Menstrual Justice

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Abstract

Menstrual injustice is the oppression of menstruators, women, girls, transgender men and boys, and nonbinary persons, simply because they menstruate. Acts of menstrual injustice occur every day in the United States. The narrative of menstruation is that it is a taboo, shameful, and that menstruators are dirty, impure, even dangerous. People internalize this narrative and are reluctant to publicly discuss menstruation. This narrative and silence negatively impacts menstruators.

Menstruators are essentialized as women, often of means, excluding transgender men and nonbinary persons, and menstruators who experience poverty or are young. Menstruating workers, especially low-wage workers, are harassed, penalized, or fired for heavy bleeding and suffering from pain. Menstruators are subjected to indignities and control. Society expects menstruators to be solely and invisibly responsible for their menstruation without recognizing it as part of the necessary reproductive life cycle.

* © 2019. Professor of Law, Co-Director, Center on Applied Feminism, Director, Bronfein Family Law Clinic, University of Baltimore School of Law. My clinic students and I have worked with the Reproductive Justice Coalition on legislative advocacy for reproductive health care policies and free access to menstrual products for incarcerated persons since fall 2016. In 2018, the two bills became law in Maryland requiring reproductive health care policies in the correctional facilities as well as free access to products. Maryland HB 787/SB629 (reproductive health care policies) and HB 797/SB 598 (menstrual products). I want to thank the Coalition members and my students who worked so hard on these important laws and are currently working on their implementation and continued reforms. I also want to thank the following persons who reviewed and provided important feedback on drafts and presentations of this article: Professors Michele Gilman, Shanta Trivedi, Virginia Rowthorn, Nadia Sam-Agudu, MD, Audrey McFarlane, Lauren Bartlett, Carolyn Grose, Claire Donohue, Phyllis Goldfarb, Tanya Cooper, Sherley Cruz, Naomi Mann, Dr. Nadia Sam-Agudu, Marcia Zug, Courtney Cross, and Sabrina Balgamwalla. I want to thank Amy Fettig for alerting me to the breadth of this issue. I also want to thank Bridget Crawford, Marcy Karin, Laura Strausfeld and Emily Gold Waldman for collaborating and thinking about issues relating to periods and menstruation. And I am indebted to Max Johnson-Fraidin for his insight into the various critical legal theories discussed in this article and Maya Johnson-Fraidin for her work on menstrual justice legislative advocacy. Special thanks to my husband Professor Matthew Fraidin for not only reviewing drafts and engaging in menstrual justice discussions, but most importantly for his always present support. I also want to thank my research assistant Jennifer Mahan for her always excellent research and Law Librarian Bijal Shah, and Law Library Director Adeen Postar for their research support. Thanks as well to the U.C. Davis Law Review staff, especially Editor in Chief Jessica Gillotte and Senior Articles Editor Rachel Schiff, for their dedication and excellent editing. My work on this article was supported by a University of Baltimore Summer Research Fellowship.

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Menstruators suffer economic disadvantage. They also suffer health disadvantages due to inadequate health research.

By analyzing the pervasiveness and variety of acts of menstrual injustice, this Article argues that menstrual injustice is another example of structural intersectionality. Menstrual injustice is not merely the operation of patriarchy or the structural oppression of women, but rather structural intersectionality, the overlapping forms of domination such as patriarchy, white supremacy, transphobia, classism, and ableism.¹ Menstrual injustice is structural intersectionality because it is the manifestation of “public policies, institutional practices, cultural representations, and other norms” ² that result in oppressive power that privileges and disadvantages persons based upon their location at the intersection of gender, race, class, gender identity, sexual orientation, age, and ability. For instance, young girls—who are at the intersection of gender and age—are disadvantaged by menstrual injustices that subject school girls to the indignity of limited bathroom access. Transgender men and nonbinary persons—who are at the intersection of gender and gender identity—are disadvantaged by menstrual injustices that exclude them from society’s policies and practices. Menstruators who are incarcerated, and disproportionately of color and low income, are disadvantaged by menstrual injustices of harassment and coercion when accessing menstrual products.

But menstrual injustice has not received nearly enough attention. Lawyers, legislators, and advocates have started addressing some of these injustices. This Article reviews the good work already done and suggests ways to better address menstrual injustices in the future.

This Article argues that menstrual injustice and actions to counter it should be examined through the lens of structural intersectionality. By using this lens, the focus can include the unequal treatment of women and men. Arguments against, for example, the lack of menstrual products and the so

¹ Similar to Kimberlé Crenshaw, I use the term structural intersectionality to mean the oppressive interaction of patriarchy, racism, classism, homophobia, transphobia, ableism, and other isms. See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1265 (1991).

² ASPEN INST., 11 Terms You Should Know to Better Understand Structural Racism (July 11, 2016), https://www.aspeninstitute.org/blog-posts/structural-racism-definition/ (defining structural racism with precepts that are equally relevant to structural intersectionality).
called “tampon tax”\(^3\) include an equality of the sexes argument in favor of change. In addition, by using a structural intersectionality lens, the focus also can be on menstrual injustice as the operation of “overlapping systems of subordination [such as patriarchy and racism].”\(^4\) This perspective brings into focus the essentialization, harassment, discrimination, indignities, and economic and health disadvantages that impacts the wide array of menstruators in different ways. This Article suggests that by using the framework of structural intersectionality and building from the strengths of the intersectionality of menstruators, society can identify more menstrual injustices and build towards menstrual justice more effectively.\(^5\)

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\(^4\) Crenshaw, supra note 1, at 1265.

\(^5\) See id. at 1242 (“[T]he social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.”)
I. INTRODUCTION

Menstrual injustice is the oppression of menstruators, women, girls, transgender men and boys, and nonbinary persons, simply because they menstruate. Acts of menstrual injustice occur every day in the United States. Here are a few examples. Menstruating workers are harassed, penalized, and/or fired for heavy bleeding, leaking, being bed ridden with pain, and for being late to work because they had an unexpected menstrual flow and had to address it. Menstruating children experience indignities at school due to delayed school-issued hall passes or escorts to the bathroom causing them to leak through their clothes. To avoid this, the students skip school. Persons who are incarcerated often have to beg for menstrual products. Visitors to prisons are banned from wearing tampons and so have to choose between visiting and leaking. And menstruators who experience homelessness or live in shelters without access to water, soap, and sanitation facilities face assaults on their dignity when they are unable to clean up during their menstrual cycle.

Why are menstrual injustices so common? One explanation is that the historical cultural classification of menstruators as impure, shameful, and incompetent continues today. Such historical classifications were common in many of the world's largest religions. And today, society continues to shame menstruators as disgusting. For instance, women who are incarcerated are strip searched, which requires the removal of their

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6 I use the term “menstruator” throughout this article to be inclusive of all persons who menstruate. The term “menstruator” includes women, transgender males, intersex persons, binary persons, and other persons who have the capacity for a menstrual cycle. See infra note Error! Bookmark not defined. and accompanying text. Throughout this article, I use gender specific and binary terms when they are the terms used by courts, advocates, or some other person or entity that I am referencing.
7 See discussion infra Section III.B. 2.a.
8 See discussion infra Section III.B. 3.
9 Id.
10 See discussion infra Section III.B.2.b.
11 See discussion infra Section III.B. 4.
12 See discussion infra Section II.B.
tampon and/or pad after visits. Upon return to their cells, they are left to bleed. See discussion infra Section III.B.3; see also, Correctional Services - Inmates - Menstrual Hygiene Products: Hearing on H.B. 797 Before the Md. Gen. Assemb. H. Jud. Comm., 2018 Sess. (Feb. 15, 2018) (Oral Testimony of Kimberly Haven, Women’s Justice Consortium), http://mgahouse.maryland.gov/mga/play/25330e79-dc6c-4a84-b8e6-65cd4ba622e8/catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=9605000 (“Women will often refuse visits from their family members and even their legal teams because of the embarrassment of having their periods and not having what they need to manage the cleanliness of their bodies and their clothes.”) (minutes 2:58:36-2:59 of video).


Menstruators are viewed as less competent and more objectified by others. Such condemnation was even present during a 2016 Republican Candidate for President debate. During that debate, then-candidate Donald Trump excoriated moderator Megyn Kelly for asking him tough questions about his sexist comments about women by saying later that she was out of line because she was “bleeding coming out of her wherever.” Even social media is censoring the reality of menstruation. In 2015, Instagram took down a post — not once, but twice — by Rupi Kaur. The post was a photograph of herself lying on her bed with a spot of blood on her pants and bed sheet due to her period. This photograph represents a common occurrence for menstruators and yet was viewed as inappropriate for social media.

Rather than treating menstruation as a natural monthly bodily event that is linked to reproduction, society expects menstruators to hide menstruation, to be shamed by menstruation, and to be solely and invisibly responsible for the care of and the effects of their menstruation. This leads to society's unwillingness to build such structures as the workplace and our

13 See discussion infra Section III.B.3; see also, Correctional Services - Inmates - Menstrual Hygiene Products: Hearing on H.B. 797 Before the Md. Gen. Assemb. H. Jud. Comm., 2018 Sess. (Feb. 15, 2018) (Oral Testimony of Kimberly Haven, Women’s Justice Consortium), http://mgahouse.maryland.gov/mga/play/25330e79-dc6c-4a84-b8e6-65cd4ba622e8/catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=9605000 (“Women will often refuse visits from their family members and even their legal teams because of the embarrassment of having their periods and not having what they need to manage the cleanliness of their bodies and their clothes.”) (minutes 2:58:36-2:59 of video).


15 See discussion infra Section II.B.

16 See infra notes 337–41 and accompanying text.


19 Id.

20 Id.

21 See id.
tax code with deep consideration of menstruation as normal, common, and a communal responsibility. As a result, menstruators experience economic disadvantage. Some of the disadvantages include having to pay a tax on all menstrual products, generally receiving no paid leave for menstruation or menstrual pain, income depreciation, and persistent menstrual harassment and discrimination. Also, menstruators experience health disadvantages because there is inadequate medical and health research and research funding regarding menstruation. In addition, there is limited public policy around environmental sustainability as it relates to disposable and reusable menstrual products. Finally, society often excludes transgender men and nonbinary persons who menstruate from being recognized as experiencing menstruation. As a result, public policy proposals do not always include them, as seen in recent policies to provide products to students and persons who are incarcerated. The same is true for young menstruators and menstruators experiencing poverty who struggle with the inflexibility of bathroom use policies and with managing their periods due to the cost of menstrual products.

Part II provides necessary background regarding menstruation. It begins by providing context to menstrual injustice by explaining the process of menstruation, the management of it, and related health issues. Part II then analyzes the cultural narratives of menstruation.

Part III of this Article examines the wide array of current menstrual injustices in the United States. Because menstrual injustice affects a broad

22 See discussion infra Section III.B.4.
23 See infra Sections III.B.2.b.i., III.B.4.
24 See infra Section III.B.5.
25 See infra Sections III.B.4, II.A.
26 See discussion infra Section IV.B.
27 See id.
28 See infra Section III.B.4.
29 See infra Section II.
30 See infra Section II.A.
31 See infra Section II.B.
32 While this Article focuses on menstrual injustice in the United States, menstrual injustice is a worldwide issue. The United Nations recognized menstrual injustice as a human rights violation because of the stigma and lack of water and sanitation for menstruators that resulted in a lack of dignity and school-age students needing to skip school to manage their periods. See U.N. Office of the High Commissioner, Every Woman’s Right to Water, Sanitation and Hygiene, (Mar. 14, 2014), https://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrighttowatersanitationandhygi
array of menstruators who may or may not be female, may be of color or white, may be of low-income or of higher income, patriarchy alone cannot address the injustice. Accordingly, Part III of this Article analyzes structural intersectionality, which examines the overlapping forms of domination such as patriarchy, white supremacy, transphobia, classism, and ableism, and its applicability to menstrual injustice. This Part then analyzes and organizes current menstrual injustices into five somewhat overlapping categories: (1) exclusion and essentialization; (2) discrimination, harassment, and constitutional violations; (3) insults and indignities; (4) economic disadvantage; and (5) health disadvantage. The range of menstrual injustice examples indicate that menstrual injustice is another form of systematic oppression towards menstruators.

Part IV uses the theory of structural intersectionality to examine how menstrual injustices affect menstruators in different ways. For instance, the fact that society does not provide free products affects menstruators who are incarcerated, without full access to income-generating jobs and low-cost stores, differently from those who are not incarcerated. Structural intersectionality theory examines not only the intersection of patriarchy and racism, but also the intersection of those forms of structural oppression with classism, ableism, transphobia, etc. This Part also analyzes how structural intersectionality can enhance the effectiveness of current menstrual legal reform and advocacy. For instance, recognizing that not only women menstruate but also trans males and nonbinary persons could shift policy proposals from providing free access to menstrual products only in women’s bathrooms to all bathrooms.

II. MENSTRUATION AND CULTURAL NARRATIVES

Menstrual injustice is the oppression of menstruators simply because they menstruate. Menstrual injustice is the shaming of menstruators for bleeding. It is the harassing, sanctioning, and firing of workers for menstruating. It is the failure to make education accessible to low-income

See discussion infra Section III.

Id.

See infra Section IV.

See infra Sections II, III, IV.

See infra Section III.B. 3.

See infra Section III.B. 2.a.
menstruating children who skip school because they lack products.\textsuperscript{39} It is the degradation when a school ignores a student's request to go to the bathroom, resulting in one's bleeding through one's clothes at school.\textsuperscript{40} Menstrual injustice is society's rejection of any public responsibility for the care of and effects of menstruation. It is the erosion of dignity for menstruators, including those who are incarcerated and have to beg for products and those who are homeless without products, water, and privacy to attend to their periods. Menstrual injustice is the lack of recognition of transgender males and nonbinary persons as menstruators, making them invisible by only discussing women or “feminine” hygiene products. To contextualize these injustices, a discussion of the basics of menstruation and the cultural narratives is helpful.

\textbf{A. Menstruation}

Each month, a woman or other menstruator's body hormonally prepares for a possible pregnancy by building up the tissue lining of the uterus.\textsuperscript{41} If one does not get pregnant, the progesterone and estrogen hormone levels drop telling the body to begin menstruating.\textsuperscript{42} Menstruation is the discarding of uterine lining that built up in the preceding month.\textsuperscript{43} Specifically, “[m]enstrual blood and tissue flow from [one's] uterus through the small opening in [one's] cervix and pass out of [one's] body through [one's] vagina.”\textsuperscript{44} This is also called a “period.”\textsuperscript{45} This menstrual cycle is “the monthly hormonal cycle a [menstruator's] body goes through to prepare for pregnancy.”\textsuperscript{46} A regular monthly period between puberty and menopause for women, girls, and other menstruators is considered healthy and a sign of proper body functioning. A period lasts on average four and one-half days.\textsuperscript{47}

\textsuperscript{39} See infra Section III.B.4.
\textsuperscript{40} See infra Section III.B.3.
\textsuperscript{42} Menstrual Cycle, supra note 41.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Abigail Durkin, Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle Against Reproductive Justice, 18 GEO. J. GENDER & L. 131, 135 (2017).
During an average menstrual cycle, a menstruator may lose on average between two to five tablespoons of blood. Some may experience “heavy menstrual bleeding,” which includes “[b]leeding through one or more pads or tampons every one to two hours,” “[p]assing blood clots larger than the size of quarters,” and “[b]leeding that often lasts longer than eight days.”

A menstrual cycle typically lasts twenty-eight days but can vary by menstruator and each month. As a result, menstruators are often caught off guard by the onset of their period. One study showed that sixty-one percent of menstruators reported having at least one unexpected period. Menstruation can begin between the ages of eight and fifteen, with the average age being twelve. A menstruator has their menstrual cycle on average for forty years. Menopause is when the menstruator has not menstruated for more than twelve months and usually occurs between the ages of forty-five and fifty-five, with fifty-two being the average age. During the transition to menopause, called perimenopause or premenopause, a menstruator can have irregular periods in terms of length of cycle and flow. And during pregnancy, periods go away and may not come back during breastfeeding of a newborn.

It is important to note that until it is exposed to air in the outside environment, menstrual blood is sterile, unless the menstruator has an infectious disease like HIV, Hep B or C. Even under such circumstances, it would be very difficult to transmit an infectious disease through menstrual blood. It is without an odor until it leaves the body and makes

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48 See id. at 133; Menstrual Cycle, supra note 41.
49 Menstrual Cycle, supra note 41.
50 See id.
51 ELISSA STEIN & SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009). Others expect the percentage is higher. See id.
52 Menstrual Cycle, supra note 41.
53 Id.
54 Id.
55 Id.
56 Id.
58 See Letter from Ruth McCully, Dir., Office of Health Compliance Assistance, to John J. Sredniwaski, Material Safety Eng’r, AIL Sys., Inc. (Oct. 8, 1992),
contact with the air and oxidizes over time. Accordingly, there is nothing unhygienic about menstrual blood.

Nonetheless, to avoid damage to clothing from the blood and to accord with the norms of public life, menstruation is managed by menstruators. Menstrual management practices range from medical suppression of menstruation to wearing absorbent products or clothing. To care for one’s menstruation, menstruators use various menstrual products from store-bought to home-made pads, tampons, menstrual cups, sponges, or period underwear. The absorbency of a vaginally inserted product, such as a tampon, sponge, or cup, should match the flow of the menstrual blood. If tampons are not changed regularly or the tampon is more absorbent than the menstrual flow, there is a risk of toxic shock syndrome (TSS). TSS is “a rare but sometimes deadly condition caused by bacteria that make toxins or poisons.” Accordingly, it is recommended that a tampon should be changed at least every four to eight hours.

As a result, a menstruator uses approximately 8,200 products during the course of their menstruating life. Even more products are used by one in five menstruators because they have medical conditions that result in bleeding ten to twenty-five times heavier than other menstruators. Disposable menstrual products vary in cost but are expensive. The average

https://www.osha.gov/laws-regs/standardinterpretations/1992-10-08 (“The intended function of products such as sanitary napkins is to absorb and contain blood; the absorbent material of which they are composed would, under most circumstances, prevent the release of liquid or semi-liquid blood or the flaking off of dried blood.”).

