Appearances Aside

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Robert Post's Brennan Lecture is, at one level, an inquiry into recent legal efforts to ban discrimination on the basis of appearance. He surveys various appearance codes, and distinguishes them as a specifically new set of instances of antidiscrimination regulation. His paper begins with these examples, but quickly moves to a broader consideration of the implicit conception of the person, the person as he or she becomes subject to the law and, specifically, as a being against whom discrimination can occur. If how a person appears is central to who the person is, and if the person ought to have a right to have protected what is most central to the person, then it follows that the appearance of the person ought to be protected against discrimination. If, however, the person against whom discrimination on the basis of appearance occurs is one who is separable from the way in which he or she appears, then it seems crucial to understand whether appearance is central to the concept of the person at work in these laws and regulations. If it should prove to be the case that a person has value and ought to be treated on the basis of that value, apart from the way in which that person appears, and we base our antidiscrimination claims on this proposition, then it seems that the person is not centrally defined by his or her appearance. Obviously, the second argument is not compatible with the first, at least not on any manifest level. So the question becomes: How did antidiscrimination law arrive at this plateau in which the implicit concept of the person whose value the law seeks to protect is fundamentally at odds with itself? The person is and is not, centrally, his or her appearance. Where can one go from here?

Post's Lecture sketches out the notion of the person as fundamentally defined by his or her appearance as the sociological view, one which holds
that the concrete, social ways in which persons appear in the world are central to their value and meaning as persons.\(^1\) The paper also offers as an example of a "transcendental" position the concept of the person as having value in spite of any and all ways of appearing in the world.\(^2\) Post then asks us to resist the transcendental seductions of antidiscrimination law, develop a skepticism toward the conception of the person that disavows his or her social mode of appearing, and to embrace instead a sociological approach that avows appearance as central to personhood.\(^3\)

What is the transcendental seduction to which he refers? According to the transcendental view as Post relates it, a person has an intrinsic worth or an instrumental value that is not reducible to or decipherable from the various ways in which persons appear.\(^4\) On the basis of the transcendental view of personhood, a few prescriptive guidelines follow. First, we are asked not to take into account a person's appearance in making employment decisions. In order to obey or implement such a law, however, we need to know how it is that we can not take appearance into account. Does this mean that when we consider a person, we do not consider the visible features of that person? Is it really possible not to consider such features if they are precisely, definitionally, what appear, especially in, for example, an interview situation? How do we consider such a person without taking into consideration what we see, or are we being asked to look at a person without actually seeing what we see, engaging in a practice of disavowal? Are either of these strategies of compliance practicable?

Post suggests that the transcendental conception of antidiscrimination law assumes that we can separate a person from the way in which the person appears, and that the separability of the person from his or her appearance presumes the person has an ontological status that preexists any appearance. Moreover, this person has an ontological status that preexists any social status as well. What is it we are supposed to consider, then, about this person who preexists his or her appearance? How do we "see" or find these salient, non-visible attributes? A judge considering a claim of discrimination might consider how this person has been treated, and make a judgment on that matter by seeking recourse to a normative conception of the essential worth of the person, a worth which would be, in line with egalitarian principle, the same as any other person's worth, a worth that pertains to persons as such. Or a judge might consider whether a person can perform a job well, and so try to make a judgment about the person's technical skill. This hypothetical person is thus either a Kantian soul with

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2. See id. at 8-16.
3. See id. at 16-40.
4. See id. at 8-16.
deontological value whose intrinsic worth is never fully expressed in any appearance, social or otherwise, or the person is reducible to an instrumental capacity, at which point the person is understood as an analogical relation to a set of functions.\(^5\)

Post warns us against accepting either or both of these conceptions of the person that seek to establish the extraneous relation of appearance to personhood. Although Post argues that the dominant legal conception presumes "a correspondence between pre-social individuals . . . and 'context-free' functional capacities," it seems like no easy task to reconcile the Kantian and functionalist paradigms. The Kantian paradigm is often used as a critique of the functionalist one in arguments which claim that the functionalist model discounts the deontological worth of persons. The functionalist, on the other hand, more often than not tends to mock the speculative status of the Kantian assertion, counterarguing that a person is nothing other than what a person can do, thereby collapsing ontology into capacity. Of course, what constitutes "capacity" may be equally as speculative as the "intrinsic worth" of persons, but the functionalists tend to presume the verifiability of the assessment of skills, relying on tests or observation or both. In fact, to the extent that the functionalist relies on observation or, indeed, that a means of testing skills has an observational component, the functionalist approach also depends for its conclusion on how people appear to those who are judging their capacities. In this sense, the functionalist position does not remain fully distinct from the position which asserts that personhood requires appearance.

