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# **LIMITATIONS OF CURRENT MENSTRUAL EQUITY ADVOCACY AND A PATH TOWARDS JUSTICE**

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## **ABSTRACT**

Since 2015, legal strategies to end period poverty and achieve menstrual equity have increased dramatically across the United States. Current advocacy for menstrual equity is concentrated in three main areas: litigation based on sex discrimination claims, legislation to end additional taxes on menstrual products, and legislation to increase access to menstrual products in schools. This Article outlines and analyzes the history of menstrual equity activism in litigation and legislative initiatives to understand the progress that advocates have achieved. This Article then argues that the framework of sex discrimination limits current menstrual equity legal strategies and, therefore, lawyers and activists should adopt a reproductive justice lens to meet the needs of the most marginalized menstruators. Lastly, this Article argues that to advocate for true menstrual justice, advocates should shift their attention and resources to administrative and policy changes that would work to eliminate period poverty for the people most in need, such as low-income, unhoused, and incarcerated menstruators.

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## INTRODUCTION

In the wake of the U.S. Supreme Court's 2022 decision to overturn *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, the fight for legal access to full reproductive autonomy is at the forefront of many activists' minds. The mainstream discourse around reproductive rights focuses on access to abortion services and contraceptives, but one topic is often missing from this discourse: menstrual periods.

People who menstruate face daily challenges due to living in a society that is not supportive of, and is sometimes actively oppressive towards, people who menstruate. Menstruating people experience financial, educational, and health-related struggles when they are denied full autonomy over managing their periods. Governments decide whether to tax menstrual products at higher rates than other necessary health products. Governments also decide if menstrual products are covered under financial assistance programs. Schools and workplaces dictate whether students and employees can access free products when they need them, or if they can access them at all. Left without a voice in the decisions made by these institutions, these restrictions on people who menstruate

are just a few examples of how menstruators currently do not have complete autonomy over the management of their period. Legal and legislative systems are crucial mechanisms that activists can use to increase rights for people who menstruate.

Part I of this paper highlights key moments in the history of menstrual activism and reviews how the phrase “menstrual equity” was developed. Part II examines the current menstrual equity legal strategy, which focuses on eliminating sex discrimination based on menstruation through the avenues of litigation and legislation. Part III details how utilizing a sex discrimination framework to achieve menstrual equity marginalizes non-cisgender people who menstruate and menstruating people who operate outside of Title VII and Title IX claims. Lastly, Part IV discusses why applying the frameworks of intersectionality and reproductive justice is essential to shift menstrual equity advocacy to menstrual justice. This part also analyzes other areas of substantive law and policy that lawyers and activists can, and should, utilize more often to achieve menstrual justice, such as government benefits or Department of Corrections policies to name a few.

## I. WHAT IS MENSTRUAL EQUITY?

Menstrual equity, a term first coined by Jennifer Weiss-Wolf, is defined as “the affordability, accessibility, and safety of menstrual products for all people—including law and policies—that acknowledge and consider menstruation.”<sup>1</sup> While Weiss-Wolf’s definition came to the forefront in 2015 in her book *Periods Gone Public*, legal advocacy for menstrual equity existed long before that.

Although not yet formally known as menstrual equity, parts of the women’s health movement of the 1970s advocated for these same rights.<sup>2</sup> From 1979 to 1983, over thirty-eight women died from toxic shock syndrome (TSS) and over 2200 cases of TSS were reported to the Centers for Disease Control sparking outrage among feminist and women’s health communities.<sup>3</sup> TSS is caused by certain strains of bacteria that spread into the bloodstream which can result in severe organ damage, and even death.<sup>4</sup> TSS is often

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1. *Glossary for the Global Menstrual Movement*, PERIOD. (Jan. 2022), <https://period.org/uploads/Global-Glossary-for-the-Menstrual-Movement.pdf> [<https://perma.cc/Q8XG-3XSU>].

2. BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW’S SILENCE OF PERIODS 2* (2022).

3. Chris Bobel, *From Convenience to Hazard: A Short History of the Emergence of the Menstrual Activism Movement, 1971–1992*, 29 *HEALTH CARE FOR WOMEN INT’L* 738, 745 (2008).

4. *Toxic Shock Syndrome*, JOHNS HOPKINS MEDICINE <https://www>.

tied to high absorbency tampons, especially those produced in the later 1970s and early 1980s.<sup>5</sup> The Boston Women's Health Book Collective helped to bring attention to the dangers of TSS tied to high-absorbency tampons by releasing educational brochures.<sup>6</sup> The Boston Women's Health Book Collective formed in 1969 to discuss and address issues in the medical system that they saw as paternalistic and condescending, and regulation of menstrual product was no exception.<sup>7</sup> The group and other activists were successful in pressuring the Food and Drug Administration (FDA) to regulate menstrual product absorbency levels more closely and require warning labels about the risk of TSS.<sup>8</sup>

Direct lobbying was not the only form of menstrual activism in the 1980s. In the mid-1980s, three women in Chicago filed the first-class action lawsuit in an effort to eliminate the tax on tampons.<sup>9</sup> They sued the City of Chicago, a major grocery store chain, and other retail stores claiming that menstrual products should be included under the tax-exempt category of medical devices.<sup>10</sup> The Illinois Supreme Court agreed with the plaintiffs, stating that the definition of "medical appliances" should be read to encompass "feminine hygiene products," which had a similar absorbance quality to other tax-exempt items like Band-Aids or sterile cotton.<sup>11</sup> The city ceased taxing menstrual products until twenty years after the close of the case when menstrual products were reclassified into the grooming and hygiene category.<sup>12</sup>

Litigation and policy advocacy continued in the margins of social justice activism until 2015, when menstrual equity advocacy caught the attention of mainstream media again. *Cosmopolitan* magazine dubbed 2015 "the year the period went public" as more activists and lawyers were pushing for legislation in their states

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hopkinsmedicine.org/health/conditions-and-diseases/toxic-shock-syndrome-tss [https://perma.cc/MY7U-DB8D] (last visited, Feb. 2023).