59 STEIN & KIM, supra note 51, at 159.
60 See generally Menstrual Suppression, NAT’L WOMEN’S HEALTH NETWORK (2015), https://nwhn.org/menstrual-suppression/ (explaining that oral contraceptive pills and similar products can be used to suppress one's menstruation).
61 See Letter from Ruth McCully to John J. Sredniwaski, supra note 58.
62 Menstrual Cycle, supra note 41.
63 Id.
64 Id.
65 Durkin, supra note 47, at 135; cf. Menstrual Cycle, supra note 41 (recommending that menstrual cups and sea sponges should be changed once or twice every twenty-four hours). Contradicting the advice of the U.S. Department of Health and Human Services, one doctor recommends to not use sea sponges at all. Jen Gunter, Are Reusable Feminine Cloths Safe?, N. Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/well/are-reusable-feminine-cloths-safe.html.
66 See Durkin, supra note 47, at 133.
menstruator pays $70 each month for their products.\(^{67}\) Over one's lifetime, a menstruator may spend between $2,037.46 and $2,140.60 on tampons alone.\(^{68}\) The menstruator will spend even more on pads and liners.\(^{69}\) While toilet paper and soap are available for free in restrooms, menstrual products are not.\(^{70}\) Menstruators experiencing poverty are often unable to purchase menstrual products and are left to make do with found items that may vary in their cleanliness.\(^{71}\)

Disposable products are viewed beneficially by workplace safety regulators, but negatively by environmentalists. Occupational Safety and Health Administration (OSHA), the federal government charged with regulating workplace safety, assumes effective absorbency of commercially available disposable menstrual products.\(^{72}\) OSHA has determined that bloodborne pathogens will not be transmitted by the used products since the products’ absorbency will prevent any leaks of the menses.\(^{73}\) Therefore, OSHA does not require workplaces to undergo any special precautions to protect workers who might come in contact with the used and disposed products.\(^{74}\) OSHA expects, but does not require, that the used products be discarded into lined receptacles.\(^{75}\) This standard, therefore, encourages the use of commercial disposable products as the basis for workplace safety. But the use of commercial disposable products is at odds with environmentalists who raise concerns that they contribute to unnecessary

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\(^{68}\) Durkin, supra note 47, at 135. This figure includes the tax usually associated with menstrual products. See generally infra note 258 and accompanying text.

\(^{69}\) Importantly, low-income women reported an unmet need of liners to help with spotting as well as leaks from tampons. See Anne Sebert Kuhlmann et al., Unmet Menstrual Hygiene Needs Among Low-Income Women, 133 OBSTETRICS & GYNECOLOGY 238, 240-41 (2019).

\(^{70}\) Weiss-Wolf, supra note 67.

\(^{71}\) Kuhlmann et al., supra note 69, at 240.


\(^{73}\) See Letter from Ruth McCully to John J. Sredniwaski, supra note 58.

\(^{74}\) See id.

\(^{75}\) Id.
landfill. Environmentalists aim to shift menstruators to environmentally friendly non-disposable products, such as menstrual cups, reusable tampon applicators, or cloth pads.

Menstruators may also manage their menstrual cycle through “medical suppression of menstruation.” Menstrual suppression is possible through the use of birth control pills and hormonal medication designed specifically for the purpose. It is expensive and not always covered by one’s health insurance, if one even has health insurance. Being able to suppress one's period can be critical in battling endometriosis, premenstrual dysphoric disorder (PMDD), and other severe menstrual symptoms. There can be some downsides to using medical suppression techniques. For instance, “[t]he small risk of stroke or blood clots associated with traditional oral contraceptives – increased in women who smoke, are over 35 years of age, or have high blood pressure – are similarly associated with extended use pills.” Environmentalists also raise the issue that the synthetic estrogen hormones from birth control and menstrual suppression pills are discharged through urine and end up affecting our ecosystem as well as humans, possibly resulting in early puberty, increased breast cancer, and decreased sperm counts.

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77 These reusable products could pose workplace safety issues because their absorbency is not equal to that of commercial products and might result in menses left in the sink bowl when cleaned. See supra notes 72-75 and accompanying text (discussing OSHA rules that rely on the absorbency of menstrual products to ensure menses do not create a health or safety risk in the workplace). OSHA regulators should review workplace safety standards for the use of these more environmentally-friendly products. Id.
78 STEIN & KIM, supra note 51, at 23-27 (the various methods of “medicalization” of menstruation).
79 See id.
82 Menstrual Suppression, supra note 60.
83 See STEIN & KIM, supra note 51, at 31.
Menstruation is associated with certain health problems. For instance, menorrhagia is menstrual bleeding that lasts longer than seven days and can be very heavy. It may require changing menstrual products after less than two hours or passing large clots of blood. If it is untreated, it may cause anemia, which makes one weak and tired. Treatment may require a hysterectomy, removal of the uterus and sometimes the ovaries and fallopian tubes, or a dilation and curettage (D&C), where the cervix is dilated, and the uterine lining is scraped with a thin instrument. Another health problem is endometriosis where uterine lining grows outside the uterus causing great pain and bleeding in between one's regular period.

Yet another health problem related to menstruation is primary dysmenorrhea (PD). PD is menstrual-related severe pain in “the low back, abdomen, and possibly the thighs,” unrelated to another medical condition. There is also secondary dysmenorrhea menstrual pain caused by another medical condition, such as “endometriosis, uterine fibroids, or pelvic inflammatory disease.” PD may cause chronic pain illnesses. In addition, about one-fifth of all women experience migraine headaches, which are very painful and severe headaches, around their period.

It is also common for menstruators to experience premenstrual syndrome (PMS) symptoms right before and at the beginning of their period. PMS includes physical symptoms such as “swollen or tender

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85 See id.
86 See id.
90 Id. at 2233.
91 See id.
breasts,” “constipation or diarrhea,” “bloating and gassy feeling,” “cramping,” “headache or backache,” “clumsiness,” “lower tolerance for noise or light,” and emotional or mental symptoms, such as ""irritability or hostile behavior," “feeling tired,” “sleep problems,” “appetite changes or food cravings,” “trouble with concentration or memory,” and “tension or anxiety.""

Due to the changes to a menstruator's estrogen and progesterone hormone levels during the menstrual cycle, a menstruator's other bodily functions can be affected. Beyond PMS, some menstruators suffer from symptoms like depression and anxiety symptoms, worsening asthma symptoms, irritable bowel syndrome, including cramping, bloating, and gas, and bladder pain syndrome. About 5-10% of menstruators suffer from PMDD, a hormone disorder, that can cause “rage, paranoia and depression” along with “fatigue, blurred vision and loss of appetite.” About 15% of PMDD sufferers may be suicidal.

As seen above, menstruation is variable across menstruators and for any individual menstruator, variable month to month. In addition, how a menstruator chooses to manage their menstruation is affected by a menstruator’s economic circumstances, health circumstances, environmental concerns, and other factors.

B. Cultural Narratives of Menstruation

In the United States, there are cultural narratives of menstruation as shameful and taboo, and menstruators as dirty, impure, and incompetent. These narratives seem to be the result of philosophy, religious teachings, and capitalism woven together. Some have termed the current cultural view of menstruation as a “period paradox,” where periods are cast as either mundane and unworthy of study, or as medically incapacitating and grounds

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94 Id.
95 For an anthropological study of PMS, see generally Emily Martin, Premenstrual Syndrome: Discipline, Work, and Anger in Late Industrial Societies, in BLOOD MAGIC: THE ANTHROPOLOGY OF MENSTRUATION 161-181 (Thomas Buckley & Alma Gottlieb eds., 1988).
96 See Premenstrual Syndrome, supra note 93.
98 See id.
99 See discussion infra Section II.B.
100 See discussion infra Section II.B.
for exclusion from civil society. To understand current day menstrual injustices, it is important to understand the cultural treatment of menstruation.

Historically, there has been a view of menstruation as a taboo, and a destructive power that is feared and respected. Aristotle, along with others, thought menstrual blood was an unrealized fetus and hence menstruation was both feared and seen as sacred. The Ancient Roman philosopher Pliny the Elder taught that “menstrual blood could make seeds infertile, kill insects, kill flowers, kill grass, cause fruit to fall off trees, dull razors, and drive dogs mad. The glance of a menstruating woman could kill bees, her touch could make a horse miscarry, and contact with her blood could cause another woman to lose her child.” Similarly, in the Navajo tradition, menstruating women’s powers were believed to “vitiate healing strength of any medicine.” In other Native American religious traditions menstruation required menstruating women to be isolated lest they undermine the power of the hunters.

Historical interpretations of major religious texts also contain the narrative of menstruation as a destructive and desecrating power that needs to be isolated from religious practices. The narrative also includes a view that menstruators are dirty and impure. For instance, in Christianity, women were quarantined traditionally during menstruation to avoid making others impure. As stated in the Book of Leviticus, if one touches a menstruating woman or her bed, the person will be impure and dirty for a day and if one

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101 Elizabeth Yuko, Periods According to Pop Culture, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 163, 185-86 (Kate Farrell ed., 2018).
102 See STEIN & KIM, supra note 51, at 38-39. Interestingly, the word taboo comes from the Polynesian word “tupua,” which means sacred and menstruation. See id.
103 See id. at 35-36.
104 Id. at 37.
106 See id. at 43-44.
107 While this article discusses only a few religions, menstrual taboos exist in many other religions such as Jain, Taoism, Ndembu, Kung Bushmen, Shinto, and Zoroastrianism. See generally WOMEN IN WORLD RELIGIONS (Arvind Sharma ed., 1987); RELIGION AND WOMEN (Arvind Sharma, ed. 1994); FEMINISM AND WORLD RELIGIONS (Arvind Sharma and& Katherine K. Young eds., 1999).
has slept with her, will be dirty for seven days.109 Women must seek a priest's sanctification and animal sacrifice in order to re-purify after menstruation.110 Relatedly, in the Book of Genesis, after Eve ate the apple, God told her “I shall give you intense pain in childbearing, you will give birth to your children in pain.”111 And so Eve's later named “curse” from God has become every woman's “curse” through the monthly period.112 As recently as the 1920s, churches barred menstruating women to stem their desecration of the sanctuaries.113 And while the Catholic Church has repealed the banishing of menstruating woman, other Christian and Orthodox religions continue restrictions on their participation in the religious rituals.114 One nun in a Russian Orthodox church explained that menstruating women are permitted to attend religious services but are generally banned from “receiv[ing] communion, drink[ing] holy water, or kiss[ing] icons, relics, or crosses.”115

In the Jewish faith, originally menstruating women were deemed unclean.116 In general, this prescription has died out, except some vestiges of it still exist. In Orthodox Judaism, for instance, a menstruating woman should not have sex or any other physical touching of her husband during “the five days of her period, plus an additional seven days. Only after she's immersed herself in a mikvah—a small pool with water from a natural source—can she and her husband reconnect physically.”117 Conservative Judaism reduces the time of required separation and permits nonsexual touching during the time.118 And generally, Orthodox Jewish men will not

109 Id.
110 See id.
111 Id.
112 Id. It is important to note that the term “curse” is never actually discussed in the Bible in relation to menstruation. See STEIN & KIM, supra note 51, at 79.
113 See STEIN & KIM, supra note 51, at 38.
114 Ahmed, supra note 108.
115 Id. However, the Eastern Orthodox Church in the United States no longer sees menstruation as a curse and so does not have such restrictions. See id. (one religious leader stated that taking communion was banned while menstruating based on the belief that menstruation would bleed out the blood of Christ taken during communion).
116 In addition, according to the Book of Exodus, “menstruation was thought incompatible with service at the altar…” See Denise L. Carmody, Judaism, in WOMEN IN WORLD RELIGIONS 183, 190 (Arvind Sharma ed., 1987) (referencing Exodus 35:22-29). Moreover, it is interesting to note that while menstruation was no more impure than say the loss of semen, over time, the Rabbis’ “fear and sexism” made menstruation more of a “cardinal focus.” Id. at 204.
117 Ahmed, supra note 108.
118 See id.
"shake hands with a woman for fear she may be menstruating, thus rendering him impure."\textsuperscript{119}

In Islam, during menstruation, a woman may not participate in the five daily prayers, pilgrimage to Mecca, may not fast, may not read from Quran, and may not step into the mosque.\textsuperscript{120} One must be pure to engage in these religious acts, and any form of bleeding makes one impure.\textsuperscript{121} An oft-cited saying by the Prophet Mohammad is that "women are 'deficient in intelligence and religion,' in part because they can't pray while menstruating."\textsuperscript{122} In addition, Islam prohibits sexual contact with women during menstruation.\textsuperscript{123}

In Hinduism, families may isolate any menstruating women and suspend household chores due to the women’s perceived impurity, which is also seen as contagious.\textsuperscript{124} In a child custody case in California, the plaintiff mother and the children alleged that defendant father, who practiced Hinduism, would not let the children prepare food nor would he touch the

\textsuperscript{119} Stein & Kim, supra note 51, at 84.
\textsuperscript{120} See id.; Ahmed, supra note 108.
\textsuperscript{121} See Ahmed, supra note 108. As Beenish Ahmed points out, urinating, defecating, vomiting, and flatulence also makes a would-be worshipper impure. Id. The major difference is that menstruation is continuous for a period of time. Therefore, the quick and normal purification act of ablution after urinating, for example, is not permitted to purify a menstruator. See id.
\textsuperscript{122} Id. One Islamic scholar explained that the passage was meant as a joke. The scholar argued that the ban on women’s participation in prayer while menstruating was a joyful “mercy” to women. Also, the ban was merely a reflection of their bodies’ change and not due to the idea they were impure. Id.
\textsuperscript{123} The Quran states as follows:

They ask you about menstruation: Say, it is harmful; you shall avoid sexual intercourse with the women during menstruation; do not approach them until they are rid of it. Once they are rid of it, you may have intercourse with them in the manner designed by God. God loves those who are clean. Your women are the bearers of your seed. Thus, you may enjoy this privilege however you like, so long as you maintain righteousness. You shall observe God, and know that you will meet Him. Give good news to the believers.

\textit{Quran} 2:222-223.
\textsuperscript{124} See Ahmed, supra note 108; see also Suneela Garg & Tanu Anand, Menstruation Related Myths in India: Strategies for Combating It, 4 J. Fam. Med. & Primary Care 184, 184 (2015).
girls when they were menstruating. The children said the father made them feel disgusting for menstruating. An Eastern Hindu menstruating woman may not participate in a religious ceremony during the first four days of her cycle.

The faithful express anxiety about complying with the religious practice restrictions and seek answers to the ways in which they can continue their worshipping despite the bans. As one Muslim woman recounts, “While I'm invariably grateful for a few days of food during Ramadan, the idea that a natural — and until very recently, uncontrollable — bodily phenomenon renders me “impure” has been difficult for me to accept.”

The traditional narratives that menstruation is destructive and menstruators impure or inferior have woven themselves firmly into our cultural secular narratives even if abandoned by certain religions. In the early 1900s, because women menstruated, society viewed them as “unstable, irresponsible, and incapable of any kind of intellectual rigor.” In 1912, a New York Times opinion stated that “the mind of a woman is always threatened with danger from the reverberations of her physiological emergencies (i.e., menstruation).” And in 1964, NASA opined that women’s hormonal mood changes would make them incompatible with being astronauts.

These views of menstruators as irrational and emotional continue today. While it is true that the menstrual cycle causes hormonal

126 See id.
127 See STEIN & KIM, supra note 51, at 80-81. It is also important to note that the Hindu tradition notably celebrates a girl's first period. See Ahmed, supra note 108.
128 Beenish Ahmed describes the experienced anxiety this way: “The internet abounds with anxious questions posed by women from a wide array of religious traditions seeking specific answers on whether or not they can attend funerals, bake bread, pickle vegetables, recite scripture, or touch their partners while menstruating.” Ahmed, supra note 108.
129 Id.
130 For more on cultural narratives, see generally JANICE DELANEY ET AL., THE CURSE: A CULTURAL HISTORY OF MENSTRUATION (1988).
131 STEIN & KIM, supra note 51, at 91.
132 Id.
fluctuations, the impact of these fluctuations varies among menstruators. \(^{134}\) And studies show men and women both have mood and emotional variability. \(^{135}\) Nonetheless, a narrative of menstruators as irrational, fragile, incompetent, and emotional has its roots in the menstrual taboo traditions. \(^{136}\)

Using the stigma of dirtiness, impurity, and otherness, early manufacturers of menstrual products created a market for their products and continued the negative narratives of menstruation. Early advertising of commercial menstrual products, first created in 1896, transformed menstruation from a natural bodily function into “a veritable hygienic crisis” to be dealt with scientifically, medically and with manufactured menstrual products. \(^{137}\) A paradox of this approach is that menstruation has nonetheless never warranted extensive research into safety of menstrual products or the menstrual process. \(^{138}\) Building off of the 1920s aversion to germs and bacteria, menstrual product advertising became focused on hygiene and cleanliness. \(^{139}\) And the use of white upper class women to market these so-called “hygienic” products used the intersection of race and class to divide menstruators. \(^{140}\) Women of color and lower-income women were therefore seen as more dirty and impure than white women of economic means. \(^{141}\)

Menstrual stigma about uncleanliness and the taboo of menstruation continue today and is noted in school girls who conceal the fact they are menstruating. \(^{142}\) Legal scholar Martha Nussbaum writes that men feel

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\(^{134}\) See Premenstrual Syndrome, supra note 93.

\(^{135}\) See Stein & Kim, supra note 51, at 75. When researchers labeled such emotional variability with the gender-neutral term “Episodic Dysphoric Disorder,” men also reported suffering from this. Id. Accordingly, the narrative that emotional variability is abnormal is linked to menstrual negative narratives. Id. On the other hand, it is true some menstruators experience significant emotional disorders, like PMDD, as a result of their menstrual cycle and this is different from the variability discussed here. See id. at 73.


\(^{137}\) Stein & Kim, supra note 51, at 117.

\(^{138}\) See discussion infra Section III.B. 5.

\(^{139}\) See Stein & Kim, supra note 51, at 118.

\(^{140}\) See id. at 120.

\(^{141}\) See id.

\(^{142}\) See Katherine Allen et al., More Than Just a Punctuation Mark: How Boys and Young Men Learn about Menstruation, 32 J. Fam. Issues 129, 133, 152 (2010), https://doi.org/10.1177/0192513X10371609; see also Elissa Nadworny & Clare Lombardo,
“disgust at women’s animal bodies” driven in part by a fear of contamination from women’s blood and bodily-fluids.\(^{143}\) Nussbaum discusses how this fear transforms into anger targeted at vulnerable groups.\(^{144}\) As Nussbaum states, “male disgust targets women.”\(^{145}\) She cites to then presidential candidate Donald Trump’s use of menstruation as a shaming tool by declaring that presidential debate moderator Megyn Kelly had “blood coming out of her wherever.”\(^{146}\)

The taboo of menstruation is even more acute for women of color. The history of state and white male control over black women’s bodies through slavery provides a different dimension to oppression due to menstruation.\(^{147}\) Cece Jones-Davis states:

I ... believe menstrual advocacy presents unique challenges for a lot of black women in the United States. Many of us carry so much shame about our bodies — our blood in particular. We struggle to see menstruation as a beautiful, God-given biological process because we remain psychologically damaged by all that has been negatively spoken about and done to our bodies. We’re still trying to see our bodies and its processes as sacred. Quite often, our bodies are more like unfamiliar machines, constantly receiving criticism and objectification. Also, our bodies have not always been our own. Many of us are still healing from our own rapes and the rapes of our maternal ancestors. We have not all reclaimed our blood as life-giving because so much of it has been profanely leaked. Many black women in America are busy trying to be socially “good enough” in a culture that has insisted that nothing about us is right.


\(^{144}\) See id.

