

K  
2  
-E75  
v. 26  
no. 2  
rm135  
Copy 1

scholarship requires critical examination of the intersection of gender with one or more other axes of subordinatio

JUSTICE BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

2011 volume 26:2 a continuation of Berkeley Women's Law Journal

# BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

The *Berkeley Journal of Gender, Law & Justice* (ISSN 0882-4312) is edited by the students of University of California, Berkeley, School of Law and published twice a year by the University of California. All content copyright © 2011 by the Regents of the University of California except when expressly indicated.

SUBSCRIPTIONS: Yearly subscriptions are:

Sponsor	\$100
Friend	\$50
Institution	\$55
Individual	\$22.50
Student (with valid ID)	\$11.25

The first two categories are tax-deductible. Subscribers outside North America should add \$15.00 for postage.

CORRESPONDENCE: Address all correspondence regarding subscriptions, address changes, claims for undelivered copies, advertising orders, and requests for permission to reproduce material from the *Journal* to: Business Services, UC Berkeley School of Law, 2850 Telegraph Avenue, Suite 500 #7220, Berkeley, CA 94705-7220, [orders@law.berkeley.edu](mailto:orders@law.berkeley.edu). Please allow at least four weeks for change of address and other subscription information to take effect.

MANUSCRIPTS: We invite you to submit your original, unpublished work to the *Berkeley Journal of Gender, Law & Justice*. We prefer electronic submittals through ExpressO or in Microsoft Word format sent to [bjlj.submissions@gmail.com](mailto:bjlj.submissions@gmail.com). We also accept typed copies sent to our editorial office at Berkeley Journal of Gender Law & Justice, 38 Boalt Hall #7200, University of California, Berkeley, CA 94720-7200.

FORM: Citations generally follow *The Bluebook: A Uniform System of Citation* (19th ed. 2010) and *The Chicago Manual of Style* (16th ed. 2010). This issue should be cited as 26 BERKELEY J. GENDER L. & JUST. \_\_ (2011).

LAW LIBRARY

NOV 18 2011

UNIVERSITY OF CALIFORNIA  
BERKELEY

10-1-10  
UNIVERSITY OF CALIFORNIA  
LIBRARY

© 2011 The Regents of the University of California  
University of California, Berkeley  
School of Law  
38 Boalt Hall  
University of California  
Berkeley, CA 94720-7200

Published semi-annually by the  
University of California  
Printed by Joe Christensen, Inc.

Cover designed by Emily Wright.  
Logo designed by Chandra Williams.

# 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 volume twenty-six, issue two of the *Berkeley Journal of Gender, Law & Justice*. Before I highlight the articles that appear in this issue, I would like to take a moment to thank you for your continued interest and support and say a few words about the importance about the *Berkeley Journal of Gender, Law & Justice* both as a source of feminist legal scholarship and as a community.

I have been involved with the *Berkeley Journal of Gender, Law & Justice* since my first week at Berkeley Law more than three years ago. Being a part of the journal framed my experience at Berkeley Law by giving me a supportive community to in which to commiserate about the stress of law school, challenge myself intellectually, and form lasting friendships. This journal is a special place, both intellectually and personally, for many of those involved, and your support will allow us to continue to publish groundbreaking feminist scholarship and shape the next generation of feminist legal scholars for years to come. I would especially like to encourage recent alumni of Berkeley Law, those who have graduated within the past five years, to continue subscribing and supporting the journal as your contributions are matched dollar for dollar by the University of California Trustees. This spring and summer, the journal re-vamped our website to increase visibility and accessibility. Visit [genderlawjustice.berkeley.edu](http://genderlawjustice.berkeley.edu) to view information about upcoming events and renew your support.

