



**University of Baltimore
Legal Studies Research Paper No. 2019-04**

Menstrual Justice

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MENSTRUAL JUSTICE

*Margaret E. Johnson**

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 Balamwalla. 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.

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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³ See generally Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 491 (2017) (defining “Tampon tax” as “an umbrella term to describe sales, VAT, and similar ‘luxury’ taxes imposed on menstrual hygiene products”); 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> (discussing the removal of the sales tax on tampons in Nevada).

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.⁶ 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.⁷ 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.⁸ To avoid this, the students skip school. Persons who are incarcerated often have to beg for menstrual products.⁹ Visitors to prisons are banned from wearing tampons and so have to choose between visiting and leaking.¹⁰ 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.¹¹

Why are menstrual injustices so common? One explanation is that the historical cultural classification of menstruators as impure, shameful, and incompetent continues today.¹² 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

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.¹³ Correctional officers proceed to ridicule them as dirty.¹⁴ Social science research confirms that the historical cultural bias against menstruators continues.¹⁵ Menstruators are viewed as less competent and more objectified by others.¹⁶ 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.”¹⁷ Even social media is censoring the reality of menstruation.¹⁸ In 2015, Instagram took down a post — not once, but twice — by Rupri Kaur.¹⁹ 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.²⁰ This photograph represents a common occurrence for menstruators and yet was viewed as inappropriate for social media.²¹

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).

¹⁴ See Zoe Greenberg, *In Jail, Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html>.

¹⁵ See discussion *infra* Section II.B.

¹⁶ See *infra* notes 337–41 and accompanying text.

¹⁷ Philip Rucker, *Trump Says Fox's Megyn Kelly had 'Blood Coming Out of Her Wherever'*, WASH. POST (Aug. 8, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/08/07/trump-says-foxs-megyn-kelly-had-blood-coming-out-of-her-wherever/?utm_term=.10daedc9f209.

¹⁸ See Emma Gray, *The Removal of Rupri Kaur's Instagram Photos Shows How Terrified We Are of Periods*, HUFFPOST (Mar. 27, 2015, 3:26 PM), https://www.huffingtonpost.com/2015/03/27/rupi-kaur-period-instagram_n_6954898.html.

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.²² 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.²³ Also, menstruators experience health disadvantages because there is inadequate medical and health research and research funding regarding menstruation.²⁴ In addition, there is limited public policy around environmental sustainability as it relates to disposable and reusable menstrual products.²⁵ Finally, society often excludes transgender men and nonbinary persons who menstruate from being recognized as experiencing menstruation.²⁶ 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.²⁷ 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.²⁸

Part II provides necessary background regarding menstruation.²⁹ It begins by providing context to menstrual injustice by explaining the process of menstruation, the management of it, and related health issues.³⁰ Part II then analyzes the cultural narratives of menstruation.³¹

Part III of this Article examines the wide array of current menstrual injustices in the United States.³² 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.³³ 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.³⁴ 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.³⁵ 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.³⁶ Menstrual injustice is the shaming of menstruators for bleeding.³⁷ It is the harassing, sanctioning, and firing of workers for menstruating.³⁸ It is the failure to make education accessible to low-income

ene.aspx. While the transnational implications of menstrual injustice demand even more attention and action, that work is beyond the scope of this paper.

³³ See discussion *infra* Section III.

³⁴ *Id.*

³⁵ See *infra* Section IV.

³⁶ See *infra* Sections II, III, IV.

³⁷ See *infra* Section III.B. 3.

³⁸ See *infra* Section III.B. 2.a.

menstruating children who skip school because they lack products.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.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.

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.⁴¹ If one does not get pregnant, the progesterone and estrogen hormone levels drop telling the body to begin menstruating.⁴² Menstruation is the discarding of uterine lining that built up in the preceding month.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.”⁴⁴ This is also called a “period.”⁴⁵ This menstrual cycle is “the monthly hormonal cycle a [menstruator's] body goes through to prepare for pregnancy.”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.⁴⁷

³⁹ See *infra* Section III.B.4.

⁴⁰ See *infra* Section III.B.3.

⁴¹ See Wiley Reading, *My Period and Me: A Trans Guy's Guide to Menstruation*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 91, 94-95 (Feiwei and Friends, 1st ed. 2018); *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH (Apr. 25, 2018), <https://www.womenshealth.gov/your-menstrual-cycle> [hereinafter *Menstrual Cycle*].

⁴² *Menstrual Cycle*, *supra* note 41.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

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.⁴⁸ 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.”⁴⁹

A menstrual cycle typically lasts twenty-eight days but can vary by menstruator and each month.⁵⁰ 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.⁵¹ Menstruation can begin between the ages of eight and fifteen, with the average age being twelve.⁵² A menstruator has their menstrual cycle on average for forty years.⁵³ 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.⁵⁴ During the transition to menopause, called perimenopause or premenopause, a menstruator can have irregular periods in terms of length of cycle and flow.⁵⁵ And during pregnancy, periods go away and may not come back during breastfeeding of a newborn.⁵⁶

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.⁵⁷ Even under such circumstances, it would be very difficult to transmit an infectious disease through menstrual blood.⁵⁸ It is without an odor until it leaves the body and makes

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 41:41.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g. Conversation., Interview with Nadia Sam-Agudu, MD, Int’l Med. Tech. Advisor, Pediatric HIV Inst. of Human Virology, Univ. of Md.-Balt. (notes on file with author); Bernhard Zondek, *Does Menstrual Blood Contain a Specific Toxin?*, 65 AM. J. OBST. & GYNEC. 1065, 1068 (1953).

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.⁵⁹ 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 menstruation⁶⁰ to wearing absorbent products or clothing.⁶¹ 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.⁶² The absorbency of a vaginally inserted product, such as a tampon, sponge, or cup, should match the flow of the menstrual blood.⁶³ 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."⁶⁴ Accordingly, it is recommended that a tampon should be changed at least every four to eight hours.⁶⁵

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.⁶⁶ 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

⁶⁷ Jennifer Weiss-Wolf, Opinion, *Helping Women and Girls. Period.*, N.Y. TIMES (Jan. 28, 2015, 11:28 AM), <https://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period/.837>

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.

⁷² *See* Letter from Patricia K. Clark, Dir., Directorate of Compliance Programs, to Jennie Smith, Safety Specialist, State Farm Mutual (Apr. 17, 1992) (on file with U.S. Dep't of Labor), <https://www.osha.gov/laws-regs/standardinterpretations/1992-04-17-0>; Letter from Thomas Galassi, Dir., Directorate of Enforcement Programs, to Jackie Transue, President, Golden Group Int'l, Ltd. (Oct. 23, 2015) (on file with U.S. Dep't of Labor), <https://www.osha.gov/laws-regs/standardinterpretations/2015-10-23>; Letter from Ruth McCully to John J. Sredniwaski, *supra* note 58.

⁷³ *See* Letter from Ruth McCully to John J. Sredniwaski, *supra* note 58.

⁷⁴ *See id.*

⁷⁵ *Id.*

landfill.⁷⁶ Environmentalists aim to shift menstruators to environmentally friendly non-disposable products, such as menstrual cups, reusable tampon applicators, or cloth pads.⁷⁷

Menstruators may also manage their menstrual cycle through “medical suppression of menstruation.”⁷⁸ Menstrual suppression is possible through the use of birth control pills and hormonal medication designed specifically for the purpose.⁷⁹ It is expensive and not always covered by one’s health insurance, if one even has health insurance.⁸⁰ Being able to suppress one’s period can be critical in battling endometriosis, premenstrual dysphoric disorder (PMDD), and other severe menstrual symptoms.⁸¹ 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.”⁸² 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.⁸³

⁷⁶ See, e.g., *How Many Years Does It Take a Tampon Take to Decompose?*, CHANGE TO GREEN, <https://changetogreen.co.nz/pages/facts> (last visited Feb. 2, 2019).

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.*

⁸⁰ Paula Adams Hillard, *Menstrual Suppression: Current Perspectives*, INT. J. WOMEN’S HEALTH 631, 635 (2014) (“Factors that play a part in the selection of an option for menstrual suppression include . . . cost or insurance coverage.”); Gina Shaw, *The No-Period Pills: The Newest Birth Control Pills Suppress Women’s Menstrual Cycles. But is This Wise?*, WEBMD (Sept. 8, 2003), <https://www.webmd.com/sex/birth-control/features/no-period-pills#1>.

⁸¹ See Imani Clovis, *What Happens to Endometriosis When You’re on the Pill*, CONVERSATION (Dec. 21, 2017, 2:08 PM), <https://theconversation.com/what-happens-to-endometriosis-when-youre-on-the-pill-89035>.

