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Herma Hill Kay
Berkeley Law

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Commentary

Berkeley Women's Law Journal:

Ten Years of Giving Voice to Underrepresented Women and Their Concerns

Herma Hill Kay†

I am honored to have been invited to reflect on the Tenth Anniversary of the founding of the *Berkeley Women's Law Journal* ("BWLJ"). The history of women's law journals is less than twenty-five years old, even if one begins the count from the appearance of a newsletter called the *Women's Rights Law Reporter* directed toward practitioners and published by Rutgers University School of Law beginning in 1971. At the time members of the Boalt Hall Class of 1983 conceived of BWLJ, only two other academic journals devoted to analyzing the differential treatment of women and men in the law were in print: the *Harvard Women's Law Journal*, which published its first issue in Spring 1978, and the *Golden Gate University Law Review's* annual issue devoted to a *Women's Law Forum*, which first appeared in Spring 1979.

The relative youth of women's law journals is hardly surprising. Although American law has drawn distinctions based on sex from the earliest beginnings of our country's history—witness only the law of marriage and of property—there was virtually no law permitting either women or men to challenge these classifications until the mid-1960s, more than three centuries after the Jamestown settlement.

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† Dean and Professor of Law, University of California, Berkeley. Herma Hill Kay joined the Boalt Hall faculty in 1960 and was appointed Dean of the Law School in 1992. She has served as the Faculty Advisor of the Berkeley Women's Law Journal since its inception.

The paucity of laws championing women's rights is explained in part by the absence of women lawyers to advocate such laws during the colonial period. The first woman allowed to appear in court on behalf of a client was Margaret Brent of Maryland who represented the estate of the deceased Governor, Leonard Calvert, in the 1640s.¹ Historians have not identified other women lawyers after her until 1869.²

Even after women began entering the legal profession on a somewhat regular basis, however, their upward progress was slow at best in three major areas—legal education, the judiciary, and law firm practice—as measured by the following rough milestones. The first woman to enter law school, Lemma Barkaloo, did so in 1869 at Washington University in St. Louis, after she had been rejected by both Harvard and Columbia.³ Ada Kepley was the first woman to graduate from law school; she did so in 1870 from the Union College of Law in Illinois (now Northwestern).⁴ Ellen Spencer Mussey and Emma Gillette became the first women to found a law school open to both sexes: the Washington College of Law opened its doors in the District of Columbia in 1898.⁵ The first woman appointed to the faculty of an ABA-approved, AALS-member school, Barbara Nachtrieb Armstrong, joined the Boalt Hall faculty as a Lecturer in 1919.⁶ Miriam Theresa Rooney opened Seton Hall College of Law in 1951, becoming the first woman named as founding Dean of an ABA-approved law school.⁷ The first woman named Dean of an established law school, Dorothy Nelson, began her work as Dean of the University of Southern California Law School in 1969.⁸ Soia Mentschikoff took office in 1974 as President of the Association of American Law Schools, the first woman to hold this position.⁹

Judicial milestones were also few and far between. The first woman to serve as a state court judge, Esther McQuigg Morris, became a Justice of the Peace in South Pass City, Wyoming, in 1870.¹⁰ Florence Ellinwood Allen was elected to the Ohio Supreme Court in 1922 and was the first

¹ KAREN BERGER MORELLO, *THE INVISIBLE BAR* 3-8 (1986).

² *Id.* at 8.

³ *Id.* at 44. See also Karen Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89 (1990).

⁴ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 82 (1983).

⁵ MORELLO, *supra* note 1, at 73-76.

⁶ Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5 (1991). Armstrong began her career as a joint lecturer in Law and Social Economics. She received tenure in the law school in 1929, became a full professor in 1935, and retired in 1957.

⁷ *First Woman Dean Was at Seton Hall*, XVI Syllabus 3 (ABA Section on Legal Education and Admissions to the Bar, March 1985).

⁸ DIRECTORY OF LAW TEACHERS 349 (AALS, 1970).

⁹ HANDBOOK 9 (AALS, 1994). Mentschikoff was the first woman to teach at the Harvard Law School. She joined the faculty at the University of Chicago Law School in 1951. She became Dean of the University of Miami Law School in 1974. DIRECTORY OF LAW TEACHERS 496 (AALS, 1974).

