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JUSTICE **BERKELEY JOURNAL OF GENDER, LAW & JUSTICE** B

2007 volume 22 a continuation of **Berkeley Women's Law Journal**

# BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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**MANUSCRIPTS:** We invite you to submit your original, unpublished work to the *Berkeley Journal of Gender, Law & Justice*. We prefer electronic submittals in Microsoft Word format sent to [bwlj@socrates.berkeley.edu](mailto:bwlj@socrates.berkeley.edu). We also accept typed copies sent to our editorial office at 491 Simon Hall, Boalt Hall School of Law, University of California at Berkeley, Berkeley, CA 94720.

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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

Twenty-two years ago, our *Journal* published its first volume. In the ensuing years our membership has grown, our name has changed and the breadth and depth of our scholarship has expanded. Amid these changes, however, one thing has remained steadfast: our commitment to the *Journal's* mandate and mission to explore the intersectionality of gendered oppression by giving voice to those whose voices have been stifled.

This year's volume upholds that commitment and continues our tradition of publishing cutting-edge scholarship. Three outstanding articles explore the connections between policy and jurisprudence and critically examine the intersection of gender with other axes of subordination. Clare Diefenbach's article, "Same-Sex Sexual Harassment After *Oncale*: Meeting the 'Because of . . . Sex' Requirement," traces the way courts have interpreted *Oncale v. Sundowner Off-shore Services, Inc.*, which extended Title VII sex discrimination protection to plaintiffs who have been harassed in the workplace by members of the same sex. The article pays special attention to satisfaction of Title VII's "because of . . . sex" requirement in these cases and discusses the success of plaintiffs who allege, under *Oncale*, that they have been harassed because of their perceived sexual orientation. Madeline Howard's article, "Subsidized Housing Policy: Defining the Family," explores the way in which the government's concepts of family rights and responsibilities determine very fundamental aspects of public housing residents' lives, such as whom they can marry and live with, whether certain family members must be excluded from the home, and how to cope with violence within the family. Lastly, William B. Turner's article, "The Lesbian De Facto Parent Standard in *Holtzman v. Knott*: Judicial Policy Innovation and Diffusion," utilizes both political science literature on policy innovation and diffusion and demographic information to uncover what characteristics appear to militate in favor of state courts recognizing de facto parent status in lesbian petitioners.

The *Journal's* own members have also made important contributions to legal scholarship with two Recent Developments. Sarah Angel's timely piece, "The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research," examines the costs and benefits of donor participation in stem cell research while Holly Henderson's piece, "Foucault, Feminism and Rape: A Theory and Politics of Rape Prevention," calls for a rethinking of feminist approaches to rape prevention. In this year's Book Review, Professor Angela Onwuachi-Willig weaves together a nuanced and insightful review of Megan Seeley's *Fight Like A Girl: How To Be A Fearless Feminist*, a book that rallies the third wave of feminism to continue the battle for full equality for women and girls. Books Received focuses on an anthology on transgender rights, a multi-

media work that probes the sexual politics of the juvenile justice system, a recent "account of the female psyche at the twenty-first-century mark" and a new primer on feminist legal theory. The Commentary section of this Volume is driven by the personal experiences of the authors and their exploration of the assumptions the law makes in conceptualizing different groups of women.

We are also thrilled to be publishing the transcripts from our fourth independent symposium, "Gender and Migration," which was held on November 18, 2005. The symposium explored many of the manifestations of abuse and inequality in the realm of gendered migration. Professor Rosa-Linda Fregoso's keynote address on the culture and politics of human rights offered insight into viable avenues for resistance against gendered inequality. As political and cultural debates over immigration and globalization continue, the publication of these transcripts reminds us of the relevance of discussions about the gendered face of migration. Planning has already begun for our fifth symposium, scheduled to take place in Fall 2007. As the development of this critical symposium on Gender and Incarceration continues, our website (<http://www.boalt.org/bwlj>) will contain further information regarding the date and content.

This has been a year of continued growth and expansion for the *Journal*. Just as the hundreds of members who have come before us, the members of Volume 22 have forged a unique community at Boalt Hall. And, like the Volumes before us, we have provided a space within legal academia for a different voice—a gendered, intersectional, multidisciplinary voice. This Volume stands as a testament to the strength and dedication of our members and the integrity and continued salience of our mandate.

# BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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2007

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The *Berkeley Journal of Gender, Law & Justice* would like to thank the following law firms who sponsored our 2005 symposium on Gender & Migration. This event would not have been possible without their generous contributions.

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# Dedication

*"Life shrinks and expands in proportion to one's courage."* -- Anais Nin

*The Berkeley Journal of Gender, Law & Justice* is proud to dedicate this volume to our editor-in-chief, Holly Henderson. In leading our journal this year, Holly has shown tremendous strength, commitment, and grace in the face of enormous obstacles.

Holly has been a true leader—showing us by example the impact a person can have when they put others ahead of themselves. Her leadership this year will continue to inspire us not only to discuss and think about the values we proclaim, but to live them in our day-to-day experiences as well.