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.⁸⁴ It may require changing menstrual products after less than two hours or passing large clots of blood.⁸⁵ If it is untreated, it may cause anemia, which makes one weak and tired.⁸⁶ 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.⁸⁷ Another health problem is endometriosis where uterine lining grows outside the uterus causing great pain and bleeding in between one's regular period.⁸⁸

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.⁸⁹ There is also secondary dysmenorrhea menstrual pain caused by another medical condition, such as “endometriosis, uterine fibroids, or pelvic inflammatory disease.”⁹⁰ PD may cause chronic pain illnesses.⁹¹ In addition, about one-fifth of all women experience migraine headaches, which are very painful and severe headaches, around their period.⁹²

It is also common for menstruators to experience premenstrual syndrome (PMS) symptoms right before and at the beginning of their period.⁹³ PMS includes physical symptoms such as “swollen or tender

⁸⁴ See *Heavy Menstrual Bleeding*, CTR. FOR DISEASE CONTROL & PREVENTION (Dec. 20, 2017), <https://www.cdc.gov/ncbddd/blooddisorders/women/menorrhagia.html>.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*; *FAQ: Dilation and Curettage*, AM. C. OF OBSTETRICIANS & GYNECOLOGISTS (Mar. 2019), <https://www.acog.org/-/media/For-Patients/faq062.pdf?dmc=1&ts=20180930T2208316905>.

⁸⁸ See *Endometriosis*, U.S. DEP'T OF HEALTH AND HUM. SERVS., OFF. ON WOMEN'S HEALTH (Apr. 10, 2019), <https://www.womenshealth.gov/a-z-topics/endometriosis> [hereinafter *Endometriosis*].

⁸⁹ Laura A. Payne et al., *Experimental and Procedural Pain Responses in Primary Dysmenorrhea: A Systematic Review*, 10 J. PAIN RES. 2233, 2234 (2017).

⁹⁰ *Id.* at 2233.

⁹¹ See *id.*

⁹² *Period Problems*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 16, 2018), <https://www.womenshealth.gov/menstrual-cycle/period-problems> [hereinafter *Period Problems*].

⁹³ *Premenstrual Syndrome*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 16, 2018), <https://www.womenshealth.gov/menstrual-cycle/premenstrual-syndrome> [hereinafter *Premenstrual Syndrome*].

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.”⁹⁴ 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.⁹⁵ 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.⁹⁶ 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.”⁹⁷ About 15% of PMDD sufferers may be suicidal.⁹⁸

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.⁹⁹ These narratives seem to be the result of philosophy, religious teachings, and capitalism woven together.¹⁰⁰ 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

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.

⁹⁷ Lydia Morrish, *How Severe PMS Nearly Stopped These Women's Careers In Their Tracks*, *REFINERY29* (Dec. 20, 2018, 10:20 PM), <https://www.refinery29.com/en-gb/pmdd-work-stories>.

⁹⁸ See *id.*

⁹⁹ See discussion *infra* Section II.B.

¹⁰⁰ See discussion *infra* Section II.B.

for exclusion from civil society.¹⁰¹ 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.¹⁰² Aristotle, along with others, thought menstrual blood was an unrealized fetus and hence menstruation was both feared and seen as sacred.¹⁰³ 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.”¹⁰⁴ Similarly, in the Navajo tradition, menstruating women’s powers were believed to “vitate healing strength of any medicine.”¹⁰⁵ In other Native American religious traditions menstruation required menstruating women to be isolated lest they undermine the power of the hunters.¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸ 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

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.

¹⁰⁵ Kathleen M. Dugan, *At the Beginning Was Woman: Women in Native American Religious Traditions*, in RELIGION AND WOMEN 57 (Arvind Sharma ed., 1994).

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).

¹⁰⁸ Beenish Ahmed, *Bloody Hell: Does Religion Punish Women for Menstruating?*, VICE (June 19, 2015, 9:37 PM), https://www.vice.com/en_us/article/7bdbw9/bloody-hell-menstruating-while-religious-235.

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.”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.¹²⁰ One must be pure to engage in these religious acts, and any form of bleeding makes one impure.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.”¹²² In addition, Islam prohibits sexual contact with women during menstruation.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.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

¹¹⁹ STEIN & KIM, *supra* note 51, at 84.

¹²⁰ *See id.*; Ahmed, *supra* note 108.

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.*

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.*

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.

Quran 2:222-223.

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.¹²⁵ The children said the father made them feel disgusting for menstruating.¹²⁶ An Eastern Hindu menstruating woman may not participate in a religious ceremony during the first four days of her cycle.¹²⁷

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.¹²⁸ 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.”¹²⁹

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.¹³⁰ In the early 1900s, because women menstruated, society viewed them as “unstable, irresponsible, and incapable of any kind of intellectual rigor.”¹³¹ 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).”¹³² And in 1964, NASA opined that women’s hormonal mood changes would make them incompatible with being astronauts.¹³³

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

¹²⁵ See *Weiser v. Clark*, No. H044352, 2018 WL 5993745, at *1 (Cal. Ct. App. Nov. 15, 2018). The father disputed these facts. See *id.*

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.*

¹³³ See Amy Shira Teitel, *A Brief History of Menstruating in Space*, POPULAR SCI. (June 10, 2016), <https://www.popsci.com/brief-history-menstruating-in-space>.

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 uncleanness 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

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.

¹³⁶ See Cece Jones-Davis, *Why Black Women in the United States Must Talk About Menstruation Now*, HUFFPOST (May 12, 2015 8:54 AM), https://www.huffpost.com/entry/why-black-women-in-the-united-states-must-talk-about-menstruation-now_b_7261470 (describing a conversation with Professor Chris Bobel, who is a Critical Menstruation Studies scholar).

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.

Periods! Why These 8th-Graders Aren't Afraid to Talk About Them, NPR (May 15, 2019, 5:02 AM), <https://www.npr.org/2019/05/15/721729850/periods-why-these-eighth-graders-arent-afraid-to-talk-about-them> (eighth grade girls' podcast discussing the stigma of menstruation).

¹⁴³ Martha Nussbaum, *The Roots of Male Rage, on Show at the Kavanaugh Hearing*, WASH. POST (Sept. 29, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/09/29/the-roots-of-male-rage-on-show-at-the-kavanaugh-hearing/?utm_term=.9f22dc4dc126.

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.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.¹⁴⁹ For some, menstrual suppressors are crucial aids to help with serious health conditions like endometriosis and PMDD.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.”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.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 Rupri Kaur posted of herself lying in bed with a bit of menstrual blood on her clothes and sheets.¹⁵³ Menstruators instantly related to the post and the all-too-common occurrence.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.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.¹⁵⁶

¹⁴⁸ Jones-Davis, *supra* note 136.

¹⁴⁹ See STEIN & KIM, *supra* note 51, at 21-22.

¹⁵⁰ See *id.* at 31.

¹⁵¹ *Id.* at 29.

¹⁵² See *id.*

¹⁵³ See Gray, *supra* note 18.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

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

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.”¹⁵⁷ 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.

Xavier Piedra, *Manila Luzon Reveals Menstruation-Inspired Gown That Was Cut From 'RuPaul's Drag Race': See the Pic*, BILLBOARD (Jan. 7, 2019), <https://www.billboard.com/articles/news/pride/8492434/manila-luzon-menstruation-inspired-gown-drag-race-photo>.

¹⁵⁷ See PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 18 (2d ed. 2000).

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, *Beyond the Unhappy Marriage: A Critique of the Dual Systems Theory*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM* 43, 44 (Lydia Sargent ed., 1981); Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in *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) *THE INSURGENT SOCIOLOGIST* 3-17 (Summer 1977)).

¹⁵⁹ See Crenshaw, *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, *Intersectionality – a Definition, History, and Guide*, *SISTER OUTSIDER* (July 27, 2016) ("[I]ntersectionality 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, *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.¹⁶³ 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."¹⁶⁴ 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."¹⁶⁵ 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."¹⁶⁶ 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).

¹⁶³ See Crenshaw, *supra* note 1, at 1245.

¹⁶⁴ ELISABETH SCHÜSSLER FIORENZA, WISDOM WAYS: INTRODUCING FEMINIST BIBLICAL INTERPRETATION 118-122 (2001).

¹⁶⁵ *Id.* at 118.

¹⁶⁶ *Id.* As described by one commentator:

[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.

Andrew Sullivan, *Kyriarchy in Action*, THE ATLANTIC (Oct. 3, 2010), <https://www.theatlantic.com/daily-dish/archive/2010/10/kyriarchy-in-action/181718/> (quoting Andrew Sullivan).

privilege and disadvantage — for example, male and black — may encounter unique forms of discrimination and subordination, depending upon the context.”¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ As some menstrual justice advocates have pointed out, women as menstruators are an over- and under-inclusive category.¹⁷⁰ 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 “[e]veryone in the world thinks periods are the ultimate expression of femininity...there’s

¹⁶⁷ Angela Onwuachi-Willig, *What About #UsToo: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. (Forum) 105, 108 (2018),

<https://www.yalelawjournal.org/forum/what-about-ustoo> (citing Darren Lenard Hutchinson, *Identity Crisis: ‘Intersectionality,’ ‘Multidimensionality,’ and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312 (2001) and Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 344-59 (2013)).

