

Introduction

Each year, hundreds of scholars, lawyers, judges, and law students publish articles on law and policy relating to sexual orientation and gender identity. *The Dukeminier Awards*, produced by UCLA School of Law students and the Williams Institute, recognizes and distributes the best of these articles.

We publish *The Dukeminier Awards* in order to disseminate superb scholarship on sexuality to the public and to lawyers, judges, legislators and policymakers; to recognize and support scholars, law students, and lawyers who write in the field; and to encourage critical thought on cutting-edge topics in legal, political, and academic debate.

Closer to home, *The Dukeminier Awards* journal offers a unique educational experience to UCLA students. Among the School of Law's many courses that address sexual orientation and gender identity, an annual seminar focuses on recent legal scholarship. Panels of UCLA students review relevant articles from the prior calendar year and choose several dozen for closer examination by their peers in the seminar, whose final deliberations include scholars housed in Williams Institute and members of the Institute's Faculty Advisory Committee. Certain key qualities—clarity, novelty, persuasiveness, and timeliness—are emphasized throughout the selection process.

2011 saw an abundance of excellent new writing on sexual orientation and gender identity law and policy. From this impressive field, three articles were selected to receive a Dukeminier Award:

- **Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011).**

Gay and transgender people are disproportionately vulnerable to sexual assault behind bars. Rather than ignoring the problem or confining members of these groups to solitary confinement while in custody, the L.A. County Jail segregates them into a special housing unit called "K6G." Professor Dolovich's article, originally published in the *American Criminal Law Review*, carefully describes how detainees are identified for inclusion in K6G and responds to some constitutional and moral objections to "strategic segregation" based on sexual orientation and gender identity. It also documents K6G's success in protecting residents from sexual assault and from the gang politics that pervade life in the Jail's General Population. Drawing on extensive interviews with K6G residents and with the officers in charge of the unit, Professor Dolovich concludes that K6G offers a plausible model, if not the only one, for protecting gay and transgender detainees from sexual assault. (In May 2012, the U.S. Department of Justice drew on language proposed by Professor Dolovich to prohibit segregation of LGBTI prisoners in jails and prisons unless, as in Los Angeles County, segregation is undertaken "in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.") "Strategic Segregation in the Modern Prison" is the first article to emerge from Professor Dolovich's study of K6G. The second, forthcoming in the *Journal of Criminal Law and Criminology*, puts to one side the normative question of

whether K6G is an appropriate carceral strategy. Comparing life in K6G with life in the Jail's General Population, "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail" asks how K6G's operation and culture can inform more humane approaches to incarceration.

- **Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).**

Professor NeJaime's article, originally published in the *Iowa Law Review*, departs from scholars' traditional focus on the effects of litigation victory and instead explores the surprisingly productive function of litigation loss. Analyzing how LGBT rights lawyers integrate loss into their multidimensional approach to advocacy, Professor NeJaime shows that, by exposing the limits and constraints of court-centered change, litigation loss may be leveraged to mobilize constituents and galvanize decision-makers in other institutional arenas. The article's account of these counterintuitive results contributes mightily to our understanding of litigation's constitutive effects on social movements and deepens our appreciation of courts' place among the institutional venues in which movement lawyers operate. Professor NeJaime's analysis of litigation loss does not suggest a turn away from courts but instead calls for a savvy, nuanced approach to litigation's complicated and contingent role in broader processes of social change.

- **Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).**

In August 2010, Chief Judge Vaughn Walker of Northern District of California held that Proposition 8, which amended the California Constitution to revoke same-sex couples' freedom to marry, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Building on important but neglected aspects of this historic decision, Professor Rosky's article, originally published in the *Arizona Law Review*, develops three new constitutional arguments for same-sex marriage. First, it shows how a historical account of the demise of sex discrimination in marriage law supports the claim that same-sex couples have a fundamental 'right to marry' under the Due Process Clause. Second, it argues that fears about exposing children to homosexuality cannot justify same-sex marriage bans because the state has no interest in inculcating heterosexuality. Third, it proposes that the Fourteenth Amendment's prohibition of morality as a legitimate rationale for same-sex marriage bans mirrors the First Amendment's requirement that laws have a "secular purpose." These insightful readings of *Perry v. Schwarzenegger* show that, whatever becomes of Proposition 8, gay rights advocates would do well in future same-sex marriage litigation to revisit the doctrinal ground mapped in Chief Judge Walker's opinion.

This volume of *The Dukeminier Awards* also recognizes the winner of the Williams Institute's annual student writing competition, Julie Anne Howe's "Transgender Youth, the Non-Medicaid Reimbursable Policy, and Why the New York City Foster Care System Needs to Change." Howe's paper reads between the lines of an ostensibly transgender-friendly policy promulgated by New York City's Administration for Children's Services. Enacted in response to public outcry over the Administration's

refusal of transition-related treatment to a male-to female transsexual in foster care, the new policy promises that New York State's specific prohibition of Medicaid funding for transition-related treatment will not, in and of itself, foreclose medically necessary treatment for transgender foster youth. Yet even where all medical, psychological, and procedural requirements are met, the Policy permits the agency to deny transition-related treatment. Howe argues that this unfettered discretion violates the Due Process Clause and, potentially, the Equal Protection Clause of the Fourteenth Amendment. Equally important, her work poignantly documents the challenges transgender youth face in foster care.

Finally, a word on format. This is the first year *The Dukeminier Awards* are being published exclusively online. The winning articles appear exactly as they did in the journals that first published them.

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