Discrimination and Appearance: What Does Equality Require?

Is it wrong to discriminate against people based on their physique, dress and grooming and, if it is wrong, should the law seek to prevent it?

The problem is complex because it is likely that appearance discrimination is *one of the ways* in which other forms of discrimination operate. So, when we discriminate against people because of their race, religion, class or sex we often do so via a hostile or disparaging response to their physique, dress, grooming and demeanour. Hence the slogan that 'black is beautiful' and the continuing efforts of black men and women to combat discriminatory claims about their aesthetic, moral and intellectual capacities based on real or supposed features of their physique. A similar point was made by the title of Susie Orbach's book, *Fat is a Feminist Issue* – namely, that negative judgements about women's weight and shape are closely connected to sexually inegalitarian assumptions about their nature, capacities and value.

So, discrimination based on appearance seems to be an example – perhaps an important example – of familiar types of discrimination. In such cases, there seems nothing odd or worrying about having legal penalties for appearance discrimination. In fact, if existing antidiscrimination laws fail adequately to protect people from such forms of discrimination, we would have some reason to think they should be amended or supplemented by other laws.

However, there does seem to be something troubling about the idea that employers should have to treat employees equally, regardless of their clothing, hairstyles and general appearance. Most of us have fairly little control over our race, sex or, even, our conscientious convictions, and have little chance of altering these when faced with prejudice or hostility. So, on the face of it, there is an important difference between laws prohibiting discrimination based on *immutable* characteristics – such as race or sex – or on characteristics over which we have *little control* – such as belief – as compared to discrimination based on our clothes, grooming and general appearance, where we have more scope for choice.

The aim of this paper is to examine current controversies over appearance discrimination, and to bring out their significance for the freedom and equality of individuals.

My working assumption is that some forms of appearance discrimination are morally unobjectionable – as we can respond to beauty, sexual attraction, signs of intelligence, of courage, of need and the like, without acting immorally. Where it is morally wrong to discriminate, the wrongness of our actions, and the harm it causes, may not warrant legal penalties, whether criminal or civil. As we know, it is a mistake to confuse the moral and the legal, just because they overlap. So, it seems sensible to assume that, as in other matters, it may sometimes be counterproductive, unhelpful or undesirable to make legal wrongs out of moral wrongs.

However, some forms of appearance discrimination merit legal response, and we can divide these types into two broad categories. The first are instances of inequality that we already have reason to prohibit – such as discrimination based on race, sex and religion, age, disability and the like. The second are harms that are troubling in their own right, whether or not they also implicate other wrongs.

Examples of the former include employer prohibitions on corn-rows- or hair braided in rows close to the head- a hairstyle popular with black women. So I will examine philosophically the legal judgements in America where employer prohibitions on corn-rows were thought NOT to violate laws against racial discrimination although, the Court implied, restrictions on afros would do so.[1] Other examples involve mandatory jackets and ties for men and mandatory jewellery and make-up for women; prohibitions on long-hair and earrings for men; prohibitions on trousers, or on red clothing for women.[2] These are examples of the ways in which dress and grooming codes can reinforce coercive and inegalitarian sex distinctions and gender roles, as well as the unjustified assumption that the behaviour, desires and interests of black women are reducible to those of white women or of black men.

Examples of the latter include the American manager who was fired for refusing to wear an anti-union button; the Sikh who was denied consideration for management unless he shaved

[1] *Rogers v. American Airlines, Inc.*, F. Supp 229 (S.D. N.Y. 1981)
[2] *Devine v. Lonschein*, 621 f. Supp 894 (s. D. N.Y. 1985) and more generally, Karl E. Klare, 'Power/Dressing: Regulation of Employee Appearance', *New England Law Review* 26 (1992).

his beard; and the Orthodox Jew who was forbidden to wear a yarmulke with his U.S. Airforceuniform while working as a clinical psychologist in a mental health clinic on base.[3] Even if – as is possible – managers are not an especially vulnerable social group, it seems wrong to force them to present their employers' beliefs as though they were their own. Likewise we can be troubled by the idea that religious expression can be limited by unfounded (and highly mutable) beliefs about beards or yarmulkes even if Sikhs and Orthodox Jews are otherwise free from discrimination.

Finally, I will be assuming- as philosophical objections to luck egalitarianism suggest- that it is a mistake to attach too much significance to the difference between choice and circumstance, or between mutable and immutable characteristics. Although it would be nice if we could say that people should be responsible for their choices, but not for their circumstances, this position leads to remarkably arbitrary and inegalitarian consequences, whether we are concerned with moral or legal responsibility. So, I expect to find that an intuitively plausible way of thinking about appearance discrimination, and one found frequently in American jurisprudence, is untenable. On the one hand, a sharp choice/circumstance distinction obscures the importance of personal choice, identification and self-expression to moral and political equality, on the other it absolves us of the need to rectify injustices that we inherited, and did not cause. This is clearly inconsistent with any democratic conception of equality. So, while we may find it difficult to decide when or why appearance discrimination should be illegal, a satisfactory answer, I suspect, requires us to examine different types of *law*, different types of *interest* and different types of *harm* rather than to abstract from these in an effort to distinguish people's choices from their circumstances.

[3] *Drake v. Cheyenne Newspapers, Inc.*, 891 P. 2d 80 (Wyo. 1995); *EEOC v. Sambo's Inc.,* 530 F. Supp. 86 (N.D.GA. 1981); *Goldman v. Weinberger*, 475 U.S. (1986)