¹⁶⁸ See SYLVIA WALBY, *THEORIZING PATRIARCHY* 19-21 (1990).

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

¹⁷⁰ See PERIOD., *PERIOD CON* 13 (2019),

https://docs.google.com/presentation/d/1KtFIGQfi4EbxLSjh3c1kMM9XAY_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.

¹⁷³ NADYA OKAMOTO, PERIOD POWER: A MANIFESTO FOR THE MENSTRUAL MOVEMENT 236 (2018) (citing Cass Bliss a.k.a. the Period Prince, *Rainbow Bleeding: A Guide to Making Your (Period) Activism Gender-Inclusive*).

Remember that there isn't a single universal trans or nonbinary menstrual experience....¹⁷⁴

To include all people who menstruate, Bliss recommends using the terms “menstruators” and/or “people with periods” when possible.¹⁷⁵ They also recommend not limiting descriptors regarding menstruation to “feminine,” as in feminine hygiene products.¹⁷⁶ As Bliss teaches us, “Check Your Language!,” because it is a simple and important change towards inclusion of and destigmatizing menstruators.¹⁷⁷

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.¹⁷⁸ In addition, some legislation regarding the provision of free products uses the language of “menstrual products” rather than “feminine products” to be inclusive.¹⁷⁹ Nonetheless, much legislative reform and legal discussion of menstruation continues to

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.

¹⁷⁸ *See, e.g.*, Rilyn Eischens, *University of Minnesota to Provide More Menstrual Supplies*, WASH. TIMES (Oct. 22, 2016),

<https://www.washingtontimes.com/news/2016/oct/22/university-of-minnesota-to-provide-more-menstrual-/>; Abby Korinek, *UNL Now Offers Free Tampons Campus-Wide*, DAILY NEBRASKAN (Sept. 2, 2015), http://www.dailynebraskan.com/news/unl-now-offers-free-tampons-campus-wide/article_e53fd76-510c-11e5-b489-3bea9466b521.html.

¹⁷⁹ MD. CODE ANN., CORR. SERVS. §§ 9-616(a)(3), 4-214 (2019).

focus on the category of “women,” such as discussing female inmates only, thereby excluding other menstruators.¹⁸⁰ 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.¹⁸¹

2. Discrimination, Harassment, and Constitutional Violations

Menstruators are subjected to discrimination, harassment, and constitutional violations that are situated in the cultural narratives about menstruation.¹⁸² 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.¹⁸³ 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.¹⁸⁴ Since then, the Equal Employment Opportunity Commission (EEOC), which hears federal public

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.

¹⁸⁴ *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 493 (5th Cir. 1980).

employees' complaints of discrimination, issued a decision in a harassment claim.¹⁸⁵ In addition, there are two federal court cases that discuss claims of disability discrimination due to menstruation.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.¹⁸⁷ The case settled while pending in the Eleventh Circuit, after an adverse ruling in the district court.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.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.”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.”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.¹⁹² Second, they argue menstruation only occurs to women and thus is sex-linked, so discrimination because of menstruation is discrimination because of sex.

¹⁸⁵ EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411, 449-50 (M.D. Fla. 1982).

¹⁸⁶ Complaint, EEOC v. Goodyear Tire & Rubber Co., Docket No. 5:11-cv-00468 (E.D.N.C. Sept. 7, 2011); Schmidt v. Solis, 891 F. Supp. 2d 72, 75-77 (D.D.C. 2012).

¹⁸⁷ Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080, at *1-2 (M.D. Ga. June 8, 2017), *appeal dismissed*, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017).

¹⁸⁸ *See id.*

¹⁸⁹ 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/>; Julia Marsh, *Hyundai Fired Me for Getting My Period*, N.Y. POST (May 30, 2017, 9:36 PM), <https://www.nypost.com/2017/05/30/hyundai-fired-me-for-getting-my-period/>.

¹⁹⁰ *Coleman*, 2017 WL 2486080, at *2 (citing 42 U.S.C. § 2000e-2(a)(1) (2019)).

¹⁹¹ *Id.* (citing 42 U.S.C. § 2000e(k) (2019)).

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 accidentally soiled company property due to heavy pre-menopausal menstruation.”²⁰² Specifically, Ms.

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.²⁰³ She kept menstrual products at work as a precaution. Ms. Coleman informed her employer about her condition.²⁰⁴ On one occasion, when Ms. Coleman had a sudden onset of heavy menstruation, she accidentally soiled an office chair.²⁰⁵ Her employer gave her a warning that she would be fired if she soiled company property again.²⁰⁶

About eight months later, Ms. Coleman accidentally soiled the carpet due to an unexpected heavy period and then she cleaned it up.²⁰⁷ Her employer fired her for failing to maintain personal hygiene standards.²⁰⁸ 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.”²⁰⁹ 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.”²¹⁰ But the court dismissed plaintiff’s complaint reasoning that plaintiff failed to show that a male

https://www.aclu.org/sites/default/files/field_document/coleman_appeal_brief.pdf
[hereinafter ACLU Brief].

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.

²¹⁰ *Coleman v. Bobby Dodd Inst., Inc.*, No. 4:17-CV-29, 2017 WL 2486080, at *2 (M.D. Ga. June 8, 2017), *appeal dismissed*, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017).

comparator who soiled himself and company property was treated more favorably.²¹¹

On appeal to the Eleventh Circuit, plaintiff argued the lower court erred in dismissing the complaint for many reasons.²¹² Plaintiff argued that the court failed to identify that menstruation is sex-linked (cis men do not menstruate or have premenopause)²¹³ and therefore discrimination on behalf of menstruation is sex-based discrimination.²¹⁴ Plaintiff also argued that menstruation is a pregnancy or childbirth-related medical condition,²¹⁵ and hence falls under “sex” under Title VII.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.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.”²¹⁸ This case settled and therefore, there was no court decision on these arguments.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

²¹¹ *Id.*

²¹² See ACLU Brief, *supra* note 202, at 18-21.

²¹³ *Id.* at 18-21.

²¹⁴ See *id.* at 19-20 (citing EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013) (lactation); Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (abortion); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1402-03 (N.D. Ill. 1994) (infertility).).

²¹⁵ See *id.* at 19.

²¹⁶ See *id.*

²¹⁷ *Id.*

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.

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.”²²⁰ 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.²²¹ She had worked there for nine years. Being fired from the job for an accidental menstrual leak was humiliating, Coleman said.²²² 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.²²³

A plaintiff also successfully argued that menstruation is sex-based discrimination in a hostile work environment harassment case.²²⁴ 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.”²²⁵ The Commission found that complainant was female and as such belonged to a statutorily protected

²²⁰ *ACLU Appeals Case of Georgia Woman Fired for Getting Her Period at Work*, ACLU (Aug. 17, 2017), <https://www.aclu.org/press-releases/aclu-appeals-case-georgia-woman-fired-getting-her-period-work>.

²²¹ *Id.*

²²² See Maricar Santos, *Mom Gets Fired for Menstruating Through Her Clothes at Work*, WORKING MOTHER (Aug. 23, 2017), <https://www.workingmother.com/mom-gets-fired-for-menstruating-through-her-clothes-at-work#page-4>.

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.

²²⁴ See Robyn M. Dupont et al., *Hostile Work Environment Based on Gender*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, XV DIGEST EQUAL EMP. OPPORTUNITY L. (Spring 2004), <https://www.eeoc.gov/federal/digest/xv-2.cfm>.

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.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.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.²²⁸

But one case held that menstrual discrimination is not sex-based discrimination. In *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.”²²⁹ Therefore, the court ruled against the plaintiff because it found that discrimination on the basis of menstruation was not sex-based discrimination.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.²³¹ The law generally only considers unidimensional classes of people, such as sex,

²²⁶ *Id.* at *2.

²²⁷ Duponte et al., *supra* note 224.

²²⁸ See *Hiebert*, 2003 WL 21302525, at *3.

²²⁹ *Jirak v. Fed. Exp. Express Corp.*, 805 F. Supp. 193, 195 (S.D.N.Y. 1992).

²³⁰ See Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 229 (2016) (comparing *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 493 (5th Cir. 1980) and *Jirak*, 805 F. Supp. at 195 and finding that “menstrual cramps are not a medical condition related to pregnancy or childbirth.”).

²³¹ See Ashley Reese, *Black Blood*, in *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).

race, or ethnicity.²³² 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

²³² See Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 142-44 (1989).

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.").

²³⁵ Complaint, *Equal Emp't Opportunity Comm'n v. Goodyear Tire & Rubber Co.*, No. 5:11-cv-00468 (E.D.N.C. Sept. 7, 2011).

²³⁶ See *id.* at para. 14; see also Press Release, U.S. Equal Emp. Opportunity Commission, *The Goodyear Tire & Rubber Company to Pay \$20,000 to Settle EEOC Disability Discrimination Suit* (July 23, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/7-23-12a.cfm> [hereinafter *Goodyear to Pay \$20,000*].