\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) See *Creating Space for Black Women to be Period-Proud*, THINX (Feb. 27, 2018), https://www.shethinx.com/blogs/thinx-piece/creating-space-for-black-women-to-be-period-proud.
Menstruation is not neat and does not aid us in rising above the many stigmas and stereotypes already attached to our person-hoods.\textsuperscript{148}

Menstrual product manufacturers and pharmaceutical companies have used menstrual narratives to stoke fears and create a market for their products. Makers of menstrual suppressors transform menstruation, which is a normal bodily function, into a medical problem that mandates a medical solution.\textsuperscript{149} For some, menstrual suppressors are crucial aids to help with serious health conditions like endometriosis and PMDD.\textsuperscript{150} But the marketing of menstrual suppressors does not delineate between those with serious health conditions and those without. Instead, the marketing indiscriminately “pathologize[s] the symptoms, demonize[s] the event, and ultimately convince[s] us to feel lousy about something that honestly shouldn’t be that big a deal to most women.”\textsuperscript{151} And this is despite the fact that there are no long-term research studies showing the effect of menstrual suppressors on menstruators or the environment.\textsuperscript{152}

As menstruators create new narratives to normalize and destigmatize menstruation, social and other media have policed and suppressed them. For instance, in 2015, Instagram removed a photograph artist and poet Rupi Kaur posted of herself lying in bed with a bit of menstrual blood on her clothes and sheets.\textsuperscript{153} Menstruators instantly related to the post and the all-too-common occurrence.\textsuperscript{154} But Instagram removed the post because it was deemed inappropriate. Following an outcry (a reinstatement and another removal by Instagram), the post was reinstated permanently.\textsuperscript{155} In 2019, a reality television show involving fashion competitions censured one contestant’s dress as in “bad taste” when it was inspired by menstruation and intended to raise awareness about menstrual justice.\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{148} Jones-Davis, supra note 136.
\item \textsuperscript{149} See Stein & Kim, supra note 51, at 21-22.
\item \textsuperscript{150} See id. at 31.
\item \textsuperscript{151} Id. at 29.
\item \textsuperscript{152} See id.
\item \textsuperscript{153} See Gray, supra note 18.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} See id.
\item \textsuperscript{156} Manila Luzon states as follows:

I was really looking forward to wearing this gown that I think celebrates a perfectly normal human experience! . . . Many of my fans are young women who may feel pressured by society to be embarrassed
\end{enumerate}
\end{footnotesize}
The negative narratives of menstruation thus have created fertile ground for a range of menstrual injustices in the United States. The next section discusses these injustices as well as some of the current menstrual justice advocacy aimed to address them.

III. MENSTRUAL INJUSTICES

As discussed above, the narratives of menstruation are that it is a taboo, shameful, and that menstruators are dirty, impure, even dangerous. Menstruation has been shunned generally from public discourse as a result. This Part analyzes the breadth of menstrual injustices to argue that they are not isolated events but part of a pattern of a “matrix of domination.” Accordingly, this Part offers the lens of structural intersectionality, which is the theory of overlapping forms of domination, such as patriarchy, white supremacy, classism, and ableism, to understand the structural and pervasive nature of menstrual injustice. This Part then examines the negative treatment of menstruation by law and society due to the negative narratives, the lack of familiarity and comfort with menstruation, and the intersectionality of menstruation with other personal identity characteristics already subject to structural oppression, such as race, gender, and gender identity. This Part analyzes these menstrual injustices and organizes them into five specific categories of injustices experienced by menstruators: (1) exclusion and essentialization; (2) discrimination, harassment, and constitutional violations; (3) insults and indignities; (4) economic disadvantage; and (5) health disadvantage. Within each category, this Part also examines current menstrual justice advocacy and the menstrual injustices it addresses as well as those injustices left unaddressed.

by periods. It’s empowering to teach young women about their bodies, encourage them to celebrate them AND to question people who tell them not to! . . . My goal with this look was to normalize menstruation.


A. Structural Intersectionality

Structural intersectionality is oppressive power manifesting in different ways to subordinate different and overlapping classes of persons, such as persons who are black and female or persons experiencing poverty and with a disability.\(^{158}\) Trying to dismantle only one power structure, like patriarchy, the structural oppression of persons based on gender, without dismantling white supremacy, the structural oppression of persons based on race, for example, will not be successful in ending all persons’ subordination.\(^{159}\) For example, Kimberlé Crenshaw discusses structural intersectionality when analyzing how battered women’s shelters located in LA’s minority communities were addressing the needs of their residents.\(^{160}\) As Crenshaw explains, the women residents of color were not only saddled with “poverty, child care responsibilities, and the lack of job skills” as were the white women residents due to gender and class oppression, but the women residents of color also faced “racially discriminatory employment and housing practices” and “disproportionately high unemployment” leaving them with fewer housing options than their white counterparts.\(^{161}\) As seen with this example, Kimberlé Crenshaw uses the term “structural intersectionality” to analyze the intersection of patriarchy and white supremacy.\(^{162}\) However, in other examples, Crenshaw broadens structural

\(^{158}\) Similarly, Iris Marion Young and Heidi Hartmann argue that the intersection of patriarchy and capitalism works to oppress women: Iris Marion Young, \textit{Beyond the Unhappy Marriage: A Critique of the Dual Systems Theory}, in \textit{Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism} 43, 44 (Lydia Sargent ed., 1981); Heidi Hartmann, \textit{The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union}, in \textit{The Unhappy Marriage of Marxism and Feminism: A Debate of Class and Patriarchy} 2, 19-33 (Lydia Sargent ed., 1981) (orig. pub’d 1977 in 7(3) \textit{The Insurgent Sociologist} 3-17 (Summer 1977)).

\(^{159}\) See Crenshaw, \textit{supra} note 1, at 1265 (using the term intersectionality to explain the concept that persons with multiple personal identities, such as a woman of color, are located within “overlapping systems of subordination and at the margins of feminism and antiracism”); see also Claire, \textit{Intersectionality – a Definition, History, and Guide}, SISTER OUTSIDER (July 27, 2016) (“[T]he concept of intersectionality is actually a pretty straightforward idea: if forms of prejudice have the same root, growing from the dominant power structure of ‘white supremacist capitalist patriarchy’ (hooks), then challenging one aspect of structural power alone is almost entirely ineffectual.”); id. (“Intersectionality is a framework designed to explore the dynamic between co-existing identities (e.g. woman, Black) and connected systems of oppression (e.g. patriarchy, white supremacy).”).

\(^{160}\) See Crenshaw, \textit{supra} note 1, at 1245-46.

\(^{161}\) Id.

\(^{162}\) Id. at 1265 (“I have used intersectionality as a way to articulate the interaction of racism and patriarchy generally. I have also used intersectionality to describe the location of women of color both within overlapping systems of subordination and at the margins of
intersectionality to include structural oppression that affects different and intersecting classes of persons based on their race, gender and class. This Article uses structural intersectionality as encompassing this broader definition and expands it to include other personal identity characteristics, such as gender identity and disability.

While this Article uses Crenshaw’s terminology, it is important to recognize that other theorists have also used different terms for concepts similar to structural intersectionality. For instance, Elisabeth Schüssler Fiorenza, a divinity professor and theorist, uses the term “kyriarchy.” Fiorenza explains that “feminist theory and practice need to be (re)conceptualized as practices of struggle against intersecting oppressions; it must make wo/men's differing experiences of multiplicative oppressions central to all feminist discourses.” Fiorenza argues that “[k]yriarchy as a socio-cultural and religious system of domination is constituted by intersecting multiplicative structures of oppression. The different sets of relations of domination shift historically and produce different constellations of oppression in different times and cultures.” And theorists Darren Hutchinson and Athena Mutua use concepts of “gendered racism” and “multidimensionality” to build upon structural intersectionality to address intersections of gender, gender identity, sexual orientation, and race. As scholar Angela Onwuachi-Willig explains, these concepts “recognize how individuals whose identities meet at the intersection of feminism and antiracism.” Audre Lorde also identified patriarchy and racism as intertwined systems of oppression. See Audre Lorde, The Master’s Tools Will Never Dismantle the Master’s House, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 110-14 (Berkeley ed., 2007).

[kyriarchy captures that oppression is not] a Simple simple dichotomy of power between men and women . . . a man may well have an easier time rising to the top than a woman . . . a lesbian woman may well have an easier time of it than a trans man and a black man may lead a harder life than an Asian woman while a one-legged Baha’i woman may find doors opening to her that have previously been shut in the face of a HIV+ Catholic.

privilege and disadvantage — for example, male and black — may encounter unique forms of discrimination and subordination, depending upon the context.”

Sylvia Walby also recognizes structural intersectionality in her framework for patriarchy. Walby acknowledges that patriarchy as traditionally discussed was overly essentialist focusing on women versus men without addressing the importance of intersectionality, anti-essentialism, and the contingent state of gender based on power, context, and other personal identity characteristics like race, class, and gender identity.

B. Current Menstrual Injustices and Menstrual Justice Advocacy

This section analyzes the wide array of injustices experienced by menstruators and the menstrual justice advocacy seeking to rectify them.

1. Exclusion and Essentialization

One area of menstrual injustice requiring change is the exclusion of all menstruators from research, advocacy, and policy changes. Usually, the discussion about menstruation exclusively focuses on women and describes it as feminine. As some menstrual justice advocates have pointed out, women as menstruators are an over- and under-inclusive category. This is because not all women menstruate, due to health reasons, their contraception or medication that suppresses their menstruation, menopause, or because they are transgender women. It is under-inclusive because transgender men and nonbinary persons may also menstruate. As a result, menstruation is over-identified as being unidimensional, namely female. Wiley Reading, a trans man who menstruates, explains that “everyone in the world thinks periods are the ultimate expression of femininity…there’s


169 See, e.g., Reading, supra note 41, at 94-95.

170 See PERIOD., PERIOD CON 13 (2019), https://docs.google.com/presentation/d/1KtFlGQfl4EbxLsjh3c1kMM9XAY_0gZ2su-9NqG0B7qU/edit#slide=id.p.
no reason bleeding makes me feminine.” 171 He further states “My body is not female. My menstruation is not female. It just is. My body just is.” 172

As Cass Bliss, a trans activist, artist and educator, states:

…sex and gender are different, and they do not always match up. However, when it comes to periods, society tried to make us believe exactly that. Menstruation is almost always tied to womanhood. To illustrate the flaws in that logic, let’s take a moment to think about the following questions: If “periods = womanhood,” does not having the ability to menstruate make you a man? And if menstruating is what makes you a woman, then are women who may not have periods, for a variety of health reasons, not real women? What about trans women? Are they not women because they do not have the capacity to menstruate? What about women who have entered menopause – have they lost some of their womanhood simply because an organ in their body has stopped shedding blood and tissue? 173

The result of the conflation of menstruation and the female gender is exclusion and inequality. They continue by stating:

Listen to the experiences of trans and nonbinary folks around you! Bleeding while trans comes with a lot of unique challenges that a cisgender person might not think about. For example, it can be difficult to know which bathroom is safe to use while menstruating, or to figure out how to smuggle a tampon into the men’s room (and out of, since men’s rooms don’t have trash receptacles in the stalls) without being outed. We may experience swelling that makes our chests more noticeable, or we may feel forced to interact intimately with our vaginal openings. Both of these experiences can cause dysphoria (anxiety around our body not matching up with our identity).

171 Reading, supra note 41, at 94.
172 Id. at 100.
Remember that there isn’t a single universal trans or nonbinary menstrual experience…

To include all people who menstruate, Bliss recommends using the terms “menstruators” and/or “people with periods” when possible. They also recommend not limiting descriptors regarding menstruation to “feminine,” as in feminine hygiene products. As Bliss teaches us, “Check Your Language!,” because it is a simple and important change towards inclusion of and destigmatizing menstruators.

Bliss’s and others’ advocacy have shifted the language in some but not all areas of menstrual advocacy from “women” to “menstruators” in order to identify persons who menstruate. This is the reason this Article refers to menstruators when talking generally about people who menstruate. Their advocacy has also resulted in some initiatives focused on providing free menstrual products in male, female, and gender neutral restrooms to ensure all menstruators have access. In addition, some legislation regarding the provision of free products uses the language of “menstrual products” rather than “feminine products” to be inclusive. Nonetheless, much legislative reform and legal discussion of menstruation continues to

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174 Id. at 237-38. Cass Bliss had an informative website that is no longer available. So What’s With This #MenCanMenstruate Thing?, TONI THE TAMPON, https://www.tonithetampon.com/wearemenstruators (last visited July 16, 2019) [hereinafter TONI THE TAMPON] (the website stated “the fact that someone's body pushes out blood and tissue from their uterus every once in a while doesn't have anything at all to do with their gender identity. Transmen can menstruate, nonbinary people can menstruate, genderqueer people (like myself) can menstruate, the list goes on! Someone who menstruates might identify on any number of points on the multidimensional spectrum of gender, but that doesn't mean that we get to exclude them from the menstruator community. Those of us who get periods and do not identify as women have enough obstacles to get through while we're bleeding that we really don't need the extra burden of being erased from existence when it comes to the experience of menstruation”)

175 OKAMOTO, supra note 173 at 238.

176 Id.; see also Reading, supra note 41, at 95-96 (explaining that he tries to avoid buying “feminine” products and would instead prefer to view menstrual products as medical products).

177 OKAMOTO, supra note 173 at 238.


focus on the category of “women,” such as discussing female inmates only, thereby excluding other menstruators. Changing these structural menstrual injustice issues will require much more work to truly move society from a gender binary construction of personhood and menstruation and that work is necessary to achieve menstrual justice.

2. Discrimination, Harassment, and Constitutional Violations

Menstruators are subjected to discrimination, harassment, and constitutional violations that are situated in the cultural narratives about menstruation. This section discusses both employment discrimination as well as discrimination in taxation that menstruators suffer.

a. Discrimination and Harassment in Employment

Women employees have been fired, demoted, and suffer harassment on the job because of menstruation and its intersection with gender, race, class, disability, and other identities. Menstruators have claimed that such adverse treatment is illegal and a violation of their civil rights. Because menstruation in general is underdiscussed in society and law, there are only a few case decisions involving employment discrimination claims by menstruators.

The earliest federal case appears to be Harper v. Thiokol Chem. Corp. decided in 1980 by the Fifth Circuit. Since then, the Equal Employment Opportunity Commission (EEOC), which hears federal public

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180 See, e.g., MD. CODE ANN., CORR. SERVS. § 9-6161(c)(1) (using the word “female” and thereby not including those who do not identify as female but still menstruate); Katherine McClain Fleming, Menstrual Equity – for All? Evaluating Period Policy with an Intersectional Framework, WOMANIFESTO (May 17, 2017), womanifestosite.wordpress.com/2017/05/17/menstrual-equity-for-all-evaluating-period-policy-with-an-intersectional-framework-by-katherine-fleming-19/ (“An intersectional analysis of menstruation policy . . . begs the question: Is menstrual equity really for all? A significant, and often overlooked, question is whether these policy efforts include and meet the needs of transgender, gender non-conforming (GNC), and gender non-binary (NB) individuals.”). But see First Step Act of 2018, Pub. L. No. 115-391, § 611(c), 132 Stat. 5194, 5247 (2018).

181 Reading, supra note 41, at 97 (stating that “anatomy isn’t binary” because there are “more similarities between ‘male’ and ‘female’ anatomy than there are differences”).

182 See infra Section III.B.2.

183 This is probably true for transgender men and nonbinary persons as well, but my research could not find any such cases.

employees’ complaints of discrimination, issued a decision in a harassment claim.\textsuperscript{185} In addition, there are two federal court cases that discuss claims of disability discrimination due to menstruation.\textsuperscript{186} And most recently, in a federal case, an employee alleged that her employer fired her because she unexpectedly bled through her clothes on the job.\textsuperscript{187} The case settled while pending in the Eleventh Circuit, after an adverse ruling in the district court.\textsuperscript{188} Being fired for unexpected spotting is a recurring situation, as seen in a case that was brought to the EEOC against Hyundai for firing an auto show model for leaking.\textsuperscript{189}

As discussed below, Plaintiffs in these lawsuits claim disparate treatment because of sex; harassment because of sex; and disability discrimination. Under Title VII of the Civil Rights Act of 1964, an employer “may not discharge or otherwise discriminate against any individual because of the individual’s sex.”\textsuperscript{190} Plaintiffs argue that menstruation discrimination is discrimination because of or based on sex for two reasons. First, they argue that “because of sex” or “on the basis of sex” is defined under Title VII as including, but not limited to, “on the basis of pregnancy, childbirth, or related medical conditions.”\textsuperscript{191} Plaintiffs argue that menstruation is a “related medical condition” to pregnancy because one would not be able to be pregnant without the menstrual cycle.\textsuperscript{192} Second, they argue menstruation only occurs to women and thus is sex-linked, so discrimination because of menstruation is discrimination because of sex.

\textsuperscript{188} See id.
\textsuperscript{190} Coleman, 2017 WL 2486080, at *2 (citing 42 U.S.C. § 2000e-2(a)(1) (2019)).
\textsuperscript{191} Id. (citing 42 U.S.C. § 2000e(k) (2019)).
\textsuperscript{192} See id.
Employees have had some success under these theories, such as in the Harper case.\(^{193}\) In Harper v. Thiokol Chemical Corp.,\(^{194}\) the employer precluded Bertha Harper from returning to work after her maternity leave until she had a “normal menstrual cycle.”\(^{195}\) The employer eventually terminated Harper, who then sued claiming sex-based discrimination.\(^{196}\) The district court found the employer had in fact discriminated against Ms. Harper because of sex and the Fifth Circuit affirmed.\(^{197}\) Specifically, the Fifth Circuit found that “Thiokol's policy of requiring women who have been on pregnancy leave to have sustained a normal menstrual cycle before they can return to work clearly deprives female employees of employment opportunities and imposes on them a burden which male employees need not suffer.”\(^{198}\) Accordingly, the court held, a company policy conditioning employment on an employee's menstrual cycles without any business justification is sex-based discrimination.\(^{199}\)

The issue of whether discrimination on the basis of sex includes discrimination on the basis of menstruation was also tackled in the Eleventh Circuit case of Coleman v. Bobby Dodd Inst., Inc.\(^{200}\) Ms. Alisha Coleman was working at a job training center as a 911 operator.\(^{201}\) In Coleman, the defendant terminated Ms. Coleman “after she accidently soiled company property due to heavy pre-menopausal mensturation.”\(^{202}\) Specifically, Ms.

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\(^{193}\) Harper v. Thiokol Chem. Corp., 619 F.2d 489, 493 (5th Cir. 1980); see also EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411, 449-50 (M.D. Fla. 1982) (finding that a black female employee, who took leave due to pain caused by menstrual cramps, was similarly situated to a white male employee, who took leave for a different illness, and thus could claim sex and race-based discrimination when she was fired for taking her leave and the male employee was not).

\(^{194}\) Harper, 619 F.2d 489.

\(^{195}\) Id. at 490.

\(^{196}\) Id. at 491.

\(^{197}\) Id. at 494.

\(^{198}\) Id. at 491-92. The Fifth Circuit further stated that the policy was illegal discrimination because the employer offered no business justification for such a policy. Id. at 492.

\(^{199}\) Id. at 493.

