53–57 (1958) (explaining that people often make substantive judgments concerning others based on “misperceptions”); see also RENATO TAGIURI, *Person Perception* (describing research concerning accuracy of substantive judgments based on “perception”), in 3 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 395, 408–14 (Gardner Lindzey & Elliot Aronson eds., 2d ed. 1968).

46. See DANIEL J. BOORSTIN, *THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM* 197–201 (1961) (alleging that graphics-technology revolution is related to American culture's obsession with image over substantive ideals).

47. See James Mann, *What Is Television Doing to America?* (citing Nielsen survey, which found that “America's 80 million television households averaged a record level of 6 hours and 44 minutes a day in front of the tube in 1981—up 9 minutes from 1980 [which is] . . . three times the average rate of increase during the 1970s”), in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 26 (Ray Eldon Hiebert & Carol Reuss eds., 1985).

48. *Id.* at 26–27; see Renee Hobbs, *Television and the Shaping of Cognitive Skills* (listing television's ability to shorten viewers' attention spans as negative drawback of television), in *VIDEO ICONS AND VALUES* 33, 36–38 (Alan M. Olson et al. eds., 1991); see also JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 192–215 (1978) (discussing various negative effects that television viewing has on viewers' minds); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* *passim* (1985) (suggesting that television is responsible for the deintellectualization of America).

49. See RICHARD I. LANYON & LEONARD D. GOODSTEIN, *PERSONALITY ASSESSMENT* *passim* (2d ed. 1982) (discussing various complex ideals and theories in personality analysis and suggesting that accurate personality and dispositional assessment is difficult and time consuming). In fact, even late 19th and early 20th century psychiatrists, who believed that the key to personality assessment was to analyze physical appearance, developed elaborate methods that could not possibly be understood without detailed study. See ERNST KRETSCHEMER, *PHYSIQUE AND CHARACTER: AN INVESTIGATION OF THE NATURE OF CONSTITUTION AND OF THE THEORY OF TEMPERAMENT* *passim* (W.J.H. Sprott trans., 2d ed., The Humanities Press, Inc. 1951) (1925) (describing various detailed physical characteristics as they relate to personality types); HOLMES W. MERTON, *DESCRIPTIVE MENTALITY: FROM THE HEAD, FACE AND HAND* *passim* (1899) (displaying difficulty of personality assessment method known as psychological physiognomy, which is science of studying physical features, as means of predicting personality traits).

ments are relatively simple and easy to make.<sup>50</sup> As a person's attention span shortens, as is increasingly the case with American television viewers, he or she is probably inclined to make more personality and dispositional judgments based on appearance rather than substance.<sup>51</sup>

## 2. The Effects of Modern Commercialism

Modern commercialism also increases the practice of physical appearance discrimination in America. The very existence of the multi-billion-dollar American beauty industry depends upon the promotion of physical appearance discrimination.<sup>52</sup> Similarly, the boom in graphics and communications technology allows the American advertising industry to assume a leading role in marketing physical appearance discrimination.<sup>53</sup> As a result of the ever-increasing print and television industries, American manufacturers no longer compete to produce the best product;

50. See DANIEL J. BOORSTIN, *THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM* 193 (1961) (stating that image is, by definition, simpler and easier to understand than object which image represents); FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 1-5 (1958) (calling attributions form of "naïve psychology," implying that attribution is, although common to all, rather simple and quick layman's technique for judging others).

51. See John A. Bargh, *Automatic and Conscious Processing of Social Information* (noting that "automatic processes in perception emphasize information that is consistent with one's own expectations"), in 3 *HANDBOOK OF SOCIAL COGNITION* 36 (Robert S. Wyer Jr. & Thomas K. Srull eds., 1984); Saul M. Kassin & Reuben M. Baron, *On the Basicity of Social Perception Cues: Developmental Evidence of Adult Processes?*, 4 *SOC. COGNITION* 180, 195 (1986) (finding that perception of character is greatly influenced by rapid perception of appearance); see also LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 35 (1992) (explaining that human behavior can be explained by cultural context).

52. See RITA FREEDMAN, *BEAUTY BOUND* 43-44 (1986) (arguing that cosmetic industry thrives on "personal doubt" that societal physical appearance discrimination creates); LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 139 (1992) (noting that "American females spend billions of dollars annually on facial cosmetics and cosmetic surgery whose whole purpose is to enhance their facial attractiveness"); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 17 (1991) (noting beauty industry's monetary interest in promoting already predominant tendency to base personal judgments on physical appearance); Barbara Ehrenreich, *Stepping out of a Dread Scourge*, *TIME*, Feb. 17, 1992, at 88 (describing \$500-million-dollar-per-year breast implant industry's interest in promoting appearance-based judgments); see also Una Stannard, *The Mask of Beauty* (stating that "[e]very day, in every way, the billion-dollar beauty business tells women that they are monsters in disguise"), in *WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS* 187, 192 (Vivian Gornick & Barbara K. Morgan eds., 1971).

53. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 240-41 (1985) (describing role of mass media in promoting physical appearance discrimination).

rather, they need only strive to produce the best image of a product because manufacturers thrive on the valuation of image over substance.<sup>54</sup>

#### D. *Some Manifestations of Corporeal Attribution in Modern American Culture*

The effects of the growing obsession with image over substance permeate modern American culture.<sup>55</sup> Children judge their peers according to their peers' attractiveness.<sup>56</sup> Students judge the capabilities of their teach-

54. See DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 181–228 (1961) (presenting fascinating discussion of advertising's valuation of image over substance).

55. DANIEL J. BOORSTIN, *THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM* 239–49 (1961) (discussing several negative effects of America's growing obsession with image over substance).

56. See Thomas R. Alley & Katherine A. Hildebrandt, *Determinants and Consequences of Facial Aesthetics* (concluding that facial attractiveness is advantageous for children in forming peer relationships), in *SOCIAL AND APPLIED ASPECTS OF PERCEIVING FACES* 101–04 (Thomas R. Alley ed., 1988); Karen K. Dion, *The Incentive Value of Physical Attractiveness for Young Children*, 3 *PERSONALITY & SOC. PSYCHOL. BULL.* 67, 67 (1977) (finding that children from ages of three to six preferred to view other physically attractive children, rather than physically unattractive children); Karen K. Dion, *Young Children's Stereotyping of Facial Attractiveness*, 9 *DEVELOPMENTAL PSYCHOL.* 183, 183 (1973) (concluding that “[p]reschoolers inferred that attractive children were more likely to behave prosocially, while unattractive children were perceived as more likely to exhibit antisocial behaviors”); Janice H. Kennedy, *Determinants of Peer Social Status: Contributions of Physical Appearance, Reputation, and Behavior*, 19 *J. YOUTH & ADOLESCENCE* 233, 242 (1990) (noting that physical attractiveness contributes to peer acceptance among children). Notably, researchers have found that children's sex has some bearing on the importance of attractiveness in peer relations. See Karen K. Dion & Ellen Berscheid, *Physical Appearance and Peer Perception Among Children*, 37 *SOCIOMETRY* 1, 1–12 (1974) (studying children between ages of four and six and concluding that boys prefer to form friendships with attractive classmates, while girls exhibit no such preference); J.H. Langlois & L. Styczynski, *The Effects of Physical Attractiveness on the Behavioral Attributions and Peer Preferences in Acquainted Children*, 2 *INT'L J. BEHAVIORAL DEV.* 325, 325–41 (1979) (finding that attractiveness is related to peer popularity for young girls, but not for young boys); Gregory J. Smith, *Facial and Full-Length Ratings of Attractiveness Related to the Social Interactions of Young Children*, 12 *SEX ROLES* 287, 291–92 (1985) (observing that unattractive preschool girls are more often recipients of aggressive behavior by peers than are attractive preschool girls); Brian E. Vaughn & Judith H. Langlois, *Physical Attractiveness as a Correlate of Peer Status and Social Competence in Preschool Children*, 19 *DEVELOPMENTAL PSYCHOL.* 561, 565–66 (1983) (examining connection between sex, attractiveness, and peer relationships and noting that importance of attractiveness in peer relations among children varies according to children's sex). *But see* Richard M. Lerner & Jacqueline V. Lerner, *Effects of Age, Sex, and Physical Attractiveness on Children's Peer Relations, Academic Performance, and Elementary School Adjustment*, 13 *DEV. PSYCHOL.* 585, 585 (1977) (concluding that physical appearance plays dominant role in friendship formation for children, regardless of children's sex); John Salvia et al., *Facial Attractiveness and Personal Social Development*, 3 *J. ABNORMAL CHILD PSYCHOL.* 171, 171–78 (1975) (declaring that ramifi-

ers based upon appearance, rather than performance.<sup>57</sup> Teachers give preferential treatment to attractive students instead of unattractive students, without regard to academic merit.<sup>58</sup> Educational administrators

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cations of facial attractiveness for children do not vary with sex of children); David F. Zakin, *Physical Attractiveness, Sociability, Athletic Ability, and Children's Preference for Their Peers*, 115 J. PSYCHOL. 117, 117-22 (1983) (suggesting that attractiveness is equally important in peer relations for boys and girls).

57. See GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 54 (1985) (describing study in which teachers' age and sex failed to influence student evaluations of them significantly, but teachers' physical attractiveness did influence student evaluations); Stephen Buck & Drew Tiene, *The Impact of Physical Attractiveness, Gender, and Teaching Philosophy on Teacher Evaluations*, 82 J. EDUC. RES. 172, 176 (1989) (reporting that physical appearance of teacher, combined with style of teaching, impacted college students' teacher evaluations); Alan L. Chaiken et al., *Students' Reactions to Teachers' Physical Attractiveness and Non-Verbal Behavior: Two Exploratory Studies*, 15 PSYCHOL. SCH. 588, 588-95 (1978) (finding that children view attractive instructors as more competent than unattractive instructors); Barbara L. Goebel & Valjean M. Cashen, *Age, Sex, and Attractiveness as Factors in Student Ratings of Teachers: A Developmental Study*, 71 J. EDUC. PSYCHOL. 646, 651 (1979) (concluding that students tested, from second-graders to college freshmen, judged teacher competence and capabilities on basis of teacher's physical appearance); Bruce Hunsberger & Brenda Cavanagh, *Physical Attractiveness and Children's Expectations of Potential Teachers*, 25 PSYCHOL. SCH. 70, 70-74 (1988) (noting that more than 92% of children tested preferred attractive teachers to unattractive teachers, and reporting that some students expected physically attractive teachers to punish less, be happier, and be more effective teachers); John P. Lombardo & Mary Ellen Tocci, *Attribution of Positive and Negative Characteristics of Instructors as a Function of Attractiveness and Sex of Instructor and Sex of Subject*, 48 PERCEPTUAL & MOTOR SKILLS 491, 493-94 (1979) (finding that college students tend to give higher ratings to physically attractive teachers in categories of warmth, sensitivity, superiority, ability to communicate, and knowledge of subject matter).

