

In Tribute: M. Katherine B. Darmer

The editors of the *Chapman Law Review* respectfully dedicate this issue to Professor M. Katherine B. Darmer.

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Tom Campbell
Dean and Donald P. Kennedy Chair in Law and Professor of Economics
Chapman University School of Law

It was my privilege to know Katherine Darmer, but it was not given to me to know her for as long as those whose tributes are included in this edition of our *Law Review*. So, let me say simply for myself that I lost a friend who showed devotion to the rule of law, to the concept of fairness, and to teaching our students so they could help others. As we read the tributes in this piece, and reflect on all that has been said about her in the months since her passing, we should focus on the blessing it was to know her; and take from her life a renewed devotion in our own lives to use our legal training, as well as our compassion, honestly and selflessly.

The School of Law of Chapman University mourns the loss of our friend, mentor, and colleague. Rest in peace, Katherine. We shall see you again.

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Erwin Chemerinsky
Dean and Distinguished Professor of Law
University of California, Irvine School of Law

Katherine Darmer was a powerful voice for social justice; for using the law to make society and the world better. Her eloquent voice is here and will be for years to come to inform us, to guide us, and to inspire us. It is here through her writings, through the students she taught, and through the institutions she created through her tireless advocacy.

Katherine was a prolific scholar. She wrote not just to get promotion and tenure, though of course she did, and not just for academics. Her writings were forceful arguments to advance her vision of justice. For

example, she wrote important articles criticizing the abuses of power that have occurred in the context of the war on terror. She and Justice Richard Fybel did a terrific recent book on national security, civil liberties, and the war on terror. Her writings hopefully will influence law professors, lawyers, judges, and the public for years to come.

Long before I ever met Katherine, I heard about her from her students. The two words they used most often to describe her were “amazing” and “inspiring.” She cared deeply about teaching and her students, and they knew it and reciprocated by adoring her. She played a special role for the students who felt alienated—especially the progressive students and the gay and lesbian students. She made them feel less alone and she let them see how they could use law for social justice. Her voice continues through these students and will echo into the future through those they influence.

I knew Katherine best through her advocacy. She was tireless in her work against Proposition 8. For her, marriage equality was a matter of basic fairness and human decency. She was instrumental in creating new organizations—the Orange County Equality Coalition and the Lavender Bar Association of Orange County. These institutions are the fruits of her efforts and her voice continues through them.

If I had to pick two words to describe Katherine Darmer, they would be “passionate voice.” That voice remains for us to hear and to heed. As we honor her in this tribute, let us resolve to listen to her voice more carefully and to let her passionate voice and the example of her life be an inspiration to us.

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Bobby L. Dexter
Professor of Law
Chapman University School of Law

Although Katherine passed several months ago, I still, from time to time, experience searing moments of grief. She was such a complex and intriguing mix of energy, confidence, passion, power, and drive that it is simply difficult to comprehend the enormity and finality of her absence. The Chapman community has, indeed, lost one of its crown jewels.

To the best of my recollection, I met Katherine for the first time several years ago at the AALS Faculty Recruitment Conference. I, like hundreds of other aspiring law professors, had tossed my hat into the ring with the hope of landing a healthy slate of initial interviews with various schools. Even strong candidates, however, know not to start the process with unshakable expectations, because different schools have different curricular needs and interests, and they often recruit largely with those

matters in mind. Yet and still, I did what others did. I polished off my resume, joined the faculty recruitment fray, sent up a prayer, and resigned myself to letting the chips fall where they may.

And then, a hero came along. Katherine was serving on Chapman's Appointments Committee that year, and as I understand it, she designated me as a person she specifically wanted the committee to interview. Years later, she would jokingly pat herself on the back at some casual get-together or celebration, crowing that bringing me to the faculty was one of the best things she did for Chapman. The clear and overwhelming truth, of course, is that the best thing Katherine did for Chapman was to come here herself. I said repeatedly during the faculty recruitment process that I wanted, above all else, to join a good group of colleagues, and I will forever be happy knowing that I was able to tell her (directly) that she was one of my favorites.

