

Book Review: Prejudicial Appearances: the Logic of American Antidiscrimination Law, by Robert C. Post; with K. Anthony Appiah, Judith Butler, Thomas C. Grey and Reva B. Seigel

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PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW BY ROBERT C. POST WITH K. ANTHONY APPIAH, JUDITH BUTLER, THOMAS C. GREY & REVA B. SEIGEL (DURHAM, DUKE UNIVERSITY PRESS, 2001) 184 pages.¹

BY SONIA LAWRENCE²

[A] sign on a courthouse door proclaiming “Men Only” evokes an entire history of discrimination against a historically disadvantaged class; a sign on a barroom door that reads “No Minors” fails to similarly offend.

*Gosselin v. Quebec (A.G.)*³

⁴ As a mere representation of Macdonald’s extensive oeuvre, see R.A. Macdonald, “A Theory of Procedural Fairness” (1981) 1 Windsor Y.B. Access Just. 3; Roderick A. Macdonald, “Understanding Regulation by Regulations” in Ivan Bernier & Andrée Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 89; Roderick A. Macdonald, “Access to Justice and Law Reform” (1990) 10 Windsor Y.B. Access Just. 287; Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) (Roderick A. Macdonald) (an initiative of the Ontario Civil Justice Review entailing a fundamental reconsideration of civil disputing in Ontario). Between 1989-1991, Macdonald chaired a Task Force on Access to Civil Justice in Quebec.

¹ [*Prejudicial Appearances*].

² Assistant Professor, Osgoode Hall Law School. This review benefitted from the excellent research assistance of Pinta Maguire and the advice of my colleagues Bruce Ryder and Kate Sutherland.

³ [2002] 4 S.C.R. 429 at 469 [*Gosselin*].

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Oliver Wendell Holmes⁴

I. INTRODUCTION

What are the rules behind Canada's constitutional equality doctrine? How do we know that "Men Only" on a courtroom door is discriminatory differentiation and that "No Minors" on a barroom door is not? As the rationale behind Canada's constitutional equality doctrine becomes increasingly murky, the need heightens for a deeper consideration of these questions. *Prejudicial Appearances* is a model for the next stage of Canadian equality scholarship.

The book is a reprint of six articles that appeared in volume 88 of the *California Law Review* in 2000. The lead article, by University of California at Berkeley Boalt Hall Professor Robert C. Post, sketches out a critique of American anti-discrimination law, and suggests a reconception of it. Professors Anthony Appiah, Judith Butler, Thomas C. Grey, and Reva B. Seigel, all noted scholars of equality, supply their reactions to Post's suggestion, with Post allowed a final word. This format is extremely effective in that it allows the four responders to take their own approach while ensuring that, at least at some level, they are all talking about the same thing. The responses reflect the different concerns, viewpoints, and expertise of the writers. They give Post's ideas the scrutiny, development, and critique that serve to further illustrate the fundamental nature of the challenge he is posing to anti-discrimination law. The result is an admirably compact piece of work that poses a challenge to contemporary understandings of anti-discrimination law. Although the book is tightly focused on American law, the ideas and questions raised within will be of interest to Canadians. Reading the book may force us beyond the smugness we often feel when looking at American anti-discrimination law, to some recognition of the hard questions that lie ahead and that have gone unanswered in the past within our own equality jurisprudence.

Post argues that the logic behind American anti-discrimination law not only fails to alleviate discrimination but, in fact, perpetuates it. By focusing on the transcendental human dignity of the individual (some acontextual core shared by all people), and by claiming non-differentiation

⁴ *The Common Law*, ed. by Mark DeWolfe Howe (Boston: Little, Brown & Company, 1963) at

as a central principle, anti-discrimination law has failed in what ought to be its true goal—transforming social practices that define, maintain, and regulate oppressive categorizations. By describing race, gender, and other grounds of discrimination as factors that ought to be completely irrelevant in decision making, anti-discrimination law displays its internal logic⁵—a logic of wilful blindness to characteristics that *are* socially relevant. Because of this continuing and unacknowledged social relevance, it is a logic that is doomed to failure both as jurisprudential rule and as transformative practice.