5. *Id.*

6. CRAWFORD & WALDMAN, *supra* note 2, at 2.

7. *Research Guides, Boston Women's Health Book Collective*, HARV. RADCLIFF INST., [https://guides.library.harvard.edu/schlesinger\\_bwbbc](https://guides.library.harvard.edu/schlesinger_bwbbc) [https://perma.cc/RU5G-T6UU] (last visited Feb. 24, 2023).

8. Bobel, *supra* note 3, at 746–47.

9. John A. Lupton, *Illinois Court History: Feminine Hygiene Products Tax*, ILL. COURTS (Feb. 22, 2021), <https://www.illinoiscourts.gov/News/949/Illinois-Court-History-Feminine-Hygiene-Products-Tax/news-detail/> [https://perma.cc/Y4WD-UY7N].

10. *Id.*

11. *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344 (Ill. 1989).

12. Lupton, *supra* note 9.

to eliminate additional taxes on tampons.<sup>13</sup> In 2014, the global youth-led non-profit PERIOD. was founded to eliminate period poverty and stigma through the three pillars of service, education, and advocacy.<sup>14</sup> PERIOD. utilizes grassroots advocacy and local organizing efforts led by young people to address menstrual equity issues. In 2016, two attorneys founded the organization Period Equity which focuses on achieving menstrual equity through law and policy advocacy.<sup>15</sup> This momentum kept building as the menstrual equity movement began to appeal to a wide array of activists seeking to eliminate burdens imposed on people who menstruate. More frequently, the intersection of lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ+) inclusion, the experiences of unhoused menstruators, and the experiences of incarcerated menstruators have come to the forefront of menstrual equity advocacy. Nevertheless, much of the current litigation and legislative strategies narrowly focus on gender discrimination against women as the basis of their arguments, leaving behind more marginalized menstruators.<sup>16</sup>

## II. CURRENT MENSTRUAL EQUITY LEGAL STRATEGY

Menstrual equity activism traditionally utilizes a “sex difference” framework that acknowledges the differences between cisgender men and cisgender women and advocates for policy changes considering these differences.<sup>17</sup> This approach mainly focuses on the legal claims of cisgender women and makes arguments based on the notion of menstruation explicitly being tied to the female body. Menstrual equity activists argue that because of a woman’s menstrual period she is at a disadvantage and needs additional support, products, and resources to fully participate in society.<sup>18</sup>

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13. Malaka Gharib, *Why 2015 Was The Year Of The Period, And We Don't Mean Punctuation*, NPR (Dec. 31, 2015, 1:30PM ET) <https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and-we-dont-mean-punctuation/> [<https://perma.cc/9AJL-RNL9>].

14. *Meet PERIOD.*, PERIOD., <https://period.org/who-we-are> [<https://perma.cc/KZ7Y-G9RM>] (last visited July 24, 2022).

15. *Period Law aims to end the discriminatory tampon tax once and for all*, PERIOD LAW, <https://www.periodequity.org> [<https://perma.cc/5PXA-HAB7>] (last visited July 25, 2022).

16. The term “menstruator” or the phrase “people who menstruate” is frequently used to include transgender, nonbinary, and other gender non-conforming people who have a menstrual period.

17. CHRIS BOBEL, *NEW BLOOD: THIRD-WAVE FEMINISM AND THE POLITICS OF MENSTRUATION* 12 (2012).

18. JENNIFER WEISS-WOLF, *PERIODS GONE PUBLIC: TAKING A STAND FOR*

### A. *Litigation*

Litigation through the state court systems particularly focuses on gender discrimination claims based on menstruation. In 2016, three women filed a class action lawsuit against the New York State Department of Taxation and Finance to eliminate the sales tax on menstrual products.<sup>19</sup> In *Seibert et al. v. New York State Department of Taxation*, the plaintiffs argued that the tax on menstrual products violated the Equal Protection Clause of the New York and U.S. Constitution because medical items (i.e., menstrual products) used exclusively by women are taxed while medical products also used by men are not, such as Rogaine, foot powder, and dandruff shampoo.<sup>20</sup> They sought not only the end of additional tax, but sought refunds for everyone who purchased menstrual products in the state.<sup>21</sup> They later dropped the suit when the New York state legislature voted to exempt menstrual products from sales tax.<sup>22</sup> Similarly, in 2020, three women sued the State of Michigan and the Michigan Department of Treasury for violations of the Equal Protection Clause due to the additional sales tax on tampons.<sup>23</sup> Like in *Seibert*, soon after they filed suit, Michigan passed legislation removing the tax on menstrual products.<sup>24</sup> Tampon tax litigation thus far has served primarily an expressive function by highlighting that the additional burden on people who menstruate is not something to be tolerated.<sup>25</sup>

There has also been litigation in the realm of Title VII as employees sue their employer for discrimination on the basis of sex. In the case of *Coleman v. Bobby Dodd Institute*, Coleman claimed she was terminated by her company due to her unpredictable and irregular menstrual period.<sup>26</sup> On two different occasions she was unable to control her heavy menstrual period while working as a 911 call taker, accidentally getting blood on her office chair and the carpet.<sup>27</sup> Coleman argued that she was wrongly discriminated against based on her sex in violation of Title VII of the Civil

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MENSTRUAL EQUITY xvi (2017).

19. *Seibert et al. v. N.Y. Dep't of Taxation and Fin.*, No. 151800, 2016 WL 822532 (N.Y. Sup. Ct. Mar. 3, 2016).

20. *Id.*

21. *Id.*

22. CRAWFORD & WALDMAN, *supra* note 2, at 62.

23. *Beggs v. Michigan*, No. 20-000149-MT (Ct. of Claims Aug. 11, 2020).