I treasure Katherine because she was an outstanding colleague and friend, and I admire her passionate sense of devotion, whether she was arguing and protesting to advance the interests of gays and lesbians or railing against the horror of torture. In fact, Katherine reminds me of the Freedom Riders, individuals who would ride buses into the Deep South in the 1960s to defy the enforcement of Jim Crow laws, even if it meant putting themselves in harm's way. I'm proud to say that the Katherine I knew was made of that stuff! I am fortunate in having known her, even if only briefly. She is now and always will be one of my heroes.

Sleep on, Katherine. Sleep on. And I'll see you when I get to the other side of that river.

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Katherine Franke

*Sulzbacher Professor of Law Director, Center for Gender & Sexuality Law
Columbia Law School*

MORAL ADAMANCE: A TRIBUTE TO PROFESSOR KATHERINE DARMER

I had the great pleasure to get to know Katherine Darmer when she visited Columbia Law School, in the fall of 2009, as a Senior Fellow in our Center for Gender & Sexuality Law. Of course this was something of a homecoming for her, as she had been a member of Columbia Law School's class of 1989 when she distinguished herself as a Harlan Fiske Stone Scholar, an exceptional moot court competitor, and an editor of the *Journal of Environmental Law*.

While a visitor at Columbia in 2009, Professor Darmer began work on an article challenging the role of immutability in constitutional Equal Protection doctrine, particularly as applied to sexual orientation-based

discrimination. She took the view that it is inherently stigmatizing to ask whether a person's sexual orientation can be "changed." She sought to illuminate the ways in which the very posing of the question of immutability or choice derived from heteronormative assumptions that presumed the normative priority of heterosexuality. "The attitude that an unchosen sexual orientation should not be criminalized or penalized, while perhaps preferable to a society that terrorizes members of the LGBT community, is still not an embracing theory that is truly accepting of the legitimacy of being LGBT," she wrote in the published version of this work as part of a LatCrit Symposium.¹

It was particularly fitting that Professor Darmer's last published work amounted to a full-throated defense of the humanity and equality of lesbians and gay men. In this work she brought to bear her searing intellect, her true-north moral compass, and her passion to engage what she regarded as one of the most pressing forms of social and legal injustice of our time. Rather than trying to untangle the puzzle of tiered scrutiny by shoe-horning sexual orientation into already flawed doctrine, she wrote that "any requirement for 'immutability' is deeply problematic in the development of equal protection doctrine with regard to the LGBT community. An immutability inquiry is inherently stigmatizing and loaded with heteronormative assumptions."²

Her focus on the problem of immutability was not merely a smart legal argument, though it was that to be sure. More than that, it reflected a fundamental part of who Professor Darmer was as a scholar, a teacher, an activist, and a person. In writing, as in the rest of her life, she led with her values and a strong commitment to respect, and defended the dignity and humanity of those around her. Her experience as a prosecutor drew her to defend the rights of criminal defendants and to question overreaching by the government in the name of protecting national security. Her strong commitment to social justice led her to play a fundamental role in defending the right to marriage equality for same-sex couples in California.

When I visited Chapman University School of Law in January of 2011 upon the invitation of Professor Darmer, I saw up close the role she played at Chapman as a mentor to students and as a committed colleague to the law faculty. Quite clearly, the values that animated her writing also formed the basis of her day-to-day interactions at work.

With Professor Darmer's passing, we all lost a colleague whose work as a lawyer, scholar, and political activist served to remind us of the importance of moral adamance. She left us a legacy to which we all should pay heed: an unyielding insistence that the good and the right are one and the same.

¹ M. Katherine Baird Darmer, "Immutability" and Stigma: Towards A More Progressive Equal Protection Rights Discourse, 18 AM. U. J. GENDER SOC. POL'Y & L. 439, 451 (2010).

² *Id.* at 453.

Mark Osler
Professor of Law
University of St. Thomas School of Law

THE LOSS OF A PROPHETIC VOICE

In my office, on a shelf near to my hand, I keep a line of old, well-read books. I reach for them often. One of them, at the end of the row, I keep there only because it contains a piece written by Katherine Darmer's father, who is a beloved philosophy professor at Baylor.³ Actually, I keep it there not even for the entire article, but for one sentence fragment in that article, in which he describes his ambition for Baylor itself: "A confident engagement with God's diverse world."⁴

What Robert Baird wrote, perhaps unknowingly, is the perfect description of his own daughter. Katherine Baird Darmer lived her too-short life in confident engagement with God's diverse world.