The law refuses to recognize both its own status as a social practice and the social significance of otherwise “illegal” grounds of discrimination, says Post.⁶ Although the jurisprudence claims to be about eliminating the social significance of categories like gender and race, law itself is a social practice in which such categories maintain their significance. Judgments are at odds with the guiding principle under which they are purportedly written, because “[j]udges have in fact been compelled systematically to disguise and contort their judgments so as to render them compatible with the surface logic of the dominant conception.”⁷ Jettisoning that “surface logic” would produce increased “accountability, doctrinal integrity, purposive clarity,” and an elimination of the “obsessive and dysfunctional focus on explicit racial classifications.”⁸

Even if one agrees with Post that the goal of anti-discrimination law ought not to be the effacement of socially significant practices like gender and race, one should not hold one’s breath for his resolution, because he does not provide one.⁹ The sociological account does not provide us with a purpose for anti-discrimination law. It simply describes the operation of law as a social practice. In so doing, it suggests that the current “logic” (which in the U.S., at least, is one largely based on the idea of “blindness”) is one at odds with the actual operation of law as a social practice. The sociological account brings to the fore the normative goals of anti-discrimination law, without telling us what those normative goals are or ought to be.

⁵ Robert C. Post, “Prejudicial Appearances: The Logic of American Antidiscrimination Law” in *Prejudicial Appearances*, *supra* note 1, 1 at 12.

⁶ *Ibid.* at 17.

⁷ *Ibid.* at 52.

⁸ *Ibid.*

⁹ For Post’s discussion of the principled possibilities for anti-discrimination law see *ibid.* at 41, n. 147.

The other authors provide their commentary on different aspects of the work. Anthony Appiah addresses the issue of stereotypes, a central phenomenon in anti-discrimination law.¹⁰ Appiah's careful read of Post prompts him to point out that there are at least three kinds of stereotypes. At a time when the precise place and significance of stereotyping in Canadian constitutional equality law remains unclear, this is a thoughtful effort to provide clarity that could illuminate aspects of our own law and provide a glimpse of the way forward.

Also interesting from the contemporary Canadian perspective is Thomas Grey's contribution.¹¹ He puts forth the argument that trusting judges with applying a sociological approach will almost surely lead to findings that familiar practices are not "invidious."¹² Still, even Grey, in the end, supports the contextual over the abstract approach to anti-discrimination. Judith Butler's contribution concentrates on the philosophical questions raised by Post's approach to appearance and personhood.¹³ Are people more than their appearance or the social practices that constitute that appearance? Post has positioned himself against "transcendental seduction," the idea that we can deal with people apart from their appearance or that there is some irreducible core of personhood, and Butler explores the implications of that rejection.

The essay written by Reva Siegel is the best of a good lot.¹⁴ Her detailed historical approach provides the stiffest support for Post's suggestions and the most telling critique. She argues that Post's argument lacks a recognition of social stratification and the institutions by which it is maintained over time. Siegel's own work has focused on the idea of "preservation through transformation,"¹⁵ in which she takes a socio-historical approach to demonstrate the persistence of status hierarchies, despite the elimination of formal categorization on forbidden grounds. How, Siegel asks, is social stratification maintained even as all the institutions for its maintenance are attacked? The answer, she argues, is in

¹⁰ K. Anthony Appiah, "Stereotypes and the Shaping of Identity" in *Prejudicial Appearances*, *supra* note 1, 55.

¹¹ Thomas C. Grey, "Cover Blindness" in *Prejudicial Appearances*, *supra* note 1, 85.

¹² *Ibid.* at 96. For instance, spousal assault, the prohibition on interracial marriage, segregated schools, and gender restrictions on access to professions—in the past, all of these practices have been understood as normal, natural, and non-invidious.

¹³ Judith Butler, "'Appearances Aside'" in *Prejudicial Appearances*, *supra* note 1, 73.

¹⁴ Reva B. Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification" in *Prejudicial Appearances*, *supra* note 1, 99.

¹⁵ *Ibid.* at 143, n. 109.

the dynamic nature of rules and rationales.¹⁶

Siegel's rich and complex argument, in a nutshell, is this: Anti-discrimination law has treated race as a categorization with no social relevance. Thus, where it is used as a categorization, it is presumptively irrelevant. Yet race is of profound social relevance. Siegel argues that the prohibition of formalized racial classification has failed to prevent discrimination or to promote any substantial changes in the differential distribution of social goods. Since so many things are race neutral but race salient, to use Siegel's language, we can maintain hierarchies based on race without mentioning race. Consider, for instance, college admission preferences based on parental alumni status, where admission has traditionally been segregated. Likewise, the fact that tax revenues received by a school district are mainly funded by property taxes in the district is race neutral but race salient. Siegel argues, in a discussion that ought to be of particular interest to the Canadian reader, that this argument must proceed on the basis that race has no social relevance. The new logic of anti-discrimination law allows the claim that since racial classification is literally outlawed, differences in current distribution are the just result of equal distribution of opportunity. In other words, it is easy to come up with language that is race and gender neutral, per American law, to describe social phenomena that are highly race or gender salient, per contemporary-American common understanding. When presented with these two arguments in conflict, that is, race and gender neutrality versus race and gender salience, judges can choose the first without acknowledging the second.