58. See, e.g., G.R. Adams & A.S. Cohen, *An Examination of Cumulative Folder Information Used By Teachers in Making Differential Judgments of Children's Abilities*, 22 ALBERTA J. EDUC. RES. 216, 219-20 (1976) (finding that "[a]ttractive children were viewed as being more creative, intelligent, educationally advanced, and expected to receive higher levels of training than unattractive youth" by 490 teachers tested); Ralph Barocas & Harvey K. Black, *Referral Rate and Physical Attractiveness in Third Grade Children*, 39 PERCEPTUAL & MOTOR SKILLS 731, 733 (1974) (observing that teachers referred physically attractive third-grade children for psychological treatment significantly more often than physically unattractive children, and suggesting that more care is sought on behalf of attractive children than for unattractive children); Margaret M. Clifford & Elaine Walster, *Research Note: The Effect of Physical Attractiveness on Teacher Expectations*, 46 SOC. EDUC. 248, 251-56 (1973) (concluding that children's physical attractiveness is significantly related to teachers' expectations concerning potential peer popularity, parents' interest in children's education, likely scholastic progress, and children's intelligence); John Salvia et al., *Attractiveness and School Achievement*, 15 J. SCH. PSYCHOL. 60, 60-66 (1977) (conducting study which found that teachers gave facially attractive elementary school children significantly higher grades when compared with facially unattractive elementary school children); see also Shelley Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 1387, 1394-96 (1979) (finding positive relationship

grant admission to physically attractive students, passing over other students who are similarly qualified, but physically unattractive.<sup>59</sup> Employers hire and promote physically attractive applicants more frequently than equally qualified, but less attractive, applicants.<sup>60</sup> Doctors treat pa-

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between physical attractiveness, college students' grade point averages, and Scholastic Aptitude Test scores). *But see* Gerald R. Adams & Joseph C. Lavoie, *The Effect of Students' Sex, Conduct, and Facial Attractiveness on Teacher Expectancy*, 95 *EDUC.* 76, 82 (1974) (reporting that facial attractiveness of tested students failed to significantly bias teacher's expectations of performance). At least one researcher suggested that societal bias in favor of the physically attractive makes physically attractive students naturally suited to develop quality communication skills, which results in better academic performance. Shelley Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1387, 1394–96 (1979).

59. *See* Helen Canning & Jean Mayer, *Obesity—Its Possible Effect on College Acceptance*, 275 *NEW ENG. J. MED.* 1172, 1173 (1966) (noting strong possibility “that a form of unconscious prejudice toward obese adolescents is exercised by high school teachers in writing recommendations or by college interviewers or by both”).

60. *See, e.g.,* Thomas F. Cash et al., *Sexism and “Beautyism” in Personnel Consultant Decision Making*, 62 *J. APPLIED PSYCHOL.* 301, 309 (1977) (studying employment hiring decisions by sending resumés of applicants with identical qualifications, but systematically variant photographs depicting applicant as either attractive or unattractive, to professional personnel consultants, and finding that hiring process was biased in favor of physically attractive applicants); Robert L. Dipboye et al., *Sex and Physical Attractiveness of Raters and Applicants as Determinants of Résumé Evaluations*, 62 *J. APPLIED PSYCHOL.* 288, 288–94 (1977) (finding correlation between applicant attractiveness and job offers); David C. Gilmore, *Effect of Applicant Sex, Applicant Physical Attractiveness, Type of Rater and Type of Job on Interview Decisions*, 59 *J. OCCUPATIONAL PSYCHOL.* 103, 103–09 (1986) (conducting study in which physical attractiveness had broader influence than sex in employment hiring decisions); Madeline E. Heilman & Lois R. Saruwatari, *When Beauty Is Beastly: The Effects of Appearance and Sex on Evaluations of Job Applicants for Managerial and Nonmanagerial Jobs*, 23 *ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE* 360, 360 (1979) (investigating effect of appearance on employment application evaluation and finding that “attractiveness consistently proved to be an advantage for men but was an advantage for women only when seeking a nonmanagerial job”); *see also* Ronald E. Riggio & Barbara Throckmorton, *The Relative Effects of Verbal and Nonverbal Behavior, Appearance, and Social Skills on Evaluations Made in Hiring Interviews*, 18 *J. APPLIED SOC. PSYCHOL.* 331, 331 (1988) (finding that physical appearance of applicant was more important in securing employment than was interview training); Jerry Ross & Kenneth R. Ferris, *Interpersonal Attraction and Organizational Outcomes: A Field Examination*, 26 *ADMIN. SCI. Q.* 617, 629 (1981) (reporting that tall and facially attractive male accountants were judged by superiors as having better chance of making partner in firm than shorter and less facially attractive male accountants); *Equality for Ugliers*, *TIME*, Feb. 21, 1972, at 8 (quoting Washington Post Columnist William Raspberry as commenting that “discrimination against ugly women (‘there’s no nice way to say it’) is the most persistent and pervasive form of employment discrimination”). *But see* Myron Boor et al., *Relationship of Physical Appearance and Professional Demeanor to Interview Evaluations and Rankings of Medical Residence Applicants*, 113 *J. PSYCHOL.* 61, 61–65 (1983) (finding that, while grooming was significantly related to interviewer evaluations, overall physical appearance was not significantly related to interviewer ratings in subjects tested); *but cf.* Arnie Cann, *Forced Atten-*

tients differently on the basis of the patients' physical appearance.<sup>61</sup> Constituents vote physically attractive candidates into office.<sup>62</sup> Lawyers

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*tion to Specific Applicant Qualifications: Impact on Physical Attractiveness and Sex of Applicant Biases*, 34 PERSONNEL PSYCHOL. 65, 71–74 (1981) (conducting study and concluding that forced postponement of hiring decision until specific job qualifications can be evaluated tends to slightly diminish hiring bias that favors physically attractive applicants). See generally LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES 83–102 (1992) (discussing various implications of facial appearance in professional employment situations).

61. See *Equal Access to Health Care: Patient Dumping: Hearings Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 1–2 (1988) (opening statement of Hon. Ted Weiss, chairman of subcommittee) (noting that doctors discriminate against patients on basis of patients' physical appearance); Colin Brewer et al., *Beneficial Effects of Jejunostomy on Compulsive Eating and Associated Psychiatric Symptoms*, 4 BRIT. MED. J. 314, 314–16 (1974) (acknowledging physician biases against obese people); Lena A. Nordholm, *Beautiful Patients are Good Patients: Evidence for the Physical Attractiveness Stereotype in First Impressions of Patients*, 14 SOC. SCI. MED. 81, 81–83 (1980) (explaining way in which medical practitioners stereotype attractive patients). Further, physically attractive persons are more likely to be the recipients of altruistic behavior. See, e.g., Peter L. Benson et al., *Pretty Pleases: The Effects of Physical Attractiveness, Race, and Sex on Receiving Help*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 409, 409–15 (1976) (describing positive correlation between victim's facial attractiveness and rescuer's willingness to offer assistance); Patricia R. Mims et al., *Interpersonal Attraction and Help Volunteering as a Function of Physical Attractiveness*, 89 J. PSYCHOL. 125, 125–31 (1975) (finding that college students are more likely to volunteer assistance to physically attractive persons than to those who are physically unattractive); Stephen G. West & T. Jan Brown, *Physical Attractiveness, the Severity of the Emergency and Helping: A Field Experiment and Interpersonal Simulation*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 531, 531–38 (1975) (noting strong positive correlation between victim's physical appearance and willingness of rescuers to volunteer assistance, and finding that correlation only diminishes slightly as severity of victim's emergency increases).

62. See DANIEL J. BOORSTIN, THE IMAGE; OR WHAT HAPPENED TO THE AMERICAN DREAM 249 (1961) (noting that “[o]ur national politics has become a competition for images or between images, rather than between ideals”); NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 4 (1985) (“Although the Constitution makes no mention of it, it would appear that fat people are now effectively excluded from running for high political office. Probably bald people as well. Almost certainly those whose looks are not significantly enhanced by the cosmetician’s art.”); Michael G. Efran & E.W.J. Patterson, *Voters Vote Beautiful: The Effect of Physical Appearance on a National Election*, 6 CAN. J. BEHAVIORAL SCI. 352, 352–56 (1974) (researching correlation between attractiveness and political success); see also Kathryn E. Lewis & Margaret Bierly, *Toward a Profile of the Female Voter: Sex Differences in Perceived Physical Attractiveness and Competence of Political Candidates*, 22 SEX ROLES 1, 1–12 (1990) (noting strong correlation between perceptions of United States Representatives’ competence and their facial attractiveness); Carol K. Sigelman et al., *Gender, Physical Attractiveness and Electability: An Experimental Investigation of Voter Biases*, 16 J. APPLIED SOC. PSYCHOL. 229, 245 (1986) (finding physical attractiveness to be significant asset for male, but not female, candidates). Michael Efran and E.W.J. Patterson conducted an experiment in which students categorized Canadian parliamentary candidates as

choose jurors on the basis of the jurors' facial features,<sup>63</sup> and physically attractive plaintiffs in civil litigation are more likely to win and obtain larger financial settlements.<sup>64</sup>

### III. PHYSICAL APPEARANCE DISCRIMINATION IN THE AMERICAN JUDICIAL SYSTEM

You can tell by looking at him that he's guilty.<sup>65</sup>

#### A. *The Effects of Physical Appearance Discrimination on Defendants in American Criminal Trials*

Physical appearance discrimination plays a substantive and all-too-frequent role in American criminal trials.<sup>66</sup> Research suggests that people viewed as facially unattractive are more likely to be perceived as criminal

physically attractive, physically unattractive, or neutral. Michael G. Efran & E.W.J. Patterson, *Voters Vote Beautiful: The Effect of Physical Appearance on a National Election*, 6 CAN. J. BEHAVIORAL SCI. 352, 352-56 (1974). The results of the actual election showed that attractive candidates received 32% of the votes and unattractive parliamentary candidates received only 11% of the votes. *Id.*

63. See 3 MELVIN M. BELLI, MODERN TRIALS § 51.84 (2d ed. 1982) (describing facial features of prospective juror types as they relate to personality).

64. See Richard A. Kulka & Joan B. Kessler, *Is Justice Really Blind? The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. APPLIED SOC. PSYCHOL. 366, 366 (1978) (evaluating positive correlation between attractiveness of plaintiff, likelihood of success as litigant, and amount of damages awarded); Cookie Stephan & Judy C. Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOL. 149, 149-50 (1977) (postulating that attractive plaintiffs are favored over unattractive plaintiffs in assessing liability and in setting size of damage awards).

65. See *Holland v. State*, 588 So. 2d 543, 545 (Ala. Cr. App. 1991) (relating statement of venireperson made before commencement of William Warren Holland's trial).