24. H.B. 5267 (Mich. 2021).

25. Christopher A. Cotropia, *Law's Ability to Further the "Menstrual Movement"*, 41 COLUM. J. GENDER & L. 53, 59 (2021).

26. *Coleman v. Bobby Dodd Inst.*, No. 4:17-CV-00029, 2017 WL 2486080 at \*2 (M.D. Ga. Jan. 31, 2017).

27. *Id.* at 2.

Rights Act of 1964.<sup>28</sup> Additionally, she argued that menstruation was a “related medical condition” to pregnancy and childbirth, and therefore the Pregnancy Discrimination Act was also violated when she was terminated.<sup>29</sup> The district court dismissed Coleman’s complaint on multiple bases, one being that menstruation is related to pre-menopause, not pregnancy or childbirth.<sup>30</sup> The court also noted that it believed that she was fired not simply for menstruating but for being unable to control her heavy menstruation and “soiling” company property.<sup>31</sup> Lastly, the court noted that the only possible way they saw a chance for Coleman to prevail was to show that her “excessive menstruation was treated less favorably than similar conditions affecting both sexes.”<sup>32</sup>

In 2021, the Virginia Department of Corrections (VADOC) terminated Joyce Flores, a dental hygienist, for “suspicion of contraband” when she passed through the scanners with a tampon in but left without a tampon after changing it during the day without replacing it.<sup>33</sup> Flores sued VADOC and alleged sex discrimination in violation of Title VII and the Pregnancy Discrimination Act.<sup>34</sup> Flores argues that perimenopausal menstruation only affects people with female reproductive organs, and therefore, is a related medical condition to pregnancy.<sup>35</sup> The district court rejected the VADOC’s motion to dismiss and has allowed the lawsuit to proceed reasoning that “*but for* Flores’s menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged.”<sup>36</sup>

As shown above, most menstrual equity litigation focuses on sex discrimination or equal protection claims. This shapes the narrative of menstruation explicitly being tied to sex which can have consequences outside of the courtroom.

## B. *Legislation and Policy*

Menstrual equity legislation is concentrated in two areas both pertaining to economic and financial reform: eliminating state taxes on tampons and increasing access to free products in schools. As of March 2023, twenty-two states impose additional taxes on

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28. *Id.* at 1.

29. CRAWFORD & WALDMAN, *supra* note 2, at 112.

30. *Coleman*, WL 2486080 at \*5.

31. *Id.* at 6.

32. *Id.* at 5.

33. Brief for Petitioner, *Flores v. Va. Dep’t of Corrections*, No. 5:20-cv-0087 (W.D. Va. Apr. 2021).

34. *Id.*

35. *Id.*

36. *Id.*

tampons.<sup>37</sup> Taxes on tampons vary from sales, value-added, or luxury taxes.<sup>38</sup> Menstruating people take on a more significant economic burden having to pay taxes on essential products while items like Rogaine and Viagra are classified as “unavoidable” and not taxed.<sup>39</sup> Legislation removing state taxes on menstrual products is often achieved by comparing them to other tax-free products in the state and showing how menstrual products are similar to or more essential than those products.

Ensuring free access to menstrual products in school restrooms consumes a large part recent of menstrual equity legislation.<sup>40</sup> Increasing access to free menstrual products is one of the ways legislatures attempt to end period poverty. Period poverty is defined as “limited or inadequate access to menstrual products or menstrual health education as a result of financial constraints or negative socio-cultural stigmas associated with menstruation.”<sup>41</sup> Just under a quarter of all menstruating students aged 13 to 19 struggle to afford period products.<sup>42</sup> Black, Indigenous, and people of color (BIPOC), low-income, and rural students experience even greater barriers to accessing period products.<sup>43</sup> When young menstruating students struggle with period poverty, they miss essential class time and confidence-building activities.<sup>44</sup> In 2016, New York City became the first city to require free menstrual products in its school restrooms.<sup>45</sup> Two years later in 2018, New York passed a law

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37. PERIOD LAW, *supra* note 15.

38. Sales tax is collected by the retailer once the customer purchases the goods at the end of the supply chain. Value-added tax (VAT) is collected in each stage of the supply chain by all sellers involved. Carla Yrjanson, *What is the Difference Between Sales Tax and VAT?*, THOMSON REUTERS (Dec. 2020), <https://tax.thomsonreuters.com/blog/what-is-the-difference-between-sales-tax-and-vat/> [<https://perma.cc/N36P-S4F8>]. Luxury tax is a type of sales tax that is placed on products that are deemed non-essential. Julia Kagan, *What Is a Luxury Tax?*, INVESTOPEdia (July 2020), [https://www.investopedia.com/terms/l/luxury\\_tax.asp](https://www.investopedia.com/terms/l/luxury_tax.asp) [<https://perma.cc/TJ4J-8UL5>].

39. Allyson Crays, *Menstrual Equity and Justice in the United States*, 3 SEXUALITY, GENDER & POL’Y 134 (2020).

40. *Period Products in Schools*, ALL. FOR PERIOD SUPPLIES, <https://allianceforperiodsupplies.org/period-products-in-schools> [<https://perma.cc/4SLT-S45K>] (last visited July 20, 2022).

41. PERIOD., *supra* note 1.

42. Thinx & PERIOD., *State of the Period 2021: The Widespread Impact of Period Poverty on U.S. Students* (2021), <https://period.org/uploads/State-of-the-Period-2021.pdf> [<https://perma.cc/7WSB-GZHY>].