II. APPLYING POST'S INSIGHTS AT HOME

Canadian equality jurisprudence seems to be teetering on the edge of Post's insights. We are not stuck in the trope of blindness that has largely stalled the development of American constitutional equality doctrine since *Griggs v. Duke Power Co.*¹⁷ This is a critical distinction as Canadian law has not been interpreted to categorically prohibit differential treatment and, in fact, it is clear in both text and interpretation that equality may require recognition of difference.¹⁸ We have settled on a regime of substantive

¹⁶ *Ibid.* at 106.

¹⁷ 401 U.S. 424 (1971).

¹⁸ See *Canadian Charter of Rights and Freedoms*, s. 15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [Charter]. See also *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

equality as opposed to formal equality. However, I would argue that we are increasingly seeing judicial language that seems to indicate that some version of Post's description of the "simple but powerful logic" of American anti-discrimination law¹⁹ exists inside the section 15(1) jurisprudence alongside a version of the sociological account that has informed the idea of substantive equality. We have failed, in my view, to effectively excavate the underlying normative assumptions of our regime of constitutional equality, and we have failed to recognize that law is simply one social practice among many.²⁰ In other words, we must stop being smug when we compare our equality law to the American version. We need to get down to business. What is it we are trying to accomplish with anti-discrimination law?

Siegel writes that she was "simultaneously compelled by [Post's] claims and yet despairing of them."²¹ This was my reaction to the entire volume. Though the arguments are incisive, offering new arguments for explaining and dissecting the logic of Canadian anti-discrimination law, they do not offer much by way of doctrinal reconstruction. This is because of the differences between American and Canadian equality doctrine. Lacking the "colour blindness" rhetoric, and speaking the language of context, Canadian doctrine ostensibly follows many of Post's suggestions.

However, as Post challenges Canadian jurisprudence, the reverse may also be true. Canadian doctrine does not require "blindness," and allows, in both text and jurisprudence, significant taking into account of difference.²² Our dominant approach (whatever it is) is certainly not the one under which the Americans labour. Our jurisprudence considers historical context and underlying purposes, the great achievements that Post sees in Justice Brennan's decisions in *United Steelworkers v. Weber*²³ and *Johnson v. Transportation Agency*.²⁴ Our doctrine does not differentiate

¹⁹ Post, "Prejudicial Appearances," *supra* note 6 at 14. Post cites Paul Brest for an authoritative summary of this logic: an "antidiscrimination principle" that "disfavor[s] classifications and other decisions and practices that depend on the race ... of the parties." See Paul Brest, "The Supreme Court, 1975 Term-Foreword: In Defence of the Antidiscrimination Principle" (1976) 90 Harv. L. Rev. 1 at 1.

²⁰ Where *Prejudicial Appearances* looks at both ordinary statutes and the U.S. Constitution, my discussion of the Canadian situation will focus on the approach to equality under the *Charter*.

²¹ Siegel, *supra* note 14 at 148.

²² See *Charter*, *supra* note 18. See e.g. *Eaton*, *supra* note 18.

²³ See *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

²⁴ See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

between facially neutral and facially explicit laws.²⁵ Can we say we have accountability, doctrinal integrity, and purposive clarity: the benefits of the sociological account, according to Post?²⁶ I would answer no. Perhaps our failure in this respect is because the commitment to the sociological account is incomplete. Perhaps we retain our own rhetoric (“human dignity”?) that serves to obscure the driving logic of section 15(1) jurisprudence. The final possibility is that the sociological account is, to a certain extent, incompatible with the “rule of law.” Both Grey and Siegel question Post’s conclusion that clarity will follow from the sociological approach,²⁷ and Post actually concedes this point, noting that “the insights yielded by a sociological apprehension of antidiscrimination law could encourage overly ad hoc and contextualized judgments.”²⁸ He could be describing *Gosselin* and *Trociuk*.²⁹

In Canada, the embrace of contextual analysis was widely seen as helpful to equality-seeking groups for precisely the reasons Siegel describes—it would admit “what everybody knows” into the doctrine.³⁰ Context was intended to defeat cold logic, so that the absence or existence of formal categorizations would not “make or break” any equality claim. However, these contextual analyses appear to have opened the door to judgments based on “common sense.”

The invitation to consider context has been used as an excuse to consider or ignore contexts at will. The contextually sensitive nature of the analysis set out in *Law*³¹ is an effective cover for judgments that choose to follow some other road without discussion. There is frequent resort to the use of vague terms and definitions which have almost infinite meanings.

