The Berkeley Journal of Gender, Law & Justice (ISSN 1933-1045) is edited by the students of University of California, Berkeley, School of Law and published annually by the University of California. All content copyright © 2021 by the Regents of the University of California except when expressly indicated.

CORRESPONDENCE: Address all correspondence regarding requests for permission to reproduce material from the Journal to: Journal Publications, University of California, Berkeley, Berkeley Law Library, LL123 Law Building, South Addition, Berkeley, CA 94720-7210, journalpublications@law.berkeley.edu.

MANUSCRIPTS: We invite you to submit your original, unpublished work to the Berkeley Journal of Gender, Law & Justice. We accept electronic submissions through Scholastica or in Microsoft Word format sent to bglj.submissions@berkeley.edu.

FORM: Citations generally follow The Bluebook: A Uniform System of Citation (21st ed. 2020) and The Chicago Manual of Style (17th ed. 2017). This issue should be cited as 36 BERKELEY J. GENDER L. & JUST. 1 (2021).
Dedication

The Berkeley Journal of Gender, Law & Justice dedicates this volume to those lost to ongoing twin pandemics: racism and COVID-19. Founded as a journal for individuals and communities pushed to the margins, we are proud to present scholarship that critiques the systems that embolden police violence, medical racism, and White supremacy. We mourn each person lost this past year, whether protestors shout their name or loved ones carry it quietly. BGLJ will continue to resist and call out oppression, and we will do so in their name.
From the Membership

The Berkeley Journal of Gender, Law & Justice is guided by an editorial policy that distinguishes us from other law reviews and feminist journals. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to race, class, sexual orientation, and disability. Therefore, discussions of “women’s issues” that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their analytical attention to differences in social location among women. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the Berkeley Journal of Gender, Law & Justice.

The majority of pieces submitted to this journal, however, 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. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the Berkeley Journal of Gender, Law & Justice as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at conference that addresses the mandate of the Berkeley Journal of Gender, Law & Justice, refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in social justice.
From the Editors

It is with great pride that we present Volume 36 of the Berkeley Journal of Gender, Law & Justice. We begin by thanking the membership and board of the Journal who managed to keep production on track while still getting out the vote, protesting in support of Black lives, and surviving a pandemic. We are, of course, grateful to you, dear readers, for your ongoing support of the Journal and our community. This past year has shown the true power and importance of community. This Journal and the work we do has always been about the people we are able to unite.

The articles in Volume 36 are about failed systems and shine light on regimes, both domestic and international, that subjugate through laws and language. They highlight legal systems and social regulations that perpetuate marginalization and minoritization. None of this will be new to our audiences, and we present this volume with the firm belief that radical change is possible and, in every instance, necessary.

We began work on Volume 36 at the same time we established a land acknowledgment and recurring payment of the Shuumi Land Tax. These are small steps towards recognizing the deep, irrepayable debt we as Berkeley Law students owe to the Chochenyo speaking Ohlone people, the successors of the sovereign Verona Band of Alameda County. The University of California, Berkeley occupies land that remains of great importance to the Muwekma Ohlone Tribe and other familial descendants of the Verona Band. We are responsible for continuing to respect the land and its original stewards who remain a vibrant community.

The Journal will continue to publish scholarship in the hopes that it will empower readers, from practitioner to layperson, and bring us closer to a more humane and just world. We are humbled to publish academic scholarship in service of that vision. Our home institution, the University of California, Berkeley, School of Law, hosts all of our past issues in the online repository where every article we have published is available for free at https://www.law.berkeley.edu/library/ir/bglj. They are also available on our website, genderlawjustice.org, where we regularly publish intersectional feminist takes on our blog Under Deconstruction.

Volume 36 opens on a first-of-its-kind empirical analysis of how sexual orientation and gender intersect to shape custody disputes. The Moral Sex: How
Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes reveals how courts use judicial proceedings to police the moral development of young girls. Mark A. Leinauer examines quantitative and qualitative data from 128 custody disputes between a heterosexual and gay parent. A multistage analysis reveals not only the historic impact of sexual-orientation bias on custody adjudications but the impact of the child’s gender in these contests. Leinauer takes his analysis a step further by categorizing which judicial rationales are advanced against gay parental fitness when daughters, as opposed to sons, are at issue.

In The Legal Limbo of Menstrual Regulation: Implications of Expanding Reproductive Health Options in the United States, Samantha Gogol Lint pushes for reproductive justice centered on the needs of those who may become pregnant. The piece argues that the time is ripe for a reconsideration of menstrual regulation, which provides a safe and distinct alternative to abortion. Lint argues that menstrual regulation is unique because it offers a solution tailored to the concerns of people with missed periods while simultaneously eliding attempts to restrict access to contraception and abortion. The article lays the groundwork for additional research as well as legal battles to secure access to menstrual regulation, which is already common in many other countries.