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.²³⁷ 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.²³⁸ 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.”²³⁹ 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.²⁴⁰

In *Schmidt v. Solis*,²⁴¹ 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.²⁴² 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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ She received the maximum amount of compensatory damages, \$300,000.²⁴⁶

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).

²³⁸ See Complaint, *supra* note 235, at paras. 12-13.

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.

²⁴¹ *Schmidt v. Solis*, 891 F. Supp. 2d 72, 81 (D.D.C. 2012).

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 in 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."²⁴⁷ The "tampon tax" refers to a variety of taxes, including sales and value-added, on menstrual products.²⁴⁸ The state taxes range from 0% to 10% tax on the products.²⁴⁹ Often the issue is that the states do not exempt menstrual products as medical and health supplies.²⁵⁰ 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.²⁵¹ 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.²⁵² Therefore, the tampon tax is unconstitutional under the equal protection clause of the U.S. Constitution on the basis of sex discrimination.²⁵³ Such an argument is required under the constitution in order to get the heightened scrutiny ascribed to gender discriminatory state action.²⁵⁴ And, unlike Title VII, equal protection clause jurisprudence does not include pregnancy-related conditions in the definition of sex.²⁵⁵ 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.²⁵⁶

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.²⁵⁷ The plaintiffs claimed that the state of New York

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

²⁵² Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 473-75 (2019); see also Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld, and Emily Gold Waldman, *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*].

²⁵³ 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.

²⁵⁴ See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

²⁵⁵ See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

²⁵⁶ 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.

²⁵⁷ 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.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.²⁵⁹ Governor Andrew Cuomo stated “[r]epealing this regressive and unfair tax on women is a matter of social and economic justice.”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.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.

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.*

²⁵⁹ See Crawford, et al., *The Ground*, *supra* note 252, at 7.

²⁶⁰ Victoria Hartman, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U.L. REV. 313, 330 (2017).

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.²⁶² In 2016 and 2017, “twenty-three states and the District of Columbia considered bipartisan legislation to make menstrual hygiene products tax-exempt.”²⁶³ As of April 2019, ten states have exempted products from sales tax and nine have legislation pending.²⁶⁴ Chicago and Denver also passed a municipal tax-exempt bill.²⁶⁵ Most of the bills that have passed have done so with bipartisan support.²⁶⁶ 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.²⁶⁷ In Utah, similar legislation was stopped by “an all-male committee of lawmakers.”²⁶⁸ 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.²⁶⁹

Defendants for Summary Judgment and Denying Motion of Plaintiffs for Summary Judgment at 7-8, *DiSimone v. Cal. Dep’t of Tax & Free Admin.*, 2018 Cal. Super LEXIS 1814 (No. CGC-16-552458) (Cal. Super. Ct. Jan. 29, 2018). For an example of another lawsuit brought in the 1980s in Illinois, see generally *Geary v. Dominick's Finer Foods*, 544 N.E.2d 344 (Ill. 1989). All of the claims save for restitution for past taxes paid were dismissed when Illinois reinterpreted the tax law to exempt menstrual hygiene products from sales taxes. See *Crawford & Spivack*, *supra* note 3, at 531-32.

²⁶² See *Crawford*, et al., *The Ground*, *supra* note 252 at 21.

²⁶³ *Crawford & Waldman*, *supra* note 252, at 459.

²⁶⁴ The ten states that have passed tax exemption legislation are Connecticut, Florida, Illinois, Massachusetts, Maryland, Minnesota, Nevada, New Jersey, New York, and Pennsylvania. See *Sagner*, *supra* note 258; *Salam*, *supra* note 258. For Washington, D.C., see *Avery Anapol*, *DC No Longer Charging Sales Tax for Feminine Hygiene Products*, THE HILL (Oct. 2, 2018, 5:16 PM), <https://thehill.com/homenews/state-watch/409548-dc-no-longer-charging-sales-tax-on-feminine-hygiene-products>. The nine states that have pending legislation are California, Louisiana, Maine, Michigan, Missouri, Rhode Island, Tennessee, Vermont, and West Virginia. Assemb. B. 31, 2019 Leg., Reg. Sess. (Cal. 2019); S.B. 5, 2019 S., Reg. Sess. (La. 2019); H.P. 210, 129th Me. Leg., First Reg. Sess. (Me. 2019); S.B. 123, 2019 S. (Mich. 2019); H.B. 747, 100th Gen. Assemb., First Reg. Sess. (Mo. 2019); S. 0049, Gen. Assemb., Jan. Sess. (R.I. 2019); S.B. 60, 111th Gen. Assemb., (Tenn. 2019); H.B. 29, Reg. Sess. (Vt. 2019); H.B. 2500, 2019 W. Va. Leg., Reg. Sess. (W. Va. 2019).

²⁶⁵ See Jennifer Weiss-Wolf, *The Politics of Periods*, in *PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH* 149, 153-54 (Kate Farrell ed., 2018); *Folley*, *supra* note 258.

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

²⁷⁰ For more discussion of the economic disadvantage regarding the unaffordability of menstrual products, see *infra* notes 361-427 and accompanying text.

²⁷¹ See Complaint for Damages, Declaratory, and Injunctive Relief, *Doe v. Corr. Corp. of Am.*, (M.D. Tenn. Jan. 22, 2015) (No. 3:15-cv-00068), 2015 WL 364179, ¶ 30-40 [hereinafter Complaint]; Susan Ferriss, *In Horrifying Detail, Women Accuse U.S. Customs Officers of Invasive Body Searches*, WASH. POST (Aug. 19, 2018), https://www.washingtonpost.com/world/national-security/in-horrifying-detail-women-accuse-us-customs-officers-of-invasive-body-searches/2018/08/18/ad7b7d82-9b38-11e8-8d5e-c6c594024954_story.html?noredirect=on&utm_term=.e037aea20924.

²⁷² See Ferriss, *supra* note 271.

²⁷³ See Complaint, *supra* note 271, at 16.

²⁷⁴ See Christina Caron, *After Outcry, Virginia Reverses Tampon Ban for Visitors to Prisons*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/tampons-ban-prisons-virginia.html>.

²⁷⁵ See Tom Jackman, *Update: Va. Suspends Ban on Tampons in Prison*, WASH. POST (Sept. 25, 2018), https://www.washingtonpost.com/crime-law/2018/09/24/stop-smuggling-va-prisons-ban-visitors-entering-with-tampons/?utm_term=.e2b9d2ee98e4.

attempted to smuggle drugs by concealing them in a body cavity.”²⁷⁶ The DOC stated that their body scan machines could not tell the difference between a tampon or a menstrual cup and contraband.²⁷⁷ The policy was an attempt to address the belief that menstrual products were used to bring in contraband.²⁷⁸ In addition, the policy was created to avoid the body scan falsely detecting contraband when a visitor wears a tampon or menstrual cup.²⁷⁹ As a result, the Department of Corrections decided to ban all internally worn menstrual products.²⁸⁰ The facilities planned to offer pads to visitors wearing tampons.²⁸¹

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.²⁸² 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.’”²⁸³ 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.²⁸⁴ 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.

study.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷

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,²⁸⁸ brought a §1983 action claiming the violation of their Fourth and Fourteenth amendment rights.²⁸⁹ 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.²⁹⁰ The facility asserted this procedure is allowed under their policy.²⁹¹ 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.²⁹² 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.²⁹³ 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.²⁹⁴ Accordingly, while not deciding that the facility's practices were unconstitutional the court stated if plaintiffs proved their

²⁸⁵ *See id.*

²⁸⁶ *See* Caron, *supra* note 274.

²⁸⁷ H.B. 1884, 2019 Leg., Reg. Sess. (Va. 2019).

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.

²⁹⁰ *See* Doe v. Corr. Corp. of Am., No. 3-15-0068, 2016 WL 6395624, at *1 (M.D. Tenn. Oct. 27, 2016).

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.*

³⁰⁰ *See Turano v. Cty. of Alameda*, No. 17-cv-06953-KAW, 2018 WL 5629341, at *1-2 (N.D. Cal. Oct. 30, 2018).

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.³¹² To avoid such indignity, female inmates often choose not to go to visits while menstruating.³¹³

Women who are incarcerated also suffer dignity harms related to limited access to menstrual products.³¹⁴ 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.³¹⁵ 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.³¹⁶ Correctional officials exert their power and control over the residents by providing products to certain women and not others.³¹⁷ As such, “[o]fficers sometimes tried to teach women a lesson by limiting access, affecting self-esteem as well as basic hygiene.”³¹⁸ 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.”³¹⁹ Formerly

³¹² See *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).

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”).