In this issue, we are proud to present two student-written commentary pieces which center on the criminal justice system. In *African American Men's Health and Incarceration: Access to Care upon Reentry and Eliminating Invisible Punishments*, joint J.D. and Masters in Public Policy student Amy Katzen argues that the disparity in health outcomes and life-expectancy between African American men and the rest of the population is due to a complex, yet addressable, interplay of disproportionately high incarceration rates, lack of access to culturally competent health care, and systematic exclusion from federal benefit programs. Katzen also discusses the relationship between gender stereotypes and access to health care among formerly incarcerated African American men. Katzen concludes that the health consequences of incarceration, along with exclusion from federal benefits, results in invisible punishments that last far longer than most prison sentences.

Berkeley Law alumna Erin Liotta, wrote our second commentary piece entitled *Double Victims: Ending the Incarceration of California's Battered Women*. Liotta examines the effect of California legislation targeted at women who are incarcerated for crimes connected to their experience as a victim of battering but who did not benefit from expert testimony about battering and its effects at trial. While recent legislation has provided some hope for these women, Liotta argues that, the avenues

to justice are extremely narrow, and many women continue to be victimized by a legal system deaf to their plight.

In the article *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, practitioner Kavita B. Ramakrishnan examines how the law treats similar unwanted sexual advances differently depending on whether the recipient of the unwanted advance is a heterosexual man, a woman, or a man perceived as queer. Courts recognize unwanted sexual advances suffered by heterosexual men both in the criminal context and in the context of work-place sexual harassment, while erecting barriers to recognition, or in some cases, providing no avenues for legal recognition at all, for harassment suffered by women and men perceived as queer. Ramakrishnan brings a novel perspective to this crucial subject and highlights the deeply gendered nature of the legal system's response to unwanted sexual advances.

In a recent developments piece entitled, *Trapped in the Wrong Phraseology: O'Donnabhain v. Commissioner – Consequences for Federal Tax Policy and the Transgender Community*, Berkeley Law third-year Alesdair H. Ittelson examines the implication of a recent Tax Court decision extending the medical expense deduction to sexual reassignment surgery and hormone replacement therapy. Ittelson explores the themes and assumptions raised by the highly fractured court in numerous separate opinions, as well as how the medical expense deduction furthers the divide between transgender individuals who can afford costly medical interventions and those who cannot.

This issue features two books received articles written by current journal members. Second-year Berkeley Law student and Book Review Editor Jon Guss reviews *The Man Question: Male Subordination and Privilege* by Nancy E. Dowd. Third-year Berkeley Law student Katie Henderson analyzes *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander.

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](mailto: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

---

Summer 2011

Volume 26:2

---

## COMMENTARY

---

- African American Men's Health  
and Incarceration: Access to Care upon  
Reentry and Eliminating Invisible Punishments 221  
*Amy L. Katzen*
- Double Victims: 253  
Ending the Incarceration of  
California's Battered Women *Erin Liotta*

## ARTICLES

---

- Inconsistent Legal Treatment of 291  
Unwanted Sexual Advances: A Study  
of the Homosexual Advance Defense,  
Street Harassment, and Sexual  
Harassment in the Workplace *Kavita B. Ramakrishnan*

## RECENT DEVELOPMENTS

---

- Trapped in the Wrong Phraseology: 356  
*O'Donnabhain v. Commissioner*—  
Consequences for Federal Tax Policy  
and the Transgender Community *Alesdair H. Ittelson*

---

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

---

The Man Question: Male  
Subordination and Privilege 384  
by Nancy E. Dowd

The New Jim Crow:  
Mass Incarceration In the Age of Colorblindness 396  
by Michelle Alexander

## Board of Editors 2010–2011

*Editor-in-Chief*  
Laura Beckerman

*Managing Editor*  
Laura Elliot

*Book Review Editor*  
Emily Prifogle

*Commentary Editor*  
Allison Hartry

*Recent Developments Editor*  
Alison Mollman

*Events Editor*  
Alesdair H. Ittelson

*Marketing Editor*  
Kate Ericsson

*First Year Representative*  
Kaitlyn Murphy

*Executive Editors*  
Dan Dwyer  
Vikram Swaruup

*Submissions Editor*  
Nila Natarajan

*Solicitations Editor*  
Hannah Alsgaard

*Production Editor*  
Matthew Valdez

*Article Editors*  
Rachel Baum  
Katy Merk  
Sonja Tonnesen

### *Members*

Lacey Bangle  
Kristi Black  
Sara Carian  
Hidemi Chen  
Rebekah DeHaven  
Aubrie Dillon  
Ana Enriquez  
Erin Everett