43. *Id.*

44. Christopher Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 6 WOMEN’S REPRODUCTIVE HEALTH 289 (2019).

45. CRAWFORD & WALDMAN, *supra* note 2, at 62.

requiring all state public schools that included grades six through twelve to provide free menstrual products in the restrooms.<sup>46</sup> Other states followed the lead of New York and passed a variety of bills to provide free menstrual products in schools; as of February 2023, twenty-one states and the District of Columbia require or provide funding for free period products to be available in public schools throughout their state.<sup>47</sup>

Because this legislation is passed on a state-by-state or city-by-city basis, the requirements of each law vary widely. Some states only require the products to be in elementary, middle or high schools, or some require products in all three.<sup>48</sup> Other states additionally require public colleges and universities to provide free products.<sup>49</sup> Alabama only allows the free products to be allocated to a nurse or female faculty member rather than freely placed in the restroom.<sup>50</sup> Out of the twenty-one states that passed legislation requiring free period products in schools, only nine states provide funding, while the other twelve states and D.C. require the products but do not provide funding to the school districts.<sup>51</sup> Some legislation requires menstrual products to only be in women's restrooms and uses female-centered language throughout the legislation.<sup>52</sup> In contrast, more inclusive legislation also requires the free products in gender-neutral, unisex, or male restrooms.<sup>53</sup>

Recently, menstrual equity activists have highlighted Title IX policies as a way to ensure access to free period products in

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46. *Id.* at 63.

47. The following states and the District of Columbia require free period products in their public schools: Alabama, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Missouri, New Hampshire, New York, Nevada, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington. *E.g.*, *Period Products in Schools*, ALL FOR PERIOD SUPPLIES, <https://allianceforperiodsupplies.org/period-products-in-schools> [<https://perma.cc/7LFV-NRVL>] (last visited July 20, 2022).

48. *Id.*

49. *Id.*

50. *Id.*

51. This distinction between states that provide funding and states that do not, is important. States that provide funding ensure greater access to menstrual products because then underfunded school districts, where menstrual products are even more of a necessity, do not have to find or reallocate their already low funding. *Id.*

52. H.B. 205, 442nd Gen. Assemb. (Md. 2021) (H.B. 205, later signed into law by the governor, shows gender inclusive language that, in its final form, was taken out and replaced with “all women’s restrooms.”).

53. H.B. 162 Utah State Leg. (2022) (“provide period products free of charge to students in each female or unisex restroom”).

schools.<sup>54</sup> Similar to the Boston Women's Health Book Collective in the 1980s pressuring the FDA to address TSS, activists have called for the United States Department of Education to provide regulatory guidance to schools on ensuring access to free menstrual products.<sup>55</sup> Activists argue that because the Department's Office of Civil Rights provides guidance on supporting pregnant students, developing guidance on menstruation would not be a significant leap for the agency.<sup>56</sup> This guidance would put more pressure on states and schools to provide free products to their students. As the popularity of a Title IX argument picks up steam, litigation could possibly develop in the free product space traditionally dominated by legislative and policy reforms.

### C. *Expressive Function*

The sex discrimination-focused approach of menstrual equity primarily serves an expressive function in the menstrual movement. Laws with an "expressive function" focus on affecting social norms, as opposed to actually changing behavior.<sup>57</sup> Advocating for menstrual equity law and policy "signals that the needs of menstruators are significant and real."<sup>58</sup> While the tangible benefits of tampon tax litigation or policy changes are not as impactful in terms of changing material conditions of the environment in which someone menstruates, advocacy in this area is critical to show that additional burdens placed on menstruating people will not be tolerated. Menstrual equity must shift away from a discrimination framework to achieve more tangible and impactful changes for all people who menstruate.

## III. THE LIMITS OF A SEX DISCRIMINATION FRAMEWORK TO ADDRESS MENSTRUAL EQUITY

### A. *Erasure of Transgender and Nonbinary Menstruators*

Cisgender women are not the only people who have menstrual periods, yet they take up the most space in mainstream menstrual equity discourse. The current menstrual discourse establishes the category of cisgender women as the only people who menstruate by centering cisgender women in the conversation. Assuming a binary

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54. Margaret E. Johnson, Emily G. Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J.L. & GENDER 225 (2020).

55. CRAWFORD & WALDMAN, *supra* note 2, at 71.

56. *Id.*

57. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

58. Cotropia, *supra* note 25, at 59.

conception of gender—women menstruate and men do not—further reinforces the idea that “gender mirrors sex or is otherwise restricted by it.”<sup>59</sup> This notion continues to perpetuate harm by excluding people who do not identify as women but have a menstrual period from the discourse.<sup>60</sup>

Transgender men, nonbinary persons, intersex persons, and other gender non-conforming persons can have a menstrual period. The term “menstruator” and the phrase “people who menstruate” are used more frequently in menstrual activism to include identities other than cisgender women who menstruate.<sup>61</sup> While this shift in language may seem like semantics, it splits the “the biological (menstruation) from the socio sociocultural (the social construction of gender)” allowing for a more expansive view of who menstruates.<sup>62</sup> This linguistic split allows activists to focus on the unique experiences of individuals who menstruate rather than generalizations about cisgender female menstruation. Exploring the “plurality” of menstruation experiences works to eliminate the notion that menstruation is solely a female experience.<sup>63</sup> Recognizing expansive genders outside the male-female binary confers “legal status and protection” on those groups.<sup>64</sup> This creates the opportunity for greater legal rights for transgender men, nonbinary persons, intersex persons, and other gender non-conforming persons who have a menstrual period.

The hyper-focus on pursuing advocacy through sex discrimination claims that tie menstruation to the female body can be extremely harmful to these classes of menstruators, as they are left out of the public legal discourse, and therefore not afforded the same rights. This distinction is not merely a symbolic or linguistic issue. Structurally, the focus on sex discrimination increases institutional support for cisgender women while erasing and leaving behind other menstruators. For example, legislation that calls

59. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 10 (1990).

60. Additionally, there are cisgender and transgender women who do not have a menstrual period for various biological reasons. Closing associating menstruation and “womanhood” can be harmful to these women as well, making them feel like “less of a woman” for not menstruating.