³¹⁴ See Van Jones & Topeka K. Sam, *The Powerful Movement for Incarcerated Women*, CNN (Mar. 10, 2018), <https://www.cnn.com/2018/03/09/opinions/justice-for-female-prisoners-jones-sam-opinion/index.html> (explaining that women incarcerated in federal facilities reported they were not able to access menstrual hygiene products). A study of incarcerated women showed that most facilities surveyed did not make products readily accessible. See *BOP Report Card – Feminine Hygiene*, CAN-DO FOUND. (Sept. 27, 2017), <http://www.candoclemency.com/bop-report-card-feminine-hygiene/>. A survey showed that most institutions received a grade of an F or a D for making products accessible. See *id.* But the Federal Correctional Institution at Bryan, Texas received an A because it always had free tampons in every size, an unlimited supply of pads including maxipads with wings, and an unlimited supply of toilet paper. *Id.*

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.³²⁰ 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.”³²¹

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.³²² The school claims the system of escorts serves the same purpose as a hall pass.³²³ The girls argue that due to the delay in getting an escort, girls are not able to handle menstruating emergencies in a timely way.³²⁴ As a result, some girls bleed through their clothes.³²⁵ One girl described the school as treating them like “animals.”³²⁶ 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.³²⁷

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.³²⁸ 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.³²⁹ 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_5ae7a19be4b04aa23f26463c (Noble Network of Charter Schools has 18 campuses and 12,000 students).

³²³ *Id.*

³²⁴ See Maiysha Kai, *Dressed for Success? This Charter School’s Policies Are Humiliating Its Female Students*, THE ROOT (May 1, 2018, 4:05 PM), <https://theglowup.theroot.com/dressed-for-success-one-charter-schools-policies-are-h-1825694277>.

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. § 944.242(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.³³⁰ This law seeks to eliminate the correctional officers' ability to control women who are incarcerated by making them ask or demand for the products.³³¹ 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.³³² 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.³³³ The law is gender neutral and

MASS. CODE REGS. 974.08 (2019); MINN. R. 2911.2750, 2945.5440 (2019); N.J. ADMIN. CODE § 10A:14-2.1 (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.6 (2019); 10A N.C. ADMIN. CODE 14J.0705 (2019); OHIO ADMIN. CODE 5120:1-8-02, 5120:1-10-02 (2019); OKLA. ADMIN. CODE § 310:670-5-6 (2019); 37 PA. CODE § 95.231 (2019); OR. REV. STAT. ANN. § 169.076(15) (2019); TENN. COMP. R. & REGS. 0250-04-08-.05 (2019); TEX. GOV'T CODE ANN. § 501.0675(2) (2019); 6 VA. ADMIN. CODE § 15-40-770 (2019); WASH. ADMIN. CODE § 137-55-030 (2019); WIS. ADMIN. CODE DOC § 350-12 (2019). It also shows that seven of those states provide menstrual products free of cost. CONN. GEN. STAT. ANN. § 18-69e (2019); 501 KY. ADMIN. REGS. 13:010 (2019); LA. STAT. ANN. § 15:892.1 (2019); MD. CODE ANN., CORR. SERVS. §§ 9-616, 4-214 (2019); N.J. ADMIN. CODE § 10A:14-2.1 (2019); 6 VA. ADMIN. CODE 15-40-770 (2019); WASH. ADMIN. CODE 137-55-030 (2019). Other states have passed or are in the process of passing similar laws. H.B. 19-1224, 2019 Leg., Reg. Sess. (Co. 2019); H.B. 920, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); *see also* Oral Testimony to Maryland General Assembly Senate Judicial Proceedings Committee regarding SB 598 by Alexis Sisolak, University of Baltimore School of Law Bronfein Family Law Clinic on February 13, 2018, <http://mgahouse.maryland.gov/mga/play/09f34ad8-69de-4414-a7d9-63192f85fb12/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c> (minutes 2:15:14-2:17:26 of video).

³³⁰ *See* MD. CODE ANN., CORR. SERVS. § 9-616(c)(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).

³³³ *See* First Step Act of 2018, Pub. L. No. 115-391, § 611, 132 Stat. 5247 (2018) ("The Director of the Bureau of Prisons shall make [tampons and sanitary napkins] available to

requires federal correctional institutions to provide free, industry-level quality tampons and sanitary napkins to all inmates.³³⁴ 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.³³⁵

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.³³⁶ 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.³³⁷ 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.³³⁸ The study found that when the woman dropped the tampon, rather than the hairclip, the observing participant evaluated the women more negatively.³³⁹ Specifically, the observer judged the woman with the tampon as lower in competency and less likable.³⁴⁰ In addition, the observer tended to avoid sitting close to the woman and was more likely to objectify the woman.³⁴¹

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.”).

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.”).

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>.

³³⁶ See STEIN & KIM, *supra* note 51, at 36 (providing historical view that menstruation made women unfit).

³³⁷ 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).

³³⁸ Roberts et al., *supra* note 337, at 131.

³³⁹ *Id.*; Winkler & Roaf, *supra* note 337, at 4.

³⁴⁰ Roberts et al., *supra* note 337, at 131; see also Winkler & Roaf, *supra* note 337, at 4.

³⁴¹ See Roberts et al., *supra* note 337, at 131.

head to the bathroom to tend to their menstruation.³⁴² 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.³⁴³ 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?"³⁴⁴ To capitalize on and continue the taboo, manufacturers of products highlight the discreteness of their products.³⁴⁵

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.³⁴⁶ 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.³⁴⁷

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.³⁴⁸ 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

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.

³⁴⁷ See Ludmila Leiva, *The Problem with Using Your Sick Days for Period Cramps*, REFINERY29 (Apr. 9, 2019, 1:57 PM), <https://www.refinery29.com/en-us/period-cramps-work-sick-days>.

³⁴⁸ See Chris Bobel, *Menstrual Pads Can't Fix Prejudice*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/opinion/sunday/menstrual-periods-prejudice.html> (stating that stigma, and not access to products, is the real issue for menstrual justice).

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.

³⁵⁰ See OKAMOTO, *supra* note 173 at 232-240, 283-285; Marissa De La Cerda, *Chicago Period Project Seeks to End Menstrual Taboo and “Period Poverty,”* CHI. READER (Jan. 2, 2019), <https://www.chicagoreader.com/chicago/chicago-period-project-seeks-to-end-menstrual-taboo-and-period-poverty/Content?oid=65700038>. Melissa Knutson founded Give Grace, Give Hope to gather and distribute menstrual products to food pantries, homeless shelters and schools in Des Moines, Iowa. Makayla Tendall, *People to Watch: Johnston Mother, Daughter Provide Menstrual Products to Women in Need*, DES MOINES REG. (Jan. 2, 2019, 6:00 AM), <https://www.desmoinesregister.com/story/news/2019/01/02/central-iowa-johnston-mother-daughter-provide-feminine-hygiene-products-pads-tampons-women-need-ia/2273288002/>.

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.”³⁵³ As such, menstruation would be viewed as a normal part of everyday life and not a problem to be fixed with a product.³⁵⁴ To this end, people argue for open discussions about menstruation.³⁵⁵ 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.³⁵⁶

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.³⁵⁷ 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.³⁵⁸ 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).

³⁵⁵ *See* Jennifer Weiss-Wolf & Maeve Roughton, *On International Women’s Day and Every Day, Fight for Menstrual Equity*, N.Y. DAILY NEWS (Mar. 8, 2018, 5:00 AM), <http://www.nydailynews.com/opinion/urgent-fight-menstrual-equity-article-1.3861279>.

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>.

³⁵⁸ *See* Sarah Barns & Bianca London, *‘Women’s Bodies Don’t Exist for Public Consumption’: Runner Hits Back at Critics After Being Branded Disgusting for Completing London Marathon During Her Period Without a Tampon*, DAILY MAIL (Aug. 18, 2015, 5:09 AM), <http://www.dailymail.co.uk/femail/article-3201878/Runner-completed-London-Marathon-free-bleeding-hits-critics-uncomfortable-normal-process.html>; Madame Gandhi, *Going with the Flow: Blood and Sisterhood at the London Marathon*, in *PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH* 41, 43 (Kate Farrell ed., 2018).

discomfort or delay.³⁵⁹ Her free bleeding garnered a lot of media coverage because the menstrual blood was visible, and she was not embarrassed by it.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.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.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.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.³⁶⁴ A menstruating employee who experiences severe pain may take

³⁵⁹ See Barns & London, *supra* note 358.

³⁶⁰ See *id.*

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, *supra* note 97.

³⁶² See discussion *supra* Section III.B. 2.b.i.

³⁶³ See JAMES T. BOND & ELLEN GALINSKY, FAMILIES & WORK INST., WORKPLACE FLEXIBILITY AND LOW-WAGE EMPLOYEES 5-6 (2011), <http://familiesandwork.org/downloads/WorkFlexandLowWageEmployees.pdf>.

³⁶⁴ See Crawford et al., *The Ground*, *supra* note 252, at 11 (Marcy Karin discussing employee break time for menstruation).

unscheduled leave.³⁶⁵ 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.³⁶⁶ Ms. Taylor had menorrhagia and uterine fibroids which resulted in sudden, unexpected heavy and prolonged bleeding.³⁶⁷ 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.”³⁶⁸ 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.³⁶⁹ 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.³⁷⁰ Giant requested additional medical documentation to support her tardiness.³⁷¹ Taylor, who believed she had provided adequate documentation, felt “devastated” by the scrutiny.³⁷² 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.³⁷³ Accordingly, Giant told Taylor they were worried she could no longer drive the truck safely.³⁷⁴ 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.