Professor Darmer and I lived in the same world; in fact, our lives were parallel up until the point when she died. We graduated from law school about the same time, then clerked for federal judges, then worked for big firms for three years, became federal prosecutors at the same time, and even made the transition to teaching in unison (though we did not know one another until we were both in the academy).

We both made the tricky transition (in tandem) from being a prosecutor to a teacher. It was a challenging change, because we were shifting from having power to having influence. As a prosecutor, we had power: to choose a charge, to start or continue an investigation, to direct the forces of the federal government against harm and danger. As a professor, there is not that form of power; instead, we had influence. We taught the law as a vocation, urged principled action, and wrote about what mattered. Katherine Darmer entered that realm of influence with grace, resolve, and hope.

In that world, the world of law professors, everyone is smart and well-educated, and most went to the kinds of places that Katherine Darmer went (Princeton and Columbia Law School). Yet, she was different.

First, as many of her students know, she *listened*. If you caught her in the kitchen, after a meal, and told her about an idea as she leaned against the counter, she would be quiet and still. She did not interrupt to show you how much she knew, or what she had read, or what important person she knew. Sometimes she would nod and her hair would bounce as it framed her face, and only when you were done would she begin to move. Her hand

³ Robert M. Baird, *An Alternative Vision for Baylor*, in *THE BAPTIST AND CHRISTIAN CHARACTER OF BAYLOR* 99 (Donald D. Schmelttekopf and Dianna M. Vitanza, eds., 2003).

⁴ *Id.* at 107.

would come out, palm forward, and she would bring that fierce intelligence to bear on what you had said, and make your idea better. There is a selflessness, a patience, in that kind of listening that is far too rare.

Second, she knew how to talk to people on all sides. Although she went to school in New York and ultimately lived in Newport Beach, she grew up in Waco, Texas, surrounded by conservative Baptists. I know the church she grew up in, which is full of smart people of good faith. Katherine Darmer never lost that ability to understand what mattered to conservatives and progressives alike, and she used her intellect to challenge both.

Finally, and perhaps most importantly, she was bold and unfussy in a field that too often is mucky and opaque. She spoke with a clear-eyed passion and conviction that rose from a heart for justice. It was with this heart and voice that she challenged those who would tell gay men and lesbians that there was no love for them, on earth or in heaven. When our nation took up torture as a method of investigation, she sent me the draft of an essay which, in her style, began with a simple clear truth: “. . . waterboarding is torture, and torture is illegal and wrong.”

That moral clarity—to say that all are loved, that torture is wrong—is too rare in my world, and rarer still now that Professor Darmer is gone. The hole she leaves is large and sad, and profoundly different than the mark of others.

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Marisa S. Cianciarulo
Professor and Director, Family Violence Clinic
Chapman University School of Law

IN MEMORY OF MY FRIEND AND MENTOR, KATHERINE DARMER

Katherine Darmer was my friend and my mentor for the six years that we were colleagues at Chapman Law School. I still immediately think of her when an issue arises that could benefit from her counsel. I still catch myself glancing towards her door when I am on her side of the hallway. I know that such instinctive reactions will fade, but what will never fade is my memory of her.

Katherine was the most energetic and driven person I knew. In between teaching classes, writing law review articles, co-authoring a book, and attending or organizing law school events, she was accompanying her two young children all over Southern California and cheering them on in their various activities, founding the Orange County Equality Coalition, hosting fundraisers, leading marches, and advocating for sexual orientation

equality. And all of this that she did, she did with passion and vigor and love.

Katherine was a leader and a doer, and I happily followed where she led. Galvanized by the injustice of 2008's Proposition 8 anti-marriage-equality ballot initiative and the aftermath of its success, Katherine helped found the Orange County Equality Coalition and became its most vocal and active member. At Chapman, she founded the Global Project for LGBTQ Rights, graciously giving me the title of "co-director" even though she was the true force behind it. As a leader of these organizations and a speaker at various pro-equality events, she was always motivated, fiercely dedicated, and brilliantly articulate.