61. PERIOD., *supra* note 1.

62. Chris Bobel & Breanne Fahs, *The Messy Politics of Menstrual Activism*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES* 1001, 1004 (Chris Bobel et al. eds., 2020).

63. Klara Rydström, *Degendering Menstruation: Making Trans Menstruators Matter*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES* 945, 955 (Chris Bobel et al. eds., 2020).

64. Jessica A. Clarke, *They, Them, Theirs*, 32 *HARV. L. REV.* 894, 937 (2019).

explicitly for free menstrual products in *women's* restrooms leaves people who menstruate and use gender-neutral or male restrooms with three options: (1) face a structural lack of access to necessary products to manage their period, (2) risk their safety by accessing products in the women's restroom, or (3) experience gender dysphoria to access products in the women's restrooms. The focus on identity politics of female-only menstruation "conflates or ignores intragroup differences" leaving non-cisgender menstruators behind.<sup>65</sup>

While there are no non-cisgender menstruation-related cases on record, there has been increasing success in the lower courts on sex discrimination claims brought based on transgender status more generally.<sup>66</sup> Transgender litigants are winning on claims of sex discrimination arguing that "but for" their sex assigned at birth, they would not have been discriminated against.<sup>67</sup> Transgender sex discrimination claims have also succeeded by arguing that the plaintiff was discriminated against by failing to conform to gender stereotypes, which is a form of sex discrimination.<sup>68</sup> This precedent in the lower courts presents hope for transgender people who menstruate, showing that they can succeed on claims of sex discrimination. The reasoning behind these arguments could be used to increase access to menstrual products in male and gender-neutral restrooms, but should be paired with other policy measures to ensure permanent access that does not depend on court precedent.

There has been intense backlash from trans-exclusionary radical feminists (TERFs) against the inclusion of all menstruators and the shift in the menstrual movement to gender-neutral language.<sup>69</sup> In 2019, Procter and Gamble, a major manufacturer of menstrual products, announced it would remove the Venus symbol from the packaging of such products as a showing of trans solidarity.<sup>70</sup> Following this announcement, TERFs took to social media to

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65. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

66. Eyer, K.R., *Transgender Constitutional Law*, U. PA. L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4173202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4173202) [<https://perma.cc/29TF-2UYF>].

67. *Id.*

68. *Id.*

69. Tareq Haddad, *Always Sanitary Products Accused of Erasing Biology After Venus Symbol Removed From Packaging*, NEWSWEEK (Oct. 21, 2019), <https://www.newsweek.com/always-sanitary-products-accused-erasing-biology-venus-symbol-removed-packaging-1466677> [<https://perma.cc/ABT3-8DQ4>].

70. Heather Murphy, *Always Remove Female Symbol From Sanitary Pads*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/business/>

“#boycottalways” because they felt cisgender women were being erased and forgotten in the area of menstruation.<sup>71</sup> This backlash is not unique to the menstrual movement, as other movements tied to reproductive rights have felt the tension between transgender inclusion and the alleged erasure of cisgender women.<sup>72</sup> Even in early menstrual activism, the Boston Women’s Health Book Collective explicitly used female-only language in their appeal to the FDA to cater to their following, excluding other gender identities who menstruate.<sup>73</sup>

In her discussion of menstrual activism, Bobel poses the question, “[c]an a movement rooted in a critique of the patriarchal construction of menstruation afford to erase the category ‘woman’?”<sup>74</sup> Especially when legal precedent often demands conformity to an argument based on a rigid gender binary, is a sex-based discrimination claim for menstruation possible without submitting to that notion? I believe it is necessary to move away from solely a discrimination framework to fully encompass the rights and experiences of non-cisgender menstruators. Menstruation must be de-gendered and distanced from traditional ideas of femininity, or it will continue to marginalize transgender men, nonbinary persons, intersex persons, and other gender non-conforming persons who menstruate by leaving them out of the mainstream discourse. This inclusion is necessary to attack the root cause of menstrual stigma and shame that pushes menstruation policies into the shadows.<sup>75</sup> What true justice is there if identities who experience harm due to menstrual oppression are left behind?

### B. *Menstruators Outside of Title IX and Title VII*

Apart from reinforcing an outdated gender binary, focusing on discrimination claims in the context of Title IX and Title VII similarly leaves out the most marginalized menstruators who are not in a covered workplace or educational institution, and therefore do not have access to those claims. Even if someone can bring a Title VII suit against their employer, as Coleman did for discrimination

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always-pads-female-symbol.html [<https://perma.cc/Z66U-P6TE>].

71. Haddad, *supra* note 69.

72. Following the *Dobbs* decision, many abortion rights advocates stressed the inclusion of transgender and non-binary people who may need abortions. See AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022) <https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion> [<https://perma.cc/L3U8-QRF4>].

73. BOBEL *supra* note 17, at 157.

74. *Id.* at 12.

75. Rydström, *supra* note 63, at 945.

based on menstruation, the outcome of the lawsuit still does not address the root causes of period poverty. A successful discrimination suit does not change how expensive menstrual products are or how many products a menstruator has available to them. It does not address the shame and stigma of not wanting to carry extra tampons out of fear that someone might see them and know they menstruate. A sex discrimination lawsuit can provide temporary or symbolic relief that the employer discriminated against the person based on menstruation. However, it does not change the material conditions of how that person manages their menstrual period.

Additionally, many menstruators experience harm due to the lack of support for menstruation outside of Title IX and Title VII jurisdiction. For example, incarcerated people who menstruate face intense oppression due to their menstrual period when they experience period poverty from products that are highly priced or held captive by guards.<sup>76</sup> Additionally, unhoused menstruators who do not work in traditional settings or attend school do not benefit from discrimination lawsuits rooted in Title IX or Title VII. Unhoused menstruators face issues daily, such as accessing menstrual products or a safe restroom to change their products discretely.<sup>77</sup>

Advocates have the potential to leave behind the most marginalized menstruators by ramping up litigation and legislation focused on Title IX, and Title VII claims. Working within a sex discrimination framework reinforces a harmful gender binary, achieves “equity” only for a subset of people who menstruate, and actively denigrates the most marginalized menstruators.