¹⁰ MORELLO, *supra* note 1, at 219.

woman to serve on a state supreme court.¹¹ The first woman to serve as Chief Justice of a state supreme court, Lorna E. Lockwood, took the helm of the Arizona Supreme Court in 1965.¹² When Chief Justice Ellen Ash Peters of Connecticut took office in 1994, she became the first woman to serve as President of the National Conference of Chief Justices.¹³

The first woman to serve as a United States Federal District Court Judge, Burnita Shelton Matthews, was appointed by President Harry Truman in 1949.¹⁴ The first woman to sit on the Court of Appeals, Florence Ellinwood Allen, was appointed to the Sixth Circuit by President Franklin D. Roosevelt in 1934;¹⁵ and the first woman to serve on the United States Supreme Court, Sandra Day O'Connor, was appointed by President Ronald Reagan in 1981.¹⁶ Today, after Justice Ruth Bader Ginsburg's appointment by President Bill Clinton in 1993, for the first time women hold two of the nine seats on the High Court.¹⁷

The promotion of women into leadership positions in law firm practice has likewise moved at a measured pace. The first woman partner in a major Wall Street law firm, Catharine Noyes Lee, became a partner with Cadwalader, Wickersham & Taft in 1942 after being hired by the firm in 1924.¹⁸ The first woman to become managing partner of a major multi-office law firm, Jessica Pers (who graduated from Boalt in 1977), did so at Heller, Ehrman, White & McAuliffe in 1992.¹⁹ Janet Reno, appointed by President Clinton in 1993, is the first woman to serve as Attorney General of the United States.²⁰

In 1983, then, when Karen Schryver, Helen Kang, Donna Ryu, Donna Peizer, Joyce Chow, Catharine Fisk, Karen Landau and others began talking to me about their vision of founding a women's law journal at Berkeley, I was entirely sympathetic and supportive. It was clear to me that a third academic women's law journal, especially one with the mission that these women had chosen, would make a major contribution to legal scholarship. True to Boalt's rich tradition of student diversity, the founding editors established as their priority "to give voice to the complex and varying perspectives, reflecting the legal concerns of all women, especially the women

¹¹ *Id.* at 234.

¹² *Id.* at 240. She has, as yet, no federal counterpart.

¹³ Correspondence with Chief Justice Peters (1995) (on file with author).

¹⁴ MORELLO, *supra* note 1, at 238.

¹⁵ *Id.* at 234-35. She became Chief Judge in 1959.

¹⁶ MORELLO, *supra* note 1, at 218.

¹⁷ Thomas L. Friedman, *The Supreme Court: News Analysis—The 11th-Hour Scramble*, N.Y. TIMES, June 15, 1993, at A1.

¹⁸ MORELLO, *supra* note 1, at 201-02.

¹⁹ James Evans, *A Woman at the Helm*, S.F. DAILY J., Mar. 17, 1992, at 1, 2. Several single-office firms smaller than Heller Ehrman have named women as their managing partner, including Mayer, Brown & Platt in Chicago; Patterson, Belknap, Webb & Tyler and Willkie Farr & Gallagher, both in New York; and Foster Pepper & Shefelman in Seattle.

²⁰ See Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 FORDHAM L. REV. 5 (1994).

of color, lesbians, disabled women and poor women whose voices have been severely underrepresented in existing literature."²¹

The need for a women's law journal with such a focus was not hard to grasp. The women who had managed to enter the legal profession in the early 1900s were predominantly white and middle-class. So far as I am aware, for example, the list of milestone "first women" above²² does not contain any representatives of the categories of underrepresented women that BWLJ's founding editors hoped to serve. Nor had either of BWLJ's two predecessor journals embraced a similar mission: the *Harvard Women's Law Journal* aspired to "examine the origins and the impact of this differential treatment [of women and men], and to develop a feminist jurisprudence,"²³ while the *Golden Gate Women's Law Forum* hoped "to publish articles of value to practicing attorneys, which combine high quality research with well-conceived suggestions for innovative legal approaches to problems facing women."²⁴

How well has BWLJ succeeded in achieving its purposes? I propose to answer that question by examining the sustained commitment to the founders' mandate as expressed by the comments of successive BWLJ editorial boards and the material they published. Living up to the mandate was not an easy task, as the first editorial board itself acknowledged. Led by Editor-in-Chief Karen Schryver and Managing Editor Dorene Giacopini, they wrote, "[a]s our inaugural issue goes to press, our goal to publish a substantial number of articles on underrepresented women is largely unfulfilled."²⁵ To its credit, the inaugural issue contained incisive analyses of several issues of major importance in the field of sex discrimination. Its lack of early success in fulfilling its own mandate, however, left the founding editorial board undeterred. They declared unequivocally that "[i]t is our strongest desire that all of our collective voices will yet be heard."²⁶