Continuing in the vein of comparative studies, in The Elimination of “Patriarchy” Under the Convention on the Elimination of All Forms of Discrimination Against Women, Cassandra Mudgway analyzes over thirty years of documents from the United Nations’ Committee on the Elimination of Discrimination Against Women to identify biases embedded within the organization and our own conceptualizations of patriarchy. By compiling these documents, Mudgway draws out the Committee’s pattern of deepening the constructed chasm between the West and non-West through language, specifically through reference to the patriarchy. The piece ends with a warning of the implications of such a lens: such an Otherizing perspective undermines the Committee’s efforts to end the subordination of women.

These conceptualizations of patriarchy and oppression affect Black Muslim women in the United States, as well, and this experience is the starting point for Vanita Saleema Snow’s Veiling and Inverted Masking. Drawing on performance theory, the arts, and Title VII jurisprudence, Snow presents a new theory of inverted masking, which analyzes religious performance of identity as a coping mechanism in a post-9/11 world as well as employers’ and legislators’ responses to it. Snow argues that various cultural stereotypes—some at odds with each other—have pushed Black Muslim women to the margins and that, in their intersectionally marginalized position, they provide a model of how to remove the inverted masks from society.
Once a year, the Journal awards the Albiston Prize to a piece of exemplary student scholarship focused on recent developments in gender and the law. This year’s recipient, Kathryn Evans, focused on the high rates of sexual assault and harassment amongst workfare participants. While Title VII and analogous state and local laws exist, they require workers to file complaints and lose time to lengthy investigations and litigation. This is far from a perfect solution, so Evans offers other options. Making Workfare More Fair: Protecting Workers in Welfare Programs from Sexual Harassment explains how to create express legal protections for welfare workers and establish better procedures within the welfare system for reporting, investigating, and remedying harassment.

Turning from the workplace to schools, Haley C. Carter examines the impact of Trump’s Title IX regulations on women students of color in Under the Guise of “Due Process.” Carter’s piece demonstrates how the new regulations will likely discourage survivors from reporting under Title IX, lead to disparate representation between parties in such claims, and result in higher rates of dismissal. These consequences will fall disproportionately on women students of color who experience sexual harassment and assault at higher rates than White students. As the Biden Administration begins dismantling Trump-era regulations, the close of Carter’s piece is especially relevant. The article closes by urging that future administrations look at prevention under Title IX through an intersectional lens. Specifically, Carter recommends ending the criminalization of sexual harassment claims, returning to the preponderance of the evidence standard, and reinvigorating the role and responsibilities of the Title IX Coordinator.

On behalf of the Journal’s membership and Editorial Board, we thank you for sharing our ongoing commitment to critical intersectional feminist legal scholarship. We hope the ideas put forth in this volume will forge paths towards access and accountability and spark insight and action within the legal field that extends beyond. It is our strongest desire that, in amplifying our collective voices, change will come.
Board of Editors 2020-2021

Editors in Chief
Virginia Lyon
Jessica Williams

Managing Editor
Amy Reavis

Article Editors
Nicole Conrad
Maggie Woods

Recent Developments & Commentary Editors
Karnik Hajjar
Carly Shortell

Executive Editors
Jenna Forster
Maddy Pilgrim

Production Editors
Julia Choi
Alyssa Crooke

Submissions Editors
Dylan Colbert
Jennifer Sherman

Online Editor
Julia Choi

Events Editors
Hannah Feldman
Simone Lieban Levine

Secretarial Editors
Sarah Dupree
Elana Muroff

Marketing Editor
Tara Branine

First Year Representative
Elissa Gray

Associate Article Editors
Tara Branine
Ella Cady
Nicole Conrad

Alyssa Crooke
Karnik Hajjar
Victoria Scordato

Associate Editors
Rachel Appel
Jenna Archer
Emma Atuire
Julia Bennett
Ella Cady
Sara Caplan

Anna Katz
Kat King
Marian Lee
Natasha Mangham
Liat Marks
Anna Martinez
Sponsors & Friends

Thank you so much to all our sponsors and friends for your generous and continuing support. We could not continue publishing intersectional feminist scholarship without you.

Laura Cindy Beckeman
Barbara Jean Flagg
Hannah Callie Haksgaard
Sue Carolyn Hansen
Becca Lynne Rausch