66. See Norbert L. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Juror's Verdicts*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 479, 481 (1978) (reporting that jurors generally do not need as much evidence to convict unattractive defendants); Michael F. Colley, *First Impressions*, LITIGATION, Summer 1977, at 8, 9 (discussing importance of subconscious effect on jurors of party's and attorney's clothing); see also Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 480, 484-94 (1987) (discussing various ways in which psychology plays role in criminal trials). Similarly, jurors may judge the veracity of witness testimony on the basis of the witness's physical appearance. See Paul Ekman et al., *Smiles When Lying*, 54 J. PERSONALITY & SOC. PSYCHOL. 414, 415 (1988) (claiming that people often smile when lying as successful means of inducing believability and implying that people are generally aware of others' judgments based on physical appearance concerning truthfulness); Susan M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 692 (1990) (finding that jurors' perceptions of witness's credibility vary according to witness's physical attractiveness).



than are facially attractive persons.<sup>67</sup> Similarly, physically unattractive people are more likely to be reported for committing a crime than are their physically attractive counterparts.<sup>68</sup> It is not surprising, therefore, that jurors tend to base their decisions on the physical appearance of the defendant<sup>69</sup> and the victim<sup>70</sup> in simulated jury trials.<sup>71</sup> Moreover, simu-

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67. See Michael Saladin et al., *Perceived Attractiveness and Attributions of Criminality: What is Beautiful is Not Criminal*, 30 CAN. J. CRIMINOLOGY 251, 256 (1988) (discussing direct relationship between perceptions of facial unattractiveness and perceptions of criminality); Donald J. Shoemaker et al., *Facial Stereotypes of Deviants and Judgments of Guilt or Innocence*, 51 SOC. FORCES 427, 427 (1973) (finding that stereotypical “look” is believed to exist for perpetrators of certain crimes); see also ERNST KRETSCHMER, *PHYSIQUE AND CHARACTER: AN INVESTIGATION OF THE NATURE OF CONSTITUTION AND OF THE THEORY OF TEMPERAMENT passim* (W.J.H. Sprott trans., 2d ed. The Humanities Press, Inc. 1951) (1925) (discussing relationship between facial appearance and potential deviance); CESARE LOMBROSO, *CRIME: ITS CAUSES AND REMEDIES* 35–36 (Henry P. Horton trans., Patterson Smith 1968) (1896) (suggesting that hair color may determine propensity for crime); HOLMES W. MERTON, *DESCRIPTIVE MENTALITY: FROM THE HEAD, FACE AND HAND passim* (1899) (detailing physical attributes as they relate to criminality). A related phenomenon is that perceived criminality tends to distort recall of facial attractiveness. See J.W. Shephard et al., *Effect of Character Attribution on Photo Fit Construction of a Face*, 8 EUR. J. SOC. PSYCHOL. 263, 266–67 (1978) (finding that test subjects tended to distort remembered faces toward unattractiveness, depending upon personal characteristics ascribed to faces).

68. See Forrest A. Deseran & Chang-Soo Chung, *Appearance, Role-Taking, and Reactions to Deviance: Some Experimental Findings*, 42 SOC. PSYCHOL. Q. 426, 426–30 (1979) (conducting experiment and finding that physically attractive shoplifters were reported for crime of shoplifting less often than physically unattractive shoplifters); Kenneth C. Mace, *The “Overt-Bluff” Shoplifter: Who Gets Caught?*, 4 J. FORENSIC PSYCHOL. 26, 26–30 (1972) (claiming that physically unattractive tend to be reported for crime more often than physically attractive); Darrel J. Steffensmeier & Robert M. Terry, *Deviance and Respectability: An Observational Study of Reactions to Shoplifting*, 51 SOC. FORCES 417, 417 (1973) (conducting study and finding that “sex of shoplifter and sex of store customer had little effect on reporting levels, whereas appearance of shoplifter exerted a major independent effect on reporting levels”).

69. See, e.g., Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45, 45–53 (1974) (finding that attractive female defendants were less likely than unattractive female defendants to be found guilty by, and receive lighter sentences from, male jurors); Robert M. McFatter, *Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions*, 36 J. PERSONALITY & SOC. PSYCHOL. 1490, 1499 (1978) (conducting jury simulation using all male defendants and finding that “accidental circumstances were blamed more for attractive manslaughterers . . . than for unattractive manslaughterers”); Charlan Nemeth & Ruth H. Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221, 227 (1973) (conducting simulated-jury research and concluding that “the most salient finding in the present study is the importance of the attractiveness of the defendant on the sentence given to him for a crime”); Jochen Piehl, *Integration of Information in the “Courts:” Influence of Physical Attractiveness on Amount of Punishment for a Traffic Offender*, 41 PSYCHOL. REP. 551, 551–55 (1977) (concluding that physically attractive female

defendants are treated more leniently for minor offenses than are physically unattractive females, but noting that disparity decreased as severity of offense increased). *But see* Gudrun Schwibbe & Michael Schwibbe, *Judgment and Treatment of People of Varied Attractiveness*, 48 PSYCHOL. REP. 11, 11–14 (1981) (conducting simulated-jury research and finding that physical attractiveness had no effect for either male or female defendants). At least one study indicates that moderately attractive defendants are at a greater disadvantage in court than are both very attractive and unattractive defendants. *See* Michael R. Solomon & John Schopler, *The Relationship of Physical Attractiveness and Punitiveness: Is the Linearity Assumption out of Line?*, 4 J. PERSONALITY & SOC. PSYCHOL. BULL. 483, 483–485 (1978) (staging simulated-jury experiment and finding curvilinear relationship between juror's action and defendant's attractiveness because both attractive and unattractive female defendants fared better than moderately attractive female defendants).

70. *See* Marsha B. Jacobson, *Effects of Victim's and Defendant's Physical Attractiveness on Subject's Judgments in a Rape Case*, 7 SEX ROLES 247, 253 (1981) (studying simulated-jury and concluding that defendants in rape trials are more likely to be found guilty when victim is attractive); Norbert L. Kerr & Susan T. Kurtz, *Reliability of the "Eye of the Beholder:" Effects of Sex of the Beholder and Sex of the Beheld*, 12 BULL. PSYCHONOMIC SOC'Y 179, 179–81 (1978) (studying simulated jury and concluding that less evidence is needed to convict defendants when victim is attractive); Bill Thornton, *Effect of Rape Victim's Attractiveness in a Jury Simulation*, 3 J. PERSONALITY & SOC. PSYCHOL. BULL. 666, 666–69 (1977) (examining effects of rape victim's attractiveness on simulated-jury and concluding that guilt determinations are largely function of victim's physical attractiveness); Bill Thornton & Richard M. Rychman, *The Influence of Rape Victim's Physical Attractiveness on Observers' Attributions of Responsibility*, 36 HUM. REL. 549, 549 (1983) (concluding that jury sentencing of defendants accused of rape is influenced by perceived attractiveness of victim). Rape victims who are attractive are sometimes seen as provokers. *See* L.G. Calhoun et al., *The Effects of Victim Physical Attractiveness and Sex of Respondent on Social Reactions to Victims of Rape*, 17 BRIT. J. SOC. & CLINICAL PSYCHOL. 191, 191–92 (1978) (finding that simulated jurors perceived attractive rape victims as more responsible for rape than their unattractive counterparts); Hubert S. Feild, *Rape Trials and Jurors' Decisions: A Psychological Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 L. & HUM. BEHAV. 261, 264 (1978) (describing commonly held belief that attractiveness can lead to rape). *But see* Clive Seligman et al., *Rape and Physical Attractiveness: Assigning Responsibility to Victims*, 45 J. PERSONALITY 554, 561 (1977) (noting that simulated jurors view attractive rape victims as less responsible for rape than unattractive rape victims).

71. It should be noted that investigating actual juror deliberations for the purpose of researching the effects of a defendant's physical appearance on guilt and sentencing determinations is illegal in over 30 states. *See, e.g.*, ALA. CODE § 13A-10-130(a)(5) (1975) (criminalizing recordation of jury proceedings); CAL. PENAL CODE § 167 (West 1980) (criminalizing act of recording or listening to jury without jury's knowledge and consent); MICH. COMP. LAWS ANN. § 750.120b (West 1994) (criminalizing recordation or attempted recordation of jury deliberation); *see also* HARRY KALVEN, JR. & HANS ZEISEL, *Preface to the First Edition of THE AMERICAN JURY* at xv (2d ed. 1966) (describing how attempt to study actual juror deliberations resulted in censure by United States Attorney General and caused investigations by Subcommittee on Internal Security of Senate Judiciary Committee). However, at least one researcher has found that in actual court trials, the physical appearance of the criminal defendant directly relates to the punishment inflicted. *See* John E. Stewart, II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348, 348 (1980) (studying actual crimi-

lated juries tend to recommend lighter sentences for physically attractive defendants and harsher sentences for physically unattractive defendants, regardless of the severity of the crime.<sup>72</sup>

**B. *The Parallel Relationship Between Racial Discrimination and Physical Appearance Discrimination in American Criminal Trials***

In several ways, physical appearance discrimination parallels racial discrimination.<sup>73</sup> First, research suggests that jurors are more lenient with attractive defendants because jurors seem to identify more closely with them.<sup>74</sup> In other words, it is easier for jurors to imagine themselves as the defendant when the defendant is attractive; attractiveness equates with familiarity, which in turn results in empathy.<sup>75</sup> This same premise under-

nal cases, independently rating attractiveness of criminal defendants, and finding that “the more attractive the defendant, the less severe the sentence imposed”).

72. See Gloria Leventhal & Ronald Kratochvil, *Physical Attractiveness and Severity of Sentencing*, 40 PSYCHOL. REP. 315, 315–17 (1977) (conducting simulated-jury research and finding that shorter sentences were recommended for physically attractive defendants than for physically unattractive defendants, regardless of juror’s gender, defendant’s gender, or seriousness of offense); Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410, 410–14 (1975) (finding that attractive defendants held advantage in sentencing proceedings, unless crime was related to attractiveness).

73. See Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1607 (1994) (stating that “if it is morally and legally unacceptable to discriminate against someone on the basis of skin color, it may also be morally troubling to discriminate against someone on the basis of eye color or other cosmetic traits”); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036–37 (1987) (noting similarities between physical appearance discrimination and racial discrimination). Some commentators also equate physical appearance discrimination with disability discrimination. See Toni S. Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Problems?*, 58 J. AIR L. & COM. 267, 327–31 (1992) (claiming that appearance traits, such as obesity, may logically be considered disabilities).

74. David Landy & Elliot Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141, 151 (1969); see Ronald L. Michilini & Stephan R. Snodgrass, *Defendant Characteristics and Juridic Decisions*, 14 J. RES. PERSONALITY 340, 340–47 (1980) (suggesting that leniency bias is result of associating attractiveness with likeability).

75. See Michael Fried et al., *Jury Selection: An Analysis of Voir Dire* (presenting empirical studies which suggest that similarity is important to juror empathy), in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 47, 52–53 (Rita James Simon ed., 1975); see also Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 518–19 (1983) (discussing prosecutorial trial strategy of constantly comparing jurors to victims as means of creating empathy); Heinz Kohut, *Introspection, Empathy and Psychoanalysis*, 7 J. AMER. PSYCHOANALYTIC ASS’N 459, 463–64 (1959) (describing how perceived similarity may result in empathy).

lies racial discrimination in juror judgments: it is easier for jurors to imagine themselves in the defendant's situation when the defendant is of the same race as the juror.<sup>76</sup>

Second, research indicates that white people tend to view black people in general as less physically attractive than other white people.<sup>77</sup> Consequently, white people may tend to view black people as deviant because unattractiveness is associated with deviance.<sup>78</sup> Because most juries con-

76. Donn Byrne & Terry J. Wong, *Racial Prejudice, Interpersonal Attraction, and Assumed Dissimilarity of Attitudes*, 65 J. ABNORMAL & SOC. PSYCHOL. 246, 247 (1962); Clyde Hendrick et al., *Race v. Belief Similarity as Determinants of Attraction: A Search for a Fair Test*, 17 J. PERSONALITY & SOC. PSYCHOL. 250, 259 (1971); see Michael Fried et al., *Jury Selection in America: An Analysis of Voir Dire* (noting that common body of race may foster empathy for defendant), in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 47, 52–53 (Rita James Simon ed., 1975); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275, 282 (1983) (finding that Hispanic jurors perceive Hispanic defendants more favorably than do Anglo jurors); Denis C.E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Juror Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 141 (1979) (observing simulated jury and noting that all-black jury found black defendants less culpable than did all-white jury). *But see* Marine Miller & Jane Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOL. 159, 160 (1978) (asserting that white jurors tend to treat black defendants with more severity than white defendants).

