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JUSTICE BERKELEY JOURNAL OF GENDER, LAW & JUSTICE BE

2011 volume 26:1 a continuation of **Berkeley Women's Law Journal**

BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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Dedication

Volume 26 of the *Berkeley Journal of Gender, Law & Justice* is dedicated to the It Gets Better Project and the people who have created online video responses encouraging LGBTQ youths to persevere through the trials of their teenage years. The It Gets Better Project started with a YouTube video made by author and sex-advice columnist, Dan Savage, and his husband, Terry, in response to a tragic series of suicides by LGBTQ youth, who suffered severe bullying in middle and high schools across the country. In their video, Dan and Terry described their own experiences with high school bullying and testified to the fact that life for LGBTQ youth can get better as soon as high school is over. They compellingly implored young people to realize that life can get better after high school but that they must live through their high school years in order to enjoy a better life ahead.

Dan and Terry's initial video in September 2010 launched a worldwide movement inspiring more than five thousand videos and receiving more than fifteen million views. Many of the videos were made by individuals and groups sharing their story and prominent politicians, celebrities, and public figures have contributed videos. Notably, President Barack Obama filmed a contribution in which he told LGBTQ youth "you are not alone . . . you didn't do anything to deserve being bullied" and "there are people out there who love you and care about you just the way you are." The most inspiring messages, however, came from ordinary people such as a city councilman in Fort Worth, Texas, who shared the despair he felt as a student struggling with his sexuality and facing bullying, and two teachers who wore masks in their video due to fear of the repercussions of being out but encouraged youth to trust their instincts and reach out to supportive teachers.

In a time of highly visible violence towards the LGBTQ community, these videos provide a sorely needed forum for individuals of all stripes to provide support for queer youth. The videos' vision of future joy and opportunity serve as a beacon of hope for those who struggle to see past the bullying and harassment of the present. It can get better for LGBTQ youth, and thanks to the intergenerational community building of the It Gets Better Project, we believe it will only continue to do so.

From the Membership

The *Berkeley Journal of Gender, Law & Justice* is guided by an editorial policy that distinguishes us from other law reviews and feminist journals. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to, race, class, sexual orientation, and disability. Therefore, discussions of "women's issues" that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their analytical attention to differences in social location among women. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the *Berkeley Journal of Gender, Law & Justice*.

The majority of pieces submitted to this journal, however, do not fall within the mandate. There are far too few of us in legal education and practice committed to advocating for women, let alone focusing on those women least served by the legal system. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the *Berkeley Journal of Gender, Law & Justice* as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at a conference that addresses the mandate of the *Berkeley Journal of Gender, Law & Justice*, refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in social justice.

From the Editor

Welcome to first issue of the twenty-sixth volume of the *Berkeley Journal of Gender, Law & Justice*. On behalf of the journal membership, I would like to thank all of our readers and supporters for helping to make 2010 our most successful fundraising year in recent memory. The journal is entirely self-supporting and relies on subscriptions and donations to continue to publish groundbreaking feminist scholarship, and we look forward to your continued support in 2011. Before I highlight the articles that appear in this issue, I would like to take this opportunity to discuss the exciting changes that have happened in the past semester.

Mandate Revision: After nearly a year and a half of discussion, the journal membership voted to revise the mandate. Unlike the major substantive revision accompanying the journal's name change in 2005, this revision aims primarily to clarify the mandate language. With this revision, we hope to bring the mandate language more into line with the scholarship that the journal actually publishes while increasing the flexibility of the mandate to accommodate emerging areas of feminist scholarship. The newly adopted language reads: "Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to, race, class, sexual orientation, and disability."

Publication Schedule: With the publication of volume twenty-six, issue one, the journal has switched from a fall-spring publication schedule to a winter-summer schedule. As a result of this change, volume twenty-five had only one issue and this issue is the first of volume twenty-six. The switch to a winter-summer schedule allows first-year members to more fully participate in the publication of the journal during their first semester of law school and better reflects the actual publication schedule the journal has kept since the switch to two issues per volume in 2008.