The second editorial board, whose members produced the Fall 1986 issue under the leadership of Editor-in-Chief Alissa Friedman and Executive Editor Barbara Flagg, came no closer to achieving this mission than had the first. They offered the following observations:

Our commitment . . . has not dissolved the obstacles that conspire to keep these underrepresented voices silent — scarce resources, a paucity of empirical information, lack of scholarly writings on which to build new theories and arguments, and most notably, the real discrimination that keeps a woman struggling for a room of her own rather than writing lengthy manu-

²¹ 1 BERKELEY WOMEN'S L.J. Editorial Page (Fall 1985).

²² See *supra* text accompanying notes 3-20.

²³ 1 HARV. WOMEN'S L.J. viii (Spring 1978).

²⁴ 8 GOLDEN GATE U. L. REV. WOMEN'S L.F. Preface (Spring 1979).

²⁵ BERKELEY WOMEN'S L.J., *supra* note 21.

²⁶ *Id.*

scripts about that struggle. Yet we believe that, over time, our efforts will help wear away these obstacles.²⁷

By the time Volume Three, dated 1987-88, appeared, Editors-in-Chief Merri Baldwin and Janet Helson, supported by the other members of the editorial board, were able to claim with justifiable pride that “[f]or the first time, many of the articles in the volume fulfill our commitment to giving voice to the concerns of underrepresented women—including women of color, lesbians, and poor women.”²⁸ The third issue featured articles on welfare reform,²⁹ same-sex marriage,³⁰ and a review of Patricia Zavella’s book on cannery workers in the Santa Clara Valley.³¹

One of the decisions made by the founding editors of BWLJ, and honored by succeeding editorial boards, was to abandon the traditional law review division between the work of established scholars and practitioners (labelled “Articles”) and that of students (called “Notes” or “Comments”). The first issue denominated all of its contributions “articles,” indicating below the line that:

It is the policy of the *Berkeley Women’s Law Journal* not to draw a distinction between student pieces and the work of scholars, practitioners and community workers. This policy reflects our belief that in a struggle for equality, all efforts are of equal value and importance.³²

This avowal of egalitarianism in BWLJ’s editorial policy, along with its non-traditional format, may have contributed to the ambivalence shown by some untenured women scholars about publishing their work in its pages. These young scholars not infrequently were advised to publish their pre-tenure work in establishment journals whose standards were well-known and could be relied upon by reviewing bodies. More than once, as BWLJ’s Faculty Advisor, I was called upon to write or call reluctant deans to assure them that BWLJ’s editorial practices conformed to the commonly-accepted norms of legal scholarship, despite its unconventional mission.

My efforts to confer respectability upon BWLJ for the limited purpose of encouraging vulnerable feminist scholars to publish in its pages fared no better than the efforts of successive editorial boards to attract articles from non-academic authors. The editors of Volume Four acknowledged this difficulty, stating that:

²⁷ 2 BERKELEY WOMEN’S L.J. Editorial Page (Fall 1986). This issue contained a path-breaking interdisciplinary article on child custody: Katharine T. Bartlett & Carol Stack, *Joint Custody, Feminism and the Dependency Dilemma*, *id.* at 9.

²⁸ 3 BERKELEY WOMEN’S L.J. Editorial Page (1987-88).

²⁹ Ann VanDePol & Katherine E. Meiss, *California’s GAIN: Greater Avenues or a Narrow Path? The Politics and Policies of Welfare Reform and AFDC Work Programs in the 1980s*, *id.* at 49.

³⁰ Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, *id.* at 134.

³¹ Maria Blanco, Book Review, *id.* at 188 (reviewing PATRICIA ZAVELLA, *WOMEN’S WORK & CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY* (1987)).

³² BERKELEY WOMEN’S L.J., *supra* note 21, at Table of Contents. All subsequent issues have repeated the first sentence of this statement while omitting the second sentence.

[W]e remain concerned about the tenure system in the law schools, and the universities generally, which prevents some feminist academics from publishing with us or our sister journals. In this system, certain mainstream journals have become proxies for acceptability. Often, tenure reviewers look no further than place of publication to determine scholarly value. . . .