77. Ira H. Bernstein et al., *Cross- v. Within-Racial Judgments of Attractiveness*, 32 PERCEPTION & PSYCHOPHYSICS 495, 500–01 (1982); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1640 (1985). Relatedly, white test subjects have more difficulty distinguishing among black faces than white faces. *See* Paul Barkowitz & John C. Brigham, *Recognition of Faces: Own Race Bias, Incentive and Time-Delay*, 12 J. APPLIED SOC. PSYCHOL. 255, 255 (1982) (finding that white test subjects had more difficulty recognizing previously observed faces when the previously observed faces belonged to black persons); John C. Brigham & Paul Barkowitz, *Do 'They all look alike?': The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOL. 306, 314 (1978) (finding that accuracy of recognizing previously seen faces depends upon race of observer and race of observed); John F. Cross et al., *Sex, Race, Age, and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393, 394 (1971) (conducting research and noting that “[w]hites recognized the white faces more frequently than black faces”); Ruth E. Galper, *“Functional Race Membership” and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455, 458 (1973) (explaining that element of race affects ability to recognize faces); *see also* Roy S. Malpass, *Racial Bias in Eyewitness Identification?*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 42, 43 (1974) (noting that, while white observers have trouble recognizing black faces, black observers have no trouble recognizing white faces).

78. *See* Karen K. Dion, *Physical Attractiveness and Evaluations of Children's Transgressions*, 24 J. PERSONALITY & SOC. PSYCHOL. 207, 207–13 (1972) (finding that unattractiveness is often equated with social deviance); Rhoda K. Unger et al., *Physical Attractiveness and Assumptions About Social Deviance: Some Sex by Sex Comparisons*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 293, 293 (1982) (finding positive correlation between attractiveness and perceived social deviance); *see also* Arthur G. Miller et al., *The Prediction and Perception of Obedience to Authority*, 42 J. PERSONALITY 23, 29 (1974) (not-

tain a white majority,<sup>79</sup> physical appearance discrimination by juries may have a disproportionately negative impact on black defendants.<sup>80</sup>

Third, racial and ethnic discrimination in the American judicial system really constitute physical appearance discrimination, because a defendant's race or ethnicity is usually only surmised by the jurors based on their visual observation of the defendant's physical appearance.<sup>81</sup> It is axiomatic that people cannot discriminate against a person on the basis of a person's race if that race is unknown.

### C. *The Parallel Relationship Between Sex Discrimination and Physical Appearance Discrimination in American Criminal Trials*

Although both sexes discriminate to some degree,<sup>82</sup> physical appearance discrimination has stronger implications for women than for men.<sup>83</sup>

ing that “unattractive persons are attributed feelings of relatively low power or internal control, hence may be perceived as less able to resist authoritative command”).

79. JOHN M. VAN DYKE, *JURY SELECTION PROCEDURES* 30 (1977); Hayward R. Alker, Jr. et al., *Jury Selection as a Biased Social Process*, 11 L. & SOC'Y REV. 9, 33 (1976); see HIROSHI FUKURA ET AL., *RACE AND THE JURY* 3 (1993) (stating that “racial and ethnic minorities are consistently underrepresented in the vast majority of both federal and state courts”). Conversely, it seems that minorities in the American criminal justice system are overrepresented as defendants. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 542 (1993) (noting that in sample of 39 of 75 largest counties in America, 54% of all defendants in 1990 were black, while only 44% were white).

80. See Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–49 (1985) (detailing various research that reveals disadvantage of African-American defendants facing white juries); Richard P. McGlynn et al., *Sex and Race Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOL. 93, 93 (1976) (finding that white jurors are more likely to find black, rather than white, defendants guilty); Denis C.E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 133 (1979) (discovering that white jurors found black defendants guilty more often than they found white defendants guilty in identical mock trials); cf. JAMES P. LEVINE, *JURIES AND POLITICS* 17 (1992) (acknowledging that juries are “a means for the expression of majoritarian sentiment”).

81. See *People v. Motton*, 704 P.2d 176, 180 (Cal. 1985) (asserting that “discrimination is more often based on appearance than verified racial descent”); see also *Sere v. Board of Trustees*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (describing claim of racial discrimination based on employer's hiring of lighter-skinned black applicants over darker-skinned black applicants), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

82. See SHARON S. BREHM, *INTIMATE RELATIONSHIPS* 62 (1985) (noting that attractiveness plays substantial role for both males and females in interpersonal relationships); Susan Sprecher, *The Importance to Males and Females of Physical Attractiveness, Earning Potential, and Expressiveness in Initial Attraction*, 21 SEX ROLES 591, 605 (1989) (finding that level of importance that physical attractiveness played in mate preferences did not vary significantly between males and females).

83. See LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 207 (1992) (declaring that “[t]here is no question

Women are more likely to encounter discrimination on the basis of their physical appearance in society,<sup>84</sup> employment,<sup>85</sup> and the judicial system.<sup>86</sup>

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that females are judged by their attractiveness to a greater extent than are males, and that these judgments have real consequences for them"); *see also, e.g.*, Gerald R. Adams, *Physical Attractiveness, Personality, and Social Reactions to Peer Pressure*, 96 J. PSYCHOL. 287, 294–95 (1977) (noting that attractive females have less fear of being evaluated than do attractive males); Kevin E. O'Grady, *Physical Attractiveness, Need for Approval, Social Self-Esteem, and Maladjustment*, 8 J. SOC. & CLINICAL PSYCHOL. 62, 67 (1989) (finding strong positive relationship between self-esteem and physical attractiveness for females, but not for males); *cf.* Carminati v. Philadelphia Transp. Co., 176 A.2d 440, 443–44 (Pa. 1962) (holding that loss of beauty in personal injury case is compensable injury for young girls because facial scars diminish females' ability to marry); J. Richard Udry & Bruce K. Eckland, *Benefits of Being Attractive: Differential Payoffs for Men and Women*, 54 PSYCHOL. REP. 47, 53–54 (1984) (noting that physically attractive females marry "upward," and finding that no such pattern exists for males).

84. *See* LINDA A. JACKSON, *PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES* 121–23 (1992) (describing various societal implications of attractiveness for females).

85. *See* CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 22–23 (1979) (describing impact on women of appearance-based discrimination in employment). Professor MacKinnon noted: "The point is not that employers prefer good looking employees, men or women. The point is that it is the very qualities which men find sexually attractive in the women they harass that are the real qualifications for the job for which they hire them." *Id.* at 23; *see also* Madeline E. Heilman & M. Stopek, *Being Attractive, Advantage or Disadvantage? Performance-Based Evaluations and Recommended Personnel Actions as a Function of Appearance, Sex, and Job Type*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 202, 202 (1985) (observing that employers rated female employees' performance based on employees' attractiveness, but did not rate male employees with same criterion); Florence W. Kaslow & Lita L. Schwartz, *Self-Perception of the Attractive, Successful Female Professional*, INTELLECT, Feb. 1978, at 313 (noting that "[i]n the business and professional world, the attractive woman has had to pay a heavy price for being well-endowed by nature with comeliness").

86. *Compare* Steven K. Jacobson & Charles R. Berger, *Communication and Justice: Defendant Attributes and Their Effect on the Severity of His Sentence*, 41 SPEECH MONOGRAPHS 282, 282–86 (1974) (finding no bias toward leniency for attractive male defendants in simulated-jury decisions) and Janet Sigal et al., *The Effects of Attractiveness of Defendant, Number of Witnesses, and Personal Motivation of Defendant on Jury Decision-Making Behavior*, 15 PSYCHOL. 4, 4 (1978) (finding that attractiveness had no effect in simulated-jury research using all male defendants) and Ellen K. Solender & Elizabeth Solender, *Minimizing the Effects of the Unattractive Client on the Jury*, 5 HUM. RTS. 201, 201–14 (1976) (finding that male defendant's attractiveness was neither beneficial nor harmful in simulated-jury findings) with Bruce W. Darby & Devon Jeffers, *The Effects of Defendant and Juror Attractiveness on Simulated Courtroom Trial Decisions*, 16 SOC. BEHAV. & PERSONALITY 39, 39–50 (1988) (finding strong correlation between female defendant's attractiveness and guilt determination in simulated-jury research) and Edward D. Smith & Anita Hed, *Effects of Offender's Age and Attractiveness on Sentencing by Mock Juries*, 44 PSYCHOL. REP. 691, 691–93 (1979) (conducting simulated-jury research and concluding that female defendant's facial attractiveness strongly affected jury's sentencing decisions) and Michael R. Solomon & John Schopler, *The Relationship of Physical Attractiveness and Punitiveness: Is the Linearity out of Line?*, 4 J. PERSONALITY & SOC.

Thus, physical appearance discrimination has a disparate impact on women, just as it has a disparate impact on certain races.<sup>87</sup> Yet, while modern American law seems greatly concerned with controlling the effects of discrimination based on race and sex in the American courtroom,<sup>88</sup> the broader underlying issue of physical appearance discrimination is largely ignored, despite the parallel relationships between race, sex, and physical appearance.<sup>89</sup>

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PSYCHOL. BULL. 483–85 (1978) (noting correlation between mock juries' sentencing decisions and female defendants' physical appearance).

87. See 1 MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 9.8(2) (1993) (describing similarity between appearance discrimination and sex discrimination); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987) (analogizing gender-related employment discrimination to appearance-related discrimination); see also Michael Dermer & Darrel L. Theil, *When Beauty May Fail*, 31 J. PERSONALITY & SOC. PSYCHOL. 1168, 1169 n.1 (1975) (claiming that “the fate of unattractive women . . . is not unlike that of Blacks in earlier years”). A dramatic example of the relationship between sex discrimination and appearance discrimination is found in a discussion of one employer's hiring policies. See *Understanding Women*, HARPER'S, Apr. 1987, at 23–24 (describing pharmaceutical corporation's policy of hiring women who “have the look of someone who might clean her bathroom on her hands and knees” and who do not “look like someone who found new boyfriends in singles bars”). Notably, appearance discrimination is also similar to age discrimination. See Toni S. Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Problems?*, 58 J. AIR L. & COM. 267, 315–18 (1992) (stating that some age discrimination may, in fact, be type of age-related appearance discrimination). Some Title VII claimants seeking compensation for age and sex discrimination are actually claiming appearance discrimination. See *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 877 (W.D. Mo. 1983) (holding that sex discrimination claim under Title VII is not cognizable where claim is truly based on employer's appearance discrimination), *aff'd in part and rev'd in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

88. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) (deciding that venirepersons may not constitutionally be excluded from jury service on basis of gender, and stating that “[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination”); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (holding that race-based peremptory strikes violate defendant's equal protection rights); see also *Turner v. Murray*, 476 U.S. 28, 36–37 (1985) (holding that, in certain cases, defendants may exclude racists from serving on juries by questioning venirepersons about racial biases).