Website Launch: I am very excited to announce the launch of a new and updated journal website: genderlawjustice.berkeley.edu. The new website incorporates all of the information found on the previous website, and it runs on a user-friendly platform that will make it easier for journal members to keep the site up-to-date. Some highlights of the new site include listings of upcoming events, information for journal alumni on how to stay in touch, and an on-line donation page to make supporting the journal even easier. We also plan to post abstracts and links to full-text versions of the articles on the website starting this spring to increase access to the journal's scholarship.

Articles: In a commentary piece entitled *Challenging Child Exclusion in California State Court*, Berkeley Law alumna Erica Franklin argues that child welfare advocates may succeed in challenging child exclusion policies in California

courts despite failure in other state courts. Child exclusion policies operate such that if a woman gives birth after receiving welfare cash assistance for ten consecutive months, her family's total grant will not increase to account for the newborn child. Franklin persuasively argues that the child exclusion policy runs afoul of the unconstitutional conditions doctrine, which has been more liberally interpreted in California courts than in those of other states or in federal court. Thus, California courts may provide fertile ground for challenging the existing policy.

In our first article, *Unbound by Theory and Naming: Survival Feminism and The Women of the South African Victoria Mxenge Housing and Development Association*, Professor Becky L. Jacobs explores a contemporary reshaping of the global feminist colloquy and the continuing articulation of African feminism through the lens of the Victoria Mxenge Housing and Development Association. Amid the wave of post-Apartheid land tenure and housing reform, the women of the Association established communal savings cooperatives and, through a combination of "sweat equity" and new government programs, transformed their informal settlement at the physical margins of society into a secure and stable community. By examining the Association and its work, Jacobs explores how African women "do" feminism, recasting their societal roles in order to improve their realities and achieve their dreams.

In *Children, Parents & the State: The Construction of a New Family Ideology*, Professor Deseriee A. Kennedy examines the impact of parental incarceration on children and families. She focuses on current state laws that allow courts to take parental incarceration into consideration when determining whether to terminate parental rights, and argues that these laws have a disproportionate impact on poor families and families of color by taking incarcerating into account even when the offense that resulted in the incarceration was unrelated to the parent's ability to care for their child. Kennedy proposes a higher standard of proof for states in termination proceedings as well as other interventions to provide support for families and improve outcomes for children, parents, and their communities.

In a recent developments piece entitled, *Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo*, current Berkeley Law student Ryan S. Lincoln tells a gripping and disturbing account of sexual violence in the Democratic Republic of the Congo as a result of two civil wars and ongoing turmoil in the region. Lincoln then analyzes the frequently proposed solution of increasing rule of law in the region. He concludes that a general rule of law approach will not ameliorate the sexual violence problem. Furthermore, any rule of law approach must be nuanced and targeted towards rebuilding cultural norms destroyed by the armed conflicts and changing norms that underscore sexual violence in order to ameliorate the problem of sexual violence in the region.

This issue features three books received articles written by current journal members. Second-year Berkeley Law student and Commentary Editor Allison Hartry analyzes *Forced to Care: Coercion and Caregiving in America* by Evelyn Nakano Glenn. *From Disgust to Humanity: Sexual Orientation and Constitutional Law* by Martha Nussbaum is reviewed by Marketing Editor and third-year student Kate Ericsson. Finally, third-year Berkeley Law student Hidemi Chen reviews *Women on Probation and Parole: A Feminist Critique of Community Programs and Services* by Merry Morash.

This issue also contains a special section spotlighting the symposium hosted by the journal in April 2010. The symposium, entitled "Uncovered: The Policing of Sex Work," brought together academics, practitioners, and sex workers to discuss the differential policing of sex work along axes of race, class, and gender as well as the conflation of sex trafficking and sex work. The symposium was a huge and memorable success with much greater than expected attendance and overwhelming interest in the law school community. This issue features an introduction and overview of the symposium written by second-year student and Solicitations Editor Hannah Alsgaard as well as a commentary article written by symposium panelist and legal practitioner Robert Uy. I hope that these articles allow our readers who were unable to attend last spring's symposium to get a taste of the event and to engage with the issues we discussed.