³⁷² Giant of Maryland v. Taylor, 981 A.2d 1, 20 (2009), *rev'd*, 33 A.3d 445 (2011) (Taylor testified during the jury trial that she felt “devastated” because of Giant's scrutiny).

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).

³⁸¹ Sue Kerr, *If You Can't Afford Tampons, What Do You Do?*, HUFFINGTON POST (May 19, 2014, 1:27 PM), https://www.huffingtonpost.com/sue-kerr/if-you-cant-afford-tampons-what-do-you-do_b_5352396.html; *see also* 7 U.S.C. § 2012(k) (20192018) (menstrual products not included in definition of “food” eligible for purchase using SNAP).

³⁸² *See Julie Kosin, Getting Your Period Is Still Oppressive in the United States*, HARPER'S BAZAAR (Oct. 9, 2017), <https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/>; Kuhlmann et al., *supra* note 69, at 242.

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.³⁸⁶ Use of rags has been documented with other populations of menstruators experiencing poverty and one concern is whether they have access to clean rags.³⁸⁷ If they do not have access to laundry facilities, they must dispose of the rags somehow and find new ones.³⁸⁸ 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.³⁸⁹ A few women in the St. Louis study reported going to the hospital emergency room to get products.³⁹⁰ 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.³⁹¹

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."³⁹²

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."³⁹³ 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.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.”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.³⁹⁶ Menstruators in school report that a lack of affordable products interferes with their school attendance.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.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%).³⁹⁹

³⁹⁴ *Id.* at 242.

³⁹⁵ *Id.*

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_sould_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. EPIDEMIOLOGICAL COMMUNITY HEALTH 1016, 1019 (2018) (noting that women in the “sexual minority” were more likely to receive public assistance than heterosexual women).

³⁹⁷ See Kerr, *supra* note 381; see also Evans et al., *supra* note 352, at 7.

³⁹⁸ See Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 9 WOMEN'S REPRODUCTIVE HEALTH (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313413.

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,⁴⁰⁰ to purchase their own menstrual products.⁴⁰¹ Without adequate employment to fund these purchases, their inability to buy products can affect their health.⁴⁰² In recent years, more states and the federal laws require the provision of free products, but most do not.⁴⁰³

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.⁴⁰⁴ 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 \$1.35.⁴⁰⁵ 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 \$5.⁴⁰⁶ 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

⁴⁰⁰ See SENTENCING PROJ., FACT SHEET: INCARCERATED WOMEN AND GIRLS 1-2 (June 2019), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (counting 225,060 women in prison and jail between 2016-17); Press Release, Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Income of the Imprisoned (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>. A higher percentage of women entering prisons are low-income than women not incarcerated. See Khala James, *Upholding the Dignity of Incarcerated Women*, CTR. AM. PROGRESS (Dec. 22, 2017, 9:59 AM), <https://www.americanprogress.org/issues/women/news/2017/12/22/444468/upholding-dignity-incarcerated-women/>; WEISS-WOLF, PERIODS GONE PUBLIC, *supra* note 258, at 79.

⁴⁰¹ See James, *supra* note 400. *But see* First Step Act of 2018, Pub. L. No. 115-391, § 611, 132 Stat 5194, 5247 (2018) (requiring the Bureau of Prisons to make tampons and sanitary napkins to federal prisoners for free).

⁴⁰² See James, *supra* note 400.

⁴⁰³ See *infra* text accompanying notes 420–423.

⁴⁰⁴ See Eleanor Goldberg, *Women Often Can't Afford Tampons, Pads in Federal Prisons. That's About to Change*, HUFFINGTON POST (Dec. 20, 2018, 12:22 PM), https://www.huffingtonpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-federal-prisons_us_5c1ac0a0e4b08aaf7a84ac38.

⁴⁰⁵ See *id.* (citing COMMISSARY SHOPPING LIST, FED. BUREAU OF PRISONS (2016), https://www.bop.gov/locations/institutions/set/SET_CommList.pdf).

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.*

⁴⁰⁹ See *United States v. Armstrong*, No. 09-CR-135 (BAH), 2018 U.S. Dist. LEXIS 193018, at *18-19 (D.D.C. Nov. 13, 2018).

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.⁴¹⁶ 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.⁴¹⁷ These shortages and uncertainties about obtaining products cause a “psychological burden” for menstruators.⁴¹⁸

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.⁴¹⁹

As discussed above, there has been some success in addressing the need for accessibly priced menstrual products for menstruators who are incarcerated.⁴²⁰ 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.⁴²¹ 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.⁴²² As discussed above, some jurisdictions have passed new legislation eliminating sales or value-added tax on menstrual hygiene products.⁴²³ College students have organized campaigns providing access to products on campus, often at no cost.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.⁴²⁵ Grassroots organizers have created hand-made reusable products and distributed free products to those in need.⁴²⁶ Companies have shaken up the traditional menstrual product market and are making and distributing environmentally-friendly and safe reusable products.⁴²⁷

TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/health/tampon-tax-periods-menstruation-nyt.html>.

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.*

⁴²³ See *supra* note 264 and accompanying text.

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/>.

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/>.

⁴²⁶ See Daniela Vidal Allee, *In Hanover, Volunteers Make Washable Feminine Hygiene Pads for Girls in West Africa*, VALLEY NEWS (June 2, 2019), <https://www.vnews.com/Hanover-family-sews-reusable-pads-for-girls-in-Ghana-25783265>.

⁴²⁷ See, e.g., Faith Brar, *THINX Just Launched the First FDA-Cleared Reusable Tampon Applicator*, SHAPE (Jan. 24, 2019), <https://www.shape.com/lifestyle/mind-and-body/thinx-reusable-tampon-applicator>; Victorine Lamothe, *Tampons: Do You Even Need Them?*, REFINERY 29 (Apr. 29, 2014, 5:30 PM), <https://www.refinery29.com/en-us/alternative-period-supplies>.

Another issue for menstruators of limited economic means is the lack of adequate water and sanitation during menstruation.⁴²⁸ If they are unable to manage their menstruation, these menstruators experience barriers to their daily life activities.⁴²⁹ 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.⁴³⁰ Another is that Washington, D.C. is proposing creating safe public restrooms and wider access to private sector restrooms.⁴³¹ 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.⁴³²

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

⁴²⁸ See, e.g., Faith Brar, *THINX Just Launched the First FDA-Cleared Reusable Tampon Applicator*, SHAPE (Jan. 24, 2019), <https://www.shape.com/lifestyle/mind-and-body/thinx-reusable-tampon-applicator>; Victorine Lamothe, *Tampons: Do You Even Need Them?*, REFINERY 29 (Apr. 29, 2014, 5:30 PM), <https://www.refinery29.com/en-us/alternative-period-supplies>.

⁴²⁹ See Klyssa Shay, *The Homeless Period: It Doesn't Bear Thinking About and That's the Problem*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 117, 117-32 (Kate Farrell ed., 2018).

⁴³⁰ See, e.g., Lisa De Bode, *Hygiene and Heartache: Homeless Women's Daily Struggle to Keep Clean*, AL JAZEERA AM. (Jan. 13, 2015, 7:00 AM), <http://america.aljazeera.com/articles/2015/1/13/-scared-to-walk-thestreet.html>.

⁴³¹ See e.g., Margaret E. Johnson, *There is Another Reason D.C. Needs Public Restrooms*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/opinions/theres-another-reason-dc-needs-public-restrooms/2019/01/08/a4e127f4-1071-11e9-8f0c-6f878a26288a_story.html; Fenit Nirappil, *Among the Pressing Issues in the Nation's Capital: Where To Go To the Bathroom?*, WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/local/dc-politics/among-the-pressing-issues-in-the-nations-capital-where-to-go-to-the-bathroom/2019/01/03/2c87e8fa-09f6-11e9-a3f0-71c95106d96a_story.html.

⁴³² 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/everywomansrighttowatersanitationandhygien.e.aspx>; Winkler & Roaf, *supra* note 337, at 21.

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.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.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.⁴³⁵ Once the ban was lifted, women were able to participate in drug research studies but continued to be excluded by many studies.⁴³⁶ Lack of participation by women in research studies means there are limited studies on health issues

⁴³³ See Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2056-58 (2016); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 54-55 (1997).

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).

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).

⁴³⁶ See Laura Entis, *The Medical Research Gap That's Leaving Women's Health Startups Behind*, FAST COMPANY (Nov. 9, 2017), <https://www.fastcompany.com/40490441/the-medical-research-gap-thats-leaving-womens-health-startups-behind>.

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.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.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.⁴³⁹ As discussed earlier, PD is menstrual-related pain in "the low back, abdomen, and possibly the thighs," unrelated to any other medical condition.⁴⁴⁰ There is also secondary dysmenorrhea menstrual pain caused by another medical condition, such as "endometriosis, uterine fibroids, or pelvic inflammatory disease."⁴⁴¹ PD may contribute to other chronic pain illnesses.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.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.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

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).