89. See Charles T. Passaglia, *Appearance Discrimination: The Evidence of the Weight*, 23 COLO. LAW. 841, 842 (1994) (noting that employers should take comfort in fact that little effort has been made to protect against personal appearance discrimination); see also Andrea M. Brucoli, Comment, *Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosps.: Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition*, 28 GA. L. REV. 771, 796 (1994) (urging lawmakers to increase awareness of problems surrounding appearance discrimination). But see D.C. CODE ANN. §§ 1-2502(22), 1-2512(a) (1992) (protecting against employment discrimination based on physical appearance); MICH. COMP. LAWS ANN. § 37.2202(a) (West 1993) (prohibiting employment discrimination on basis of weight or height).

IV. A CONSTITUTIONAL ANALYSIS OF PHYSICAL APPEARANCE  
DISCRIMINATION IN AMERICAN CRIMINAL TRIALS

You can't judge a book by its cover.<sup>90</sup>

A. *A Due Process Analysis*

The United States Supreme Court is well aware of the important role that a criminal defendant's overall physical appearance plays in criminal proceedings. In *Estelle v. Williams*,<sup>91</sup> for example, the Court held that forcing a criminal defendant to appear before a jury in identifiable prison clothing violates the defendant's due process rights.<sup>92</sup> Further, in *Illinois v. Allen*,<sup>93</sup> the Court noted that an unruly criminal defendant should only be bound and gagged in front of a jury after all other methods of compelling compliance have been exhausted.<sup>94</sup> The Court also held in *Riggins v. Nevada*<sup>95</sup> that compelling a criminal defendant to take antipsychotic drugs as a means of ensuring the defendant's competence to stand trial violates the defendant's due process rights in most instances because antipsychotic drugs might have harmful effects on the defendant's physical appearance.<sup>96</sup>

In *Estelle*, *Allen*, and *Riggins*, the Court essentially acknowledged that a criminal defendant's physical appearance is so vital to his or her defense that any alteration of that appearance by government actors may constitute a denial of due process.<sup>97</sup> Unfortunately, by prohibiting certain state actions that facilitate physical appearance discrimination, while failing to take corresponding measures to prevent state *systems*, such as the jury system, from fostering the same type of discrimination, the Court has

90. Anonymous.

91. 425 U.S. 513 (1976).

92. *Estelle*, 425 U.S. at 513-14.

93. 397 U.S. 338 (1969).

94. *Allen*, 397 U.S. at 344.

95. 112 S. Ct. 1810 (1992).

96. *Riggins*, 112 S. Ct. at 1816-17. In *Riggins*, the Court noted that a state may compel a criminal defendant to take antipsychotic drugs if "necessary to accomplish an essential state policy." *Id.* at 1817.

97. See *Estelle*, 425 U.S. at 504-05 (discussing defendant's appearance in context of right to fair trial); *Allen*, 397 U.S. at 344 (acknowledging that binding and gagging defendant before jury may violate defendant's due process rights); see also Richard L. Ferrel, III, *Riggins v. Nevada Fails to Resolve the Conflict Over Forcibly Medicating the Incompetent Criminal Defendant*, 26 AKRON L. REV. 297, 300-01 (1992) (discussing *Riggins* and *Allen* in light of defendants' constitutional rights). See generally Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 96 (1992) (discussing constitutional implications of state alterations of defendants' appearance before jury).



failed to address one of the major obstacles to a fair trial. Thus, the Court has implicitly accepted juror discrimination based on physical appearance as an inextricable and perhaps necessary evil in maintaining a jury system.<sup>98</sup>

### B. *An Eighth Amendment Analysis*

Despite judicial indifference, the physical appearance discrimination practiced by juries may implicate the same constitutional protections that apply to discrimination based on race and sex.<sup>99</sup> In *McCleskey v.*

98. See *Castaneda v. Partida*, 430 U.S. 482, 516 (1977) (Powell, J., dissenting) (recognizing that “[w]ere it not for the perceived likelihood that jurors will favor defendants of their own class, there would be no reason to suppose that a jury selection process that systematically excluded persons of a certain race would be the basis of any legitimate complaint by criminal defendants of that race”); see also GLANVILLE WILLIAMS, *THE PROOF OF GUILT* 271–72 (3d ed. 1963) (listing problems of jury system and stating that “[t]here is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased, or temperamental”); Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the “Batson Function” to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 208 (1990) (asserting that there is “no disagreement that discrimination pervades the jury process in many civil courthouses”); cf. Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036 (1987) (observing that “[t]o be human is to discriminate”).

99. See Peter B. Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 93 n.290 (1988) (arguing that “contemporary equal protection analysis, taken to its logical and worthwhile limits, . . . proscribe[s] irrational instances of personal appearance discrimination”); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2042 (1987) (noting that physical appearance discrimination plausibly implicates Equal Protection Clause, but doubting success of such claims in light of current restrictive interpretations of Clause’s reach). Likewise, physical appearance discrimination in American criminal trials may implicate Fifth Amendment concerns. The Fifth Amendment proscribes government actors from compelling criminal defendants to testify against themselves. U.S. CONST. amend. V. A defendant’s physical appearance in court is, in essence, a type of evidence that rests before the jury throughout the trial—a form of silent testimony from which jurors might infer guilt or innocence. See *Birden v. Borg*, No. 91-16035, 1993 U.S. App. LEXIS 13088, at \*1 (9th Cir. May 26, 1993) (mentioning prosecutor’s charge that changes in defendant’s in-court physical appearance constituted suppression of evidence); *Holland v. State*, 588 So.2d 543, 545–46 (Ala. Cr. App. 1991) (noting impropriety of venireperson’s remark in front of other jurors that “you can tell by looking at him that he’s guilty”); *Commonwealth v. McKinnon*, 620 N.E.2d 792, 797 (Mass. App. Ct. 1993) (noting inappropriate nature of prosecution’s allusions to defendant’s physical appearance as means of introducing evidence); cf. *In re A.N.*, 630 A.2d 1183, 1184 (N.J. Super. Ct. App. Div. 1993) (holding that when age is element of crime, alleged jurors may infer evidence of age from defendant’s physical appearance). See generally David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1083 (1986) (explaining that some prosecutors have defendant’s pre-trial physical appearance admitted as type of evidence). In fact, research indicates that

*Kemp*,<sup>100</sup> Justice Brennan impliedly acknowledged this premise.<sup>101</sup> In that case, Warren McCleskey argued that a Georgia jury sentenced him to death in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>102</sup> McCleskey relied upon a complex statistical study which indicated that Georgia's death sentence was unequally applied, depending on the race of the victim and the race of the defendant.<sup>103</sup> Based on this study, McCleskey alleged that the Georgia system of capital punishment was unconstitutionally arbitrary because the element of race entered into juries' capital sentencing determinations.<sup>104</sup>

Writing for the majority, Justice Powell rejected McCleskey's argument that a statistical discrepancy in the imposition of capital sentences along racial lines rendered Georgia's capital punishment system unconstitutional.<sup>105</sup> While acknowledging that race is one of many arbitrary factors that jurors might use in imposing death sentences,<sup>106</sup> Justice Powell refused to hold that decisions based on arbitrary and capricious factors render a death penalty cruel and unusual for purposes of the Eighth Amendment.<sup>107</sup> In part, Justice Powell feared that if juror considerations such as race rendered a judgment unconstitutional, considerations such as

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jurors do base judgments of guilt on a defendant's physical appearance. See Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY, 45, 45-53 (1974) (conducting research and finding that guilt determinations are influenced by defendants' physical appearance). Thus, compelling a criminal defendant to be present before a jury essentially forces the defendant to testify, which directly contradicts the purposes underlying the Fifth Amendment. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (discussing purposes underlying privilege against self-incrimination); cf. Ann L. Iijima, *The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances*, 29 HARV. C.R.-C.L. L. REV. 101, 130 (1994) (noting that in-court appearance in tax evasion case may be self-incriminatory).

100. 481 U.S. 279 (1987).

101. See *McCleskey*, 481 U.S. at 341 (Brennan J., dissenting) (suggesting that any arbitrary factor that plays role in convicting and sentencing defendants may render conviction or sentence unconstitutional).

102. *Id.* at 286.

103. *Id.* at 286-87. Specifically, McCleskey relied on the statistical analysis performed by Professors David C. Baldus, George Woodworth, and Charles Pulaski, which found that in Georgia "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.*

104. *Id.* at 286-92.

105. *McCleskey*, 481 U.S. at 297.

106. See *id.* at 319 (recognizing that jurors may also discriminate on basis of facial characteristics and physical attractiveness of defendants and victims).

107. *Id.* at 319.

gender and physical appearance might support constitutional challenges as well.<sup>108</sup>

In his dissent, Justice Brennan noted the fundamental importance of preventing arbitrary factors from serving as a basis for punishment and accused the majority of fearing “too much justice.”<sup>109</sup> He reasoned that race is simply too arbitrary a factor for jurors to consider in imposing a sentence of death.<sup>110</sup> Justice Brennan observed that factors such as hair color, which the Court may consider morally irrelevant, could at least theoretically impact sentencing results to the extent that the Court “would regard as arbitrary a system in which [those factors] played a significant role.”<sup>111</sup> This observation led Justice Brennan to suggest that physical appearance discrimination by jurors may result in unconstitutionally arbitrary sentencing.<sup>112</sup>

Aside from *McCleskey*, the Court has recognized in other contexts that arbitrarily dispensed state punishments may violate the Eighth Amendment’s Cruel and Unusual Punishment Clause.<sup>113</sup> Therefore, in light of the plethora of research which suggests that sentencing allocations vary according to the defendant’s physical appearance,<sup>114</sup> and considering the

108. *Id.* at 317–19. Justice Powell wrote:

If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by *McCleskey*.

*Id.* at 318–19.

109. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

110. *Id.* at 339–40 (Brennan, J., dissenting).

111. *Id.* at 341.

112. *Id.*

113. See *Saffle v. Parks*, 494 U.S. 484, 506 (1990) (noting that “[t]he foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner”); see also *Sawyer v. Whitley*, 112 S. Ct. 2514, 2520 (1992) (Brennan J., dissenting) (describing Framers’ process-based protections that guard against inaccurate truth finding, including “the Eighth Amendment’s . . . [protection] against the imposition of an arbitrary and capricious sentence”); *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (noting that original intent of Eighth Amendment was to “forbid arbitrary and discriminatory penalties”); cf. Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839, 845–46 (1969) (noting that Cruel and Unusual Punishment Clause was derived from English Bill of Rights of 1689, which Parliament designed to outlaw arbitrarily dispensed punishments).

114. See, e.g., Bruce W. Darby & Devon Jeffers, *The Effects of Defendant and Juror Attractiveness on Simulated Courtroom Trial Decisions*, 16 SOC. BEHAV. & PERSONALITY 39, 39–50 (1988) (finding that simulated-jury decisions vary according to attractiveness of defendant); Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and the Severity of Recommended Punishment in a Simulated Jury*

infirm foundations upon which *McCleskey* rests,<sup>115</sup> it is logical to conclude that the Eighth Amendment's prohibition against cruel and unusual punishment may someday evolve to proscribe physical appearance discrimination in the imposition of criminal sentences.