\(^{200}\) See Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080, at *1 (M.D. Ga. June 8, 2017), appeal dismissed, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017). Because the case was dismissed on Defendant's motion to dismiss, the available facts are those that were stated in the complaint. See id.

\(^{201}\) See id. Coleman, 2017 WL 2486080, at *1.

\(^{202}\) Id. As stated in the initial appellate brief filed by the ACLU, pre-menopause is a colloquial term for “perimenopause,” “the time during which a woman begins to undergo physiological changes before she enters menopause.” Brief for Plaintiff at 13 n.2, Coleman, 2017 WL 6762403 (No. 17-13023), (citing Complaint, Coleman, 2017 WL 2486080),
Coleman was premenopause and as such had heavy, unpredictable and sudden onset menstruation. She kept menstrual products at work as a precaution. Ms. Coleman informed her employer about her condition. On one occasion, when Ms. Coleman had a sudden onset of heavy menstruation, she accidentally soiled an office chair. Her employer gave her a warning that she would be fired if she soiled company property again.

About eight months later, Ms. Coleman accidentally soiled the carpet due to an unexpected heavy period and then she cleaned it up. Her employer fired her for failing to maintain personal hygiene standards. Ms. Coleman sued her employer claiming her termination was the result of illegal sex discrimination under Title VII because menstruating is, what she called, a “uniquely feminine condition.” The federal district court agreed with plaintiff that an employer cannot treat excessive menstruation, which is a uniquely “feminine” condition, “less favorably than similar conditions affecting both sexes, like incontinence.” But the court dismissed plaintiff’s complaint reasoning that plaintiff failed to show that a male


203 ACLU Brief, supra note 202, at 13.
204 Id.
205 Id.
206 Id. at 14.
207 Id.
208 In another case with similar facts, Lydia Groenendyk claims she was harassed by the CEO of her company when she had unexpectedly bled through her underwear. Her boss allegedly texted back “Why are you not prepared.” Aimee Green, Lawsuit: Portland Boss Harassed Employee After She Had 'Menstruation Accident' at Work, OREGONIAN (Feb. 23, 2019), https://oregonlive.com/news/2019/02/lawsuit-portland-boss-harassed-employee-after-she-had-menstruation-accident-on-the-job.html.
209 ACLU Brief, supra note 202, at 15. Of course, this argument raises issues regarding the menstruation of trans men, for instance. As Wiley Reading explains, “menstruation isn’t an inherently female thing - if trans men experience it, it can’t be truly female, can it?” Reading, supra note 41 at 94-95. Accordingly, under Title VII, structural intersectionality legal arguments regarding menstrual discrimination could be constructed by tying menstrual discrimination to the target’s reproductive organs and hence related to a pregnancy condition and not necessarily tying it to the female sex. See supra note 192 and accompanying text. Moreover, advocates could consider arguing for amendment of federal and civil rights laws to include discrimination on the basis of menstruation as discrimination on the basis of sex, or that menstruation is a pregnancy or childbirth-related medical condition and therefore a clear fit with the protected class of sex.
comparator who soiled himself and company property was treated more favorably.\textsuperscript{211}

On appeal to the Eleventh Circuit, plaintiff argued the lower court erred in dismissing the complaint for many reasons.\textsuperscript{212} Plaintiff argued that the court failed to identify that menstruation is sex-linked (cis men do not menstruate or have premenopause)\textsuperscript{213} and therefore discrimination on behalf of menstruation is sex-based discrimination.\textsuperscript{214} Plaintiff also argued that menstruation is a pregnancy or childbirth-related medical condition,\textsuperscript{215} and hence falls under "sex" under Title VII.\textsuperscript{216} The plaintiff also argued that because premenopause is the end of one's viability for being pregnant it should be analyzed as "related to pregnancy" as courts have done with lactation, abortion, and infertility.\textsuperscript{217} Accordingly, the plaintiff argued on appeal that the lower court decision should be reversed because it was contrary to Title VII, as amended by the Pregnancy Discrimination Act, and case precedent "recognizing that sex-linked traits related to women's reproductive capacity are covered under Title VII."\textsuperscript{218} This case settled and therefore, there was no court decision on these arguments.\textsuperscript{219}

The Coleman case shows the necessity of structural intersectionality theory in addressing menstrual injustices. As Plaintiff’s lawyer, the ACLU, stated, “A heavy period is something nearly all women will experience, especially as they approach menopause, and Alisha was shamed, demeaned

\footnotesize{\textsuperscript{211} Id.  
\textsuperscript{212} See ACLU Brief, supra note 202, at 18-21.  
\textsuperscript{213} Id. at 18-21.  
\textsuperscript{215} See id. at 19.  
\textsuperscript{216} See id.  
\textsuperscript{217} Id.  
\textsuperscript{218} Id. at 18. The plaintiff also importantly argued that the lower court’s determination that Ms. Coleman had “excessive menstruation,” terms she did not include in her complaint, indicated a misunderstanding that there is a normal type of flow and this exceeded it. Id. at 21.  
\textsuperscript{219} See ACLU Settles Case on Behalf of Woman Alleging She Was Fired for Getting Her Period at Work, ACLU GA. (Nov. 9, 2017, 8:00 AM), https://www.acluga.org/en/news/aclu-settles-case-behalf-woman-alleging-she-was-fired-getting-her-period-work.}
and fired for it.” Ms. Coleman, who is an African American ciswoman, worked at Bobby Dodd Industries, which was a job-training and employment agency as a 911 operator. She had worked there for nine years. Being fired from the job for an accidental menstrual leak was humiliating, Coleman said. As seen in the Coleman case, low-wage workers without job security are particularly vulnerable to the whims and biases of their supervisors that menstruators should be banished. This pervasive cultural disgust can lead to loss of employment and resulting economic hardship for menstruators.

A plaintiff also successfully argued that menstruation is sex-based discrimination in a hostile work environment harassment case. In a federal employee case against the Department of Transportation, the EEOC supported the Administrative Judge’s finding that “failing to act promptly, the agency tolerated the use of sexist comments and jokes in the workplace, including during training, a coworker’s reference in writing to menstrual cycles; a written joke about PMS and a joke called “The Gift,” both of which were passed around the office.” The Commission found that complainant was female and as such belonged to a statutorily protected

221 Id.
223 Rachel Rickert brought another case raising the issue of menstrual discrimination as sex discrimination to the Equal Employment Opportunity Commission (EEOC). Katie Frost, This Model Says She Was Fired for Being on Her Period, COSMOPOLITAN (June 1, 2017), https://www.cosmopolitan.com/uk/reports/a9960116/model-rachel-rickert-fired-for-being-on-period-claims/. Rickert is a female model and claims that, while representing the Hyundai automobile company at the New York International Auto Show, Hyundai fired her because she menstruated. Id. During the show, Ms. Rickert’s requests for a toilet break were denied because Hyundai said the booth was too busy. Id. When she was finally able to go to the restroom she had bled through her uniform and requested a new pair of tights and underwear. Id. Instead she was told to go home and the next day fired. Id. Rickert was an hourly worker on contract and as such particularly vulnerable to discrimination against menstruators. Id. Unfortunately, research could not discover what happened to Rickert’s EEOC claim. See supra note 189.
225 Tonja R. Hiebert, Complainant, EEOC Decision No. 01A05253, (May 30, 2003), WL 21302525, at *1.
class and was subjected to unwelcome conduct because of her sex when co-workers made the menstrual, sex-based and sexist comments and jokes.\textsuperscript{226} The Commission found the harassment was sufficiently severe or pervasive to have the purpose or effect of altering the terms and conditions of the employee's work environment and making it abusive.\textsuperscript{227} As a remedy, the EEOC ordered the agency to pay compensatory damages, medical expenses, and attorney's fees and costs for a total of over $58,000, and to consider disciplining complainant's supervisor.\textsuperscript{228}

But one case held that menstrual discrimination is not sex-based discrimination. In \textit{Jirak v. Fed. Exp. Corp}, the Southern District of New York determined that "menstrual cramps are not a medical condition related to pregnancy or childbirth."\textsuperscript{229} Therefore, the court ruled against the plaintiff because it found that discrimination on the basis of menstruation was not sex-based discrimination.\textsuperscript{230}

These few published cases do not provide a clear doctrine on how menstrual discrimination fits sex-based discrimination. As more cases are brought, plaintiffs and their lawyers will continue to create and argue case theories. To battle structural intersectionality, lawyering of menstrual discrimination claims could create helpful precedent for all menstruators. The precedent could avoid linking menstrual discrimination claims only to females or feminine persons because transmen and gender nonbinary persons menstruate. And the precedent could recognize the structural intersectionality of the discrimination that involves not only the menstruator’s gender but also their race or other relevant personal identity characteristics. This is not easy to do. Title VII, as with other civil rights laws, is limited as a vehicle for such intersectional claims.\textsuperscript{231} The law generally only considers unidimensional classes of people, such as sex,

\textsuperscript{226} Id. at *2.
\textsuperscript{227} Dupont et al., supra note 224.
\textsuperscript{228} See \textit{Hiebert}, 2003 WL 21302525, at *3.
\textsuperscript{231} See Ashley Reese, \textit{Black Blood}, in \textit{PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH}, 103, 109-111 (Kate Farrell ed., 2018) (explaining that Black American girls start their periods earlier than other girls; they are subjected to additional stigma regarding racist assumptions that therefore they have behavioral issues, need less nurturing, and are more sexual).
Accordingly, an argument that menstruation is sex-linked and quintessentially feminine or female fits neatly into Title VII’s available claims. But it excludes trans men, for instance, and furthers the exclusion and essentialization discussed earlier. One potential inclusive case theory at least for menstruators who are transgender or gender nonbinary could be to argue that menstruation discrimination is actionable because it is a pregnancy or childbirth-related medical condition. This avoids linking the claim to sex in terms of being female or a woman and focuses instead on the biological act of menstruation that is a part of a reproductive cycle. This argument would be akin to Ms. Coleman’s argument in the Eleventh Circuit. Another possibility would be to amend Title VII to explicitly cover discrimination on the basis of menstruation as sex discrimination.

Menstruating employees also have claimed employment discrimination because of disability under the Americans with Disabilities Act (ADA)\(^{233}\) or the Rehabilitation Act.\(^{234}\) These laws solely focus on disability. As a result, these claims are also analyzed as unidimensional and not intersectional with sex-based or other discrimination claims. Below is a discussion of two published cases because again there are only a limited number of cases that even raise the issue of menstruation.

In *EEOC v. The Goodyear Tire & Rubber Company*,\(^{235}\) the EEOC sued under the ADA claiming that an employee was illegally terminated because of her menstrual-related disability.\(^{236}\) In the lawsuit, the EEOC

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\(^{233}\) In order to understand the requirements of the ADA, see generally 42 U.S.C. § 12101 (2019).

\(^{234}\) In order to understand the requirements of the Rehabilitation Act, see generally 29 U.S.C. § 701 (2019). See generally *A Guide to Disability Rights Laws*, U.S. DEP’T OF JUSTICE (July 2009), https://www.ada.gov/cguide.htm#anchor65610 (“The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act.”).


claimed the following. Alisha Adams applied for and was granted a conditional employment offer. During a required post-offer physical examination, Ms. Adams disclosed that she had menorrhagia, a bleeding disorder associated with her menstrual cycle, that caused her dizziness and sometimes loss of consciousness. Goodyear required that she get two medical clearances, which she did, and then Goodyear cleared Ms. Adams for work. Three weeks into her job, Ms. Adams disclosed to her supervisor that she had menorrhagia, and was then fired. Despite the medical clearances to the contrary, Goodyear fired Ms. Adams based on the “unfounded belief that Adams was substantially limited in the major life activities of remaining conscious and working.” As part of the settlement, Goodyear paid Ms. Adams $20,000, re-hired her, provided anti-discrimination training to its management, posted a notice regarding employees’ civil rights, and provided reports to the EEOC regarding its hiring practices.

In *Schmidt v. Solis*, Janet Schmidt sued her employer, the Department of Labor, under the Rehabilitation Act for discriminating against her because of her disability, adhesive disease of the pelvis and endometriosis. This disability caused her menstrual cycles to be “abnormal, painful, and often accompanied by profuse and uncontrollable bleeding” as well as loss of bowel control. Her employer provided her the accommodation of “flexiplace,” a flexible location to work, and “flexitime,” a flexible work schedule, which permitted her to avoid commuting and periodic rest as required due to her painful and uncontrollable bleeding. The District Court found that the Department of Labor discriminated and retaliated against Ms. Schmidt when it revoked her flexible work schedule despite having proper medical documentation of the need for the accommodation for her disability. She received the maximum amount of compensatory damages, $300,000.

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237 Menorrhagia is the condition of having very heavy periods and can result from such issues as having fibroids or an inherited bleeding disorder. See *The Boston Women's Health Book Collective, Our Bodies, Ourselves* 26 (2011).
239 Id. at para. 14.
240 *Goodyear to Pay $20,000*, supra note 236. Unfortunately, the only publicly available facts are those alleged in the complaint and so the facts recounted here are sparse.
242 See id. at 81-84.
243 Id. at 75.
244 See id. at 77.
245 See id. at 92-93.
246 See id. at 94.
Accordingly, from the review of publicly available cases, it appears that some employees are being discriminated against at the workplace due to menstruation. Employees and employers need to understand that discrimination on the basis of menstruation may be actionable. While some plaintiffs have been able to succeed under a claim of disparate treatment because of sex, sex-based harassment, or disability, to date there are only a limited number of reported cases and a lack of appellate court decisions. Therefore, this area is a bit uncertain and ripe for further development of legal theories. And because of the employment discrimination laws’ general requirement for unidimensional claims, the structural intersectionality of menstrual injustice is not fully explored.

b. Constitutional Violations

In addition to bringing cases of menstrual injustice under Title VII, menstruators have challenged state law and policy targeting menstruators as violative of the U.S. Constitution, as discussed below. Again, the nature of Constitutional claims of equal protection constrains a plaintiff’s ability to fully scrutinize the structural intersectionality of menstrual discrimination.

i. “Tampon Tax”

Most states tax menstrual products, like tampons, pads, and menstrual cups. This tax is often called the “tampon tax.” The “tampon tax” refers to a variety of taxes, including sales and value-added, on menstrual products. The state taxes range from 0% to 10% tax on the products. Often the issue is that the states do not exempt menstrual products as medical and health supplies. And yet, products that are for other “involuntary, biological” happenings such as Chapstick (a lip balm), Rogaine (a hair loss treatment), and Viagra (a male erectile dysfunction treatment) are tax-exempt. Proponents for elimination of the tampon tax

247 Crawford & Spivack, supra note 3 at 491.
248 Id. at 493. See id.
249 See Durkin, supra note 47, at 135.
250 See id. at 137-38.
251 Crawford & Spivack, supra note 3, at 497 n.24, 516; see Hiroko Tabuchi, Menstruation Joins the Economic Conversation, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/business/menstruation-joins-the-economic-conversation.html. As stated earlier, “menstruation isn’t an inherently female thing – if trans men experience it, it can’t be truly female, can it?” Menstrual Cycle, supra note 41.
argue that the difference between menstrual products and the others listed above are that menstrual products are “female.” They argue that because “[m]enstruation is a regular occurrence in most women’s lives,” a tax on menstrual products is a tax on women. Therefore, the tampon tax is unconstitutional under the equal protection clause of the U.S. Constitution on the basis of sex discrimination. Such an argument is required under the constitution in order to get the heightened scrutiny ascribed to gender discriminatory state action. And, unlike Title VII, equal protection clause jurisprudence does not include pregnancy-related conditions in the definition of sex. Therefore, a sex-based discrimination argument under the equal protection clause necessarily incorporates a gender binary view. Hence, advocates against the tampon tax argue that the tampon tax is putting more of a burden on women, and when compared to the treatment of uniquely-male Viagra, constitutes disparate treatment discrimination on the basis of sex.

These arguments have been very successful with many states eliminating their tampon tax and many states proposing similar legislation. Here are some examples of what has happened. Advocates challenged the 4% New York state tax under the federal and state constitution citing the equal protection clause. The plaintiffs claimed that the state of New York according to Crawford et al., The Ground on Which We All Stand: A Conversation About Menstrual Equity and Activism, 26 MICH. J. GENDER & L. (forthcoming December 2019) (manuscript at 8-10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352857 [hereinafter Crawford et al., The Ground].

Accordingly, there needs to be intersectional theory to support legal arguments regarding the tampon tax as discrimination.

For an excellent and thorough discussion of constitutional arguments under the heightened scrutiny standard for sex-based discrimination, see Crawford & Waldman, supra note 252, at 472-482.


See Crawford & Spivack, supra note 3, at 516. In the alternative, there is an argument that the “tampon tax” should be struck down because it fails the rational basis test because of the discriminatory impact on women and its maintenance of inequality. See Crawford & Waldman, supra note 253 at 482-83.

See Verified Class Action Complaint at para. 1, Seibert v. N.Y. State Dep’t of Taxation and Finance, No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016); Julia Marsh, Sales Tax on Tampons Not Fair to Women: Lawsuit, N.Y. POST (Mar. 3, 2016, 12:14 PM), https://nypost.com/2016/03/03/sales-tax-on-tampons-not-fair-to-women-lawsuit/. It is important to note that there is no specific U.S. or state law that regulates discrimination in
collects $14 million a year from the tampon tax from 5 million menstruators.\textsuperscript{258} Their strategy through litigation and the media was successful. On May 25, 2016, the New York legislature passed a new law exempting menstrual products from sales tax.\textsuperscript{259} Governor Andrew Cuomo stated “[r]epealing this regressive and unfair tax on women is a matter of social and economic justice.”\textsuperscript{260} As of January 2019, there were similar lawsuits brought claiming federal equal protection clause and due process Clause violations, as well as state equal protection clause violations, for not exempting menstrual products from the state sales tax in California, Florida, Illinois, and Ohio.\textsuperscript{261}

sales taxes. See Crawford & Spivack, supra note 3, at 515. Crawford and Spivack state that such discrimination is prohibited by state and federal constitutions, as well as “by international human rights norms.” Id. at 516.

\textsuperscript{258} See Marsh, supra note 257. Policy experts and legislators seeking to repeal states’ tampon tax highlight the monies collected in other jurisdictions as well. JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC 126 (2017) (stating that the tax revenues for menstrual products are $20 million in California and $1 million in Utah). See also Ema Sagner, More States Move to End ‘Tampon Tax’ That’s Seen as Discriminating Against Women, NPR (Mar. 25, 2018, 8:01 AM), https://www.npr.org/2018/03/25/564580736/more-states-move-to-end-tampon-tax-that-s-seen-as-discriminating-against-women; Maya Salam, Goodbye Tampon Tax (at Least for Some), N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/health/tampons-tax-periods-women.html. And in Colorado, one legislator estimated the sales tax on menstrual products was $2.4 million. See Megan Schrader, A Toast to Chiles, Tampons and Switchblades, as the 2017 Colorado Legislature Wraps Up, DENV. POST (May 9, 2017, 2:04 PM), https://www.denverpost.com/2017/05/09/toast-chiles-tampons-switchblades-2017-colorado-legislature/. Unfortunately, Colorado’s bill to exempt such products failed in 2017. See id. However, in March of 2019, the Denver City Council voted to exempt menstrual products from the city’s 4.3% sales tax. See Aris Folley, Denver Unanimously Votes to Remove ‘Tampon Tax,’ THE HILL (Mar. 27, 2019), https://thehill.com/homenews/state-watch/435993-denver-unanimously-votes-to-remove-taxes-from-tampons-and-pads. Because of such taxes as sales and value-added, the cost of tampons alone increases over one’s lifetime from $1,946 to between $2,037.46 and $2,140.60. Durkin, supra note 47, at 135. And this calculation does not include the added costs due to taxes for other menstrual products like pads. Id.