Holly is proof that convictions can triumph over challenges; that dedication can overcome difficulty; and that courage is more important than circumstance.

Thank you, Holly, for your leadership, your friendship, and your courage.

# *Berkeley Journal of Gender, Law & Justice*

## **2007 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 Maria Blanco. Ms. Blanco is the Executive Director of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. The *Journal* greatly admires Ms. Blanco's history of advocacy not only in the area of gender equity, but also in racial justice and immigrant rights—both areas of social justice that the *Journal* strives to promote. Her extensive experience as a civil rights attorney includes important victories such as *Davis v. San Francisco*, which brought women for the first time into the San Francisco Fire Department, *Castaneda v. U.C. Regents*, which challenged UC Berkeley's admissions policy for its over reliance on the SAT and Advanced Placement courses, and *Castrejon v. Tortilleria La Mejor*, which established that undocumented workers are covered by federal anti-discrimination laws. Ms. Blanco has also worked as an attorney with Equal Rights Advocates, was a professor of law at Golden Gate University's School of Law, and served as National Senior Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF). More information about Ms. Blanco and the work of Lawyers' Committee for Civil Rights of the San Francisco Bay Area can be found at <http://www.lccr.com>.

The *Journal* is honored to recognize Maria Blanco for her skillful advocacy and enduring commitment to the rights of underrepresented communities.

## *Berkeley Journal of Gender, Law & Justice* 2007 Writing Award

The *Journal* created the Writing Award in the fall of 1999 in an effort to advance scholarship on underrepresented women and increase the number of submissions falling within our mandate. Students and public interest practitioners of all disciplines are invited and encouraged to submit pieces for consideration. The Writing Award recipient receives a cash prize, and the article is published in the spring. The deadline for submissions is generally the beginning of November.

The 2007 Writing Award winner, Madeline Howard, is the author of "Subsidized Housing Policy: Defining the Family." This article critically examines housing policy and its impact on the non-traditional families that reside in government-subsidized housing. Madeline explores the development of housing policy, from its original conception of the family as a married couple with children to current guidelines that define a family as any combination of people that have a stable relationship. Her analysis focuses specifically on the effects of housing policies on families headed by single women, and the way in which program rules may forbid a mother from bringing her partner into her home or force her to evict her own child. The *Journal's* membership was compelled by Madeline's attention to public policies that impact underrepresented communities along gender, race, and class lines, and the clear commitment to social justice that pervades Madeline's work.

Madeline's prior work with public housing residents inspired her to pursue a career as an attorney. For three years prior to law school, she worked with the Family Advocacy Program, a small legal services group integrated with the largest safety-net hospital in Boston. At the Family Advocacy Program, Madeline advocated for low-income tenants living in unsafe housing conditions and facing illegal evictions. Seeing so many families facing the same problems led her to explore ways to create broader change. As a first step towards this goal, Madeline helped to establish a collaborative program with the Boston Public Housing Authority to combat asthma among public housing residents.

During her time at the hospital, Madeline also researched the impact of welfare reform on women's and children's health. This work sparked her interest in the conceptions of family that guide public policy and their ability to impact the most intimate details of mothers' lives.

Madeline's work with struggling families led to her decision to attend law school. She hopes to continue her legal services work this fall after graduating from Boalt. Madeline lives in the Bay Area with her partner, a doctoral student in Physical Chemistry at Berkeley.

The *Berkeley Journal of Gender, Law & Justice* is pleased with the caliber



of submissions that we received this year, and we hope that the Writing Award will continue to foster and promote scholarship devoted to underrepresented women and genders. Please consider submitting your original, unpublished work to us. Together we can give a voice to those too often silenced.



## Commentary

The following pieces are driven by the personal experiences of the authors and their exploration of the intersection of gender with other axes of subordination. Personal interaction with and/or observation of the assumptions the law makes in conceptualizing different groups of women led each of these authors to critically question the way the law presently operates.

In "Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?" Tamara Kuennen reveals the difficulties judges face in evaluating whether or not women have been "coerced" into requesting that their civil protection orders be lifted. Kuennen's work with women who have experienced domestic violence and domestic violence clinical students informs her observations and research. After exploring many of the ways that different sources of coercion can affect women from different races, classes, and situations; Kuennen calls for a dialogue among judges and practitioners to create a workable definition of coercion for judges to use. This conversation will hopefully begin the process of ensuring fair treatment of all women who appear in court after having faced domestic violence.

In, "Psychic Charlatans, Roving Shoplifters, and Traveling Con Artists: Notes on a Fraudulent Identity," Alexandra Oprea discusses her experiences as a Roma woman in the United States. Her personal experiences led her to research the way Roma women, particularly those who practice fortune telling, are treated by the law and legal scholarship. Oprea questions the way that Roma women are portrayed in both the law itself and legal scholarship, exploring how these portrayals influence the daily experiences of Roma fortune tellers. Her discussion of the personal and shared experiences of Roma woman is a model for advocacy and scholarship based on life experiences with the law.