



## INTRODUCTION

Welcome to the eleventh annual publication of *The Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review Articles*. Each year, hundreds of scholars, lawyers, judges, and law students publish articles on law and policy regarding sexuality, sexual orientation, and gender identity. *The Dukeminier Awards*, produced by The Williams Institute and students at the UCLA School of Law, recognizes the best among these articles.

We publish *The Dukeminier Awards* to advance the following goals:

- To encourage scholars to begin or continue writing about sexuality and gender identity law and public policy, and to provide valuable support and recognition to those who do so;
- To disseminate superb scholarship regarding sexuality and gender identity to the general public, as well as to lawyers, judges, legislators, and policymakers; and
- To encourage critical thought on cutting-edge topics in legal, political, and academic debate.

Producing *The Dukeminier Awards* also offers a unique educational experience to students here at UCLA. Among the numerous courses at the UCLA School of Law that address sexuality and gender, the Sexual Orientation and Gender Identity Workshop is an annual seminar, taught by the senior Williams Institute Law Teaching Fellow, which focuses specifically on legal scholarship. Students in this seminar read, think critically about, and ultimately vote on which articles constitute the best sexuality and gender identity scholarship of the year.

This year, the seminar's structure was overhauled to improve the student learning experience and the process for selecting *Dukeminier Award* winners. In fall 2012, a committee of law professors from various institutions reviewed every legal article published between January 2012 and September 2012 that substantially relates to sexuality and gender identity law.<sup>1</sup> From an initial pool of over 100 articles, this committee, as well as students and professors from all over the country, nominated approximately twenty-five articles for a *Dukeminier Award*. An additional panel of law professors then reviewed that list and selected thirteen articles to advance to the final stage of review—the Sexual Orientation Workshop. These thirteen finalists thus comprised the core readings for the seminar.

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<sup>1</sup> The faculty committee reviewed articles that were published during a truncated period in 2012 because of a new change in the timeframe for when articles qualify for an award in any given year. Previously, *The Dukeminier Awards* operated on a calendar year; going forward, *The Dukeminier Awards* will operate on an academic year. For example, in 2014, *The Dukeminier Awards* will recognize articles that were published between September 2012 and August 2013.



Each week during the seminar, students assessed one or two of the finalists' substantive contributions to the field, their arguments' strength and rigor, and their craft, style, and methodology. In addition to reading at least one finalist per class, students also read supplemental materials—either cases or related scholarly works—to inform their evaluations of each finalist and bolster their understanding of the cutting edge legal issues implicated therein.

In 2013, students read articles on a variety of topics, including but not limited to: the interaction between states and the federal government in defining marriage; alternative reproductive technology and donor conceived families; Title VII and the history and meaning of discrimination “because of sex”; the role of litigation and its tension with LGBTQ and other social movements; bisexuals and the legal harms they face; mobilizing and advocacy frameworks in the intersex movement; marriage as a vehicle for state-imposed discipline; gender norms, sex roles, and their interaction with marital structures and choices; the use of “illegitimacy” as a rhetorical tool in the LGBTQ rights movement and its racialized implications; the intersection between LGBTQ rights and immigrants' rights; the role that anxiety over the human body can play in civil rights reform; and the ways in which sexuality is localized and territorialized in the United States.

This year's winning articles represent diversity in terms of subject matter and authorship. They embody intersectional approaches and novel ways of thinking about long-standing legal questions. From an expansive and impressive body of scholarship, these three winners emerged as representative of the most dynamic and exciting work in the field.

- **Pooja Gehi, *Gendered (In)Security: Migration in the Security State*, 35 HARV. J. L. & GENDER 357 (2012).**

Over the past decade, both immigrant rights and LGBTQ rights have been key issues in United States political and legal debates. These two issue areas, however, have rarely publicly intersected. While the “war on terror” has heightened the public debate around immigration, national security, and border control, LGBTQ concerns and LGBTQ immigrants continue to be rhetorically separate from immigration-focused conversations. This rhetorical separation is especially problematic for those living at the intersections of different identities, including LGBTQ immigrants of color who live in poverty. As this Article demonstrates, the separation ignores how individuals who do not fit the public description put forth by rights-based organizations are the most negatively impacted by the laws and regulations that these mainstream organizations challenge.