#### IV. SUPPORTING THE MOST MARGINALIZED MENSTRUATORS

Shifting away from an equity and discrimination framework opens the door to different legislative and policy avenues that would support the most marginalized menstruators in their daily lives. Adopting an intersectionality or reproductive justice framework will allow lawyers and activists to advocate for laws and

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76. Margaret E. Johnson, *Menstrual Justice*, 5 U.C. DAVIS L. REV. 1, 58 (2019).

77. A study of low-income women who menstruate reported the following about the experience of unhoused menstruators: “At night, these women 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 the winter, women often went 12–14 hours overnight without using a toilet or changing their pad or tampon.” Anne Sebert Kuhlmann et al., *Unmet Menstrual Hygiene Needs Among Low-Income Women*, 133 OBSTETRICS & GYNECOLOGY 238, 242 (2019).

policies that will achieve menstrual justice within the context of community situations and needs.

### A. *Theoretical Frameworks*

In her research, law professor Margaret Johnson applies an intersectionality framework coined by Kimberlé Crenshaw to make her claim that menstrual injustice is a form of structural intersectionality.<sup>78</sup> Johnson coined the term “menstrual injustice” as “not merely the operate 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.”<sup>79</sup> This term appears more frequently in academic contexts, but mainstream activism has yet to advocate for menstrual justice rather than solely menstrual equity.

Women of color, indigenous people, and transgender people have been advocating for reproductive justice for many years, but the term was first coined in 1994 by a group of Black women in Chicago who named themselves Women of African Descent for Reproductive Justice.<sup>80</sup> In 1997, three years after the term reproductive justice was coined, sixteen organizations joined together to form SisterSong with the goal to foster a national movement fighting for reproductive justice.<sup>81</sup> SisterSong is the “largest national multi-ethnic Reproductive Justice collective.”<sup>82</sup> SisterSong defines reproductive justice as “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”<sup>83</sup> Reproductive justice focuses on access to comprehensive and culturally responsive reproductive services rather than simply having the choice or option to use such services.<sup>84</sup> A reproductive justice framework embraces the intersecting identities of individuals and recognizes societal influences and power structures that people face daily.<sup>85</sup> Reproductive justice advocates then consider these connected influences and structures when advocating for change whether through legislation or a different avenue.<sup>86</sup>

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78. *Id.* at 2.

79. *Id.*

80. *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/P6PG-XNKN>] (last visited Feb. 12, 2022).

81. Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14, 16 (last updated Mar. 2011).

82. SISTERSONG, *supra* note 80.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Approaching menstrual equity with a reproductive justice framework is crucial in the menstrual movement's fight to eliminate period poverty and eliminate inequities. By adopting a menstrual justice framework rather than an equity framework, activists can improve the daily lives of menstruators in their unique, localized contexts. A menstrual justice framework would center the most marginalized menstruator to ensure their needs are met. A legal advocacy strategy built around the tenets of reproductive justice would ensure that the unique contexts of BIPOC, LGBTQ+, incarcerated, low-income, and unhoused people who menstruate are included when pursuing legal rights for menstruators. For example, rather than focusing so heavily on discrimination claims that do not directly improve the material conditions for these menstruators, policy advocacy strategies could focus more on government benefit coverage of menstrual products. Pairing these legal strategies with menstrual education and stigma-busting components is essential to eliminate period stigma which is the root cause of all menstrual injustices. A menstrual justice framework would allow activists to decenter upper middle-class white women from the mainstream menstrual equity discourse and fight for menstrual justice for LGBTQ+ and BIPOC menstruators. Additionally, a menstrual justice framework would recognize that lawyers are not at the center of the movement but should rely on the insight and leadership of grassroots organizers.

Distancing menstrual equity from discrimination-based reasoning will allow for more substantive and impactful advocacy in other areas of law. Focusing on these areas will encourage activists to advocate for changes that impact the daily lives of menstruators and eliminate period stigma, rather than high-level discrimination lawsuits that have minimal impact. Below are some areas of law that lawyers and activists should shift their focus to achieve menstrual justice.

#### B. *State and Federal Government Benefits*

Currently, there is no federal government benefits program that allows for the purchase of necessary menstrual products. Menstrual products cannot be purchased with Supplemental Nutrition Assistance Program (SNAP), or Women, Infants, & Children Nutrition Program (WIC), and are not eligible for Medicaid reimbursement.<sup>87</sup> When low-income people who menstruate cannot afford menstrual products, they resort to other products such as rags,

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87. Johnson, *supra* note 76, at 55.

tissues, toilet paper, and diapers.<sup>88</sup> However, providing coverage for menstrual products through WIC would continue to reinforce the notion that only women menstruate. In addition to coverage under WIC, a different government benefits program would need to be utilized to ensure product accessibility to all people who menstruate. “Behavioral and ethical flaws” of low-income people are often used as an excuse for the federal and state government to deny them rights.<sup>89</sup> The federal and state governments continue to disregard the needs of low-income menstruators by not providing necessary financial support.

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), menstrual products were categorized as “qualified medical expenses” that were able to be reimbursed under various tax-advantaged accounts such as health savings accounts (HSAs).<sup>90</sup> While the CARES Act was an excellent first step, it did not have the widespread impact of increasing access to menstrual products and only applied for a limited time.<sup>91</sup> For example, HSAs are only available to people with a high-deductible health plan which requires paying a greater share of your personal health care costs before your insurance company does.<sup>92</sup> People receiving Medicare and Medicaid are not eligible to enroll in a HSA.<sup>93</sup> It is highly unlikely low-income people who live paycheck to paycheck will utilize HSAs by setting aside money to purchase menstrual products.