### C. *An Equal Protection Analysis*

Even if physical appearance discrimination by jurors does not violate the Eighth Amendment, it may deny criminal defendants equal protection of the law.<sup>116</sup> To establish a colorable equal protection claim, a claimant must first prove that a state actor engaged in purposeful discrim-

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*Task*, 8 J. RES. PERSONALITY 45, 45 (1974) (concluding that juries found physically attractive defendants guilty less often and sentenced them less severely than physically unattractive defendants); Gloria Leventhal & Ronald Krate, *Physical Attractiveness and Severity of Sentencing*, 40 PSYCHOL. REP. 315, 317 (1977) (conducting simulated-jury research and stating that "those defendants who were rated by an independent group to be attractive were given lighter sentences, while those rated unattractive by that independent group tended to receive longer terms"); Ronald L. Michilini & Stephan R. Snodgrass, *Defendant Characteristics and Juridic Decisions*, 14 J. RES. PERSONALITY 340, 340 (1980) (conducting simulated-jury research and finding that "the attractive defendant was treated more leniently than the unattractive defendant, regardless of the relevancy of the traits of the crime"); Jochen Piehl, *Integration of Information in the "Courts:" Influence of Physical Attractiveness on Amount of Punishment for a Traffic Offense*, 41 PSYCHOL. REP. 551, 554 (1977) (conducting simulated-jury research and finding support for previously conducted research which concluded that "attractive defendants are treated leniently to some extent"); Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410, 410-14 (1975) (revealing strong positive correlation between defendant's physical attractiveness and sentencing decisions); Edward D. Smith & Anita Hed, *Effects of Offender's Age and Attractiveness on Sentencing by Mock Juries*, 44 PSYCHOL. REP. 691, 691 (1979) (surmising that "attractive people were judged less harshly than unattractive people"); see also Ellen K. Solender & Elizabeth Solender, *Minimizing the Effects of the Unattractive Client on the Jury*, 5 HUM. RTS. 201, 201-14 (1976) (explaining bias that physically unattractive defendants face in criminal cases); M.R. Solomon & J. Schopler, *The Relationship of Physical Attractiveness and Punitiveness: Is the Linearity Assumption Out of Line?*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 483, 483-85 (1978) (describing bias against physically unattractive in sentence allocation).

115. See Jacqueline Cook, Casenote, *Constitutional Law: McCleskey v. Kemp Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387, 387-88 (noting that *McCleskey* was five to four decision, and claiming that *McCleskey* is inconsistent with prior Supreme Court case law); see also Rebecca A. Rafferty, Note, *In the Shadows of McCleskey v. Kemp: The Discriminatory Impact of the Death Sentencing Process*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 271, 304-08 (1995) (describing congressional attempts to legislatively overturn *McCleskey*).

116. See U.S. CONST. amend. XIV (prohibiting states from denying equal protection of laws).

ination.<sup>117</sup> A claimant may, however, establish purposeful discrimination “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”<sup>118</sup> Accordingly, statistical evidence which suggests that arbitrary jury decisions have an immensely disproportionate impact on unattractive criminal defendants may suffice to prove that a state jury system purposefully discriminates on the basis of physical appearance.<sup>119</sup>

A defendant must also show that he or she is a member of a “recognizable, distinct class, singled out for different treatment” to establish an equal protection claim.<sup>120</sup> In the context of physical appearance discrimination, this “suspect class” requirement is satisfied because the physically unattractive have historically been singled out for discriminatory treatment by the law<sup>121</sup> and society.<sup>122</sup> Physically unattractive people are, by definition, a distinct and almost universally recognizable group of people.<sup>123</sup> For purposes of the Equal Protection Clause, a physically unat-

117. *Washington v. Davis*, 426 U.S. 229, 239–40 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973); *Whitus v. Georgia*, 385 U.S. 545, 550 (1966); see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.2, at 570–73 (4th ed. 1991) (describing requirements of colorable equal protection claim).

118. *Batson v. Kentucky*, 476 U.S. 79, 94 (1985).

119. See *Castaneda v. Partida*, 430 U.S. 482, 494 n.13 (1977) (noting that sufficiently large disparity in impact may suffice to prove discriminatory intent); *Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 266 (1977) (insinuating that disproportionate impact may establish discriminatory intent); see also Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 791–96 (1993) (describing efficacy of discriminatory intent arguments based on disproportionate impact); cf. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (warning against grounding constitutional decisions on supposed state intentions or motivations, thereby insinuating that effect of challenged law is more important than purpose of challenged law in constitutional claims). *But cf. Washington*, 426 U.S. at 247–48 (noting that impact alone may not always suffice to prove discriminatory intent).

120. *Castaneda*, 430 U.S. at 494; *Hernandez v. Texas*, 347 U.S. 475, 478–79 (1953).

121. See Marcia P. Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a ‘Suspect Class’ Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 863 (1975) (discussing major American cities’ “ugly-laws,” which prohibit “unsightly” people from appearing in public).

122. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987) (noting that physically unattractive people are “poorly treated in such diverse contexts as employment decisions, criminal sentencing, and apartment renting”). One commentator noted that, “[a]lthough appearance discrimination can have a devastating economic, psychological, and social impact on individuals, its victims have not yet found a legal recourse.” *Id.*

123. See Ira H. Bernstein et al., *Cross- v. Within-Racial Judgments of Attractiveness*, 32 PERCEPTION AND PSYCHOPHYSICS 495, 495 (1981) (finding cross-cultural consensus among test subjects’ perceptions of who is and who is not attractive); see also John F. Cross & Jane Cross, *Age, Sex, Race and the Perception of Facial Beauty*, 5 DEV. PSYCHOL. 433, 437–38

tractive defendant may legitimately claim that he or she belongs to a distinct class of people with immutable traits that has traditionally been subjected to discrimination.<sup>124</sup>

Finally, a defendant presenting an equal protection claim must prove that the challenged state action does not pass scrutiny under the Court's "logical nexus" doctrine.<sup>125</sup> If a state action discriminates against an individual on the basis of an immutable characteristic<sup>126</sup> or impinges on a "fundamental" right,<sup>127</sup> strict scrutiny analysis applies and the State must prove that its action is necessary to achieve a compelling state interest.<sup>128</sup> Because physical appearance is largely an immutable trait,<sup>129</sup> state-sanctioned physical appearance discrimination should trigger strict scrutiny.

(1971) (finding that, although race and sex of observer may slightly affect external perceptions of attractiveness, age of observer does not); Douglas F. Johnson & John B. Pittenger, *Attribution, the Attractiveness Stereotype and the Elderly*, 20 DEV. PSYCHOL. 1168, 1168-72 (1984) (finding that variable of age does not effect consensus among test subjects' perceptions of attractiveness).

124. See Toni S. Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Problems?*, 58 J. AIR L. & COM. 267, 325 (1992) (claiming that appearance, as opposed to grooming, is immutable trait); see also *Kelley v. Johnson*, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting) (suggesting that appearance and grooming style might be immutable characteristics because "personal appearance may reflect, sustain, and nourish [a person's] personality and may well be used as a means of expressing [a person's] attitude and lifestyle"). See generally *Fullilove v. Kluznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (finding that "immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision").

125. *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); GERALD GUNTHER, *CONSTITUTIONAL LAW* 586 (11th ed. 1985); Robert W. Bennett, "Mere" Rationality in *Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1049 (1979).

126. *Michael M. v. Superior Court*, 450 U.S. 464, 477-78 (1981) (Stewart, J., concurring); *Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, § 14.3, at 575-78 (4th ed. 1991); see *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that immutable characteristics are those "determined solely by the accident of birth").

127. *Rodriguez*, 411 U.S. at 16; *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, § 14.3, at 575-78 (4th ed. 1991).

128. *Kahn v. Shevin*, 416 U.S. 351, 357 (1974); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 18 (1974) (Marshall, J., dissenting); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

129. See Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 201 (1985) (noting that "[a] youthful appearance is an immutable or, at the very minimum, a semi-immutable characteristic"); Toni S. Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?*, 58 J. AIR L. & COM. 267, 325 (1992) (stating that "appearance, as an intrinsic part of an individual, is immutable"); cf. GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 154 (1985) (describing various types of physical features that test subjects agreed made someone "physically attractive"); Pamela

Likewise, because the right to an impartial jury in a criminal trial is a fundamental right<sup>130</sup> and a state system that fosters arbitrary juror discrimination impinges on this right,<sup>131</sup> physical appearance discrimination by juries should invoke strict scrutiny under the Equal Protection Clause. Thus, a state jury system that discriminates against a criminal defendant on the basis of physical appearance is constitutionally permissible only if the practice of discrimination is necessary to achieve a compelling state interest.<sup>132</sup>

The states' interest in maintaining a jury system is not only legitimate and important, but it is also compelling because juries serve to ensure the freedom of innocent people and protect against the tyrannical and capricious whims of government.<sup>133</sup> However, allowing juries free reign to dis-

Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175, 217 (1990) (claiming that age-related appearance is "semi-immutable").

130. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976); *Johnson v. State*, 476 So. 2d 1193, 1209 (Miss. 1985); see *Johnson v. Louisiana*, 406 U.S. 366, 366 (1972) (Powell, J., concurring) (noting that right to jury trial is fundamental); *Duncan v. Louisiana*, 391 U.S. 145, 152-54 (1968) (recognizing that strong historical significance of jury trials supports conclusion that right to jury trial is fundamental); *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1512 (11th Cir. 1991) (noting that right to impartial jury is "most fundamental of all freedoms" (quoting *Estes v. State*, 381 U.S. 532, 540 (1965))).

131. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (explaining that equal protection precedent proscribes state action that discriminates on basis of "an unjustifiable standard such as race, religion, or other arbitrary classification").

132. See *Craig*, 429 U.S. at 211 (Stevens, J., concurring) (discussing logical nexus test).

133. See Dale W. Broder, *The Functions of the Jury: Facts or Fictions*, 21 U. CHI. L. REV. 386, 386 (1954) (stating that "[m]ore than any other institution, the jury has been the symbol of a democratic people zealous of freedom and afraid of centralized government power"); see also *Hearings on Recording of Jury Deliberations Before the Subcomm. to Investigate the Administration of the Internal Security Act of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess., 63-81 (1955) (publishing extensive bibliography of works relating to benefits and drawbacks of jury systems). Praising the virtues of the jury system, Lord Justice Devlin proclaimed:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

LORD JUSTICE DEVLIN, TRIAL BY JURY 164 (1956). Lord Justice Devlin echoed the sentiments of Alexis de Tocqueville, who explained:

The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing which is judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged.

criminate on the basis of race, sex, or physical appearance is not necessary, or even rationally related, to the achievement of the states' admittedly compelling interest.<sup>134</sup> To the contrary, allowing juries to discriminate freely and arbitrarily on irrelevant bases affirmatively fosters the evils that juries are designed to prevent—the capricious imprisonment and execution of innocents.<sup>135</sup> As Justice Thurgood Marshall noted:

It makes little difference to a criminal defendant whether the jury has prejudiced him because of the color of his skin or the length of his hair. In either event he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict.<sup>136</sup>

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ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (Francis Brown trans., Alfred E. Knopf 1976) (1835). Thomas Jefferson also summarized his philosophical beliefs concerning juries by writing succinctly: “Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.” Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (Julian P. Boyd ed., 1958). Nevertheless, the jury system is not without its staunch critics. See Bruce G. Seville, *Trial by Jury: An Ineffectual Survival*, 10 *A.B.A. J.* 53, 55 (1924) (criticizing jury system). Seville exclaimed:

Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve. Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakespearean character been echoed “Justice has fled to brutish beasts and men have lost their reason.”

