

Opening Up the Law to Accommodate Non-Binary Genders

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Jessica A. Clarke, *They, Them and Theirs*, 132 **Harv. L. Rev.** 894 (2019).

Professor Jessica Clarke's law review article, [They, Them, and Theirs](#), published this year in the Harvard Law Review, does important work in conceptualizing ways that anti-discrimination and other laws can change to accommodate non-binary people. This piece adds significantly to the emerging body of legal scholarship concerning non-binary persons, including such projects as [The Future of Legal Gender: A Critical Law Reform Project](#), in the UK, and [Ontario Human Rights Commission: Backgrounder – Talking about Gender Identity and Gender Expression](#) in Canada. One of the most interesting aspects of Professor Clarke's approach is her rejection of a one-size-fits-all solution in favor of a more contextual and pluralistic set of solutions.

As Professor Clarke explains, non-binary persons pose special challenges for the existing legal framework of anti-discrimination law, although, as she suggests, none of these challenges is insurmountable. One example of such a challenge is that non-binary identity disrupts the common transgender rights narrative that a transgender person is simply trapped in the wrong body. Such a narrative can sometimes fit comfortably in anti-discrimination law frameworks in the sense that the narrative seems to mesh nicely with the decades-old case law prohibition on stereotyping based on sex. Like the gruff, cursing plaintiff in [Price Waterhouse v. Hopkins](#), who did not fit with stereotypical notions of womanhood espoused by the male partners in the accounting firm that employed her, the transgender person who was born a man but identifies as a woman may be perceived as not quite fitting with traditional notions of what it means to be a woman, and the discrimination against her in a work context may thus be seen as actionable under employment discrimination laws like Title VII. The non-binary person's claim is harder to categorize because the discrimination they face is usually not so easily traced back to stereotyped ideas as to the gender that women (or men) are expected to perform. Posing issues similar to those posed by bisexuality in some contexts, with a non-binary person, the comparator (who must be proven to have been more favorably treated in traditional discrimination law) may be unclear. However, this problem dissipates if one looks to how gender-binary persons are treated in a workplace compared to non-binary persons, instead of trying to sort out whether the non-binary person's treatment should be compared to that of women or men.

Given the significant numbers of persons who identify as non-binary and the fact that eight states currently permit non-binary gender designations on at least some identification documents, the need to deal with these challenges is sure to heighten. The article does a good job explaining how non-binary status relates to transgender identity—it is often seen to fit under the transgender umbrella, although some non-binary people do not identify as transgender—as well as how it relates to intersex status. In the latter case, there is overlap between the groups of intersex and non-binary persons but they are not co-extensive.

The importance of changing the law or, at a minimum, legal interpretations to accommodate non-binary persons is demonstrated by Professor Clarke's discussion of the particular mental health risks that non-binary persons face due, most likely, to stigmatization and marginalization. She notes that "[b]ias against non-binary people often takes the form of disbelief, disregard, disrespect, and paternalism" (P. 910).

As Professor Clarke mentions, even defining non-binary genders can be challenging, as there are many variations, including rejection of the concept of gender altogether and hybridity or the melding of different gender roles into unconventional combinations, among many others. She argues persuasively that, after the de-emphasis of gender wrought by [Obergefell v. Hodges](#) and given the Supreme Court's mistrust of classifications based on sex, there are

not many contexts left in which the law requires an overarching definition of sex or gender. These developments, she argues, paved the way for legal recognition of non-binary rights.

Professor Clarke discusses various possible solutions to the law's current lack of recognition of non-binary persons in most contexts (although Obama-era Title VII regulations did cover non-binary persons). Among the potentially most promising of her solutions are recognition of a third gender category, which states like Oregon and California have already done in the identification context, and neutrality in the form of anti-classification based on sex, although, as Professor Clarke acknowledges, each possible solution has drawbacks. For instance, recognizing a third gender can be limiting given the extremely wide variety of gender expressions that exist, and, further, a third gender solution does not accommodate those that see themselves as having no gender at all.

After discussing several possible solutions, and quite a few variations within them, Professor Clarke addresses how they might apply in legal subject areas, such as identification laws, anti-discrimination laws, sex-specific rules and programs, sex-segregated spaces, and healthcare. She argues the best solution varies by context. For instance, she sees recognition of a third gender as the best option for identification documents and the laws governing them, whereas she sees anti-discrimination law as better able to accommodate and respect the numerous—or possibly infinite—variations in gender identity among non-binary persons. Professor Clarke compares the diversity of gender identities to that of religious beliefs, arguing that anti-discrimination law quite successfully has managed to protect the numerous varieties of religious belief. She rebuts the concern that using the wrong pronoun accidentally could subject an employer to liability by noting that it would only be repeated, intentional acts of disrespect that would rise to the level of actionability.

All in all, *They, Them, and Theirs* is an excellent piece of scholarship that is a must read for those interested in gender, sexuality and law. And beyond that context, the article provides an interesting exploration of how the law can accommodate diversity without stifling it in the name of efficiency and administrability. I am heartened by Professor Clarke's conviction that such an accommodation is possible.

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