- **Victoria L. Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 Harv. J. L. & Gender 209 (2012).**

This Article challenges the common assumption that Title VII does not protect against discrimination because of sexual orientation. It does so by showing that the same jurisprudential logic which has led courts to find that an individual who is discriminated

against because of his or her relationship with someone of a different race, national origin, or sex is actionable under Title VII—a form of discrimination that this Article calls relational discrimination—necessarily applies to discrimination because of sexual orientation. While courts have consistently rejected arguments that Title VII applies to sexual orientation, this position is indefensible in light of the current state of the law. Courts presented with sexual orientation discrimination claims have focused primarily on an individual plaintiff’s protected characteristic in isolation, resulting in courts’ fixation on how to interpret “sex” as a statutory term. Meanwhile, courts analyzing other kinds of Title VII claims have gone beyond viewing an individual plaintiff’s protected characteristic in isolation, and have instead applied a relationship-based analysis. As a normative matter of statutory interpretation, this analysis should appeal to jurists on both sides of the political spectrum, and it should force scholars, academics, and courts—who have largely conceded that sexual orientation is not protected by Title VII—to confront and apply these relational principles to sexual orientation-based employment discrimination cases.

- **Melissa E. Murray, *What’s so New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387 (2012).**

At common law, children born out of wedlock were legally disfavored — *filius nullius*, the child of no one. But according to an inherited legal progress narrative, this all changed in 1968 when the U.S. Supreme Court decided *Levy v. Louisiana* and *Glonn v. American Guarantee & Liability Insurance Co.*, ushering in a new era in which the common law tradition that imposed serious disadvantages on non-marital children gave way to a more liberal era where the sins of the parents would not be visited upon the children. More recently however, illegitimacy seems to be making a comeback. In June 2011, the Family Leader, a Christian conservative group, exhorted presidential hopefuls to sign “The Marriage Vow — a Declaration of Dependence upon Marriage and Family.” “The Marriage Vow” emphasized the importance of the traditional nuclear family and marital fidelity, disavowed the expansion of civil marriage to same-sex couples, and identified the harms of illegitimacy. Illegitimacy has also become pervasive on both sides in the debate over same-sex marriage. Marriage traditionalists argue that marriage was intended to deal with the problem of illegitimacy and irresponsible procreation, while those favoring marriage equality argue that illegitimacy is an injury foisted upon same-sex couples and their families simply because they are ineligible for civil marriage. In this Essay, Professor Murray debunks the inherited legal progress narrative that claims that law abandoned the common law’s treatment of illegitimacy and its many legal disadvantages in favor of a more liberal legal regime. Murray revisits *Levy*, *Glonn*, and the line of unmarried fathers cases and argues that constitutional protection for illegitimate families has been contingent on adhering to norms forged in the marital family. Murray then turns to the emergence of illegitimacy as a salient concept in the struggle for marriage equality. She traces the emergence of the “illegitimacy as injury” argument in marriage equality cases, and she explains the underappreciated costs of using illegitimacy to bolster claims for marriage equality.



This volume of *The Dukeminier Awards* also recognizes the winner of the Williams Institute’s annual student writing competition, Shawn Thomas Meerkamper’s “Contesting Sex Classifications: The Need for Genderqueers as a Cognizable Class.” Meerkamper’s paper explores how genderqueer plaintiffs—meaning those who do not, or do not always, identify as either a man or a woman—might serve to expand the law’s conception of sex and gender through strategic litigation. Meerkamper argues that lawyers and advocates should include genderqueers when analyzing sex discrimination claims under state and federal statutes, as well as when considering possible constitutional challenges to gendered governmental regulations and identification requirements. Meerkamper poignantly and persuasively suggests that genderqueer legal victories would benefit those who defy or reject strict gender binaries as well all people in the broader trans community.

Finally, a word on format. This is the second year that *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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