*Id.*; see also H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966) (discussing historic criticisms of jury system).

134. See *Turner v. Murray*, 476 U.S. 28, 36–38 (1985) (recognizing states' lack of interest in having racially biased juries and holding that defendants have right, under certain circumstances, to question prospective jurors concerning racial biases); *Ham v. South Carolina*, 409 U.S. 524, 531–32 (1973) (Marshall, J., concurring in part and dissenting in part) (suggesting that defendant's right to impartial jury is more important than states' interest in maintaining efficient jury system); see also *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (discussing importance of juries deciding cases only on legitimate criteria and not based on arbitrary considerations); *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (recognizing that “the theory of the law is that a juror who has formed an opinion cannot be impartial”).

135. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*349–50 (including preservation of freedom against arbitrary judgments among virtues of jury system); BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* VI, 79–80 (Thomas Nugent trans., Hafner Publishing 1949) (1748) (claiming that jury system is best method of preserving freedom of innocent people); cf. *Ham*, 409 U.S. at 531–32 (Marshall, J., concurring in part and dissenting in part) (warning against dangers of prejudiced juries).

136. *Ham*, 409 U.S. at 531–32 (Marshall, J., concurring in part and dissenting in part). Although Justice Marshall made this observation in a case involving a due process claim, his admonitions concerning the importance of impartiality and neutrality of jurors tran-



Thus, the Equal Protection Clause appears to require that state jury systems not discriminate on the wholly irrelevant basis of physical appearance.

#### D. A Sixth Amendment Analysis

To ensure that jury systems are free from discrimination, the Framers modified the clause in the Constitution that provided for the right to a jury trial<sup>137</sup> by drafting the Sixth Amendment, which created the right to an *impartial* jury.<sup>138</sup> Unlike due process and equal protection claims, the Court has acknowledged that there is no “purposeful discrimination” requirement in a Sixth Amendment claim; a disproportionate impact may suffice to render a jury practice unconstitutional under the Sixth Amendment.<sup>139</sup> Thus, the United States Supreme Court recognized, as did the Framers, that even the possibility of juror partiality may violate a criminal defendant’s Sixth Amendment rights.<sup>140</sup> Accordingly, the Court held in

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scend the strictures of the Due Process Clause. *See id.* at 531 (describing importance of impartiality in juror decisions).

137. *See* U.S. CONST. art. III, § 2, cl. 2 (providing for trial by jury).

138. *See* U.S. CONST. amend. VI (providing for trial by *impartial* jury); *Glasser v. United States*, 315 U.S. 60, 85 (1942) (noting Sixth Amendment’s modification of Article III). The Court in *Glasser* stated:

Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of a jury trial. When the original Constitution provided only that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.

*Id.* (footnote omitted) (quoting U.S. CONST. art. III, § 2, cl. 2).

139. *See Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979) (holding that “in Sixth Amendment . . . cases, systematic disproportion itself demonstrates an infringement of the defendant’s interest”); *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980) (stating that “a defendant need not show discriminatory purpose for a Sixth Amendment violation”), *cert. denied*, 447 U.S. 921 (1980); *see also* Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1090–91 (1987) (noting that one advantage claimants have in advancing Sixth Amendment claims over Equal Protection claims is that Sixth Amendment claims have no intentional discrimination requirement).

140. *See, e.g., Witherspoon v. United States*, 391 U.S. 510, 518–23 (1968) (holding that process of excluding venirepersons who are merely opposed to death penalty resulted in unconstitutionally biased jury); *Turner v. Louisiana*, 379 U.S. 466, 471–75 (1965) (holding that allowing sheriff in charge of jury to testify for prosecution biased jury unconstitutionally); *Irvin v. Dowd*, 366 U.S. 717, 728–29 (1961) (recognizing that exposure of jurors to overzealous media coverage of trial’s underlying facts before trial began resulted in seating of unconstitutionally biased jury); *Glasser*, 315 U.S. at 84–88 (holding that selection of jurors from membership of particular private organizations resulted in potentially biased jury in violation of Sixth Amendment).

*Turner v. Murray*<sup>141</sup> that, under certain circumstances, the Sixth Amendment affords a criminal defendant the constitutional right to have a judge question prospective jurors concerning their propensity to discriminate on the basis of race.<sup>142</sup> The Court recognized that the Sixth Amendment's guarantee of an impartial jury includes the right to exclude jurors who may discriminate or fail to judge on the basis of evidence alone.<sup>143</sup> However, since this slowly developing approach is, at best, only effective in excluding overtly biased jurors, it fails to account for the probability that discrimination by jurors is an unconscious process.<sup>144</sup>

To address unconscious discrimination, the Court sought to counterbalance juror biases by ensuring that juries represent a "fair cross-section of the community."<sup>145</sup> For example, in *Batson v. Kentucky*,<sup>146</sup> the Court held that venirepersons may not be excluded from jury service on the basis of their race.<sup>147</sup> Likewise, in *J.E.B. v. Alabama ex rel T.B.*,<sup>148</sup> the Court held that venirepersons may not be excluded on the basis of their

141. 476 U.S. 28 (1986).

142. *Turner*, 476 U.S. at 36–37.

143. *See id.* at 35–37 (discussing dangers of discrimination by jurors and need to exclude racist jurors); *see also* Powers v. Ohio, 499 U.S. 400, 415 (1991) (stressing importance of eradicating discrimination by jurors); Holland v. Illinois, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (discussing importance of absolutely impartial jurors).

144. *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (noting that "[r]acism is in large part a product of the unconscious"); *see also* Rose v. Mitchell, 443 U.S. 545, 558–59 (1979) (stating that "today discrimination takes a form more subtle than before"); Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981) (noting importance of peremptory strikes in countering jurors' unconscious racism); John F. Dovidio & Samuel L. Gaertner, *The Aversive Form of Racism* (reviewing studies and concluding that unconscious racism is as harmful as overt racism), in PREJUDICE, DISCRIMINATION AND RACISM 85 (John F. Dovidio & Samuel L. Gaertner eds., 1986); Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1023 (1988) (detailing ways in which unconscious racism pervades criminal law); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2324 (1993) (observing that "[a]ll people see the world through lenses tinted by both conscious and unconscious biases").

145. *See* Ballew v. Georgia, 435 U.S. 223, 234 (1978) (noting that "fair cross-section" approach to seating jury promotes "the counterbalancing of various biases [that] is critical to the accurate application of the common sense of the community to the facts of any given case"); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 122 (1994) (describing "fair cross-section" doctrine as response to unconscious biases); *see also* M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2324 (1993) (recognizing that "[a]n impartial jury would . . . logically be 'well rounded'—a jury in which the individual biases of some jurors are offset by those of others").

146. 476 U.S. 79 (1986).

147. *Batson*, 476 U.S. at 93–99.

148. 114 S. Ct. 1421 (1994).

sex.<sup>149</sup> Therefore, the Court has sought to achieve jury impartiality by guaranteeing that juries are drawn from diverse groups, thereby allowing for the counterbalancing of biases.<sup>150</sup> The Court's approach in this area acquiesces, however, in the face of discrimination by jurors because the Court has attempted merely to mitigate the effects of juror discrimination by either enhancing a defendant's ability to exclude jurors who overtly discriminate, as in *Turner*, or by ensuring the counterbalancing of covert juror biases with other jurors' covert biases, as in *J.E.B.* and *Batson*.<sup>151</sup>

Though crude, these methods may be effective when different jurors hold different biases.<sup>152</sup> For instance, if only a small section of the community, such as Ku Klux Klan members, discriminates overtly, it is feasible that the judicial system could effectively exclude that section from jury service.<sup>153</sup> Similarly, under the Court's "fair cross-section of the

149. *J.E.B.*, 114 S. Ct. at 1422.

150. See Roger L. Hochman, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1388–89 (1993) (discussing Court's attempt to counterbalance male juror biases with female juror biases in hopes of achieving jury impartiality); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1050–51 (1991) (noting that Court seeks to achieve jury impartiality through counterbalancing of juror biases); see also *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978) (recognizing that "the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent that they are antagonistic, will tend to cancel each other out"). Although the Court based its holdings in *Batson* and *J.E.B.* on the Equal Protection Clause, both opinions suggest that juror biases should be counterbalanced to ensure representative juries. See *J.E.B.*, 114 S. Ct. at 1427–28 (discussing negatives of non-representative juries); *Batson*, 476 U.S. at 85–87 (noting benefits of representative juries).

151. See *J.E.B.*, 114 S. Ct. at 1427 (stating that "litigants are harmed by the risk that the prejudice which motivated the discriminatory selection [of jurors] will effect the entire proceedings," thereby implicitly emphasizing importance of having well-balanced jury); *Batson*, 476 U.S. at 86–87 (noting importance of having "indifferently chosen" jury and implying need for "balanced" jury (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*350)); *Turner*, 476 U.S. at 36–37 (enhancing defendant's ability to question potential jurors concerning racial prejudice); see also *Ballew*, 435 U.S. at 234 (stating that "the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case").

152. See M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2325 (1993) (recognizing that diversity of juror biases is essential to ensure impartial jury under "fair cross-section of the community" approach); see also *Ballew*, 435 U.S. at 233 (claiming that size of jury is important in process of counterbalancing juror biases as means of ensuring impartial jury); J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015, 1049 (1989) (noting that "a heterogeneous jury is less likely to share common biases that might interfere with an accurate evaluation of the facts").

153. See *Mauldin v. State*, 874 S.W.2d 692, 698 (Tex. App.—Tyler 1993, pet. ref'd) (noting that Ku Klux Klan members can easily be excluded from jury service); Kenneth B.

community” approach, one juror’s covert antiblack sentiments may be offset by another juror’s covert antiwhite sentiments.<sup>154</sup> These approaches fail, however, when all people share the same overt or covert bias.<sup>155</sup> Thus, physical appearance discrimination presents a unique dilemma that is, perhaps, more menacing than the dilemma of race-<sup>156</sup> or sex-based bias,<sup>157</sup> because research suggests that all people discriminate on the basis of physical appearance<sup>158</sup>—even the physically unattractive themselves.<sup>159</sup> Accordingly, the exclusion of all people in a community with this bias leaves no one left to serve on juries. Likewise, the “fair cross-section of the community” approach to discrimination fails because no bias exists within the community with which to counterbalance the physical appearance bias. Hence, the traditional safeguards of the voir dire process seem ill-suited to ensure a criminal defendant’s uncontroverted right to be judged on the merits of the evidence, rather than on the

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Nunn, *Rights Held Hostage: Race, Ideology, and the Peremptory Challenge*, 28 HARV C.R.-C.L. L. REV. 63, 118 (1993) (observing that efficacy of challenges for cause is limited to overt forms of racism).