It is in this sense that it is a mistake to equate the move to a contextual approach with a move to a sociological approach. If judges are convinced that what amounts to common sense is not discriminatory, then anti-discrimination law will never succeed in changing social practices. It

²⁵ See Post, “Prejudicial Appearances,” *supra* note 5 at 52; *Andrews v. Law Society of Upper Canada*, [1989] 1 S.C.R. 143 at 173-74 (per McIntyre J. for the majority on this point indicating that laws that have a differential impact may violate the equality provision of the *Charter*).

²⁶ See Post, *supra* note 5 at 42-50.

²⁷ See Siegel, *supra* note 14 at 148; Grey, *supra* note 11 at 95-96.

²⁸ Robert C. Post, “Response to Commentators” in *Prejudicial Appearances*, *supra* note 1, 153 at 153.

²⁹ *Supra* note 3; *Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835 [*Trociuk*].

³⁰ See Siegel, *supra* note 14 at 139-41 (discussing the importance of “what everybody knows” in the history of race jurisprudence in the United States, specifically the tendency of Court majorities to ignore it).

³¹ *Law v. Canada (Ministry of Employment and Immigration)*, [1999] 1 S.C.R. 497.

will only condemn actions that are already the subject of some undefined societal consensus, actions that common sense would not support. This is one possible approach to anti-discrimination law (recall that Post refuses to set out a program for anti-discrimination law, although Siegel embraces the anti-subordination approach³²). Is this a defensible approach to anti-discrimination law? Time after time we have seen political, judicial, or social reconsiderations conclude that what was common sense was also discriminatory. Segregation was, after all, “common sense” for many people. In addition to stripping anti-discrimination law of any transformative potential, relying on common sense is part of a more general refusal to elaborate the normative dimensions of anti-discrimination law. Without a clear idea of what we might need to know in order to determine if something is discriminatory, which arises from the lack of understanding about what constitutes discrimination, we rely on what we already know. What “we” know differs among the various possibilities for “we.” When the Supreme Court’s intuitions and common sense agree with the Darrell Trociuks and clash with the Louise Gosselins, the Jeanne Lavoies, and the Nancy Laws, is it time to worry?

III. CONCLUSION

Post builds his argument by discussing an ordinance proposed by the City of Santa Cruz in 1992. The ordinance would have prohibited discrimination against persons on the basis of “personal appearance.”³³ Post uses this ordinance to frame his discussion because, he says, moving it outside the familiar territory of gender and race will illustrate the limits of the “logic of American antidiscrimination law.” But he maintains this focus on appearances throughout the argument.³⁴ I think that part of the common sense notion of discrimination is that it is a kind of “judging a book by its cover,” that it involves drawing conclusions from appearance. It is a challenge to that logic to ask for an explanation for why we include race and gender but not other aspects of appearance, such as obesity. However, things that may not “appear” require more excavation. What of things that might not appear, like citizenship and sexual orientation? I do not fault Post’s choice of story, but by focusing on questions of appearance and hiring, some issues that are more likely to come up in other circumstances

³² See Siegel, *supra* note 14 at 141-42.

³³ See Post, *supra* note 5 at 2.

³⁴ *Ibid.* at 11-14 where Post does recognize non-appearance-based forms of discrimination, for instance marital status and religion as well as group membership more generally.

(for example, failure to provide benefits) and raise different concerns are left out.

Perhaps the greatest challenge to contemporary anti-discrimination doctrine is how to deal with the question of discrimination on the basis of poverty or class. While the rhetoric of Canadian doctrine can be employed to support such claims,³⁵ it is easy to predict judicial unease and resistance to these applications of the *Charter*.³⁶ We need our judges to be more explicit about the account of equality they are working with, and about the substantive content of their common sense. Otherwise I fear that attempts to argue the proper place of poverty in equality jurisprudence are not addressing the common sense issues. All of us, judges, litigants, scholars, and Canadians, would benefit from a better understanding of what the law *is* doing, so that we can argue about what the law *ought* to be doing. *Prejudicial Appearances* is a book that Canadian equality law scholars should appreciate for more than just the elegant and thoughtful writing. It ought to remind us of the large (and perhaps growing) gaps in our own equality law scholarship, and push us to investigate more closely the logic behind Canadian equality jurisprudence.

³⁵ See e.g. Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law" (1994) 2 Rev. Const. Stud. 76; Martha Jackman, "Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate" in Joel Bakan & David Schneiderman, eds., *Social Justice and The Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 25.

³⁶ See e.g. Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179 at 189 (arguing that "'socioeconomic status' or 'poverty' will be hard to present as analogous because, within a capitalist liberal ideology, this is understood to be a product of individual choice and merit").