\textsuperscript{259} See Crawford, et al., The Ground, supra note 252, at 7.


\textsuperscript{261} See, e.g., Class Action Complaint, DiSimone v. Cal. Dep't of Tax & Fee Admin., 2018 Cal. Super. LEXIS 1814 (Cal. Super. Ct. Jan. 29, 2018) (No. CGC-16-552458); Class Action Complaint, Wendell v. Fla. Dep't of Revenue, No. 2016-CA-001526 (Fla. Leon County Ct. July 6, 2016); Class Action Second Amended Complaint, Rowitz v. Ohio, No. 16CV003518 (Ohio C.P. Aug. 16, 2016). In dicta, the court states the plaintiff’s constitutional challenge fails because both men and women could pay the tax equally. While only women would use the products, the court held that the statute contained no discriminatory intent as the statute is gender neutral. See Order Granting Motion of
In addition, many state legislatures have passed or are posed to consider bills that would exempt menstrual products from these sales and value-added taxes. As of April 2019, ten states have exempted products from sales tax and nine have legislation pending. Chicago and Denver also passed a municipal tax-exempt bill. Most of the bills that have passed have done so with bipartisan support.

Unfortunately, some states have rejected exempting menstrual products from sales or value-added taxes. In California, the Governor refused to sign such legislation stating it would cost California too much in revenue, which is estimated at $20 million. In Utah, similar legislation was stopped by “an all-male committee of lawmakers.” Accordingly, to ensure that there is uniformity across the country, menstrual justice advocates call for federal legislation to avoid the varying state tax schemes and costs of products.

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263 Crawford & Waldman, supra note 252, at 459.
266 See Tabuchi, supra note 251.251
267 Sagner, supra note 258.
268 Tabuchi, supra note 251.
269 See Durkin, supra note 47, at 138.
While the constitutional arguments for making menstrual products is necessarily unidimensional, the impact of these taxes is intersectional. Low-income menstruators are hit the hardest by these taxes but so are those families with multiple menstruators such as those headed by lesbian couples.270

ii. Strip Searches and Lack of Products

Menstruators claim constitutional violations by government officials and institutions because of their menstruation and their multidimensionality including their carceral and immigration status. For instance, women have claimed correctional officers and customs agents violated their constitutional rights when the government officers strip searched them when menstruating, making them remove all menstrual products they were using and exposing their genitalia to prove their menstruation.271 The government often claims these searches are based on reasonable suspicions and conducted properly under their policies.272 Women have brought suit claiming such searches are not done under a reasonable suspicion and that that the searches strip them of their dignity.273

The Commonwealth of Virginia issued, and then suspended under public pressure, a policy that banned visitors wearing tampons or menstrual cups to prison.274 Under the policy, if visitors wore such menstrual products they would be turned away and their visitation privileges would be reviewed.275 The Virginia Department of Corrections (DOC) promulgated the policy because there had been “many instances” where visitors have

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270 For more discussion of the economic disadvantage regarding the unaffordability of menstrual products, see infra notes 361-427 and accompanying text.
272 See Ferriss, supra note 271.
273 See Complaint, supra note 271, at 16.

Electronic copy available at: https://ssrn.com/abstract=3389773
attempted to smuggle drugs by concealing them in a body cavity.”

The DOC stated that their body scan machines could not tell the difference between a tampon or a menstrual cup and contraband. The policy was an attempt to address the belief that menstrual products were used to bring in contraband. In addition, the policy was created to avoid the body scan falsely detecting contraband when a visitor wears a tampon or menstrual cup. As a result, the Department of Corrections decided to ban all internally worn menstrual products. The facilities planned to offer pads to visitors wearing tampons.

It is unclear why the Department of Corrections chose to enact this policy instead of another alternative that could have permitted menstruating visitors to wear their preferred absorbent product. For instance, as an alternative, they could have created different scanning technology or enhanced their supervision during visits. Instead, the policy banning menstrual products would preclude or deter menstruators who want to visit and cannot attend to their bleeding with pads due to the heaviness of their flow or privacy concerns.

There was an immediate and swift outcry by prisoner advocacy groups and family members that the policy was undermining the dignity of persons who are incarcerated and their families. As the ACLU of Virginia stated, “[m]aintaining contact with friends and family ‘is critically important to people being rehabilitated and having a successful re-entry to society and not repeating criminal behavior’ . . . ‘So, this can have a very negative effect and discourage people from visiting those who are incarcerated.’”

Also, the ACLU expressed a concern that a visitor should not have to choose between visiting a loved one or the visitor's own dignity and health. The day after the DOC announced the ban, the Virginia Secretary of Public Safety announced its suspension pending further

276 See Caron, supra note 274.
277 See Jackman, supra note 275.
278 See id.
279 See id.
280 See Caron, supra note 274.
281 Id.
282 See id. Jana White, a co-founder of the Virginia Coalition for the Fair Sentencing of Youth who often visits her loved one inside the prison, stated that the policy was “a complete violation of my rights and discriminating against women.” Id.
283 Id.
284 See Jackman, supra note 275.
The advocacy of community groups helped to stop this policy from going into effect and hurting the dignity of the residents and their family and friends. In spring 2019, Virginia passed a law requiring the Department of Corrections to change its policy to permit visitors to wear tampons and menstrual cups.

A similar policy was implemented in the federal prison in Tennessee and was challenged by prison visitors. In 2016, visitors to the South Central Correctional Facility in Clifton, Tennessee brought a §1983 action claiming the violation of their Fourth and Fourteenth amendment rights. According to the plaintiffs, the correctional facility required female visitors to remove their menstrual products, “expose their unclothed genitalia to correction officials to verify that Plaintiffs were menstruating,” and then replace the menstrual products with the facility’s products. The facility asserted this procedure is allowed under their policy. Plaintiffs argued that the policy was misapplied because it required a reasonable suspicion that a visitor was smuggling in contraband before a search could be undertaken, and that suspicion was absent. Plaintiffs claimed the facility’s treatment of them was unconstitutional in part because the search treated them differently because they were female, as men who could also smuggle contraband in and around their genitalia were not so searched. The court dismissed defendant’s motion for summary judgment because there were genuine issues of material fact and could not decide this case solely on the legal issues before it. Accordingly, while not deciding that the facility's practices were unconstitutional the court stated if plaintiffs proved their

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285 See id.
286 See Caron, supra note 274.
287 H.B. 1884, supra note 274.
288 This is a state prison run by the largest private prison contractor, according to the plaintiff. See Complaint, supra note 271, at ¶¶ 1, 3 (referencing Corrections Corp. of America, which is now called CoreCivic. See CORRECTIONS CORP. OF AM., http://www.correctionscorp.com/ (last visited Aug. 31, 2019)).
289 Complaint, supra note 271, at ¶ 1.
291 See id.
292 See Complaint, supra note 271, at ¶ 65.
293 Id. at 18-20. Again, understanding that trans men, binary, and intersex persons can have genitalia similar to females, this gender binary legal theory suffers from a lack of intersectionality theory, where cis females might be compared to cis men for instance. Or sex would be defined not as gender binary but as specific to one who menstruates, in this instance.
294 See Doe, 2016 WL 6395624, at *4-5.
facts at trial, there could be enough to support their claims.295 While the case ultimately settled, the court appears to sanction the legal theory that the visiting policy was constitutionally problematic.296

Women and girls have also brought federal court cases claiming constitutional violations by the Customs and Border Protection agency (CBP) when searching them, including strip searching them while they were menstruating.297 In one case, a girl alleged that female officers moved her to the side and told her “to disrobe, hand over a sanitary pad, and squat and cough ‘while officers probed and shined a flashlight at her vaginal and anal areas.’”298 In another case, a women sued CBP claiming that, among other things, she “was tied to a bed with restraints, stripped naked by medical staff and had a tampon removed from her vagina during a body search.”299

Women in state custody also have claimed constitutional violations of the due process clause and equal protection clause of the Fourteenth Amendment due to the state’s failure to provide menstrual products when requested. In her complaint, plaintiff Cynthia Turano alleged the following treatment while she was held for eight and a half hours in jail:300 First, she began to feel unwell and requested menstrual products. She did not receive them.301 She began to menstruate, bleeding through her pants and onto the concrete bench in the cell.302 She requested products and still did not receive them.303 After hours, she was finally provided menstrual pads after making yet another request.304 There was no soap or paper towels in her cell to clean her hand or clothes and no proper disposal container for used products.305 When she was discharged, she was given public transportation funds and made to leave “in her wet, visibly blood-stained clothing.”306 In this case, the district court denied defendant’s motion to dismiss finding that

295 See id.
296 See id. (finding “genuine issues of material fact as to whether Defendants violated Plaintiffs' constitutional rights”).
297 See Ferriss, supra note 271.
298 Id.
299 Id.
301 See id. at *1.
302 See id.
303 See id.
304 See id. at *2.
305 See id. at *1-2.
306 See id. at *2.
plaintiff had alleged a claim upon which relief could be granted for unconstitutional conditions of confinement and discrimination.\(^{307}\)

The Second Circuit heard a comparable case where pretrial detainees made many allegations regarding the conditions of prisoner’s confinement, including that correctional officers caused a menstruating detainee to bleed all over herself because they ignored her requests for pads. The Second Circuit found their allegations were enough to state a claim of unconstitutional conditions of confinement.\(^{308}\) Although constitutional claims reduce plaintiffs to unidimensional characters, the structural intersectionality approach permits consideration of the multidimensionality of the plaintiffs. For instance, if a menstruator in Ms. Turano’s position had financial means she might have been able to have someone meet her upon release from jail with a change of clothes and a ride to the nearest sanitation facilities. Ms. Turano instead was only able to leave via public transportation without a change of clothes.

3. Insults and Indignities

Beyond discrimination, illegal harassment and constitutional violations, menstruators are subjected to other forms of unjust treatment, including suffering dignity harms.\(^{309}\) Indignities and insults affect menstruators in differing ways based upon their multidimensionality.

Women who are incarcerated are forced to endure correctional officers making them remove their tampons during strip searches after visits. One woman recounts that she had blood running down her legs and the correctional officer told her she was “disgusting.”\(^{310}\) The woman felt embarrassed.\(^{311}\) And because correctional officers require menstruating residents to remove their tampon during strip searches at the end of visits, but do not provide a new product after the search, menstruating residents

\(^{307}\) See id. at *3-6.

\(^{308}\) See Darnell v. Pineiro, 849 F.3d 17, 25, 36-37 (2d Cir. 2017).

\(^{309}\) These dignity harms include microaggressions, which are acts that “are subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of people in subordinated groups. Peggy C. Davis, Popular Legal Culture: Law as Microaggression, 98 Yale L.J. 1559, 1565 (1989) (quoting Pierce, Carew, Pierce-Gonzalez & Wills, An Experiment in Racism: TV Commercials, in TELEVISION AND EDUCATION 62, 66 (C. Pierce ed. 1978)).

\(^{310}\) Greenberg, supra note 14.

\(^{311}\) See id.
must return to their cell with blood leaking through their clothes. To avoid such indignity, female inmates often choose not to go to visits while menstruating.

Women who are incarcerated also suffer dignity harms related to limited access to menstrual products. In order to obtain menstrual products that are controlled by correctional officers, they often have to negotiate or beg to get these items that are required to maintain a healthy body and also manage their bleeding. For instance, Ms. Oldfield Parker began menstruating and because her cell did not have supplies, she asked for menstrual products; after an hour and a half, the officers only provided her with one gauze bandage. Correctional officials exert their power and control over the residents by providing products to certain women and not others. As such, “[o]fficers sometimes tried to teach women a lesson by limiting access, affecting self-esteem as well as basic hygiene.” One woman, Ms. Whaley, recounted that at the New York Rikers Island jail facility (Rikers), a “correction officer threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they didn’t know when they would next be able to get tampons.”


313 Id.; see also Greenberg, supra note 14 (stating that one woman at Rikers “asked her social worker not to visit while the client was menstruating, afraid that she would bleed through her uniform and be ashamed”).


315 See Greenberg, supra note 14.

316 See id.

317 See id.

318 Id.

319 Id.
incarcerated women have stated that the lack of menstrual products was one of the most degrading aspects of incarceration. This sentiment was echoed by a Colorado legislator advocating for a bill to provide menstrual products to women who are incarcerated, calling the lack of products “dehumanizing.”

In addition, school girls complain that they are treated unjustly and in a way that harms their dignity. For example, in a network of Chicago charter schools, girls are not permitted to go to the bathroom without an escort. The school claims the system of escorts serves the same purpose as a hall pass. The girls argue that due to the delay in getting an escort, girls are not able to handle menstruating emergencies in a timely way. As a result, some girls bleed through their clothes. One girl described the school as treating them like “animals.” The delay may also significantly impact the students’ health as it precludes them from timely changing their tampons to prevent against such health issues as Toxic Shock Syndrome.

There has been some good progress to address this issue. For example, some states have laws requiring facilities to make menstrual products available, and not only on demand. As of August 2019, twenty-two states have laws requiring the provision of and sometimes free access to menstrual products and two have legislation pending. Increasing laws to

320 BOP Report Card, supra note 314.
321 Schrader, supra note 258.
322 Doha Madani, Girls Reportedly Bleeding Through Pants Due to Charter School Bathroom Policy, HUFFPOST (Apr. 30, 2018, 9:44 PM), https://www.huffingtonpost.com/entry/charter-school-bathroom-policy-periods_us_5aa4e00a4a231f26463c (Noble Network of Charter Schools has 18 campuses and 12,000 students).
323 Id.
325 Madani, supra note 322.
326 Id.
327 See id.; supra text accompanying notes 64–65 for a discussion of TSS.
328 ME. REV. STAT. ANN. tit. 34-A, § 3031, sub-§ 9 (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.6(b) (2019); OHIO ADMIN. CODE 5120:1-10-02(C)(3) (2019).
329 ALA. CODE § 14-3-44(b) (2019); CAL. PENAL CODE § 4023.5 (2019); CONN. GEN. STAT. ANN. § 18-69e (2019); FLA. STAT. ANN. § 440.1442(2) (2019); FLA. ADMIN. CODE ANN r. 33-602.201 (2019); ILL. ADMIN. CODE tit. 20, §§ 701.100(b)(5), 720.60(d) (2019); 501 KY. ADMIN. REGS. 13:010 (2019); LA. STAT. ANN. § 15:892.1 (2019); ME. REV. STAT. ANN. tit. 34-A, § 3031, sub-§ 9 (2019); MD. CODE ANN., CORR. SERVS. §§ 9-616, 4-214 (2019); 103
require provision of menstrual products is important. It is also important to ensure that the laws are as inclusive and comprehensive as possible.

On October 1, 2018, Maryland joined the states that require correctional facilities to provide menstrual products. The Maryland law importantly requires the products to be freely accessible and not only available on demand. This law seeks to eliminate the correctional officers’ ability to control women who are incarcerated by making them ask or demand for the products. As important as this Maryland law is, it has one area that could be improved. The law is gender specific and as such does not apply to trans men and non-binary individuals. Laws providing freely-accessible menstrual products should be gender-neutral and apply to all menstruators.

The First Step Act, 2018 federal legislation that provides free menstrual products to individuals who are incarcerated, is a significant law that also has one area for improvement. The law is gender neutral and

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330 See Md. Code Ann., Corr. Servs. § 9-616(e)(1) (2019) ("Each correctional facility shall have a written policy and procedure in place requiring menstrual hygiene products to be provided at no cost to a female inmate on: (i) admission to the facility; (ii) a routine basis; and (iii) request").

331 Id.

332 See Corr. Servs. § 9-616 (only requiring provision of menstrual hygiene products to "female" inmates).

requires federal correctional institutions to provide free, industry-level quality tampons and sanitary napkins to all inmates.\footnote{334}{See id. ("The Director [of the Bureau of Prisons] shall ensure that the healthcare products provided under this section conform with applicable industry standards.").} Unfortunately, the Act simply states that the products should be available to prisoners but does not specify how they will be made available. The law should be edited to address coercion and degradation concerns and ensure the products are freely accessible and not available only on request.\footnote{335}{In addition, because the federal prison population of approximately 181,000 represents only a fraction of the entire U.S. jail and prison population of 2.1 million, reform is necessary in all states on this issue. See German Lopez, The First Step Act, Explained, VOX (Feb. 5, 2019, 9:42 PM), https://www.vox.com/future-perfect/2018/12/18/18140973/first-step-act-criminal-justice-reform-senate-congress.} Menstruators experience other indignities as well that are tied to the continuation of traditional cultural menstruation narratives that menstruation is a taboo, burden, unhygienic, and makes women inferior and irascible.\footnote{336}{See generally Tomi-Ann Roberts et al., “Feminine Protection”: The Effects of Menstruation on Attitudes Towards Women, 26 PSYCHOL. WOMEN Q. 131, 131 (2002); Inga T. Winkler & Virginia Roaf, Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality, 21 CARDOZO J. L. & GENDER 1, 4 (2014).} This unconscious bias is pervasive and has even been documented in a psychological study. Dubbed the “Tampon Experiment,” this study examined the effect of raising another’s awareness of a woman’s menstruation.\footnote{337}{Roberts et al., supra note 337, at 131.} In the experiment, the woman dropped either a tampon or a hairclip from her purse and the researchers studied how the person observing this later evaluated the women.\footnote{338}{Id.; Winkler & Roaf, supra note 337, at 4.} The study found that when the woman dropped the tampon, rather than the hairclip, the observing participant evaluated the women more negatively.\footnote{339}{Id.; Winkler & Roaf, supra note 337, at 4.} Specifically, the observer judged the woman with the tampon as lower in competency and less likable.\footnote{340}{See Roberts et al., supra note 337, at 131; see also Winkler & Roaf, supra note 337, at 4.} In addition, the observer tended to avoid sitting close to the woman and was more likely to objectify the woman.\footnote{341}{See Roberts et al., supra note 337, at 131.} Countless women and girls, internalizing the bias and stigma evidenced by the Tampon Experiment, recount hiding their products as they prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner.

head to the bathroom to tend to their menstruation. Menstruators describe pharmacy clerks double bagging bought products in order to protect the purchaser from the stigma of being seen with them. Assumed etiquette is to keep one’s menstrual products hidden because it is taboo. As one commentator noted, “It’s at least understandable why people are motivated to keep used feminine products concealed — social stigma aside, it’s messy, it’s private — but what’s embarrassing about a clean, unopened tampon?” To capitalize on and continue the taboo, manufacturers of products highlight the discreteness of their products.