By publishing feminist jurisprudence in traditional forums, feminist academics are compelled to contradict their theory with their practice. Because many feminist academics gain tenure only after being forced to deny their commitment to feminist institutions, these gains often leave the tenure system intact and unchallenged. . . . [W]e must ensure that law schools stop evaluating feminist legal scholarship and feminist scholars through the myopic lenses of hierarchy; a hierarchy that rewards those who ignore the existence of sexism, racism, classism and homophobia rather than those who actively fight to change those realities.³³

Volume Four departed from prior practice by publishing two issues: a "regular" issue plus a special conference issue which collected some of the papers presented at the 20th Annual Women and the Law Conference held at the Oakland Convention Center. Lillian Hamrick was Editor-in-Chief and Elizabeth Denney was Managing Editor in 1988-89. Denise Rosales edited the Conference Issue.

Writing in mid-decade, the editors of Volume Five (1989-90) proclaimed BWLJ to be in transition: "no longer a newcomer, not yet an institution."³⁴ In reporting on BWLJ's "progress," rather than its "success" in achieving the founders' mission, the editors indicated that they had restructured the work of the editorial board in order to better accomplish that end: "As a journal, we have tried to provide an alternative to the traditional law review structure by incorporating feminist principles and values of cooperation, inclusion, and consensus into our production process."³⁵

As part of this process, both the Editor-in-Chief and Managing Editor positions were shared (by Lori Chamberlain and Diane Kallas and Lyna Faucett and Annie Tillery, respectively), and all articles were team-edited. This issue featured an essay on adolescent pregnancy co-authored by Dr. Joycelyn Elders,³⁶ later named by President Clinton as Surgeon General, whose controversial and outspoken defenses of underrepresented groups triggered her resignation.

The editors of Volume Six, under the leadership of Editor-in-Chief Ann Lucas and Managing Editor Sue Hansen, re-dedicated themselves to BWLJ's original mandate: "to publish articles which address the special legal issues affecting traditionally underrepresented women (poor women, women of color, lesbians, and disabled women.)"³⁷ Like the editors of Vol-

³³ 4 BERKELEY WOMEN'S L.J. Editorial Page (1988-89).

³⁴ 5 BERKELEY WOMEN'S L.J. Editorial Page (1989-90).

³⁵ *Id.*

³⁶ M. Joycelyn Elders et al., *Adolescent Pregnancy: Does the Nation Really Care?*, *id.* at 170.

³⁷ 6 BERKELEY WOMEN'S L.J. Editorial Page (Part 1, 1990-91).

ume Four, they presented two issues. Part One was a collection of “reflections, observations, chronicles, and commentaries written by members of the Northeast Corridor Collective of Black Women Law Professors about their experiences in law teaching and practice.”³⁸ The unique aspect of this collection, as the editors noted, was that “here, women of color are vital participants in the debate, not mere topics of discussion.”³⁹ Part Two of Volume Six included articles on the “war on drugs”⁴⁰ and violence against women.⁴¹

In addition to these accomplishments, the editors of Volume Six noted that:

[T]his year we count among our achievements a renewed commitment to open and frank discussion, shared information, and group decision-making and consensus at all levels. Among our as-yet-unattained goals are greater diversity in membership and stronger connections to other alternative law journals at Boalt Hall and to feminist law journals elsewhere.⁴²

By the time those words were written, the growth of “feminist law journals elsewhere”⁴³ had become impressive. The *Wisconsin Women’s Law Journal* appeared in the same year as BWLJ, in 1985. The *Hastings Women’s Law Journal* and the *Yale Journal of Law and Feminism* followed suit in 1989. So far, the 1990s have seen nine women’s law journals launched: the *Columbia Journal of Gender and Law*⁴⁴ and the *UCLA Women’s Law Journal* in 1991; the *Texas Journal of Women and the Law* and the *Southern California Review of Law and Women’s Studies* in 1992; *The American University Journal of Gender & the Law*, the *Michigan Journal of Gender & Law*, and the *Cardozo Women’s Law Journal* in 1993; and the *William & Mary Journal of Women and the Law* and *Duke Journal of Gender Law and Policy* in 1994.

Despite their similarities, however, BWLJ stood out among this group because of its mandate. The editors of Volume Seven, led by Editor-in-Chief Sue Hansen, Executive Editors Deirdre Davis and Jennifer Johns, and Managing Editor Allison Claire pointed to these differences:

Our mandate is to publish research, analysis, and commentary that address the lives and struggles of underrepresented women, such as women of color, poor women, lesbians, and disabled women. We believe that excellence in feminist legal scholarship requires critical examination of categories such as race, class, sexual orientation, and disability as well as gender. Therefore,

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Bernida Reagan, *The War on Drugs: A War Against Women*, *id.* at 203.