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>.

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>.

⁴⁴⁰ Payne et al., *supra* note 89, at 2234.

⁴⁴¹ *Id.* at 2233.

⁴⁴² See *id.*

⁴⁴³ See *id.*

⁴⁴⁴ See Yuko, *supra* note 438.

suffer.⁴⁴⁵ 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.⁴⁴⁶

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.⁴⁴⁷ And low-wage and other workers lose pay and may risk termination due to their frequent and necessary absenteeism due to severe period pain.⁴⁴⁸

Another menstrual health disadvantage is the limited FDA oversight of the safety of menstrual products.⁴⁴⁹ 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.⁴⁵⁰ Further, because tampons are placed inside the vagina, their

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).

⁴⁴⁶ For stories about homeless persons' experiences after surgery, see Sarah Mann, *The Longest Night: Discharged and Homeless*, ASS'N AM. MED. COLLEGES (May 2, 2017), <https://news.aamc.org/patient-care/article/longest-night-discharged-and-homeless/>; Isabelle T. Walker, *Where Do the Homeless Heal?*, SANTA BARBARA INDEP. (Oct. 18, 2011, 12:00 AM), <https://www.independent.com/news/2011/oct/18/where-do-homeless-heal/>.

⁴⁴⁷ Gabrielle Jackson, *Endometriosis: 20 Things Every Woman (and Every Doctor) Should Know*, GUARDIAN (Sept. 27, 2015, 5:18 PM), <https://www.theguardian.com/society/2015/sep/28/endometriosis-20-things-every-woman-and-every-doctor-should-know>.

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”).

⁴⁴⁹ See generally U.S. DEP'T OF HEALTH & HUM. SERVS., FOOD & DRUG ADMIN., *MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(k)s) 9 (2005)* [hereinafter FDA, *MENSTRUAL TAMPONS & PADS*]. The FDA regulates menstrual hygiene products as medical devices. See *id.* at 11. For a comprehensive article on the safety concerns of menstrual hygiene products, see Markham Heid, *The Truth About Your Tampons*, TIME (July 27, 2016), <http://time.com/4422774/tampons-toxic-cancer/>.

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 blood stream through the vaginal mucosa and do not go through the same metabolic and elimination processes as products entering the body by eating or drinking.⁴⁵¹ Concerns about the products' safety include carcinogenic elements as well as other contaminants from the synthetic fibers, chlorine, fragrances, colorants, dyes and preservatives.⁴⁵²

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.⁴⁵³ In the late 1990s, the amount of dioxin in menstrual products decreased after manufacturers changed their product bleaching process.⁴⁵⁴ Nonetheless, products still contain dioxin residue, which exists as a result of air, water, and soil pollution.⁴⁵⁵ 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.⁴⁵⁶ Because the vaginal wall is highly absorbent, chemical elements inside and near the vagina can be absorbed into the bloodstream very

menopausal women receiving hormone therapy, the number could be as high as 24,360); Nadia Kounang, *What's in Your Pad or Tampon?*, CNN (Nov. 13, 2015, 11:19 AM), <https://www.cnn.com/2015/11/13/health/whats-in-your-pad-or-tampon/index.html> (“On average a woman will use between 11,000 and 16,000 tampons in her lifetime.”).

⁴⁵¹ See Heid, *supra* note 449.

⁴⁵² See Menstrual Products Right to Know Act of 2019, H.R. 2268, 116th Cong. § 2 (2019) (proposed legislation requiring labels if menstrual products contain these ingredients).

⁴⁵³ See Susan Dudley et al., *Tampon Safety*, NAT'L CTR. HEALTH RES., <http://www.center4research.org/tampon-safety/> (last visited July 9, 2019).

⁴⁵⁴ See *id.* (“Up until the late 1990's, bleaching the wood pulp resulted in traces of dioxin in tampons, but that method has been replaced with a chlorine-free bleaching process.”).

⁴⁵⁵ *Id.*; see also *Always Pads Testing Results*, WOMEN'S VOICES FOR THE EARTH, <https://www.womensvoices.org/feminine-care-products/detox-the-box/always-pads-testing-results/> (last visited July 4, 2019) (Women's Voices for the Earth commissioned testing of menstrual products and found that they “emit toxic chemicals, including chemicals identified by the U.S. Department of Health and Human Services National Toxicology Program, the Agency for Toxic Substances and Disease Registry, and the State of California Environmental Protection Agency as carcinogens, and reproductive and developmental toxins.”).

⁴⁵⁶ See Kounang, *supra* note 450 (“[t]he FDA says that trace amounts of dioxin are not of concern for human health”); *Always Pads Testing Results*, *supra* note 455 (Women's Voices for the Earth noting that the results of its product testing “demonstrate the need for more testing of these products to better characterize the chemical exposures and to better understand the potential health impacts of those exposures.”).

efficiently.⁴⁵⁷ And with the recent discovery that tampons were unraveling and remaining undetected for lengthy periods in menstruators' vaginas, the risk could be higher still.⁴⁵⁸

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.⁴⁵⁹ VOCs and phthalates can be toxic to women's reproductive health and "increase the risk for neurocognitive impairment, asthma, congenital disability, and cancer."⁴⁶⁰

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.⁴⁶¹ 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]."⁴⁶²

⁴⁵⁷ See David E. Tourgeman et al., *Serum and Tissue Hormone Levels of Vaginally and Orally Administered Estradiol*, 180 AM. J. OBSTETRICS & GYNECOLOGY 1480, 1480-83 (1999).

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/>.

⁴⁵⁹ Chan Jin Park et al., *Sanitary Pads and Diapers Contain Higher Phthalate Contents than Those in Common Commercial Plastic Products*, 84 REPROD. TOXICOLOGY 114, 117, 120 (2019).

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).

⁴⁶² Press Release, Women's Voices for the Earth, New Tampon Testing Reveals Undisclosed Carcinogens and Reproductive Toxins (June 5, 2018),

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".⁴⁶³ The FDA requires manufacturers to include a safety label regarding the risk of tampon use and toxic shock syndrome.⁴⁶⁴ The FDA identified only the risk of an adverse tissue reaction for menstrual pads.⁴⁶⁵ 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.⁴⁶⁶ As a result,

<https://www.womensvoices.org/2018/06/05/new-tampon-testing-reveals-undisclosed-carcinogens-and-reproductive-toxins/>.

⁴⁶³ See FDA, MENSTRUAL TAMPONS & PADS, *supra* note 449, at 9, 13. The FDA required only a declaration of conformity with standards and not a disclosure of the contents. See 21 C.F.R. § 807.92(a)(3) (1994); *How to Prepare an Abbreviated 510(k)*, FOOD & DRUG ADMIN.,

<https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/HowtoMarketYourDevice/PremarketSubmissions/PremarketNotification510k/ucm134574.htm> (last visited July 13, 2019) (an abbreviated 510K is when a manufacturer can either declare conformity to recognized standards or provide summary reports showing conformity to a guidance document to streamline the review of the 510K).

⁴⁶⁴ See 21 C.F.R. § 801.430(a)-(b) (2010).

⁴⁶⁵ To address these risks the FDA recommends the following mitigation measures: performance characteristics and labeling. See FDA, MENSTRUAL TAMPONS & PADS, *supra* note 449, at 6, 9 (classifying pads as a Class I device (low risk) or Class II, exempt from any premarket notification to FDA); *Product Classification: Speculum*, FOOD & DRUG ADMIN.,

<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfpdc/classification.cfm?ID=3895> (last visited July 13, 2019). The FDA regulates other products even more loosely. The FDA classified menstrual cups as a medium risk like tampons, but, unlike the tampon, does not even require a statement that the product conforms to standards. See *Product Classification: Menstrual Cup*, FOOD & DRUG ADMIN.,

<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfPCD/classification.cfm?ID=HHE> (last visited July 20, 2019). The FDA does not appear to regulate liners, sponges, or period underwear. See FDA, MENSTRUAL TAMPONS & PADS, *supra* note 449 (omitting any reference or mention of liners, sponges, or period underwear).

⁴⁶⁶ See FDA, MENSTRUAL TAMPONS & PADS, *supra* note 449, at 1, 3-4, 9-11 (repeatedly stating the Guidance is just a recommendation and even "should" in the document means "recommended"). But see that in the Guidance, the FDA also states that "FDA believes that the devices addressed in this guidance are non-significant risk (NSR) devices." *Id.* at 13. In 2005, the FDA issued guidance to the industry regarding tampons and pads. *Id.* Some have

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.⁴⁶⁷

The New York City Assembly introduced a bill requiring the disclosure of menstrual products' ingredients.⁴⁶⁸ This bill covers tampons and pads, as well as cups and period underwear.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."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,⁴⁷¹ incarceration,⁴⁷² or domestic violence.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).

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

⁴⁶⁸ *See* B164 § 1, Assemb. Reg. Sess. (N.Y. 2019); Press Release, Women's Voices for the Earth, *supra* note 462.