A novel proposed bill in New Jersey would create a pilot program to award food pantries grants to purchase menstrual products

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88. Kuhlmann et al., *supra* note 77, at 240–41.

89. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 22 (2017); Lucy A. Williams, *Welfare & Legal Entitlements: The Social Roots of Poverty*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 571 (David Kairys ed., 1998) (discussing how opponents of welfare programs often cite “individual human failure” and a lack of “traditional family values” as justification for not providing relief to people in poverty).

90. Press Release, IRS Outlines Changes to Health Care Spending Available Under CARES Act, IRS (June 17, 2020), <https://www.irs.gov/newsroom/irs-outlines-changes-to-health-care-spending-available-under-cares-act> [<https://perma.cc/E92Q-LKSK>].

91. Deanna Cuadra, *The CARES and American Rescue Plan Act Will Not Be Offering the Same Flexibility in 2022*, EMP. BENEFIT NEWS (Jan. 11, 2022), <https://www.benefitnews.com/news/cares-act-and-american-rescue-plan-act-provisions-expired> [<https://perma.cc/TKX6-CM8J>].

92. *What's a Health Savings Account*, HEALTHCARE INS. MARKETPLACE (Aug. 2022), <https://marketplace.cms.gov/outreach-and-education/health-savings-account.pdf> [<https://perma.cc/RE4G-DKA6>].

93. *Id.*

to give to eligible individuals.<sup>94</sup> Eligible individuals are people enrolled in SNAP, WIC, and other state and federal nutrition or income assistance programs.<sup>95</sup> This is a great example of creating a new path for purchasing menstrual products without taking funding away from already-underfunded government programs. Low-income menstruators need and deserve to have a government benefits program that consistently and sufficiently assists them in purchasing menstrual products.

### C. *Department of Corrections Policies*

Incarcerated people who menstruate face oppression based on the lack of access to menstrual products and are subjected to demoralizing environments when managing their periods. One study showed that the average price of menstrual products consumed a significant portion of the average wage a worker could earn.<sup>96</sup> There are reported instances of guards using menstrual products as bargaining chips with incarcerated individuals and only giving them out as favors.<sup>97</sup> Like the needs previously discussed of low-income menstruators, incarcerated menstruators often use socks, sheets, mattress stuffing, or bleed through their clothing to “manage” their periods when products are unavailable.<sup>98</sup>

In 2017, the First Step Act was passed bipartisan to ensure access to menstrual products for all incarcerated individuals who menstruate in federal jails and prisons.<sup>99</sup> The Act says that tampons and pads will be made available to incarcerated individuals for free “in a quantity that is appropriate to the healthcare needs” of each individual.<sup>100</sup> This provision requiring menstrual products was orig-

94. Assemb. B. 1935, 220th Leg., 1st Annual Sess. (N.J. 2022).

95. N.J. Assemb. B. 1935.

96. Eleanor Goldberg, *Women Often Can't Afford Tampons, Pads in Federal Prisons. That's About To Change.*, HUFFPOST (Dec. 20, 2018), [https://www.huffpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-feder-al-prisons\\_n\\_5c1ac0a0e4b08aaf7a84ac38](https://www.huffpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-feder-al-prisons_n_5c1ac0a0e4b08aaf7a84ac38) [<https://perma.cc/4WUH-YVZC>].

97. 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> [<https://perma.cc/F5X8-9U4R>].

98. Kimberly Haven, *Why I'm Fighting for Menstrual Equity in Prison*, ACLU: News and Commentary (Nov. 8, 2019) <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison> [<https://perma.cc/YZB9-CQGQ>]; Thais Alves & Emily Spears, *The Period Project: The Fight for Menstrual Equity in Prisons*, MS. MAGAZINE (Feb. 24, 2022) <https://msmagazine.com/2022/02/24/period-project-menstrual-equity-women-prisons/> [<https://perma.cc/ND7D-42PN>].

99. First Step Act of 2018, S. 756, 115th Cong. (2018).

100. S. 756.

inally part of the Dignity for Incarcerated Women Act introduced by Senator Elizabeth Warren and Senator Cory Booker; they successfully advocated for this provision to be incorporated into the First Step Act.<sup>101</sup>

While the First Step Act is an important advancement for federal menstrual equity policy, there are many limitations. The Act lacks specifics of how menstrual products will be made available, whether freely placed in restrooms like toilet paper, or if they will be distributed by correctional officers. It also lacks a specific timeline on when federal prisons must implement this policy and the repercussions if not implemented. It also is important to note that far more incarcerated people are held in state prisons than federal prisons.<sup>102</sup> In 2020, 151,156 people were incarcerated in federal prisons, while 1,063,665 were incarcerated in state prisons.<sup>103</sup> The First Step Act has minimal impact in terms of securing access to menstrual products for the incarcerated population because it only focuses on federal jails and prisons. State, local, and privately run carceral facilities should also be required to provide free menstrual products.

Incarcerated individuals should not have to ask correctional officers to provide necessary products. Asking correctional officers for products could not only be dehumanizing and humiliating for incarcerated menstruators, but could open them up to abuse or a coercive situation. Similar to schools, these products should be made freely available in the restrooms like toilet paper. No incarcerated individual should have to piece together inadequate pay or barter with corrections officers to access necessary menstrual products.

#### D. *Policies Affecting Unhoused Menstruators*

Unhoused menstruators also have unique experiences in managing their menstrual period. Unhoused people who menstruate face barriers to accessing necessary menstrual products and restrooms to change their products safely.<sup>104</sup> A safe and private place to change their menstrual products can be hard to come by

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101. Press Release, Booker, Warren, Jayapal, Bass Reintroduce Dignity for Incarcerated Women Act, CORY BOOKER (Apr. 2, 2019) <https://www.booker.senate.gov/news/press/booker-warren-jayapal-bass-reintroduce-dignity-for-incarcerated-women-act> [<https://perma.cc/SHC7-EBPL>].