Women and girls also state that they are worried about the stigma of bleeding through their clothes if their menstruation is heavier than normal or is unexpected. Employees who suffer severe menstrual pain or heavy bleeding that make work especially challenging, worry that their supervisors will not take them or their health issue seriously if they request leave.

As in other areas of menstrual injustices, there has been recent advocacy and education to try to destigmatize menstruation and surface and address unconscious bias. Jennifer Weiss-Wolf, an instrumental leader in the menstrual equity movement, states that:

In order to have a fully participatory society, we must have laws and policies that ensure menstrual products are safe and affordable for

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342 See Julie Beck, Don’t Let Them See Your Tampons, THE ATLANTIC (June 1, 2015), https://www.theatlantic.com/health/archive/2015/06/dont-let-them-see-your-tampons/394376/ (discussing how menstruators are discrete with their products and manufacturers market how discrete the products are); cf. Rose George, Menstrual Leave: A Workplace Reform to Finally Banish the Period Taboo?, THE GUARDIAN (June 28, 2018, 5:00 AM), https://www.theguardian.com/commentisfree/2018/jun/28/menstrual-leave-period-taboo-work-reform-women-health (describing the phenomenon of Japanese women rarely using menstrual leave because they fear being paid less, losing authority, or being considered weak).

343 See Beck, supra note 342.

344 Id.

345 See id. (describing several tampon products that marketed the discreteness of their tampons’ size as a positive feature).

346 E.g., Madani, supra note 322.


everyone who needs them. The ability to access these items affects a person’s freedom to work, study, stay healthy, and engage in the world with basic dignity. And if anyone’s access is compromised, whether by poverty or stigma or lack of education and resources, it is in all of our interests to ensure those needs are met.349

Similarly, groups like Period., co-founded by menstrual movement advocate Nadya Okamoto, and the Period Project Chicago, founded by Marissa de la Cerda, seek to challenge the menstrual taboo by providing products to those who cannot otherwise afford them, making them readily available in public spaces, and also providing safe spaces for the most vulnerable menstruators, such as transmen and non-binary menstruators.350

While recognizing the importance of provision of products, Chris Bobel, a long-time advocate and scholar on menstrual issues, argues that more must be done to address the menstrual injustice of stigma.351 In addition, and at the bare minimum, school education should not create additional stigma around menstruation.352 Bobel argues that there needs to be education and a reframing of menstruation as “a vital marker of health and a pivotal developmental milestone” so menstruators can develop an

349 Weiss-Wolf, supra note 265, at 149.
351 See Bobel, supra note 348.
352 For instance, students also are trained in the taboo of menstruation. For example, in one school, students were told to call tampons and pads “turtles” and “penguins” when requesting them from a teacher to ensure no one uttered the proper words of the products. TOJANIQUE EVANS ET AL., BRINGING RESOURCES TO AID WOMEN’S SHELTERS, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 7 (2018), https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf. This taught the students that menstruation and the way to address it were shameful. See id. And because generally, schools do not provide menstrual products, girls internalize a message that menstruation must be hidden and is stigmatized. See id. For those schools that do provide products, if they are not provided for transgender boys and binary students as well menstruation becomes further stigmatized for them. See id.
“lifelong authentic engagement” with their body.” As such, menstruation would be viewed as a normal part of everyday life and not a problem to be fixed with a product. To this end, people argue for open discussions about menstruation. And schools should provide adequate education regarding menstruation for boys and girls. In a 2011 study, researchers found that because boys rarely were educated about menstruation, when they grew to be college age men, many had internalized the taboo of menstruation and showed a lack of empathy around menstruation, as evidenced by their harassing menstruating girls and policing women’s bodies regarding menstrual hygiene.

Other attempts to address the indignities and destigmatize menstruation are happening. For instance, since 2007, Nike has offered menstrual leave in an effort to acknowledge and destigmatize menstrual pain. Menstruators are taking action to bring menstruation into the open to tackle the taboo around it. One noted menstrual justice advocate bled freely while running the 2015 London Marathon. She made this decision because use of menstrual products during the race would have either caused

353 Bobel, supra note 348.
354 See id.; see also OKAMOTO, supra note 173 at 98-117 and 283-89 (discussing marketing of menstrual products causing shame and actions taken to normalize menstruation); WEISS-WOLF, supra note 258, at 226-27 (arguing for better education about menstruation for boys and girls).
356 See Allen et al., supra note 142.
357 See Kayleigh Lewis, Company Gives Women ‘Period Leave’ to Make Them More Productive, INDEPENDENT (Mar. 1, 2016, 8:27 PM), https://www.independent.co.uk/life-style/health-and-families/period-leave-menstruation-work-employment-uk-women-a6905426.html. Countries have also institutionalized such leave. See George, supra note 342. One concern about such company policies is whether they offer “special treatment” to women and stigmatizes women and menstruation, which is a normal bodily function and not a disease. See id.; Lizzie Crocker, Do Women Really Need ‘Period Leave’?, DAILY BEAST (Mar. 3, 2016, 12:01 AM), https://www.thedailybeast.com/do-women-really-need-period-leave.
discomfort or delay.\textsuperscript{359} Her free bleeding garnered a lot of media coverage because the menstrual blood was visible, and she was not embarrassed by it.\textsuperscript{360} It started a conversation about the stigma of menstruation.

The insults and indignities relating to menstruation have deep roots in the cultural narratives of menstruation. While difficult to redress, menstrual justice advocates have made inroads into this area. Good work has been done to address shaming and oppression of menstruators. And multidimensional menstruators have been included in some initiatives, such as legislation to freely provide menstrual products to menstruators who are incarcerated. Nonetheless, there is more to be done to address the insults and indignities experienced by menstruators.

4. Economic Disadvantage

Economic disadvantage is another menstrual injustice. Economic disadvantage can result from employment discrimination taken against menstruators resulting in their termination or loss of pay.\textsuperscript{361} Also, as discussed above, due to the sales and value-added taxes on menstrual products, menstruators have to spend more money for basic necessities leaving less money for other needs.\textsuperscript{362}

Economic disadvantage also results from the pervasive issue of the need for flexible schedules and on-site requirements to deal with menstrual flow. Low-wage workers and those experiencing poverty often have less flexibility in their employment or schooling.\textsuperscript{363} A menstruating employee who experiences a sudden heavy flow or an unexpected period may be delayed in their work arrival, require additional breaks, or be delayed in their return from break due to a necessary change of products or clothes.\textsuperscript{364}

A menstruating employee who experiences severe pain may take

\textsuperscript{359} See Barns & London, \textit{supra} note 358.
\textsuperscript{360} See \textit{id}.
\textsuperscript{361} For instance, having severe PMDD may affect workers’ ability to maintain steady employment if they experience cyclical incapacity due to suicidality and other PMDD symptoms. See Morrish, \textit{supra} note 97.
\textsuperscript{362} See discussion \textit{supra} Section III.B. 2.b.i.
\textsuperscript{364} See Crawford et al., \textit{The Ground, supra} note 252, at 11 (Marcy Karin discussing employee break time for menstruation).
unscheduled leave. As discussed below, as a result, the employer may take adverse action against the menstruator. Such adverse action may include reprimands, pay reductions, suspensions or terminations. From current case law, it does not appear that employment or labor laws or family medical leave act laws provide adequate relief for menstrual justice. This may be due in part to a lack of acceptance of the disabling nature and inflexibility of menstruation for some menstruators.

For instance, Julia Taylor, an African American female tractor-trailer driver for Giant supermarkets, brought a breach of contract claim for wrongful termination. Ms. Taylor had menorrhagia and uterine fibroids which resulted in sudden, unexpected heavy and prolonged bleeding. She notified her supervisor of her condition and requested, and Giant approved, Family Medical Leave Act (FMLA) leave for her “gynecological-related lateness and absence.” Nonetheless, Ms. Taylor was disciplined for violating a rule requiring her to give 1.5 hours advance notice if she was going to be late to or absent from work. Taylor provided a doctor's note and explained that her lateness was due to her heavy menstrual bleeding which disrupted her preparations for work and left her unable to give 1.5 hour’s notice between the bleeding’s onset and her start time. Giant requested additional medical documentation to support her tardiness. Taylor, who believed she had provided adequate documentation, felt “devastated” by the scrutiny. Giant sought a second medical opinion of Taylor's condition as their reviewing doctor opined that Taylor's fibroids could cause dizziness due to anemia. Accordingly, Giant told Taylor they were worried she could no longer drive the truck safely. Giant urged Taylor to undergo an independent medical examination, and according to Taylor, the findings from that examination might require a hysterectomy to

365 See, e.g., Leiva, supra note 347.
366 Taylor v. Giant of Maryland, 33 A.3d 445, 447, 449 (2011) (reversing the Maryland Court of Special Appeals decision overturning a jury decision in Ms. Taylor’s favor). Ms. Taylor also brought sex and race discrimination claims and a retaliation claim. Id. at 447.
367 Id. at 449.
368 Id. at 449-50. The FMLA is a federal law that permits eligible employees unpaid leave necessary for serious health conditions and certain family caretaking. 29 U.S.C. § 2612 (2019).
369 See Taylor, 33 A.3d at 450.
370 See id.
371 See id. at 451.
373 See Taylor, 33 A.2d at 451; Giant of Maryland, 981 A.2d at 9.
374 See Giant of Maryland, 981 A.2d at 9.
be “rehired” by Giant.375 Upset and believing she was constructively fired, Taylor stopped going to work and applied for unemployment benefits.376 She also filed a retaliation claim.377 At trial, the jury found Giant had discriminated against Ms. Taylor on the basis of sex and retaliated against her.378

Another menstrual injustice is the lack of affordable menstrual products. For the almost 40 million menstruators living in or near poverty, their difficult economic circumstances are exacerbated by the lack of affordable healthy menstrual products.379 Given that the cost of purchasing some of the necessary menstrual products is high (between $2,037.46 and $2,140.60 in a lifetime) these costs can be unaffordable for those experiencing poverty.380 And currently, menstrual products cannot be bought with food stamps (SNAP)381 or WIC benefits, and are not covered by Medicaid.382

A 2019 research study of low-income women in St. Louis, Missouri shows that two-thirds of the women needed to use “10-35 or more pads or tampons in any given cycle.”383 Despite this need, 64% of the women studied could not afford those menstrual products, tampons or menstrual pads, during the previous year.384 21% said this lack of resources happened every month.385 As a result, one-third of the low-income women reported that they used other things to make homemade tampons and pads like rags,

375 Taylor, 33 A.2d at 451-52.
376 See id. at 452.
377 See id.
378 See Giant of Maryland, 981 A.2d at 4. The Maryland Court of Appeals upheld the jury verdict in part but remanded the case for consideration of additional issues. See Taylor, 33 A.2d at 467-68.
379 See Weiss-Wolf, supra note 67.
380 See Durkin, supra note 47, at 135 (this figure includes the tax usually associated with menstrual products).
383 Kuhlmann et al., supra note 69, at 241.
384 Id. at 238.
385 Id.
tissues, toilet paper, paper towels, diapers, and adult incontinence products. Use of rags has been documented with other populations of menstruators experiencing poverty and one concern is whether they have access to clean rags. If they do not have access to laundry facilities, they must dispose of the rags somehow and find new ones. If they cannot access alternative materials to absorb the blood, their only alternative may be to bleed through their clothing and seek donated clothing to replace the bloody ones. A few women in the St. Louis study reported going to the hospital emergency room to get products. The women in the study wanted SNAP and WIC benefits to apply to the purchase of menstrual products and were frustrated by the tampon tax.

The St. Louis study also shows that low-income women’s employment was also affected by their menstruation. While less than a third of the low-income women studied worked full- or part-time, “[m]ore than one third . . . of the women who worked missed one or more days of work per month owing to their periods, generally due to cramps or heavy menstrual flow.”

Beyond the lack of economic resources to purchase menstrual products, low-income women in the study reported facing three other challenges: (1) the low absorbency of products provided by community organizations were inadequate to manage heavy flows and required using multiple pads at one time; (2) transportation difficulties to stores that sell larger quantities for lower prices; and (3) risks to their “safety, security, and sanitation during menstruation.” As to the latter, homeless women reported having:

no place to change their menstrual hygiene supplies [and] . . . were afraid to use a public toilet for fear of getting assaulted when exiting the facility. Some women simply waited all night until they could get to a safe location in a public restroom, day shelter, or soup kitchen during daylight hours. During winter, women often went

386 Id. at 240
387 See Kerr, supra note 381.
388 See id.
389 See id.
390 See Kuhlmann, supra note 69, at 241.
391 See id. at 242.
392 Id. at 241.
393 Id.
12-14 hours overnight without using a toilet or changing their pad or tampon.\textsuperscript{394}

The low-income women in the St. Louis study provide three recommendations to assist their menstruation experiences: (1) make “a greater variety of sizes and absorbency levels of menstrual hygiene supplies available through donations and community service organizations”; (2) increase “community awareness about where menstrual hygiene supplies are available”; and (3) offer “coupons to reduce the cost of products purchased out-of-pocket.”\textsuperscript{395}

The issue of lack of affordable products has been documented as stark for other menstruators as well. Households with multiple menstruators such as mothers with dependent daughters and lesbian households, which are twice as likely to be experiencing poverty, may struggle to obtain the necessary products each cycle.\textsuperscript{396} Menstruators in school report that a lack of affordable products interferes with their school attendance.\textsuperscript{397} A recent study of eighteen to twenty-five year old females who attended high school shows that they needed menstrual products while at school but fewer than half of their schools (42.13\%) provided products for cost or for free.\textsuperscript{398} The study documented that there was a statistically significant correlation between the lack of access to the menstrual products and decreased school attendance (12.7\% missed school), leaving school early (23.91\%), difficulty learning (17.6\%).\textsuperscript{399}

\textsuperscript{394} Id. at 242.
\textsuperscript{395} Id.
\textsuperscript{396} See Christina Cauterucci, Tampons Shouldn’t Be Tax Free. They Should Be Covered by Food Stamps and Medicaid., SLATE (Mar. 17, 2016, 2:46 PM), http://www.slate.com/blogs/xx_factor/2016/03/17/tampons_shouldn_t_be_tax_free_they_should_be_covered_by_food_stamps_and.html; see also Kerith J. Conron et al., Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health, 72 J. EPIDEMIOL COMMUNITY HEALTH 1016, 1019 (2018) (noting that women in the “sexual minority” were more likely to receive public assistance than heterosexual women).
\textsuperscript{397} See Kerr, supra note 381; see also Evans et al., supra note 352, at 7.
\textsuperscript{399} See id. Study participants also indicated that the lack of menstrual products was related to their tardiness (15.01\%) and negative health issues (7.76\%), but these outcomes were not found to be statistically significant. See id.
Generally, correctional facilities require the more than 225,000 women who are incarcerated, and who are disproportionately African American and Hispanic as well as low-income, to purchase their own menstrual products. Without adequate employment to fund these purchases, their inability to buy products can affect their health. In recent years, more states and the federal laws require the provision of free products, but most do not.

Since correctional facilities do not always provide free or a ready supply of menstrual products to menstruators who are incarcerated, the products are available in the commissary, the prison or jail store. These products are usually priced quite high. For instance, the commissary in federal prisons sold tampons and menstrual pads at high prices, with two tampons costing $5.55 and two panty liners at $1.35. Of course, menstruators need many more than a pair of each of these products each month, and yet purchasing more products may be financially impossible. The average monthly pay for a resident of a federal correctional facility is only $5. According to a 2015 study of women in the New York State Department of Corrections and Community Supervision, fifty-four percent of women inmates have said that the monthly supply of sanitary napkins


402 See James, supra note 400.

403 See infra text accompanying notes 420–423.


406 See id.
they are provided with does not meet their needs.⁴⁰⁷ Without products, “[s]ome women walked around in stained jumpsuits. Others fashioned pads out of socks. Some used their weekly allotment of tissues and stuffed them in their underwear.”⁴⁰⁸ A federal court has recognized the hardship on residents from a lack of menstrual products due to their lack of free provision by the institution, their high commissary cost, the lack of decent paying jobs while incarcerated, and the constructive requirement that residents pay restitution to the government at high amounts.⁴⁰⁹ Activists hope this new federal law, which requires the provision of free products, will eliminate this hardship in federal institutions.⁴¹⁰

While the federal government and twenty states have laws seeking to rectify the lack of free menstrual products, the majority of states do not.⁴¹¹ And even when products are supposed to be provided, the facility may not provide an adequate quantity for the menstruator’s cycle or adequate quality products to properly absorb the menses.⁴¹² Often, residents are left with no resort but to purchase products in the commissary. Such purchases may be out of reach financially for residents. At Rikers, “[n]ame-brand tampons are available at the jail commissary for about $4 a box . . . [and so] some women can’t afford them . . . [W]omen said tampons were valuable enough that they could be traded for a bag of chips or a pack of coffee.”⁴¹³ And for those who are incarcerated, “prison jobs are scarce and typically pay less than one dollar a day.”⁴¹⁴ Menstrual products can eat up about half of a typical woman’s weekly income.⁴¹⁵ Residents are left with the choice of buying menstrual products or buying some other necessary or

⁴⁰⁷ See id. (citing TAMAR KRAFT-STOLAR, CORRECTIONAL ASS’N OF N.Y., REPRODUCTIVE INJUSTICE 65 (2015), https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c4f5d01758d466ad39b0a97/1548705033102/2015+Reproductive+Injustice+in+New+Yorks+Prisons.pdf).

⁴⁰⁸ Id.


⁴¹⁰ See e.g., Anjana Samant, The First Step Act is a Small Step for Incarcerated Women, ACLU (Dec. 27, 2018, 10:00 PM), https://www.aclu.org/blog/prisoners-rights/women-prison/first-step-act-small-step-incarcerated-women (“[U]nnecessary restrictions on access to menstrual health products have turned a normal bodily function into a nightmare for people in prison.”).

⁴¹¹ See supra note 329 and accompanying text.

⁴¹² Importantly, women in prison suffer from endometriosis, which causes heavy and irregular bleeding, at a higher rate than women not in prison. See James, supra note 400.

⁴¹³ Greenberg, supra note 310.

⁴¹⁴ James, supra note 400.

⁴¹⁵ See id.
important good. One woman who was incarcerated showed up for her court hearing with no pants and was bleeding due to a lack of access to products. These shortages and uncertainties about obtaining products cause a “psychological burden” for menstruators.

One woman described it this way:

At York [Correctional Institution in Niantic, Connecticut], each cell, which houses two female inmates, receives five pads per week to split. I'm not sure what they expect us to do with the fifth, but this comes out to 10 total for each woman, allowing for only one change a day in an average five-day monthly cycle. The lack of sanitary supplies is so bad in women's prisons that I have seen pads fly right out of an inmate's pants: prison maxi pads don't have wings and they have only average adhesive so when a woman wears the same pad for several days because she can't find a fresh one, that pad often fails to stick to her underwear and the pad falls out. It's disgusting but it’s true.