154. See Roger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1388–89 (1993) (analyzing “fair cross-section” approach as means of ensuring jury impartiality); M.A. Widder, Note, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2324–25 (1993) (noting that Court’s “fair cross-section” approach to jury selection process is designed to ensure impartiality through counterbalancing of biases). See generally *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 168, 178 n.66 (1990) (claiming that original intent behind peremptory challenges was to counterbalance various juror biases).

155. See *Wheeler*, 583 P.2d at 755 (suggesting that diversity of jury composition only achieves jury impartiality when biases of jurors are similarly diverse); cf. *Dennis v. United States*, 339 U.S. 162, 183 (1950) (Frankfurter, J., dissenting) (stating that “one cannot have confident knowledge of influences that may play and prey unconsciously upon [juror’s] judgment”); Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL’Y & L. 445, 449 (1994) (reviewing HIROSHI FUKARAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* (1993)) (noting that jury impartiality is necessarily premised upon diversity of juror backgrounds).

156. See Charlan Nemeth & Ruth H. Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221, 227 (1973) (arguing that defendant’s race is not nearly as important as defendant’s physical attractiveness in allocation of sentences).

157. See Gloria Leventhal & Ronald Kratochwill, *Physical Attractiveness and Severity of Sentences*, 40 PSYCHOL. REP. 315, 315–17 (1977) (asserting that defendant’s physical attractiveness is more important than defendant’s sex in sentence allocation).

158. JOHN H. HARVEY & GIFFORD WEARY, *PERSPECTIVES ON ATTRIBUTIONAL PROCESSES* 5 (1981).

159. See Marshall Dermert & Darrel L. Theil, *When Beauty May Fail*, 31 J. PERSONALITY & SOC. PSYCHOL. 1168, 1173 (1975) (finding that, although unattractive people make different types of appearance-based attributions, they also ascribe some positive characteristics on basis of physical appearance).

basis of his or her physical appearance.<sup>160</sup> A new approach is, therefore, in order.

## V. REMEDIAL SUGGESTIONS

[J]ustice to be done, it is often said, must be seen to be done; but justice to be established, cannot be seen to be established.<sup>161</sup>

Discrimination by jurors is treated as an unfortunate, but inherent, phenomenon in jury systems.<sup>162</sup> Legal scholars have called for greater jury diversity to offset individual juror biases with other jurors' biases.<sup>163</sup> Jury diversity fails, however, when the discrimination to be countermanded is nearly universal.<sup>164</sup> For example, commentators generally believe that people will discriminate, consciously or unconsciously, against people with unsavory reputations.<sup>165</sup> The law does not, however, attempt

160. Cf. Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 650 (1991) (stating that "the research that is available suggests that voir dire is ill-suited to its important task"); Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 172 (1988) (stating that "voir dire examination is grossly ineffective in eliciting data that would indicate juror prejudices").

161. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 244 (1982).

162. See Nancy J. King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 *passim* (1993) (assessing results of empirical studies and describing inadequacy of Supreme Court's jurisprudence regarding discrimination by jurors).

163. See James S. Bowen, *Peremptory Challenge Discrimination Revisited: Do Batson and McCleskey Relieve or Intensify the Swain Paradox?*, 11 NAT'L BLACK L.J. 291, 329 (1990) (analyzing various suggested means of ensuring jury diversity); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1695–99 (1985) (calling for mandatory racial quotas in jury selection process as means of guaranteeing diversity); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2332 (1993) (calling for greater protection of jury representativeness). *But see* Mark Sabel, Comment, *Racing Away From Georgia v. McCollum: The Case for an All-Black System of Criminal Justice*, 13 NAT'L BLACK L.J. 83, 113 (1993) (calling for establishment of separationist all-black court system); Note, *The Case for Black Juries*, 79 YALE L.J. 531 *passim* (1970) (discussing feasibility and desirability of establishing all-black jury system).

164. See *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978) (suggesting that diversity of jurors fails when juror biases are not antagonistic).

165. See MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 162–63 (1978) (noting that people tend to discriminate on basis of reputation); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 18 (1993) (discussing foundations of laws excluding character evidence); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (noting that "humans have always sought to read one another's characters and often base important decisions on these judgments").

to screen out jurors that might overtly discriminate in this fashion, nor does the law attempt to offset jurors that would covertly place weight on a person's reputation with those that would not. Instead, the law simply mandates that character evidence is generally inadmissible at trial to prove actions in conformity therewith.<sup>166</sup> Instead of inefficiently excluding biased jurors from the courtroom, or attempting to balance juror biases within the courtroom, the law eliminates any opportunity for jurors to discriminate in this regard by simply excluding evidence of the defendant's character altogether.<sup>167</sup>

Accordingly, the law should seek to end juror discrimination based on race, sex, and physical appearance in much the same way that it approaches character evidence—by keeping any evidence of the defendant's race, sex, and physical appearance out of the courtroom. Because evidence of the defendant's physical appearance is mainly drawn from visual observations made during trial, a court, in order to keep physical appearance evidence out of the jury's consideration, should offer the defendant the option of remaining outside of the jury's presence. In addition to being easy to implement and administer, this approach would promote increased fairness and objectivity in criminal trials. Moreover, this approach would be even more effective than the *Batson* method at ending courtroom discrimination<sup>168</sup> because it is free from the inefficient and intractable inquiries of *Batson*.<sup>169</sup> To ensure the viability of this approach, the Court could prevent prosecutors from mentioning a defendant's absence from the courtroom under the same theory that prosecutors are disallowed from mentioning the defendant's refusal to testify at trial.<sup>170</sup>

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166. See, e.g., FED. R. EVID. 404(a) (creating blanket exclusion to admissibility of character evidence, limited by several enumerated exceptions); ARK. CODE ANN. § 16-41-404 (Michie 1994) (mirroring federal rules of evidence concerning admissibility of character evidence); OR. REV. STAT. § 40.170 (1993) (establishing that evidence of character is inadmissible to prove actions in conformity therewith, except in certain enumerated instances).

167. See FED. R. EVID. 404(a) (prohibiting use of evidence concerning defendant's character, except in specifically enumerated instances).

168. See *J.E.B. v. Alabama ex rel T.B.*, 114 S. Ct. 1421, 1437 (1994) (Scalia, J., dissenting) (criticizing *Batson* doctrine's expansive standing analysis); *Georgia v. McCollum*, 112 S. Ct. 2351, 2359–60 (1992) (Thomas, J., concurring) (predicting that *Batson* doctrine will, in practice, disproportionately prejudice black criminal defendants); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2322–23 (1993) (criticizing efficacy of *Batson* approach in adequately dealing with discrimination by jurors).

169. See *J.E.B.*, 114 S. Ct. at 1439 (Scalia, J., dissenting) (recognizing that *Batson* doctrine encourages wasteful collateral litigation and greatly lengthens voir dire process).

170. See *Griffin v. California*, 380 U.S. 609, 615 (1964) (forbidding state prosecutors from mentioning defendant's refusal to testify at trial).

Alternatively, if the defendant chooses not to testify and is willing to stipulate to identification, perhaps he or she could choose to have a proxy defendant attend trial proceedings in his or her stead. This approach would at least enable defendants to have more meaningful control over physical appearance discrimination than mere grooming allows.<sup>171</sup> For example, if a black defendant charged with killing a white man faces an all-white jury, the defendant could simply place a white proxy defendant before the jury to stand trial. This would effectively eliminate the white jury's opportunity to discriminate against the defendant and would serve to protect the defendant's constitutionally mandated presumption of innocence.<sup>172</sup> The use of proxy defendants might, in fact, actually encourage prosecutors to seat diverse juries to prevent defendants from using juror bias in their favor.

Regardless of the remedy chosen, the fact remains that physical appearance discrimination by jurors in American criminal trials impedes several of the Constitution's guarantees. Although allowing for a defendant's absence or for the presence of a "proxy" defendant may create difficulties, the Constitution's guarantees must not be subverted for utilitarian conveniences.

## VI. CONCLUSION

An impartial jury is a contradiction in terms. Recent research in social psychology confirms that jurors are not impartial, nor can they be.<sup>173</sup> Jurors, like all humans, make substantive value judgments concerning other people based on physical appearance. Although these "gut reactions" to

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171. See *Estelle v. Williams*, 425 U.S. 501, 505, 512 (1976) (acknowledging that jurors may be influenced by defendant's attire, holding that defendants have constitutional right to choose in-court attire, and implying that defendants should have meaningful control over discrimination by jurors); cf. Gary Fontaine & Rick Kiger, *The Effects of Defendant's Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 L. & HUM. BEHAV. 63, 63-71 (1978) (discussing biasing effects of defendant's dress); D.A. Clay, Comment, *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System*, 67 TUL. L. REV. 2335, 2345-46, 2350 (1993) (discussing effects of defendant's dress and defendant's physical attractiveness on jury decisions and finding that "attractiveness of the defendant is the single most important variable in the trial process").

172. See *Williams*, 425 U.S. at 503 (noting that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice").

173. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 480, 492 (1987); see John A. Call, *Psychology in Litigation*, TRIAL, Mar. 1985, at 48 (noting that "the unbiased jury does not exist").

appearance are not wholly inaccurate,<sup>174</sup> they are too arbitrarily conceived to serve as a basis for imprisoning and executing defendants.<sup>175</sup> The physical appearance discrimination that juries practice is repugnant to several specific constitutional guarantees and indefensible as a means of enforcing the law. The founding premise of the United States Constitution's Bill of Rights is the ensurance of liberty against capricious seizure. Nowhere is the realization of this precious principle more desperately needed than in the context of society's decision to imprison or execute another human being. Therefore, our judicial system must be reformed to prosecute persons based solely on what they have done, rather than who they are<sup>176</sup> or what they look like. This reformation could be accomplished by excluding any evidence of the defendant's physical appearance from the courtroom, or through the use of proxy defendants. Regardless of the method, the law should act swiftly to ensure that defendants are neither imprisoned nor executed based on their physical appearance.

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174. See Robert Agnew, *Appearance and Delinquency*, 22 CRIMINOLOGY: AN INTERDISCIPLINARY J. 421, 421-37 (1984) (finding positive correlation between juvenile delinquency and facial unattractiveness); Norman Cavior & David A. Lombardi, *Developmental Aspects of Physical Attractiveness in Children*, 8 DEVELOPMENTAL PSYCHOL. 67, 67-70 (1973) (finding higher rates of unattractiveness among juvenile delinquents than in general population); R. Masters & D. Greaves, *The Quasimodo Complex*, 20 BRIT. J. PLASTIC SURGERY 204, 204-10 (finding higher rates of facial disfigurement among convicted male criminals than among general population); cf. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1421, 1432 (1994) (O'Connor, J., concurring) (acknowledging that stereotypically attributed attitudes may sometimes be accurate). However, other researchers criticize this view. See RAY BULL & NICHOLA RUMSEY, *THE SOCIAL PSYCHOLOGY OF FACIAL APPEARANCE* 120 (1988) (criticizing notion that appearance correlates with criminality).

175. See BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 112 (1921) (discussing fundamental role of law in social life). As Justice Cardozo elucidated, "[o]ne of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness." *Id.*

176. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 73-74 (1968) (stating that criminal sanctions should only be imposed upon individuals "for what they do and not for what they are").