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JUSTICE BERKELEY JOURNAL OF GENDER, LAW & JUSTICE BE

2008 volume 23 a continuation of Berkeley Women's Law Journal

BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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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 research, analysis, narrative, theory, and commentary that address the lives and struggles of underrepresented women. We believe that excellence in feminist legal scholarship requires critical examination of the intersection of gender with one or more 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 If you read an unpublished paper or hear a speech at a conference that addresses the mandate of the *Berkeley Journal of Gender, Law & Justice*, refer it to us.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 interests of underrepresented women, and thus serve the interest we share in social justice.

From the Editor

On behalf of the *Journal*, I am pleased to present our twenty-third volume of feminist scholarship. True to years past, our membership has produced this volume in the midst of a flurry of other activities. Throughout the academic year, our membership has prepared for a transition into publishing not just one, but two issues of the *Journal* annually. We hope this shift will allow us to publish more critical feminist scholarship in a more timely fashion. In addition, in early 2008, the *Journal* presented a symposium, "Gender Behind Bars," which examined our country's prison crisis through the lens of gender. Symposium events examined topics such as the unique difficulties faced by transgender youth in the delinquency system, gendered health care needs and access to adequate health care in prison, and the impact of incarceration on families.

In spite of the bustle, we have compiled for our readers yet another collection of cutting-edge feminist scholarship that spans the range of our publication mandate. Professor Judith Daar's article, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, examines access to various assisted reproductive technologies and discusses three significant barriers to such treatment: cost; race and ethnicity; and marital status or sexual orientation. Professor Daar argues that these barriers harm society by stigmatizing those who are unable to conceive "naturally." She concludes that these barriers must be eliminated to protect fully procreation as a basic human right. In *Toward a Transformative Approach: The Limits of Transgender Formal Equality*, Anthony Gilden examines the efforts of transgender rights advocates to redress discrimination via a formal equality approach. Gilden argues that treating transgender people the same as non-transgender people under the law may reduce blatant discrimination, but also perpetuates the underlying stigmatization of gender non-conformity. The article advocates a "gender fluidity" approach, drawn from Navajo and other traditions, based on its potential to value the experiences of a broadly diverse transgender population. Finally, in *Loving Couples, Split-interests: Tax Planning in the Fight to Recognize Same-Sex Marriage*, Anthony Rickey proposes a unique tax strategy that same-sex couples might employ to undermine the federal Defense of Marriage Act (DOMA). He suggests that litigation arising out of the use of this strategy could facilitate consensus-building around the elimination of DOMA with groups that have not traditionally supported same-sex marriage.

This issue also features a Recent Development by Boalt Hall student, Flynn Coleman: *Pan-African Strategies for Environmental Preservation: Why Women's Rights Are the Missing Link*. Coleman argues that strengthening women's rights to land ownership in Sub-Saharan Africa and facilitating their participation in environmental decision-making will in turn improve environ-

mental preservation in this region. She posits that rural Sub-Saharan African women, the keepers of environmental knowledge and tradition, are uniquely situated to play a pivotal part in creating a Pan-African system of environmental rights protection that is based in a human rights framework.

In this year's book review, Professor Anita Allen reviews Joan Wallach Scott's recent book, *The Politics of the Veil (The Public Square)*. Scott's timely book discusses the debate raging in France about the public school ban on the wearing of clothing or symbols that "exhibit conspicuously a religious affiliation," which has specifically targeted the *hijab* of Muslim school girls. In her review of the book, Professor Allen explores legal attitudes in the United States toward religious garb and suggests that such a ban is unlikely in schools in the United States. Allen explains that "there is more than one way to be a modern, multicultural Western liberal democracy with a Muslim population, and some ways are better than others." Additionally, Sarah Steinheimer, a *Journal* member, reviews *Welfare Reform and Sexual Regulation* by Anna Marie Smith. Smith, a feminist political theorist, examines the manner in which the federal government has used the welfare system to impose sexual regulations on poor women and to control their decisions about intimate and familial relationships.

Finally, in this issue's Commentary, Nissa Thompson critically analyzes the proposed International Violence Against Women Act (I-VAWA) by measuring it against standards derived from Iraqi activist Haifa Zangana's suggestions for the proper role of feminism in U.S. foreign policy. While Thompson has reservations about some of I-VAWA's current language, she concludes that, in contrast to the failures of U.S. policy in Iraq during and after the invasion, I-VAWA is a substantial step toward creating a pro-woman and women-centric U.S. foreign policy.

Our membership is very proud to present these pieces to you, our readers, and I hope that you will find this issue to be as provocative and inspiring as past issues. I would also like to extend our thanks to our readers; your support allows us to continue to publish scholarship on issues and human experiences that are marginalized within the legal academy still today. We look forward to presenting to you yet another collection of feminist scholarship at the close of this year!

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Berkeley Journal of Gender, Law & Justice

2008 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 female 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 Professor Karen Musalo. Professor Musalo is the Director of both the Center for Gender and Refugee Studies, and the Refugee and Human Rights Clinic at UC Hastings College of Law. Her dedication to removing the particular barriers faced by female asylum seekers embodies this Journal's focus on the intersection of gender with economic, social, and political rights. As an expert in refugee law and women's rights, she has substantially contributed to the development of asylum jurisprudence—both academically and as an attorney in a number of influential cases. Most notably, Professor Musalo served as lead counsel in *Matter of Kasinga*, a landmark decision recognizing female genital cutting as a basis for granting asylum. Currently, she is litigating a case that could provide political asylum for women experiencing domestic abuse abroad. In addition, Professor Musalo co-authored the authoritative text entitled *Refugee Law and Policy: An International and Comparative Approach*, and has written a number of reports published by the *Expedited Removal Study*, which she directed from 1997 to 2000.

The *Journal* is honored to present Ms. Musalo with the Barbara Nachtrieb Armstrong Award for her continued fight for justice on behalf of refugees and her long-standing commitment to gender equity.