As discussed above, there has been some success in addressing the need for accessibly priced menstrual products for menstruators who are incarcerated. There have also been efforts to obtain affordable, safe, and reusable products for students in public schools and for those experiencing poverty or homelessness. Specifically, advocates have worked with lawmakers to get laws to ensure the provision of menstrual products to certain sets of menstruators. Some jurisdictions have passed new

416 See Chandra Bozelko, Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights, GUARDIAN (June 12, 2015), https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights (discussing the trade-offs between buying menstrual products or other necessities like tooth paste and deodorant).
417 See WEISS-WOLF, PERIODS GONE PUBLIC, supra note 258, at 79 (discussing an incident in a Kentucky court in 2016).
418 Id. at 80.
419 Bozelko, supra note 416.
420 For instance, as discussed above, in 2018, the federal government passed a new law requiring federal correctional institutions to provide free, industry-level quality tampons and pads. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5247 (2018).
421 Activists have labeled this movement “menstrual equity”: seeking “equal access to hygiene products, but also to education about reproductive health . . . Advocates are also urging states to exempt menstrual hygiene products from sales tax, arguing that they’re a necessity.” Karen Zraick, It’s Not Just the Tampon Tax: Why Periods are Political, N.Y.
legislation giving persons who are incarcerated and public school students access to menstrual products, sometimes at no cost.\textsuperscript{422} As discussed above, some jurisdictions have passed new legislation eliminating sales or value-added tax on menstrual hygiene products.\textsuperscript{423} College students have organized campaigns providing access to products on campus, often at no cost.\textsuperscript{424} In addition, in college campuses across the country, student groups or schools are providing free products in all bathrooms, not only women’s, to include all menstruators.\textsuperscript{425} Grassroots organizers have created handmade reusable products and distributed free products to those in need.\textsuperscript{426} Companies have shaken up the traditional menstrual product market and are making and distributing environmentally-friendly and safe reusable products.\textsuperscript{427}

\textsuperscript{422} See, e.g., Maryland Lawmakers OK Bill on Hygiene Products in Prison, CBS BALTIMORE (Mar. 1, 2018, 6:45 PM), https://baltimore.cbslocal.com/2018/03/01/maryland-bill-hygiene-products-prison-women/. In 2016, New York City enacted a new law that makes free menstrual products available in all public schools, jails, and shelters, making menstrual products as available and visible as toilet paper and soap. Audrey Huang, Major NYC Legislations from 2016-2018 for Menstrual Equity, MEDIUM (June 28, 2018), https://medium.com/periodmovement/major-nyc-legislations-from-2016-2018-for-menstrual-equity-b9102619124f. A similar proposal was considered in Maryland. See H.B. 133, 2019 Leg., 439 Sess. (Md. 2019) (proposed legislation in Maryland requiring a county board of education “ensure that each public school serving students in any grade from grades 6 through 12 provides, at no charge to students, feminine hygiene products in the restrooms at the school.”). Unfortunately, this Maryland law did not pass. See id. and accompanying text.

\textsuperscript{423} See supra note 264 and accompanying text.

\textsuperscript{424} See Megan Woolhouse, Should Colleges Make Tampons Free on Campus?, BU TODAY (Nov. 7, 2018), http://www.bu.edu/today/2018/free-tampons-on-campus/.

\textsuperscript{425} For example, at Brown University, students placed products in men’s and women’s bathrooms for all menstruators. See Katie Mettler, Free Tampons for All at Brown University This School Year — Even in the Men’s Room, WASH. POST (Sept. 9, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/09/09/free-tampons-for-all-at-brown-university-this-school-year-even-in-the-mens-room/.


Another issue for menstruators of limited economic means is the lack of adequate water and sanitation during menstruation. If they are unable to manage their menstruation, these menstruators experience barriers to their daily life activities. One promising response is that community activists are creating accessible private bathrooms and showers for persons experiencing homelessness that permit menstruators to be able to tend to their bleeding. Another is that Washington, D.C. is proposing creating safe public restrooms and wider access to private sector restrooms. While these reforms and new laws are only in a few jurisdictions, more work can be done to create universal access to affordable, safe, and environmentally-friendly products and soap, water, and private sanitation facilities for menstruators. Working on this issue will bring the United States in line with the 2014 UN Human Rights Council’s statement that the lack of access to water and sanitation facilities for menstrual hygiene is a human rights violation.

Another form of economic disadvantage and one that has been raised by feminist theorists in relation to child care and pregnancy is the fact that menstruators are not monetarily compensated for menstruation. Menstruation is a societal good because it is part of the reproductive cycle and necessary for the propagation of society. Nonetheless, society does not

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place a monetary value or compensate menstruators for their production. As menstruation is in fact a form of labor conducted by citizens that benefits society, it should be recognized as such and valued. This argument is akin to feminist arguments regarding reproductive labor, the recognition that labor performed in the private sphere, such as pregnancy, child care, and housework, should be recognized as labor and compensated.\textsuperscript{433} Despite this, society and law penalize menstruation as seen in the examples of economic disadvantage above.

In sum, menstrual injustice includes the economic disadvantage menstruators face based on their intersection with poverty, race, gender identity, sexual orientation, homelessness, carceral status, work status, disability, and age. Advocacy across this structural intersectionality is necessary to effectuate menstrual justice.

5. Health Disadvantage

Another example of menstrual injustice involves inadequate medical and health research about menstruation. Medical research has been very limited in its study of menstrual pain and related issues. In addition, research has been limited as to the safety of menstrual products and the health consequences of poor menstrual hygiene.\textsuperscript{434}

The federal government excluded women of child-bearing potential from participating in early phase pharmaceutical research until 1993 when the Federal Drug Administration (FDA) lifted the ban.\textsuperscript{435} Once the ban was lifted, women were able to participate in drug research studies but continued to be excluded by many studies.\textsuperscript{436} Lack of participation by women in research studies means there are limited studies on health issues


\textsuperscript{434} Further, the environmental impact of menstrual products is understudied and there are limited eco-friendly alternatives. See Nina Shen Rastogi, Greening the Crimson Tide, SLATE (Mar. 16, 2010, 9:36 AM), http://www.slate.com/articles/health_and_science/the_green_lantern/2010/03/greening_the_crimson_tide.html (discussing some eco-friendly alternatives).

\textsuperscript{435} See Katherine A. Liu & Natalie A. DiPietro Mager, Women’s Involvement in Clinical Trials: Historical Perspective and Future Implications, 14 PHARM. PRAC. 1, 3 (2016).

that largely impact women like menstruation. In addition, there has been less funding available to research and develop pharmaceuticals for primarily women's health issues than men's.\textsuperscript{437} As a result, women's health issues have not gotten the attention they warrant. The National Institutes of Health (NIH) has attempted to address this gender disparity recently and so there are some, though not enough, studies involving women’s health issues.\textsuperscript{438} Since menstruators are largely, although not only, cis females, the lack of research has impacted research about menstruation.

Recent research illuminates that up to 90\% of menstruators experience menstrual pain, 20-25\% of women experience moderate to severe menstrual pain.\textsuperscript{439} As discussed earlier, PD is menstrual-related pain in “the low back, abdomen, and possibly the thighs,” unrelated to any other medical condition.\textsuperscript{440} There is also secondary dysmenorrhea menstrual pain caused by another medical condition, such as “endometriosis, uterine fibroids, or pelvic inflammatory disease.”\textsuperscript{441} PD may contribute to other chronic pain illnesses.\textsuperscript{442}

Despite the increase in studying women's health issues, little is known about PD and treatment options are few and often require economic means.\textsuperscript{443} The most common recommended treatments for PD are ibuprofen, an IUD or an oral contraceptive pill, but the latter two are expensive and infrequently covered by insurance.\textsuperscript{444} And for those 176 million people with endometriosis, which causes secondary dysmenorrhea, surgery may provide relief for some but not necessarily all those who

\textsuperscript{437} See id. (stating also that venture capitalists, who are primarily male, choose to fund male health issues they can relate to rather than women's health issues).

\textsuperscript{438} See Liu & DiPietro Mager, supra note 435, at 4; Elizabeth Yuko, Period Pain Must Be Taken Seriously – But It Also Shouldn’t Define Us, MEDIUM (Feb. 23, 2016), https://medium.com/the-establishment/how-the-period-paradox-keeps-women-down-6b956d7fcb10.

\textsuperscript{439} See Yuko, supra note 438 (noting that 20-25 percent of women experience moderate to severe menstrual pain). (noting that 20-25 percent of women experience moderate to severe menstrual pain). In addition, 40 percent of women also experience other symptoms related to their menstrual cycle such as “bloating, tender breasts, a swollen stomach, lack of concentration, mood swings, clumsiness and tiredness.” Period Pain, WOMEN’S HEALTH CONCERN (Nov. 2017), https://www.womens-health-concern.org/help-and-advice/factsheets/period-pain.

\textsuperscript{440} Payne et al., supra note 89, at 2234.

\textsuperscript{441} Id. at 2233.

\textsuperscript{442} See id.

\textsuperscript{443} See id.

\textsuperscript{444} See Yuko, supra note 438.
suffer. In addition, the necessary recovery time from surgery may not be a viable, safe option for those experiencing homelessness or low-wage workers without paid sick leave or guaranteed reemployment.

And the health disadvantages caused by inadequate treatment options result in economic disadvantages too. PD negatively affects menstruator’s ability to engage in daily activities. For those suffering from endometriosis, research shows that the lost work productivity and health care costs are estimated at $10,762 per woman per year. And low-wage and other workers lose pay and may risk termination due to their frequent and necessary absenteeism due to severe period pain.

Another menstrual health disadvantage is the limited FDA oversight of the safety of menstrual products. For example, considering that women could use as many as 12,000 to 24,630 tampons during their lifetime, understanding the health risks from them and other menstrual products is critical. Further, because tampons are placed inside the vagina, their

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445 Endometriosis is a painful condition where the tissue that normally grows inside the uterus grows outside of it. See Mayo Clinic Staff, Endometriosis, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/endometriosis/symptoms-causes/syc-20354656 (last visited July 10, 2019); Yuko, supra note 438 (citing that 176 million people worldwide have endometriosis). For a larger discussion of endometriosis, along with the treatment of women’s health issues, see MAYA DUSENBERY, DOING HARM: THE TRUTH ABOUT HOW BAD MEDICINE AND LAZY SCIENCE LEAVE WOMEN DISMISSED, MISDIAGNOSED, AND SICK 216-229 (2018).


448 See Payne et al., supra note 89, at 2233 (“[s]evere PD leading to medication use and absenteeism affects up to 25% of the female population”).


450 See Robin Danielson Feminine Hygiene Product Safety Act of 2017, H.R. 2379 § 2, 115th Cong. (2017) (stating that the number could be as high as 16,800, and for
chemicals are absorbed almost directly into the bloodstream through the vaginal mucosa and do not go through the same metabolic and elimination processes as products entering the body by eating or drinking. Concerns about the products' safety include carcinogenic elements as well as other contaminants from the synthetic fibers, chlorine, fragrances, colorants, dyes and preservatives.

One health concern with menstrual products is dioxin residue. Dioxin is a toxin that causes cancer in animals, may cause cancer in humans, and may put people at risk of immune system illnesses, pelvic inflammatory disease, and endometriosis. In the late 1990s, the amount of dioxin in menstrual products decreased after manufacturers changed their product bleaching process. Nonetheless, products still contain dioxin residue, which exists as a result of air, water, and soil pollution. The FDA states that the trace amount of dioxin in a tampon is not a health risk, but policymakers and researchers have called for further information about the materials in menstrual products and further testing due to a concern that cumulative dioxin amounts over the menstruator’s life could be a health risk. Because the vaginal wall is highly absorbent, chemical elements inside and near the vagina can be absorbed into the bloodstream very...
efficiently. And with the recent discovery that tampons were unraveling and remaining undetected for lengthy periods in menstruators’ vaginas, the risk could be higher still.

A recent study confirms the potential health risk of menstrual products. A University of Illinois research study found volatile organic compounds (VOCs) and phthalates present in the majority of studied menstrual pads. VOCs and phthalates can be toxic to women’s reproductive health and “increase the risk for neurocognitive impairment, asthma, congenital disability, and cancer.”

In addition, while there are only a few studies into the health risks of menstrual products, other research studies showed a low-level amount of styrene, which is a carcinogen, chloroethane, which can cause neurological problems, and chloroform in menstrual pads. Another test showed that carbon disulfide, a toxin, was present in rayon tampons, and “some brands of tampons contained other volatile organic compounds including reproductive toxins, toluene and xylene, as well as carcinogen, methylene chloride [used in paint stripper].”

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458 Kimberly-Clark, maker of U by Kotex tampons, recalled its regular absorbency tampons in December 2018 because of reports that the tampons were unraveling inside menstruators’ vaginas or falling apart upon removal thereby requiring medical attention to remove the pieces and causing “infections, vaginal irritation, localized vaginal injury, and other symptoms.” Press Release, Kimberly-Clark, Kimberly-Clark Announces Voluntary Recall of U by Kotex® Sleek® Tampons, Regular Absorbency, Throughout U.S. and Canada (Dec. 11, 2018), https://kimberlyclark.gcs-web.com/news-releases/news-release-details/kimberly-clark-announces-voluntary-recall-u-kotexr-sleekr. This defect in the tampon is worrisome because retained tampon material can lead to toxic shock syndrome (TSS), which is treatable with early detection of such symptoms as “sudden fever, nausea, vomiting, low blood pressure, confusion, muscle aches, and headache.” Nurse Alice Benjamin, Nurse Alice: Don’t Ignore this Kotex Tampon Recall, BLACK ENTERPRISE (Dec. 18, 2018), https://www.blackenterprise.com/nurse-alice-kotex-tampon-recall/.


460 See id. at 115, 119.

461 See Kounang, supra note 450 (citing a research study performed by the activist group Women’s Voices for the Earth, WOMEN’S VOICES FOR THE EARTH, supra note 455).

Unfortunately, consumers do not have the information about the products’ components because manufacturers are not required to disclose this information. The FDA’s regulation of menstrual products is limited and does not require much disclosure. The FDA acknowledges that there are risks associated with tampons, namely adverse tissue reaction, vaginal injury, vaginal infection and toxic shock syndrome, but classifies tampons as a “non-significant risk”. The FDA requires manufacturers to include a safety label regarding the risk of tampon use and toxic shock syndrome. The FDA identified only the risk of an adverse tissue reaction for menstrual pads. The FDA only recommends, and does not require, products to be dioxin, pesticide, or other chemical-residue free, does not require biocompatibility testing, does not require public disclosure of the type of bleaching process used, or a risk analysis to be performed. As a result,
consumers are not apprised of the make-up of tampons and pads to be able to make health decisions about which products they feel most comfortable using.\textsuperscript{467}

The New York City Assembly introduced a bill requiring the disclosure of menstrual products' ingredients.\textsuperscript{468} This bill covers tampons and pads, as well as cups and period underwear.\textsuperscript{469} As the sponsoring Assembly member Linda B. Rosenthal stated, “There is something deeply amiss when chemicals are deemed too unsafe for paint stripper, but just fine for women to use in their tampons.”\textsuperscript{470}

Another under-researched but important issue is the connection between lack of access to safe menstrual products and a menstruator's health. Some menstruators have difficulty accessing products due to material poverty,\textsuperscript{471} incarceration,\textsuperscript{472} or domestic violence.\textsuperscript{473} One study criticized the FDA’s overreliance on guidance rather than creating regulations pursuant to the Administrative Procedure Act. See, e.g., Washington Legal Foundation, Comment Letter on Review of Existing Center for Drug Evaluation and Research Regulatory and Information Collection Requirements (Dec. 7, 2017), http://www.wlf.org/upload/litigation/misc/FDAComments-UseofGuidanceDocs.pdf (comments of the Washington Legal Foundation criticizing the FDA’s heavy reliance on guidance).

\textsuperscript{467} See Dudley et al., \textit{supra} note 453; Kounang, \textit{supra} note 453. For an important discussion of menstrual product safety, see Crawford et al., \textit{The Ground on Which We All Stand: A Conversation about Menstrual Equity and Activism}, \textit{supra} note 252, at 15 (Laura Strausfeld discussing health and safety issues of menstrual products).

\textsuperscript{468} See B164 § 1, Assemb. Reg. Sess. (N.Y. 2019); Press Release, Women’s Voices for the Earth, \textit{supra} note 462.

\textsuperscript{469} See Press Release, Women’s Voices for the Earth, \textit{supra} note 462.

\textsuperscript{470} Id.

\textsuperscript{471} See Winkler & Roaf, \textit{supra} note 337, at 22-23.

\textsuperscript{472} See \textit{supra} text accompanying note 290 (women inmates coerced regarding menstrual products); \textit{Testimony in Support of H.B. 797 Before the Md. Gen. Assemb. H. Judiciary Comm.}, 2018 Sess. (Feb. 15, 2018) (written testimony of Kimberly Haven, Women’s Justice Consortium) (stating “[w]omen [in state custody] who do not have ready access to [menstrual] . . . products are forced to innovate to survive – women make makeshift pads by using toilet paper, washcloths, whatever they can find – just to take care of themselves. Women such as myself will make these DIY products and may find ourselves having to have emergency hysterectomies because of toxic shock syndrome or other long term medical complications.”).

\textsuperscript{473} Domestic violence can include differing forms of coercive control, including controlling the person's menstrual products. \textit{See}, e.g., Margaret E. Johnson, \textit{Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence}, 42 UC DAVIS L. REV. 1107, 1109 (2009) (detailing how a male partner locks up household products, including tampons, to prevent female partner from freely accessing them).
found a link between limited hygiene care and reproductive tract infections although it is possible that any itching or discharge could be the result of the plastics in the products.\textsuperscript{474} Another study found a link between tampon use and a decreased risk of endometriosis.\textsuperscript{475} This issue needs further study to gather reliable information about necessary menstrual care and how it affects an individual menstruator’s health as well as the general public health.

Menstruators experiencing homelessness face the challenge of managing their menstruation without safe access to products, water and soap as well as privacy to attend to their menstruation.\textsuperscript{476} Even in the shelter, the regular access to a private bathroom to change one’s menstrual products and to clean up can be restricted making it especially difficult for those menstruators with heavy periods.\textsuperscript{477} And shelters have a difficult time providing products because they do not have the financial resources or are not permitted to use their grant monies to purchase them.\textsuperscript{478}

Some women have gotten admitted to the hospital in order to have access to sanitation products and facilities.\textsuperscript{479} Jennifer Weiss-Wolf recounts that menstruators experiencing homelessness may use items found in trash bins to staunch the blood, but those items may be unclean or otherwise pose a health or safety risk.\textsuperscript{480} And without access to water and soap, the use of reusable products like a cup or cloth pads are difficult.\textsuperscript{481} Weiss-Wolf further states that if the person is transgender and homeless, a private place to tend to their menstruation may be necessary for their personal safety.\textsuperscript{482} And shelters and homeless centers identify that they do not always have

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\textsuperscript{474} See Winkler & Roaf, \textit{supra} note 337, at 8; see also Enu Anand et al., \textit{Menstrual Hygiene Practices and Its Association with Reproductive Tract Infections and Abnormal Vaginal Discharge Among Women in India}, 6 Sexual & Reprod. Healthcare 249, 253 (2015).

