

**Protecting Transgressive Identities:
A Contemporary Challenge for Equality Law**

Abstract
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The discourse and doctrine of antidiscrimination law produce a covert—yet powerful—apparatus of classifying identities. My research project is motivated by a concern about the classifying power of law. I seek to explore and expose the ways in which the law serves and legitimates our political, social, and cultural "will to know."

I wish to probe an unexplored aspect of the current understandings of equality: how should antidiscrimination law protect individuals or groups who are discriminated against not because they belong to a group whose identity is stigmatized but because they defy classification within recognized categories of identity?

Contemporary legal theory lacks the conceptual framework to provide adequate protection to those who defy classification without simultaneously effacing their liminal social position. Success in a discrimination claim is today intertwined with the price of being typologized by the judicial gaze as being of a clear-cut identity category, while the plaintiff might not see his or herself as belonging to this category.

Complex identities, with multiple centers and crossing axes, are very common in today's global and multicultural world. However, the way we have been thinking about equality reflects a romantic longing for a stable and easily decipherable cultural order. My research aims to develop a new model for understanding discrimination claims of claimants whose identities are hard to classify. I wish to develop a model with which equality law could recognize that an individual or a group can be discriminated against not merely because they suffer stigma or negative stereotyping, but also because they fall between recognized categories, and are therefore treated disparately.

In thinking about equality, jurists and philosophers invest much intellectual energy in debating which is the best equality model (e.g. Rawlsian, utilitarian, libertarian, egalitarian, etc.). But their discussions fail to recognize an unspoken premise of the debate, which is far from trivial. In examining models of equality, the debate always presupposes that we can (and should) take individual or group *X* (say, women, people of color, or homosexuals) and guarantee that they receive equal treatment and opportunity to individual or group *Y* (e.g. men, Caucasians, or heterosexuals). This always presupposes the possibility of comparison between two groups. In this way, theories of equality take the classifiability (or intelligibility) of identities for granted. That is, they take as self evident that we can recognize the different social, ethnic, or gendered nature of social actors.

While much has been written on the complexity of identity and on the classification difficulties in implementing policies to particular groups, equality debates still assume that the basic premise and methodology of equality is correct. That is, that in order to achieve equal treatment and access to social goods, different groups or identities should first be recognized and classified, and only then can we determine who needs equality, and to whom. In other words, according to the common perspective on equality, the grounds for equality between individuals or groups entails the identification and classification of parties in order to compare their situation, conditions, and treatment.

But what of those who are hard to classify under particular category of identity? How can we recognize claims of groups or individuals that are discriminated against precisely because they challenge the clear boundaries between identities?

Normally, the response of courts to claims of plaintiffs of this kind is either to deny such claims, for the plaintiffs are not able to position themselves solidly as members of a particular group, or to reclassify the legal subject in one of the preexisting identity categories available to it, so that even if the legal subject entered the courtroom without a clear label, he or she leaves the court with a designated place in the social structure. This judicial act of clear repositioning of the plaintiff's identity allows the law to compare the plaintiff's position to those in the opposite category and determine whether he or she received equal treatment.

Consider, for example, the case of a man who comes to work wearing women's clothes and is dismissed for refusing to wear attire that matches his gender. For many years, such a plaintiff's sex-based discrimination claim would have been denied by the courts. The prevailing antidiscrimination doctrine had been short of conceptual tools to handle such a claim, because the courts would be puzzled as to how to apply equality doctrine. Specifically, it would be unclear whether the plaintiff was arguing that he was discriminated as a man or as a woman. Thus it would be unclear to what group his treatment should be compared. Today, such a plaintiff might be able to win his case, but only if he proves that the employer who treated him adversely took him to be *a man*, and not a homosexual or transgender man (the former category is protected under federal US antidiscrimination law, as opposed to homosexuality or transsexuality, which is not). We see, therefore, that if the legal subject's identity is socially perceived as blurred or located on the border between two categories, the law currently lacks the ability to relate to it effectively.

Now compare this case to the case of a female employee who refuses to wear makeup at work, because she feels that the 'feminine' appearance required of her impaired her ability to be assertive with customers¹. *Her* claim for sex based discrimination would be rejected under the prevailing logic of equality law, since she cannot show that similarly situated men have been treated differently (after all, just as women are required to wear makeup, men are required to refrain from wearing makeup).

Moreover, while both plaintiffs blur the dividing line between femininity and masculinity, the difference that leads to the inconsistent legal outcomes is that the latter did not have a category of identity in which to anchor her 'bare face' (she did not claim that she was transgender or lesbian), while the former did have such a category.

Viewed from a different angle, my research will aim to highlight the ways in which equality discourse serves, albeit unwittingly, to reify and sustain prevailing typologies of identity. This project emanates from an awareness that despite the good intentions of its framers, the concept of equality as currently understood and applied presents constraints to contemporary individuals' complex axis of identity and affiliation, and limits their freedom and ability to choose and pursue a life path that is "less traveled by" and be part of the social structure in ways that contribute to its ongoing change and development. It is time to recognize the ways in which those whose identity is not easily classifiable suffer from discrimination, and develop the theoretical tools and the practical means to mitigate such discrimination.

¹ My examples are loosely based on the facts and law of two US cases: *Rosa v. Park West Bank & Trust*, 214 F.3d 213 (1st Cir. 2000), and on *Jespersen v. Harrah's Operating Company Inc*, 392 F.3d 1076 (2004).