Katherine was also a good friend. Despite the many commitments that filled her life, she still had time to chat, offer counsel, and take time out for lunch or happy hour. She even found the time to throw me an engagement party, where she voiced her concern that my feminist sentiments might be offended by the spice carousel she bought for me. I assured her that it was indeed exactly what I wanted and an item for which I had registered without any feminist qualms. As I await the arrival of my first child, I miss her on yet another level. She loved being a parent and was eager for me to experience the joys of having a child.

The magnitude of losing Katherine is difficult to put into words. I miss my brilliant, serious, fun, loyal friend; I miss her counsel, her laughter and her infectious zeal. Chapman has lost a much-needed voice and an incomparable colleague. The communities and values she supported have lost a powerful ally. Her family—those most deeply and irrevocably affected by her death—has lost the center of their world.

But even though we are left with a tremendous, gaping loss, that is not all that we are left with. Katherine was a special and uniquely gifted person. In her short life, she inspired us through her friendship and her leadership. Her life was a daily challenge to all of us to put our strengths and talents to the best use, to take action even when the opposition is powerful, and to take risks in support of justice. Katherine's memory is as powerful as the heart and mind that guided her in life, and it is imprinted upon each of us who knew and loved her.

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James L. Doti, Ph.D.
President
Chapman University

A woman of courage and conviction, Katherine Darmer was one of Chapman University School of Law's foremost legal scholars, who wrote

and spoke and advocated at the forefront of marriage equality issues. As I reflected upon her life and career while writing this tribute, an image leaped to mind—one of those archetypes that tend to linger in the human psyche through the ages and the generations. Katherine, in many ways, reminds me of a warrior goddess, fierce and fearless, clear-eyed and honest, standing at the front line of battle—Athena, perhaps, or some similar figure from our collective memory. For Katherine, the ongoing war in which she took up sword and shield was equality for all people—in life, in love and in legal standing.

Her loss has been especially devastating because I believe we stand on the cusp of widespread acceptance of marriage equality, and it is poignant to realize that Katherine is not here, with us, to witness it. As I have written publicly in past op-eds and articles, I strongly believe that denying a same-sex couple the cultural and legal status of marriage is not only discriminatory, but also degrading, because it denies them a basic human right. Religions may determine their own values and creeds, but they must not impose those creeds upon individuals' civil rights.

Katherine and I certainly stood on the same side of the fence on this issue, but she expressed these views far more eloquently—and, of course, with far more legal acuity—than I ever could. And that is just a part of why we cherished her both as a colleague and a friend: her virtuosic ability to cut to the heart of tangled matters, of arguments that seemed thorny and vast and circuitous, to tease out the threads, and to state truths and propose solutions that were humane, brilliant, and sound.

A teacher as well as a formidable scholar, Katherine Darmer was beloved by her students, many of whom cite her as their inspiration in life as well as in their career paths. A wife and mother, she meant the world to her family, especially her husband Roman and children Lia and Locke.

In the days following her passing, I watched with great sadness, along with the rest of our Chapman community, as the tributes poured in, as the candlelight vigil was held on the steps of our School of Law, and as Katherine was remembered on a web page created by the *Orange County Register* that encouraged online reminiscences from the Chapman and legal communities and the public. “A hero,” many called her. A “deeply committed activist.” “A terrific human being.” “She inspired us to open our minds in new ways, and to evolve.” “Beacon of light,” “courageous advocate and leader,” “friend to all.”

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*Justice Richard D. Fybel
California Court of Appeal*

A FOND REMEMBRANCE OF M. KATHERINE B. DARMER

All of us who knew Professor Katherine Darmer were, and are, devastated by her loss. She inspired us and earned our respect and admiration. I am grateful for the opportunity to honor Katherine's memory in the *Chapman Law Review*, and commend the editors and the Law School for the decision to remember her in an important, lasting manner.