\textsuperscript{475} Erika L. Meaddough et al., \textit{Sexual Activity, Orgasm and Tampon Use Are Associated with a Decreased Risk for Endometriosis}, 53 Gynecologic & Obstetric Investigation 163 (2002).


\textsuperscript{477} See De Bode, \textit{supra} note 430.

\textsuperscript{478} See Evans et al., \textit{supra} note 352, at 14.

\textsuperscript{479} See De Bode, \textit{supra} note 430.

\textsuperscript{480} See \textit{WEISS-WOLF, supra} note 258, at 66.

\textsuperscript{481} See id.

\textsuperscript{482} See id.
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menstrual products to provide to their residents because there is not always a ready supply of donations.\textsuperscript{483}

Without access to menstrual hygiene products “to staunch the flow of menstrual blood and prevent encrustation and detritus,” menstruators can negatively affect their health.\textsuperscript{484} Specifically, as stated by the plaintiffs in a case regarding the tax on menstrual products, without such products, menstruators “are forced to use unsanitary and dirty rags — which can lead to infections and an increased risk of diseases such as cervical cancer — or have nothing at all to staunch the blood — which poses a risk to the health of women and the public.”\textsuperscript{485} And without menstrual products to absorb the flow, there is a risk that any menstruator’s infectious disease such as HIV, hepatitis B or hepatitis C could be transmitted through her menses.\textsuperscript{486} To avoid any risk, it is best practice for the disposal of any item used to absorb menstrual blood and tissues to be in a lined receptacle and removed by someone wearing gloves.\textsuperscript{487}

Yet these best practices are not followed routinely. Sanitation in prisons relating to menstrual blood can be deplorable.\textsuperscript{488} One woman from the Muskegon County Jail stated: “When I arrived at the jail, I was placed in the jail’s holding tank and left there for about 7 days. The floor was covered in urine, and other bodily fluids, and was also full of ants and other insects. Cells had showers covered in dark mold and toilets which spilled raw

\textsuperscript{483} See De Bode, supra note 430; cf. Johnson, supra note 431 (suggesting that menstruation should be a motivating factor for city councils to decide to build new public restrooms).


\textsuperscript{485} Id.; see also Weiss-Wolf, supra note 67 (menstrual products are important to women's health).

\textsuperscript{486} The Occupational Safety and Health Agency (OSHA) declared that menstrual waste is not medical waste when the menstrual blood has been absorbed in menstrual products like tampons and pads. See U.S. Dep’t of Labor, Opinion Letter, supra note 58; see also supra notes 74-75 and accompanying text. Interpreting OSHA’s guidance, one medical waste disposal company states that the standard is whether there is a potential for the product to release blood. See Sean, Does OSHA Consider Feminine Hygiene Products Medical Waste?, RED BAGS (Mar. 24, 2017), https://www.redbags.com/feminine-hygiene-products-medical-waste/. This potential is greater with rags and items that are not as absorbent as commercial menstrual products. Cf. supra notes 72-75 and accompanying text. It is interesting to note that Delaware does identify used menstrual products as hazardous waste. See DEL. CODE ANN. tit. 7, § 6402(7) (2019).

\textsuperscript{487} See Sean, supra note 486.

sewage, urine, and menstrual blood.\textsuperscript{489} For this reason, the recently passed law in Maryland requires correctional facilities to create policies regarding the proper disposal of menstrual products.\textsuperscript{490}

As seen above, there are many ways in which the health impact of menstruation and menstrual products requires additional study and research. Health disadvantages are yet another area of menstrual injustice for which menstrual justice advocacy has and will continue to make an impact.

Menstrual injustices are pervasive and result in exclusion and essentialization; discrimination, harassment, and constitutional violations; insults and indignities; economic disadvantage; and health disadvantage. The next Part uses the theory of structural intersectionality to examine and analyze how menstrual injustices are structural, political, and representational. The next Part also identifies areas for menstrual justice advocacy in the future.

IV. STRUCTURAL INTERSECTIONALITY AND MENSTRUAL JUSTICE

This Part argues that menstrual injustice is a manifestation of structural intersectionality. It then examines menstrual justice advocacy and how it has been effective in tackling menstrual injustices. Finally, this Part recommends additional areas for menstrual justice advocacy with an eye towards battling structural intersectionality.

A. Structural Intersectionality and Menstrual Injustice

This Article has shown the pervasiveness of menstrual injustices. It has analyzed menstrual injustices manifested in exclusion and essentialization; discrimination, harassment, and constitutional violations; insults and indignities; economic disadvantage; and health disadvantage.

As explained earlier, menstrual injustice is an example of structural intersectionality. Crenshaw explains that structural intersectionality is maintained by and occurs in structural, political, and representational spheres.\textsuperscript{491} As Crenshaw explains, the structural sphere is how the

\textsuperscript{489} Id.
\textsuperscript{490} See MD. CODE ANN., CORR. SERVS. § 9-616(c)-(d) (2019).
\textsuperscript{491} Crenshaw, Mapping the Margins, supra note 1, at 1244.
intersection of personal identities and structural oppression result in “qualitatively different” experiences.\textsuperscript{492} The political sphere recognizes that persons at the intersection are situated in different subordinated groups that “frequently pursue conflicting political agendas.”\textsuperscript{493} And “representational intersectionality” means “the cultural construction” of persons situated within multiple subordinated groups.\textsuperscript{494} For example, for women of color this representation includes not only “prevalent narratives of race and gender” but also how “critiques of racist and sexist representation marginalize women of color.”\textsuperscript{495} Sylvia Walby covers similar structural and political spheres of oppression organized by context,\textsuperscript{496} namely employment, household, work, culture, sexuality, violence and state action, but does not explicitly recognize intersectionality or multidimensionality.\textsuperscript{497} These realms of oppression also overlap with spheres of kyriarchy, which are identified as “law, education, socialization, and brute violence.”\textsuperscript{498}

As seen throughout this Article, structural intersectionality manifests in menstrual injustices. Persons of intersecting personal identities are subjected to different experiences of structural oppression because of menstruation. One structure that exhibits menstrual injustice is the workplace. Employers, in general, are not fully anticipating and accommodating menstruation through providing products, providing paid leave for menstrual pain, providing flexible worktime, breaks, and flexible workplace, or accommodating unanticipated flows and leakages. Low-wage

\textsuperscript{492} See id. at 1245 (focusing on women of color, Crenshaw states that “structural intersectionality, the ways in which the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women.”).
\textsuperscript{493} Id. at 1251-52.
\textsuperscript{494} See id. at 1245.
\textsuperscript{495} Id. at 1282-83.
\textsuperscript{496} See WALBY, supra note 168, at 20; see generally Michèle Barrett, Women’s Oppression Today: Problems in Marxist Feminist Analysis (1980); Bell Hooks, Homeplace (A Site of Resistance), in YEARNING: RACE, GENDER, & CULTURAL POLITICS (1990).
\textsuperscript{497} See WALBY, supra note 168, at 20. Walby wrote about these spheres in analyzing various strands of feminist theory as they relate to the idea of patriarchy. See id. at 20-21. And although her work is from 1990, she grapples not only with original second wave feminist theories, such as liberal and radical feminism, but also with the more contemporary theories of intersectional theory, postmodernism, and anti-essentialism, making her work still highly relevant today.
workers like Ms. Coleman and Ms. Taylor are among the most vulnerable to discipline or termination if menstruating causes them to be late to work, return late from break, leak, or call in sick. And because workers of color make up a greater percentage of the low-wage workforce than white workers, menstrual employment discrimination will disproportionately affect workers of color. Those menstruators who suffer endometriosis, menorrhagia, or are premenopausal, experience sudden, unexpected flows and those who suffer PD experience difficult period pain. Without paid period leave, low wage workers are made vulnerable to being fired or disciplined due to their period. And while anti-disability discrimination law and FMLA law should offer some accommodations and flexibility for those who suffer from these conditions, those legal remedies do not appear wholly adequate based on a review of published cases. In addition, workplaces continue to stigmatize menstruation. Accordingly, the structure of the workplace oppresses differently depending on one’s location at the intersection of gender, race, class, and disability. As the number of published cases of menstrual discrimination increase, it would be fruitful for future research to track the impact of structural intersectionality on employees’ termination, demotion, discipline, and harassment for menstruating.

Another example of a structure impacting structural intersectionality is schools. Young girls and other menstruators at the intersection of gender and age are subject to structural disadvantages because they are not able to freely go to the bathroom when menstruating. School girls report the indignity of their schools’ limited bathroom access. The limited access results in unnecessary leaks, stigma, and avoidance of attending school while menstruating.

Political intersectionality also is demonstrated by menstrual injustices. Many of our legal remedies examine issues of inequality only on a unidimensional axis, such as on the basis of sex by examining differential treatment of cis men versus cis women, or on the basis of race by examining differences between African American persons and white persons, for example.511 Under the equal protection clause of the U.S. Constitution’s Fourteenth Amendment and civil rights laws, such as Title VII of the Civil Rights Act, the law scrutinizes treatment of a unidimensional protected class, such as race or sex, but not the intersection of both.512

The law’s historical unidimensional axis proscription has resulted nonetheless in individual remedies for plaintiffs able to point to discrimination motivated by only one protected class such as gender or race.513 In menstrual discrimination claims, the claims focus on the unidimensional axis of “sex,” comparing women to men. Claims argue, for instance, that women were targeted for termination or harassment because they menstruated and since men do not menstruate, the targeting was sex-based. A similar unidimensional axis claim is present in arguments against the “tampon tax.”514 Specifically, the claim is that the tax is unconstitutional because while men are able to get Viagra tax free, women cannot get tampons tax free. And this argument has been persuasive as seen by the New York court case and many state legislatures repeal of the tax.

But the unidimensional analysis obscures structural intersectionality and the way in which racism and sexism, classism and sexism, ableism and sexism, or transphobia and sexism, intersect to multiply the resulting discrimination. For instance, the unidimensional analysis focused on women rather than those who menstruate excludes trans men and binary persons who menstruate and are burdened by the tampon tax or the lack of access to products. This analysis also does not distinguish between menstruators with economic means who are inconvenienced by the unjust cost and those who have to make hard choices about whether or not to

512 See U.S. CONST. amend. XIV, § 1; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964); Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 232, at 148-49. But see Payne v. Travenol Labs., Inc., 673 F.2d 798 (5th Cir. 1982) (Fifth Circuit finding a claim for a black woman on the intersection of race and sex under Title VII).
513 See discussion supra Section III.B. 2.
514 See discussion supra Section III.B.2.b.i.
attend school or work because of a lack of affordable access to products. This obscuring can cause harm by marginalizing those persons at the intersections of different structural oppression, thereby undermining the very justice outcomes the action hopes to achieve.

Accordingly, it is important for advocacy to be informed by the lens of structural intersectionality across all multi-dimensionality. One example of advocacy that demonstrates structural intersectionality is the recent New York legislation requiring free products in public schools, correctional institutions, and shelters. This legislation focuses on the needs of low-income menstruators, who are disproportionately of color. Another example, is that advocates have argued that SNAP should cover menstrual products so menstruators experiencing poverty should not have to choose between addressing their menstruation and eating.

Representational intersectionality is exhibited by menstrual injustices as well. As discussed above, the Tampon Experiment shows that menstruators are seen as less competent. And for women of color, being seen as less competent multiplies the already existent indignities and discriminatory judgments about their competency. For young menstruators, they are shamed for menstruating. They are instructed that any inclination toward discussing menstruation in an open and honest way is inappropriate and are told to hide menstruation by using coded language. And menstrual product manufacturers have stigmatized menstruators of color by using white supremacy stereotypes in their marketing. Specifically, the manufacturers have used wealthy, white women as spokesmodels who portrayed the products as clean and desirable thereby creating the inference that women of color were dirty. Further, this same marketing excluded menstruators of limited economic means and gender nonbinary menstruators altogether as members of the group of menstruators.

515 See Huang, supra note 422.
516 See supra text accompanying note 381.
518 See supra note 352 and accompanying text.
519 See supra text accompanying notes 140-141.
520 See supra text accompanying notes 140-141.
521 See supra text accompanying notes 140-141.
To understand how best to challenge menstrual injustice it is important to first recognize that menstrual injustice is the operation of power through intersecting and multidimensional structures of oppression based on gender, gender identity, race, class, sexual orientation, disability, etc. The next section discusses future menstrual justice advocacy. It recommends all such action would benefit from consideration of structural intersectionality in order to effectuate menstrual justice.

B. Menstrual Justice

Since menstrual injustice occurs because of structural intersectionality, advocacy to achieve menstrual justice should be evaluated through a structural intersectionality lens. As Kimberlé Crenshaw presages, a unidimensional analysis of gender or a narrowly-defined patriarchy often results in marginalizing or excluding all but white, cis, middle-class women. Accordingly, in designing menstrual justice advocacy, it is important to recognize who benefits and who does not under certain theories. By using structural intersectionality as a lens, society can address the multidimensional menstrual injustice and its impact on different and intersecting classes of menstruators. This section also examines the strengths that come from the intersectionality of menstruators to identify further advocacy that can work towards menstrual justice.

Focusing even more on the structural intersectionality framework could assist advocates to identify even more gender, race, and class identity intersections of societal classifications that are targeted by menstrual injustice. Beyond ensuring that nonwoman-identified menstruators or poor menstruators are included in menstrual justice, an intersectional approach can highlight the situational basis of rights — how their meanings shift based on one's gender, race and/or class, for instance — and use that understanding to influence future reform.

An example of the importance of a structural intersectional lens is recent legislation my students and I worked on with an amazing coalition of recently incarcerated women, nurse midwives, doulas, ob-gyn doctors, reproductive health care researchers and advocates in researching and

522 See Crenshaw, Mapping the Margins, supra note 4, at 1242-43.
523 Cf. id. As Crenshaw writes, “implicit in certain strands of feminist and racial liberation movements, for example is the view that the social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.” Id.
advocating for a bill that requires the Maryland correctional system to provide products — free of charge and not only on demand — in all institutions.\textsuperscript{524} The law also requires standards for the proper disposal of the used products.\textsuperscript{525} This bill became law on October 1, 2018.\textsuperscript{526} This law provides important change for residents of Maryland correctional institutions. It addresses structural intersectionality by addressing coerciveness against the more vulnerable resident menstruators in the institutions by requiring the products to be freely available and not only on demand or by begging for them.\textsuperscript{527} The law also avoids using terms for menstrual products that exclude trans males and nonbinary persons as menstruators.\textsuperscript{528} It does this by using the terms “menstrual hygiene products” and not “feminine products.”\textsuperscript{529} But unfortunately and inadvertently, the law only applies to female residents, rather than all residents.\textsuperscript{530} So the law would not require facilities to provide products to those residents categorized as male or non-female because they are transgender or binary. A structural intersectionality review of the proposed legislation may have been able to change this limitation in the law.\textsuperscript{531} Luckily, the newly enacted federal First Step Act does not have this exclusion as it requires all facilities to provide free menstrual products to all residents, not solely female residents.\textsuperscript{532}

As advocates work on menstrual justice initiatives, structural intersectionality can be a helpful lens to ensure the initiatives benefits the largest number of menstruators while reducing any harm to all menstruators. Moving forward, lawyers and claimants bringing Title VII claims, for instance, could evaluate whether it is necessary to make a unidimensional argument of sex, which relies on comparing men to women, or whether they could argue sex-based discrimination on the basis of


\textsuperscript{525} Id.

\textsuperscript{526} Id.

\textsuperscript{527} See id.

\textsuperscript{528} Id.

\textsuperscript{529} Id.

\textsuperscript{530} See id.

\textsuperscript{531} The Coalition is continuing to work on this issue and hopes to correct this issue with a legislative amendment.

\textsuperscript{532} However, as discussed earlier, the First Step Act does require the provision of products to be freely accessible and so does not address the important coercion issues for vulnerable residents of correctional facilities. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).
menstruation’s relationship to pregnancy or childbirth. Such an argument avoids comparing persons as unidimensional beings based on gender and focuses instead of the shared process of menstruation. Given the required structure of claims under certain laws, there will still be exclusions as to overlapping forms of discrimination and advocates should bring forward narratives of intersectionality when possible to try to reform current laws that permit only unidimensional claims.

Lawyers, legislators, advocates can use terms that include all menstruators rather than identifying only women or middle-class persons as menstruating, for example. This language is a simple way to recognize the spectrum of menstruators. Including narratives from all perspectives and making those narratives accessible to a broad array of audiences is a way to battle representational intersectionality. PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH is a wonderful example. It is a book for a young adult audience and contains first person narratives by menstruators who are with disability, experiencing homelessness or are transgender, black, or intersex.533

In addition, in pursuing menstrual justice, lawyers, legislators, advocates, and others can draw from the strengths in menstruators’ intersectionality. Permitting the narratives of different menstruators can identify new solutions to problems that had not been previously identified. For instance, realizing young girls may skip school because they cannot afford menstrual products, California, Illinois, and New York City passed laws to make free menstrual products available in public schools, and in 2019, Maryland and Oregon introduced similar legislation.534 Similarly, understanding that low-wage workers are vulnerable to menstrual discrimination may provide incentive for employers to create more flexible leave and workplace programs or advocates to work on more robust family and medical leave act laws. The focus on supporting and enhancing the dignity of menstruators to battle stigma and other menstrual injustices could

533 See generally PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH (Kate Farrell ed., 2018).
involve the sharing of a range of narratives highlighting the structural intersectionality of menstrual injustices.\footnote{\textit{Cf.}, e.g., Nussbaum, \textit{supra} note 143 (linking Dr. Christine Blasey Ford's testimony in the Judge Brett Kavanaugh Supreme Court confirmation hearings before the Senate Judiciary Committee to the anxieties surrounding women's bodies and the importance of testimony to overcome this pervasive attitude).}

\section{Conclusion}

Menstrual injustice, the subordination and oppressive treatment of menstruators, is pervasive. Menstrual injustice is based on the cultural narratives of menstruation that represent menstruators as shameful, impure, and incompetent. Menstrual injustice results in exclusion and essentialization of, as well as discrimination, harassment, and constitutional violations against, menstruators. It manifests in insults and indignities, and economic and health disadvantages. It affects all menstruators through structural, political, and representational oppression. Menstrual injustice affects all menstruators differently based on their location at the intersections of gender, gender identity, race, class, and disability, for instance, as well as privilege and disadvantage. As such, menstrual injustice is an example of structural intersectionality, the intersecting and multidimensional operation of patriarchy, white supremacy, transphobia, classism, and ableism, for example. New laws and legal theories in court are addressing these menstrual injustices, as is exciting and innovative menstrual justice advocacy. As the menstrual justice work continues such work could be strengthened by considering its impact on structural intersectionality to ensure menstrual justice for all menstruators.