On behalf of the Journal's membership, I would like to thank you, our readership, for your continued support. I welcome comments and feedback from readers at genderlawjustice.berkeley@gmail.com. I hope that you will find this volume as intellectually stimulating and satisfying as those of years past and that you will continue to look to us as a reliable source of exciting feminist scholarship.

BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

Winter 2011

Volume 26:1

COMMENTARY

- Challenging Child Exclusion in
California State Court 1
Erica Franklin

ARTICLES

- Unbound by Theory and Naming: 19
*Survival Feminism and the Women of the
South African Victoria Mxenge Housing and
Development Association* *Becky L. Jacobs*
- Children, Parents & the State: 78
*The Construction of a New Family
Ideology* *Deseriee A. Kennedy*

RECENT DEVELOPMENTS

- Rule of Law for Whom?: 139
*Strengthening the Rule of Law as a
Solution to Sexual Violence in the
Democratic Republic of the Congo* *Ryan S. Lincoln*

It is the policy of the *Berkeley Journal of Gender, Law & Justice* not to draw a distinction between student pieces and the work of scholars, practitioners, and community workers. This policy reflects our belief that in a struggle for equality all efforts are of equal value and importance.

BOOKS RECEIVED

Forced to Care: 168
Coercion and Caregiving in America
by Evelyn Nakano Glenn

From Disgust to Humanity: 179
Sexual Orientation and Constitutional Law
by Martha C. Nussbaum

Women of Probation and Parole: 191
A Feminist Critique of Community
Programs and Services
by Merry Morash

SYMPOSIUM

Uncovered: The Policing of Sex Work

Introduction 198
Hannah Alsgaard

Blinded by Red Lights: 204
*Why Trafficking Discourse Should
Shift Away from Sex and the
"Perfect Victim" Paradigm*
Robert Uy

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Berkeley Journal of Gender, Law & Justice

2011 Barbara Nachtrieb Armstrong Award for Outstanding Advocacy on Behalf of Social Justice for Women

The *Journal* created the Barbara Nachtrieb Armstrong Award for Outstanding Advocacy on Behalf of Social Justice for Women in 1985 when the *Journal* was founded. Barbara Nachtrieb Armstrong was the only woman in the Boalt Hall Class of 1915. She became the Morrison Professor of Municipal Law, Emeritus, and was the first tenured woman law professor in the United States. She was instrumental in drafting state and federal social security acts and also published a monumental text on family law and community property. The Armstrong Award is a national award open to all people—including scholars, community workers, legal practitioners, and activists—who demonstrate outstanding advocacy on behalf of social justice for women and underrepresented genders. The recipient is chosen by the membership of the *Journal*.

The recipient of this year's Armstrong Award is The Honorable Victoria Kolakowski. In November 2010, Judge Kolakowski was elected to the Superior Court of Alameda County and is the nation's first openly transgender trial court judge. In addition to practicing law for over twenty years and serving as an Administrative Law Judge for five years, Judge Kolakowski brings personal experience with discrimination to the bench. After earning her J.D. at Louisiana State University, Judge Kolakowski was denied the opportunity to sit for the bar, because the state bar association viewed her transgender status as evidence of "unsound mind." Judge Kolakowski appealed to the Louisiana Supreme Court, eventually winning the opportunity to sit for the bar examination. Since moving to the Bay Area, Judge Kolakowski has been an asset to the LGBTQ community. In 1991, she helped draft Berkeley's Domestic Partner Registry Ordinance, one of the first of its kind in the nation. More recently, she has co-chaired the Board of Directors of the Transgender Law Center and volunteered her services as an advocate on behalf of transgender clients in court.

The *Journal* is honored to present Judge Kolakowski with the Barbara Nachtrieb Armstrong Award for her fight for recognition and to end discrimination against transgender individuals.