I was extraordinarily fortunate to have collaborated with Katherine in our two-year project of co-editing a book published in Summer 2011, entitled *National Security, Civil Liberties, and the War on Terror*. Katherine and I knew each other through our participation in the Ferguson American Inn of Court, based at Chapman Law School.

Our book was Katherine's idea, and we had common goals for its content. We wanted to edit and publish a balanced book with important viewpoints from diverse and knowledgeable perspectives. Katherine worked especially hard in an effort to gather and present opposing viewpoints by distinguished authors. I believe we succeeded in soliciting and selecting pieces demonstrating differing points of view on controversial subjects involving national security and civil liberties. Katherine authored significant chapters, wrote a powerful introduction, edited wisely, and encouraged me to publish my own chapter.

I am proud of our achievement in publishing our book, but the publication itself is not the lasting memory of my experience with Professor Darmer. Allow me to discuss with you qualities I learned about Katherine as a scholar, person, and colleague with whom I worked so closely.

Katherine was extraordinarily smart, and a gifted writer. Beyond her professional talent, Katherine's ethics, integrity, and moral compass were engrained in her character and revealed by her acts. She was held in esteem by all of us as an intellectual giant and force of nature who also was blessed with compassion and kindness. Her energy, enthusiasm, and work ethic were remarkable.

We edited and discussed literally every sentence and paragraph from the book's contributors. We resolved any possible problem with respect, and found common ground. Working with Katherine was a joy and profoundly easy.

No description of working with Katherine would be complete without a tribute to her personal and professional courage. In editing our book and in championing important causes, Katherine faced political challenges. Katherine took the high road and never gave up her goals of fairness,

equality, and justice. She achieved these goals with her strength of character, intellectual honesty, commanding knowledge, and compassion.

I conclude as I started: we all miss Katherine, and are devastated by her loss. We lost a treasure. May Katherine's memory be a blessing to her family, her students, and all of us who so respected, admired, and liked her.

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*Kirsten E. Gillibrand
United States Senator
State of New York*

Kathy Darmer was many things to many people: a loving wife, a devoted mother, a beloved daughter, a passionate advocate, a brilliant teacher . . . the list goes on and on. To me, she was a treasured friend, an advisor, and an inspiration.

During the early 1990's, Kathy and I practiced law together as associates at Davis Polk & Wardwell and we trained for the New York City marathon together. During the hours in conference rooms and the miles in Central Park and on New York City streets, we talked about the big stuff and the small stuff: our hopes and plans, our work, our families, our friends, what books we were reading, and where to get the best sushi. After a few years, we both left private practice for public service. When Kathy joined the United States Attorney's office in the Southern District of New York, and I moved to Washington D.C. to work at the United States Department for Housing and Urban Development, our friendship continued through phone calls, visits and emails.

During Kathy's time as a prosecutor she argued many cases before the U.S. Court of Appeals for the Second Circuit. She was always a wonderful public speaker and advocate: eloquent and persuasive, with just the faintest hint in her voice of her Texas upbringing. She joined the faculty of Chapman Law School and was a prolific and elegant writer and a brilliant teacher.

Last year, after I was elected to the Senate, Kathy brought her young son, Locke, to see me at an event in Los Angeles. I know that Kathy wanted to instill both of her children—Lia and Locke—with a love for public service. Her love for her children and her pride in them was evident in every conversation we had.

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*Tiffany Chang
Former Student
Chapman University School of Law '10*

I met Katherine when I was a student at Chapman University School of Law in 2008. After expressing interest in starting an LGBTQ law student group, I was tipped off that Katherine would be an interested faculty advisor. Little did I know that I would soon be swept up in the wave of impassioned accomplishment that accompanied Katherine. She left many legacies behind—the most important being her two beautiful children. Although she left behind a litany of work addressing various human rights violations, I knew her best for her tireless and heroic efforts for LGBTQ marriage and full equality.