⁴⁶⁹ *See* Press Release, Women's Voices for the Earth, *supra* note 462.

⁴⁷⁰ *Id.*

⁴⁷¹ *See* Winkler & Roaf, *supra* note 337, at 22-23.

⁴⁷² *See supra* text accompanying note 290 (women inmates coerced regarding menstrual products); *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.").

⁴⁷³ Domestic violence can include differing forms of coercive control, including controlling the person's menstrual products. *See, e.g.*, Margaret E. Johnson, *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.⁴⁷⁴ Another study found a link between tampon use and a decreased risk of endometriosis.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.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.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.⁴⁷⁸

Some women have gotten admitted to the hospital in order to have access to sanitation products and facilities.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.⁴⁸⁰ And without access to water and soap, the use of reusable products like a cup or cloth pads are difficult.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.⁴⁸² And shelters and homeless centers identify that they do not always have

⁴⁷⁴ See Winkler & Roaf, *supra* note 337, at 8; see also Enu Anand et al., *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).

⁴⁷⁵ Erika L. Meaddough et al., *Sexual Activity, Orgasm and Tampon Use Are Associated with a Decreased Risk for Endometriosis*, 53 *GYNECOLOGIC & OBSTETRIC INVESTIGATION* 163 (2002).

⁴⁷⁶ See De Bode, *supra* note 430; WEISS-WOLF, *supra* note 258, at 66; Winkler & Roaf, *supra* note 339, at 10. The same is true for women who have experienced intimate partner abuse and are housed in a domestic violence shelter. See *Put the Nail in Domestic Violence*, THINX (Oct. 19, 2017), <https://www.shethinx.com/blogs/thinx-piece/put-the-nail-in-domestic-violence>.

⁴⁷⁷ See De Bode, *supra* note 430.

⁴⁷⁸ See Evans et al., *supra* note 352, at 14.

⁴⁷⁹ See De Bode, *supra* note 430.

⁴⁸⁰ See WEISS-WOLF, *supra* note 258, at 66.

⁴⁸¹ See *id.*

⁴⁸² See *id.*

menstrual products to provide to their residents because there is not always a ready supply of donations.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.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.”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.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.⁴⁸⁷

Yet these best practices are not followed routinely. Sanitation in prisons relating to menstrual blood can be deplorable.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

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).

⁴⁸⁴ See Complaint at 7, *Seibert v. N.Y. State Dep’t of Taxation and Finance, et al.*, (N.Y. Sup. Ct. 2016) (No. 151800/2016).

⁴⁸⁵ *Id.*; see also Weiss-Wolf, *supra* note 67 (menstrual products are important to women’s health).

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).

⁴⁸⁷ See Sean, *supra* note 486.

⁴⁸⁸ See *Abuse and Neglect at Muskegon County Jail*, ACLU MICH., <https://www.aclumich.org/en/abuse-and-neglect-muskegon-county-jail> (last visited July 9, 2019).

sewage, urine, and menstrual blood.”⁴⁸⁹ For this reason, the recently passed law in Maryland requires correctional facilities to create policies regarding the proper disposal of menstrual products.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.⁴⁹¹ As Crenshaw explains, the structural sphere is how the

⁴⁸⁹ *Id.*

⁴⁹⁰ See MD. CODE ANN., CORR. SERVS. § 9-616(c)-(d) (2019).

⁴⁹¹ Crenshaw, *Mapping the Margins*, *supra* note 1, at 1244.

intersection of personal identities and structural oppression result in “qualitatively different” experiences.⁴⁹² The political sphere recognizes that persons at the intersection are situated in different subordinated groups that “frequently pursue conflicting political agendas.”⁴⁹³ And “representational intersectionality” means “the cultural construction” of persons situated within multiple subordinated groups.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.”⁴⁹⁵ Sylvia Walby covers similar structural and political spheres of oppression organized by context,⁴⁹⁶ namely employment, household, work, culture, sexuality, violence and state action, but does not explicitly recognize intersectionality or multidimensionality.⁴⁹⁷ These realms of oppression also overlap with spheres of kyriarchy, which are identified as “law, education, socialization, and brute violence.”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

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.”).

⁴⁹³ *Id.* at 1251-52.

⁴⁹⁴ See *id.* at 1245.

⁴⁹⁵ *Id.* at 1282-83.

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).

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.

⁴⁹⁸ See ELISABETH SCHÜSSLER FIORENZA, *WISDOM WAYS: INTRODUCING FEMINIST BIBLICAL INTERPRETATION* 122 (2001).

workers like Ms. Coleman⁴⁹⁹ and Ms. Taylor⁵⁰⁰ 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.⁵⁰¹ 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.⁵⁰² Those menstruators who suffer endometriosis, menorrhagia, or are premenopausal, experience sudden, unexpected flows and those who suffer PD experience difficult period pain.⁵⁰³ 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.⁵⁰⁴ In addition, workplaces continue to stigmatize menstruation.⁵⁰⁵ 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.⁵⁰⁶

Another example of a structure impacting structural intersectionality is schools.⁵⁰⁷ 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.⁵⁰⁸ School girls report the indignity of their schools' limited bathroom access.⁵⁰⁹ The limited access results in unnecessary leaks, stigma, and avoidance of attending school while menstruating.⁵¹⁰

⁴⁹⁹ See discussion *supra* Section III.B. 2.a.

⁵⁰⁰ See discussion *supra* Section III.B. 4.

⁵⁰¹ See discussion *supra* Sections III.B. 2, III.B. 4.

⁵⁰² See David Cooper, *Workers of Color Are Far More Likely to Be Paid Poverty-Level Wages than White Workers*, ECON. POL'Y INST. (June 21, 2018, 4:53 PM), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>.

⁵⁰³ See discussion *supra* Sections III.B. 2, III.B. 4, III.B. 5.

⁵⁰⁴ See discussion *supra* Sections III.B. 2, III.B. 4.

⁵⁰⁵ See discussion *supra* Sections III.B. 2, III.B. 4.

⁵⁰⁶ See discussion *supra* Section III.B. 2B. 2.

⁵⁰⁷ See discussion *supra* Section III.B. 3.

⁵⁰⁸ See discussion *supra* Section III.B. 3.

⁵⁰⁹ See discussion *supra* notes 324, 326.

⁵¹⁰ See discussion *supra* notes 322-327.

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

⁵¹¹ See Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 156 (2010) (situating the scholarship of Catharine MacKinnon in an intersectional framework).

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.⁵¹⁵ 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.⁵¹⁶

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.⁵¹⁷ 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.⁵¹⁸ And menstrual product manufacturers have stigmatized menstruators of color by using white supremacy stereotypes in their marketing.⁵¹⁹ 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.⁵²⁰ Further, this same marketing excluded menstruators of limited economic means and gender nonbinary menstruators altogether as members of the group of menstruators.⁵²¹

⁵¹⁵ See Huang, *supra* note 422.

⁵¹⁶ See *supra* text accompanying note 381.

⁵¹⁷ See, e.g., Chanda Prescod-Weinstein, *Here's What It's Like When Self-Appointed High Priests of Reality Presume Your Incompetence*, MEDIUM (Mar. 7, 2016), <https://medium.com/@chanda/presumed-incompetent-objectivity-with-the-self-appointed-high-priests-of-reality-30b9d08d39fc>.

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.⁵²² 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.⁵²³

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.⁵²⁴ The law also requires standards for the proper disposal of the used products.⁵²⁵ This bill became law on October 1, 2018.⁵²⁶ 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.⁵²⁷ The law also avoids using terms for menstrual products that exclude trans males and nonbinary persons as menstruators.⁵²⁸ It does this by using the terms “menstrual hygiene products” and not “feminine products.”⁵²⁹ But unfortunately and inadvertently, the law only applies to female residents, rather than all residents.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.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.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

⁵²⁴ See Katherine Haladay et al., *Progress on Providing Dignity to Menstruating Inmates*, HUMAN RIGHTS AT HOME BLOG (Dec. 9, 2018), https://lawprofessors.typepad.com/human_rights/2018/12/progress-on-providing-dignity-to-menstruating-inmates.html.

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *See id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *See id.*

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

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).

⁵³⁴ See CAL. EDUC. CODE § 35292.6 (2019); 105 ILL. COMP. STAT. 5 / 34-18.56 (2019); N.Y. PUB. HEALTH § 267 (2019); H.B. 133, 2019 Leg., Reg. Sess. (Md. 2019); H.B. 3020, 80th Leg., Reg. Sess. (Or. 2019). Unfortunately, Maryland's legislation to provide such products failed. H.B. 133, 2019 Leg., 439 Sess. (Md. 2019). legislation to provide such products failed. H.B. 133, 2019 Leg., 439 Sess. (Md. 2019).)

involve the sharing of a range of narratives highlighting the structural intersectionality of menstrual injustices.⁵³⁵

V. 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.

⁵³⁵ *Cf.*, e.g., Nussbaum, *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).