Jolene Forman  
Jon Guss  
Brett Hammon  
Lily Harvey  
Katie Henderson  
Ana Herrera  
Liz Kim  
Molly Leiwant

Shannon Maguire  
Katie Mathews  
Martin Quiñones  
Becca Rausch  
Alexandrea Scott  
Emily Stabile  
Olga Tomchin  
Kristen Young

## National Advisory Board

Herma Hill Kay  
PROFESSOR OF LAW  
*University of California, Berkeley*  
Faculty Advisor

Roberta Achtenberg  
COMMISSIONER  
*United States Commission on Civil Rights*

Lynn B. Cooper  
PROFESSOR OF SOCIAL WORK  
*California State University, Sacramento*

Hon. LaDoris H. Cordell  
VICE PROVOST FOR CAMPUS RELATIONS, EMERITUS  
*Stanford University*

Constance de la Vega  
PROFESSOR AND ACADEMIC DIRECTOR OF  
INTERNATIONAL PROGRAMS  
*University of San Francisco School of Law*

Anna de Leon  
JAZZ ARTIST & FORMER JOURNAL MEMBER  
*Berkeley, CA*

Margaret Fung  
EXECUTIVE DIRECTOR  
*Asian American Legal Defense and Education Fund*

Hon. Donna J. Hitchens  
JUDGE, EMERITUS  
*Superior Court, State of California*

Arlie Hochschild  
PROFESSOR OF SOCIOLOGY AND DIRECTOR,  
CENTER FOR WORKING FAMILIES  
*University of California, Berkeley*

Emma C. Jordan  
PROFESSOR OF LAW  
*Georgetown University Law Center*

Hesung Chun Koh  
CHAIR AND DIRECTOR  
*East Rock Institute, New Haven*

Linda Hamilton Krieger  
PROFESSOR OF LAW  
*University of Hawai'i at Manoa School of Law*

Judith E. Kurtz  
CIVIL RIGHTS ATTORNEY  
*San Francisco*

Jean Love  
JOHN A. AND ELIZABETH H. SUTRO  
PROFESSOR OF LAW  
*University of Santa Clara*

Carrie J. Menkel-Meadow  
A.B. CHETTLE, JR. PROFESSOR OF  
DISPUTE RESOLUTION AND CIVIL  
PROCEDURE  
*Georgetown University Law Center*

Eva Jefferson Paterson  
PRESIDENT  
*Equal Justice Society, San Francisco*

Andrea L. Peterson  
PROFESSOR OF LAW  
*University of California, Berkeley*

Deborah L. Rhode  
ERNEST W. MCFARLAND PROFESSOR OF LAW  
*Stanford University*

Marjorie M. Shultz  
PROFESSOR OF LAW  
*University of California, Berkeley*

Dr. Judith Stacey  
PROFESSOR OF SOCIAL AND CULTURAL  
ANALYSIS, SOCIOLOGY  
*New York University*

Karen L. Tokarz  
CHARLES NAGEL PROFESSOR OF PUBLIC  
INTEREST LAW & PUBLIC SERVICE AND  
DIRECTOR OF DISPUTE RESOLUTION  
*Washington University, St. Louis*

Hon. Diane E. Watson  
REPRESENTATIVE, EMERITUS  
*33rd District, Los Angeles*

D. Kelly Weisberg  
PROFESSOR OF LAW  
*Hastings College of Law, San Francisco*

Wendy Webster Williams  
PROFESSOR EMERITUS  
*Georgetown University Law Center*

# *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.