The night Proposition 8 passed in California, the injustice facing LGBTQ people flipped a switch in Katherine. Despite severe push back, hate mail, and malicious acts against her, her righteous conviction plus sharp intelligence made her unstoppable. In a short three and a half years, Katherine was involved in founding Chapman OutLaw, the Orange County Equality Coalition (“OCEC”), the Orange County Lavender Bar Association and the Global Project for LGBTQ Rights and Feminism at Chapman. She served as a senior fellow in the Gender and Sexuality Law Program at Columbia Law School. She was the legal confidant to “Don’t Ask, Don’t Tell’s” iconic Lt. Dan Choi, as well as the victims of gender and sexual orientation harassment and the *Rent* production controversy at Corona del Mar High School. She spoke at almost every rally, festival, protest, church sanctuary, community meeting, and law school event. She was a symbol of the LGBTQ movement, and now that she is gone, what I will treasure most is what made her Katherine, an extraordinary person and a beloved friend.

For a long time, I figured she was superhuman and her artful oratory skills just poured out like magic. Whether she was speaking to three people on a restaurant’s back patio or in a packed lecture hall seated next to Dean Erwin Chemerinsky, Katherine always spoke flawlessly and never seemed to sweat it. But over time, I caught on to her tells and found she was often nervous. She would distance herself from the crowd and look down at notes or take her seat on stage early trying to seem busy. Regardless of the nerves she might have been concealing, once the curtain lifted, Katherine empowered her audience with her unwavering poise. Katherine listened as well as she spoke. She listened more intensely than anyone I have ever known. No matter who was speaking in any setting, she would lean in with her body and neck as if she were straining to hear every syllable. Her eyes would be trained on the speaker and you could see her processing every sentence. Her mind was constantly analyzing. When she met an unfamiliar person or was in an unfamiliar conversation, she was so focused that her eyes would flit just slightly as if she were decoding an encrypted message.

Katherine would put any perfectionist to shame. Emails from her at 3:00 A.M. sharing one edited paragraph on what should have been a finished article, or that maybe those OCEC event tickets should be \$60 versus \$75, were not uncommon. One early afternoon I met Katherine in the offices of Crowell and Moring to help put the final touches on an amicus brief she submitted to the California Supreme Court in support of the petitioners in *Perry v. Schwarzenegger*. As the clock pushed past midnight, I sat with Katherine in the empty office building as she insisted on reviewing the brief “just once more.” Of course, the brief was accepted; all of her articles were perfect, and every event was fully attended. Katherine knew her quirks and could laugh at herself. I once drove her home after her car broke down. While at the mechanic, I witnessed a paralyzed Katherine overwhelmed with indecision about whether to leave the car there or to call about the warranty first, and what to do next. I was a little surprised by this woman who was so meticulous and who moved mountains daily, but mostly, I was just thrilled to finally have a chance to help her. On the way to her house, she turned to me with a nervous laugh and said, “I don’t do well with daily life crises.” Katherine also often joked about her sense of style. However, at each rally, protest and event she attended, she added another civil rights button or ribbon to her sweater. A reassuring sight to see walking toward you was Katherine in her A-frame skirt, sandals and short sweater, heavy laden with her convictions.

Off the battlegrounds, Katherine was warm and fun. She always had homemade pasta waiting for attendees of the various organization meetings held in her family room. She often held cocktail parties bringing together her lesbian activist circle and her Newport Beach female neighbors. Katherine suggested it was a good break from the fight and that it might change some hearts and minds, but I believe the amusement resulting from two worlds colliding was undoubtedly motivating. When she heard that most of my family was not going to make it to my law school graduation, she threw a party for me at her house and together we took a shot of tequila in celebration. She chased her shot with Arrowhead Sparkling Water, her constant companion. It replays in my head the common scene of her whipping her head around, hair flipping over her shoulder, and smile widening as she says “Hey guys!” with the distinct mix of a faint Texan drawl, hint of Southern California valley girl and New York directness.

While we all saw her as a champion of our cause, the LGBTQ struggle was very personal to Katherine. I know that we inspired her, just as she inspired us. She felt that the LGBTQ community, her friends, were taking so much abuse that there was no way she could stop fighting until equality was won. She invested blood, sweat and tears into being perfect when it counted; and the dignity of the LGBTQ community counted to her. She was a force of nature, yet exceedingly human. Through all of this, she took me with her and I am forever changed and grateful. She was my mentor

and a kindred spirit. Her absence is unspeakable, but may she rest peacefully knowing she is loved unconditionally by many.