Indeed, these functionalist and transcendental conceptions might be understood to constitute something like a modern antinomy of presocial and disembodied conceptions of personhood, both of which try to determine the person prior to appearance, but which determine the person in differing, if not opposing ways, either in terms of intrinsic worth or presumed instrumental values. Both might be understood to be perspectives on persons that have developed in response to modern forms of rationalization.\(^7\) The deontological seeks to resist rationalization by insisting that persons must be treated as ends, and not means;\(^8\) the functionalist might be said to give a certain moral rationale to the processes of functional rationalization, disembedding individuals from traditional contexts, and

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5. For an introduction to deontological and instrumentalist ethics, see Paul W. Taylor, Problems of Moral Philosophy (1972).
shifting the legal focus from the status of individuals to the tasks that they perform.

Post wants us to reject these notions because they both seek, with varying degrees of success, to deny what is undeniable about persons, namely their status as social beings. One might speculate here that the debate about the moral pros and cons of rationalization have occluded the importance of the social constitution of persons. In other words, Post is asking us to sidestep this particular set of options and to consider instead the way in which antidiscrimination law ought to presuppose the person not only as one who is, by definition, \textit{engaged in} a set of social practices, but one who might be said \textit{to be} a social practice, one whose ontology is that of an ongoing and revisable social practice or set of social practices. Note that this would be different from saying that there is a person who engages in social practices, for the former “person” in such an instance might well be engaged in something else, and the practice is grammatically positioned as extraneous to the person. To claim that what a person “is” is constituted by the practices in which he or she engages is to claim that the person is a mode or a set of modes of socially engaged practices. No practice, no person.

One might simply counterpose the transcendental and social conceptions of personhood and argue that the social is better, that it is more fully descriptive, that it takes into account the world as we know it. But does the distinction between the transcendental and the social finally hold? Is the transcendental always compromised by the dimension of social reality it seeks to exclude? Would it not be a stronger argument to claim that personhood presupposes its social ontology, and that no transcendental or functionalist position can work without making this very social presumption? Whereas I cannot fully elaborate that argument here, I do think that there is a very strong argument in Post’s reading that is worth pursuing. That argument runs somewhat as follows: (1) If certain codes and statutes ask us not to discriminate on the basis of appearance, and (2) these codes and statutes hold that what we judge to be relevant about a person when we consider employing that person, for instance, ought not to include aspects of appearance that neither have bearing on the tasks a person can perform nor constitute an essential feature of that person, it follows that these codes and statutes presume the ontological integrity of a person prior to appearance. But this conclusion raises a serious question: Is there a person apart from his or her appearance? If we insist in return that surely there are dimensions to a person that are legally relevant to discrimination cases, and which do not strictly speaking “appear,” we still have not answered the question of whether a person can be observed or judged on whatever basis without first appearing. This is simply to say that appearance provides the epistemological condition for judging another person’s worth or skill, even
if that worth or skill is not, as it often is not, reducible to appearance itself. Thus, if appearance is the way in which persons are made available to judgment (which is not to say that all we can judge of a person is his or her appearance), then what is it we purport to judge when we judge a person? Do we judge something that exists, or does our judgment bring into being its own presumption about personhood, operating performatively, as it were, to install its speculative premise as human reality?

I do not take Post to be making the sweeping claim that persons are nothing but their appearance, a form of social phenomenalism. Although he does not pursue the issue here, it would be interesting to know how he accounts for those dimensions of personhood that do not, strictly speaking, appear: dimensions of psychic life that remain unexpressed or inexpressible, dimensions of human biology which for the most part remain concealed, aspects of human experience, especially those pertaining to time, such as memory or expectation, that cannot appear in any direct form in the present. Indeed, we can surely find myriad antidiscrimination claims made on behalf of these non-apparent dimensions of life, claims made on the basis of personal integrity, cultural history, or memory, all of which assert non-phenomenal aspects of personhood. Certainly there are dimensions of psychic and biological life that have only an oblique relation to appearance, and there are probably characteristics of persons, even those that are relevant to the question of job performance, that do not appear in any visual sense. If the meaning of persons is, in Post’s view, not fully exhausted in the realm of appearance, it would be good to know how we can continue to conceive of persons as social beings without, as it were, reducing them to the ways in which they appear.