⁴¹ Caroline Forell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, *id.* at 215.

⁴² *Id.* at Editorial Page.

⁴³ *Supra* text accompanying note 42.

⁴⁴ Its mission is “to publish legal and interdisciplinary writings on feminism and gender issues and to expand feminist jurisprudence.” 1 COLUM. J. GENDER & L. Editorial Page (1991).

discussions of "women's issues" that treat women as a monolithic group do not fall within our mandate.⁴⁵

The editors went on to acknowledge, however, that "the majority of pieces submitted to this journal . . . 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."⁴⁶ They called on "thinkers and writers nationwide who share our vision" to "[p]ublish with us."⁴⁷

Only the *UCLA Women's Law Journal*, founded a year before these words were written, had a similar mandate. Its founding Editors-in-Chief, Stephanie H. Villafuerte and Laura E. Reece, wrote:

[W]e hope to place at the center of our journal the perspectives of women of color, lesbians, impoverished women, physically challenged women, and other underrepresented voices. The touchstone of a more encompassing feminist jurisprudence is acknowledging difference with accuracy and without exclusion.⁴⁸

It is not surprising that the women's law journals of the two largest public university law schools in California, the state with the nation's most multicultural and diverse population, should be especially attuned to the voices of underrepresented women.

The editors of BWLJ's Volume Eight, with Deirdre Davis as Editor-in-Chief and Cynthia Dailard as Managing Editor, joyously celebrated 1992, "the Year of the Woman," with its heady political triumphs (especially in California where the voters elected two women Senators). But they also committed themselves "to struggle to guarantee all women housing as hard as we struggled to get more women into the House."⁴⁹ This issue contained articles on lesbian perspectives⁵⁰ and mentally disabled women.⁵¹

The editors of Volume Nine, under the leadership of Editor-in-Chief Cynthia Dailard and Managing Editor Gretchen Bosschart Barber, communicated to their readers a well-deserved sense of accomplishment. Looking back "almost a decade," they recast the mission of BWLJ as a commitment "to move issues concerning traditionally underrepresented women from a marginalized position in legal discourse to the center of discussion."⁵² Reflecting on the obstacles they and their forerunners had faced in fulfilling this commitment, they observed:

At that time, neither mainstream law reviews nor feminist legal journals were interested in the concerns of women of color, poor women, disabled women,

⁴⁵ 7 BERKELEY WOMEN'S L.J. Editorial Page (1992).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Stephanie H. Villafuerte & Laura E. Reece, *Foreword*, 1 *UCLA WOMEN'S L.J.* 1 (1991).

⁴⁹ 8 BERKELEY WOMEN'S L.J. Editorial Page (1993).

⁵⁰ Maia Ettinger, *Color Me Queer: An Aesthetic Challenge to Feminist Essentialism*, *id.* at 106.

⁵¹ Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, *id.* at 122.

⁵² 9 BERKELEY WOMEN'S L.J. Editorial Page (1994).

or lesbians. Mainstream law reviews questioned the legitimacy of such scholarship, while the few existing feminist law journals essentialized women's experiences. . . . Today, almost ten years later, the *Journal* remains on the cutting edge of feminist legal writing. We proudly fulfill the mandate of our founding members, publishing articles on race, class, disability, and sexual orientation as well as gender.⁵³

This issue of BWLJ, the Tenth Anniversary Issue, is truly a celebration of the past ten years of struggle and achievement. But it is more. It is a promise to the future. The Symposium selections that appear in its pages—*Looking to the 21st Century: Under-represented Women and the Law*—document the present situation of underrepresented women, whose voices are only beginning to be heard. As this issue is published, California—the symbol of multiculturalism and diversity in this country—is about to be tested in its commitment to the claim that we are a society that offers freedom and justice to all people. BWLJ will be an effective force in expanding that testing ground to include all women.

And so I add my congratulations to Editors-in-Chief KT Albiston and Jessica Lanning and to Managing Editor David Lowe, and to all members of the editorial board of this Tenth Anniversary Issue. They have brought the *Berkeley Women's Law Journal* to the portal of its next ten years—one that will take it into the next century, no longer a fragile vessel, but a sturdy ship well-provisioned to carry its contributors and readers through difficult times.

⁵³ *Id.*

