

## INTRODUCTION

Welcome to Volume 15 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 for those who do so;
- To disseminate outstanding scholarship regarding sexuality and gender identity to the general public, as well as to lawyers, judges, legislators, and policymakers; and,
- To stimulate critical thought on cutting-edge topics and inform ongoing legal, political, and academic debates.

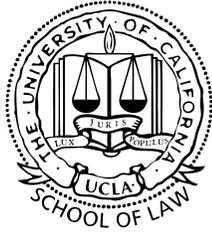
Producing *The Dukeminier Awards* also offers a unique educational experience to students here at the UCLA School of Law. The Sexual Orientation and Gender Identity Workshop, an annual seminar at the law school, which took place this year during UCLA's January Term, provides a forum for students to read, think critically about, and ultimately vote on articles thought to constitute the best sexuality and gender identity scholarship of the year.

The process for selecting this year's *The Dukeminier Awards* winners began in fall of 2015, when *The Dukeminier Awards* student editors; Professors Jordan Blair Woods, Douglas NeJaime, and I; and the three winners of last year's awards<sup>1</sup> reviewed the 25 most substantial articles published between August 2014 and August 2015 that related to gender identity and sexual orientation law. We selected six finalists, and the students in the Sexual Orientation and Gender Identity Workshop read those articles. In response papers and in class discussions, they assessed each article's substantive contribution, rigor, style, and methodology and selected the three winners.

This year's winners include one senior, well-established, sexual orientation legal scholar and two junior scholars, writing early in what will surely be long and productive careers. The articles by the two junior scholars focus on historical insights that cast light on the recent legal and political fights for same-sex marriage. James Oleske documents religious objections to interracial marriage and explores why those objections, unlike

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<sup>1</sup> Last year's winners of *The Dukeminier Awards* were Professors Jessica Clarke, Brian Soucek, and Elizabeth Sepper.



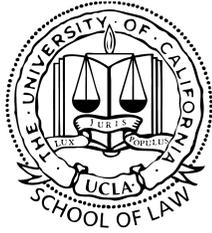
recent religious objections to same-sex marriage, played no significant role in litigation or in the legal academy. Michael Boucai contrasts the recent efforts to achieve same-sex marriage with the context for the first same-sex marriage cases in the early 1970's, documenting how the early litigants perceived their efforts, and situating their struggle within the post-Stonewall movement for gay liberation. The third winner, Suzanne Goldberg, brings her years of litigation experience as well as her years as a sexual orientation scholar to an analysis of why conceptualizing same-sex marriage bans as sex discrimination might have been too risky a challenge to gender-based norms, and to the benefits and drawbacks of making such risky arguments in social change litigation. Descriptions of each of the winning pieces appear below:

- **Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 *Yale J.L. & Human.* 1 (2015).**

In the years immediately following the Stonewall riots of June 1969, at least ten same-sex couples across the United States applied or attempted to apply for marriage licenses. All were refused except for two men in Texas. Lawsuits ensued in five states, and four made their way to and beyond trial. The three that produced written judicial opinions—*Baker v. Nelson* in Minnesota, *Jones v. Hallahan* in Kentucky, and *Singer v. Hara* in Washington State—have endured for decades as precedents supporting a heterosexual definition of marriage. Boucai focuses on this early trilogy of cases and the movement that inspired them. Boucai proposes that marriage litigation in the wake of Stonewall had much more to do with gay liberation generally than with gay marriage specifically—which is not to deny that its expressive power derived precisely from marriage's status as a foundational structure of sexual and family relations.

- **James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 *Harv. C.R.-C.L. L. Rev.* 99 (2015).**

Oleske offers the first comprehensive discussion of why the legal academy has been so solicitous of religious objections to same-sex marriage when it was never receptive to similar objections to interracial marriage. After examining several factors that have contributed to this “marriage dichotomy” in the academy, Oleske explains why the most important factor for purposes of the proposed exemptions is the recent reconceptualization of religious liberty as extending fully to for-profit commercial businesses. That reconceptualization, which the Supreme Court accepted for the first time in *Burwell v. Hobby Lobby Stores, Inc.*, creates a dynamic in which religious liberty will inevitably conflict with the rights of third parties in the marketplace. Oleske concludes that exemptions authorizing such conduct threaten the constitutional right of same-sex couples to equal protection—a right that has received scant attention in the



debate until now, but one that can no longer be ignored in light of *United States v. Windsor*.

- **Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 Colum. L. Rev. 2087 (2014).**

Goldberg takes up the puzzle of the risky argument or, more precisely, the puzzle of why certain arguments do not get much traction in advocacy and adjudication even when some judges find them to be utterly convincing. Through a close examination of the sex discrimination argument's evanescence in contemporary marriage litigation, Goldberg draws lessons about how and why arguments become risky in social-justice cases and whether they should be made nonetheless. The marriage context is particularly fruitful because some judges, advocates, and scholars find it "obviously correct" that laws excluding same-sex couples from marriage discriminate facially based on sex or impose sex stereotypes. Yet advocates have tended to minimize these arguments and most judges either sidestep or go out of their way to reject them.

The students in the workshop also selected the winner of The Williams Institute's annual student writing competition. *The Dukeminier Awards* student editors reviewed student submissions from around the country and selected three finalists from which the workshop students selected one winner: **K. B., *Never Quite the Woman That She Wanted to Be: How State Policies Transform Gender Marker Identification Into a Scarlet Letter*.**

Baker's article begins with a personal story about presenting her birth certificate, which named her John and identified her as male, when she began her judicial externship while a student at Case Western Reserve School of Law. Given the hardship suffered by the 76 percent of transgender individuals who lack gender-conforming birth certificates, and the 41 percent who lack gender-conforming driver's licenses or state identification cards, Baker's comment articulates a substantive due process right to change one's gender marker on state documents. Baker further argues that gender reassignment surgery should not be a prerequisite for such changes because the expert medical consensus does not consider such surgery a necessary component of changing one's gender. Rather, Baker proposes that ideal policy, and the one consistent with substantive due process, permits amendment of a gender marker upon the recommendation of a therapist, a position consistent with those of the American Medical Association and the World Professional Association for Transgender Health (WPATH).

A final word regarding the online publication format for these outstanding articles and the student comment: *The Dukeminier Awards* is published exclusively online. The winning articles appear as they did in the journals that first published them. The winning



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student comment is published on The Williams Institute's website and is also available via Westlaw and Lexis.

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