Post’s argument relies on there being a crucial connection between a notion of persons conceived as social beings and one in which persons exist in an essential relation to appearance. I take Post to be arguing that certain social categories, such as sex and race, are fundamental to social reality as we live it, and that they are essential coordinates within the social field, ones which, at this point in time and culture, are essential to the social meaning of personhood. Moreover, these are categories that appear, and they depend upon appearance for their social legibility. I would add: Some modes of appearance for these categories are “marked” and some are “unmarked,” which means that some stand out, such as Blackness, as visible social signs, whereas whiteness, which is no less social, is nevertheless part of the taken-for-granted visual field, a sign of its presumptive hegemony. These categories and the differential relations among them structure the culturally lived horizons of appearance: They determine the visual field in which we live, one that is saturated with social meaning.
What does this mean for the problem of judgment as it is raised in Post's paper? In our everyday practice, we do notice, and it does make a difference whether someone is understood to be of a given gender or transgender or in transition or, whether someone is of a given race, or of mixed race inheritance and/or racially indeterminate. I gather that Post would also say that the way in which these categories matter is not always in the service of discriminatory aims. But as conventional sites for discrimination, this will be part of the meaning they bear in the social world in which we live.

There are, of course, those who would say that to notice such categories is already to have discriminated, but I take it that this is not Post's view, and that he would maintain a social operation of such categories that is not necessarily discriminatory in its aims. But he does tend to conflate the social category of gender, for instance, with its stereotypical norms. He writes, for example, that the "generalizations and stereotypes" upon which gender discrimination relies are coextensive with the practice of gender itself, which would suggest that any and all references to gender are potentially or actually discriminatory. Such "stereotypes," he writes, "are, of course, the conventions that underwrite the social practice of gender. To eliminate all such generalizations and stereotypes would be to eliminate the practice." Post goes on to worry that the main aim of antidiscrimination law is to "disestablish the category of sex and to replace it with the imperatives of functional rationality." But is the practice of gender exhausted by the operation of the stereotype, or is there a dimension of gender that is not only anti-stereotypical, which would still be tied to the stereotype, but astereotypical, which would be free of the stereotype or, perhaps, in a relation of indifference to it? How do we account for the transformation of the stereotype within the practice of gender if there were not something else in gender, as it were, that is not immediately co-opted or foreclosed by the stereotype? Of course, it is a major social and political question whether gender should be eliminated as a category and, if so, what might be the most practical means to effect that solution. But it is not clear that the elimination of gender is an undisputed political goal of feminism. Indeed, given the spate of feminist work on transforming gender, of relieving it of its entrenched hierarchies, of producing new cultural forms

9. Anthony Appiah has argued that racial categories always work in the service of discriminatory aims. He writes, "The truth is that there are no races: there is nothing in the world that can do all we ask 'race' to do for us," and proceeds to refer to the "evil of the concept." See Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in "RACE", WRITING, AND DIFFERENCE 35-36 (Henry Louis Gates, Jr., ed., 1985). For a similar argument, see SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES (1991).

10. Id. supra note 1, at 18.

11. Id.

12. Id.
of gender, it is unclear whether the practice of gender is, or must be, coexterensive with its stereotype. Indeed, those who suffer specific forms of gender discrimination make claims before the law that it is precisely the nonstereotypical expression of gender which provides the occasion for discriminatory conduct. Thus, such claims implicitly refute the more rigid feminist thesis that gender stereotypes underwrite gender, a formulation that cannot countenance the existing deviations from the norm. Even if the stereotype were eliminated, would that be the end of gender? Would that elimination perhaps only constitute the end of gender as we have known it, and the beginning of gender as a social practice governed by a transformed—and transformable—set of social norms?

What I take Post to claim is that if we are obliged by the transcendental and functionalist imperatives in the law to ignore the realm of appearance in questions of employment, admissions, and the allocation of resources, we ignore the very condition—appearance—that allows persons to matter to us. In other words, if race and gender are central to how we come to understand other people, and if those categories establish, to some degree, the conditions under which persons appear, and how they appear (sometimes even “whether” they appear) as persons, can we then even have a notion of the person if we are asked to discount the realm of appearance?

Let me make this point yet another way: We could say that gender and race are attributes of a person and that if we do not consider those attributes, the personhood of the person is still intact: “This is Peter; he happens to be x, y, and z.” But what happens if we consider these categories not as simple attributes but as social conditions of appearance and intelligibility? If our very notion of personhood is dependent on such social categories, indeed if we cannot have a conception of a person without first determining that person’s sex, for instance, then it seems that the elimination of the category eliminates the person as well. I take it that the constitutive power of these social categories is what Post has in mind, authorizing, I hope, my formulation that a person is the social practice of gender or, indeed, is the social practice of race (where the copula is understood to resist a reduction to the categories at hand). In matters of race, this argument becomes more complex and, finally, it is complex for sex as well. A mixed race person may be precisely one whose “race” is not identifiable on the basis of appearance, or one for whom the category of race has become finally undecidable. Similarly, a person with complex chromosomal arrangements or a transitional transsexual will be one for whom sex is


not precisely a stable or systematic social category. We might say, though, that their asystematic appearance in such cases is precisely understandable over and against the norms that are stable and systematic. This would all be well and good, but if the social aim at hand here is the transformation of such norms, the unstable and asystematic operation of such categories must have a transformative effect on the norm itself, such that gender and race never get to be the same again.

I suppose this brings me to my one point of worry here. In claiming that race and gender are stable and systematic features of social reality and social appearance in particular, and in claiming that persons cannot legibly appear to us without these conditions of social appearance in place, are we perhaps fortifying these categories precisely in their stereotypicality and persistence? By what means, then, are they disrupted and revised?

Clearly Post looks to antidiscrimination law as a way to disrupt and transform such categories, and here I agree that this is indeed one very powerful instrument. But I wonder whether in order to achieve his goal of social transformation in the service of equality, he might need to revise his description of social reality. Post appears to understand these categories as pervasive and systematic in social reality: “[W]e have been,” he writes, “socialized into a culture in which these differences matter, and matter in systematic ways.” There are, he writes, “social practices or norms within which categories like race, gender and beauty acquire their significance,” and these practices and norms are part of what constitute us as persons.

The law, Post writes, is also a social practice, one that is also steeped in these very norms and practices. Indeed, the law is made by those who participate in the above-mentioned social practices and who invariably replicate those norms. It follows from his view, then, that we ought not to idealize the law as a neutral instrument that might intervene in the social operation of such categories in order to eliminate them. Antidiscrimination law participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate. Ideally, however, antidiscrimination law is a social practice that seeks to disrupt and transform another set of discriminatory social practices. Insofar as both are social practices, and society is underwritten by stereotype, it is hard to see that antidiscrimination law might transcend the stereotypes it seeks to eliminate.

If I am hiring someone, and I become mindful of antidiscrimination law, then I can find myself wondering how considerations of appearance fit into my assessment of the capabilities of a person. It may be that I do notice aspects of that person’s appearance and decide that I will not

15. Post, supra note 1, at 17.
16. Id.
I will make. Here it is not a matter of blinding myself to how the person appears, but, rather, deciding what ought to count about that person for the job in question from within the observational realm in which that person appears. I take this to be a revised version of the practice of “blindness” that the transcendental turn asks us to make. Thus, it is not a question of blinding oneself to how a person appears, but a question instead of how the way in which a person appears blinds one to the worth and capability of the person. What if the way in which a person appears makes me wonder at some less than fully conscious level about the personhood of the person, of their worth and their capability as persons? Here it is not a question of setting aside one set of attributes to consider a person exclusive of those attributes, but a matter of unsettling the social conditions by which persons become intelligible at all.

For this challenge to take place, it must be possible for a person whose appearance calls the category of the person into question to enter into the field of appearance precisely as a person. This is the power the astereotypical has to rewrite the stereotype, the power that the asystematic and unstable in gender and race have to unsettle the epistemological conditions of human intelligibility, a power that is “had” to the extent that such a person is not first defeated by the powers of discrimination. The radical consequence of law, conceived as social practice, is to make us pause, and pause again, as we enter into the risky process of knowing and judging one another.