102. BUREAU OF JUST. STAT. OF THE U.S. DEP'T OF JUST., PRISONERS IN 2020—STATISTICAL TABLES (2021). <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<https://perma.cc/YQ2X-9RLZ>].

103. *Id.*

104. Johnson, *supra* note 76, at 69.

because they “have no alternative but to be and remain and live all their lives (all aspects of their lives) in public.”<sup>105</sup> This lack of privacy can lead to unhoused menstruators using menstrual products longer than recommended by waiting until daylight for a safe place to change their products.<sup>106</sup> Even if unhoused menstruators have access to shelters, the shelter’s menstrual product supply may be limited, and the shelter may be restricted from using grant funds to buy such products.<sup>107</sup>

This struggle by unhoused menstruators may be exacerbated when they identify as LGBTQ+. In particular, LGBTQ+ youth<sup>108</sup> and transgender adults<sup>109</sup> experience high rates of unstable housing. Due to this large number of LGBTQ+ individuals who are unhoused, they could experience more drastic effects of period poverty than their traditionally housed peers. For example, a transgender man who menstruates may have even more limited access to menstrual products in a male-centered shelter, because these shelters could receive less donated period products compared to a female-centered shelter. Unhoused LGBTQ+ individuals can face additional safety and privacy concerns when it comes to managing their menstruation if they do not have access to a safe or affirming restroom.

One possible solution is to increase access to safe public restrooms for unhoused people.<sup>110</sup> This would increase safety for unhoused menstruators when changing their menstrual products and increase access to free products, which overall could increase the physical and mental health of unhoused menstruators. State

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105. Jeremy Waldron, *Community and Property for Those Who Have Neither*, 10 THEORETICAL INQUIRES L. 161 (2009).

106. Kuhlmann et al., *supra* note 77, at 242.

107. Lisa De Bode, *Hygiene and Heartache: Homeless Women’s Daily Struggle to Keep Clean*, AL JAZEERA AM. (Jan. 13, 2015), <http://america.aljazeera.com/articles/2015/1/13/scared-to-walk-thestreet.html> [<https://perma.cc/WL5Q-PYUM>].

108. Jonah DeChants et al., *Homelessness and Housing Instability Among LGBTQ Youth*, TREVOR PROJECT (2021), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf> [<https://perma.cc/M66D-SD33>].

109. *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, NAT’L ALL. TO END HOMELESSNESS (July 24, 2020), <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf> [<https://perma.cc/5G6X-NW6H>].

110. Margaret E. Johnson, *There’s 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](https://www.washingtonpost.com/opinions/theres-another-reason-dc-needs-public-restrooms/2019/01/08/a4e127f4-1071-11e9-8f0c-6f878a26288a_story.html) [<https://perma.cc/LZ3R-ZCTUJ>].

legislatures should also pass legislation that permits grant funds to purchase menstrual products along with other necessary personal care items. The increased funding and flexibility should apply to all shelters that serve potential menstruators, not just female-centered shelters. States should provide the funding rather than just mandating that shelters provide these products without an adequate source of monetary support.<sup>111</sup>

#### E. *Labor and Employment Law*

Labor and employment laws can be improved to increase menstrual justice. Some activists have called for menstrual leave policies as an accommodation for menstruators.<sup>112</sup> Menstrual leave policies allow time off for menstruators who experience period pain.<sup>113</sup> This policy proposal runs into the same issue of the sex difference framework discussed earlier, as the current menstrual leave proposals focus on the differences between cisgender women and cisgender men. Rather than singling out people who menstruate, labor laws should be revised to include more flexibility in the workday. This would improve working conditions for all people but would significantly impact people who menstruate. More flexibility in a work environment could allow people who menstruate to take more breaks to change their products when needed or flex their hours to manage severe pain due to menstruating. For example, in *Coleman*, the plaintiff had irregular and unpredictable periods.<sup>114</sup> Even if she had access to menstrual products in her workplace, given her heavy period, more flexibility in her workday could potentially have a greater impact in achieving menstrual justice. Many work schedules are structurally set up in a way that burdens people who menstruate due to the lack of minimal breaks, and limited ability to choose when to take those breaks. Labor and employment laws should be used to improve workplace environments for people who menstruate by changing their structure, not just simply providing products.

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111. Feminine Hygiene Products for the Homeless Act, H.B. 310, 102nd Gen. Assemb. 1st Sess. (Ill. 2021).

112. Angela Haupt, *Menstrual Leave: Why Some Companies Are Offering Time Off for Periods*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/wellness/2022/05/25/menstrual-leave-spain-paid-benefits/> [<https://perma.cc/JV8K-P3CA>].

113. *Spain Plans Menstrual Leave in New Law for Those With Severe Pain*, BBC NEWS (May 12, 2022) <https://www.bbc.com/news/world-europe-61429022> [<https://perma.cc/Y9NJ-A2EC>] (Spain's proposed law would give women who experience period pain three days of leave each month).

114. *Coleman*, 2017 WL 2486080 at \*2.

## F. *Food and Drug Administration (FDA) Regulations*

Menstrual products are regulated by the FDA as medical devices.<sup>115</sup> While there are labeling requirements for manufacturers to include warnings about the risk of TSS and absorbency levels for tampons, there is no requirement to include a list of ingredients found in pads or tampons.<sup>116</sup> Since the late 1990s, there have been concerns about the chemicals used in the manufacturing process still present in menstrual products.<sup>117</sup> Because the FDA's regulation is so limited and there are minimal requirements for disclosure, it is nearly impossible to know what is in menstrual products.<sup>118</sup> Recently, the popular period underwear brand Thinx settled a class-action lawsuit over the presence of per- and polyfluoroalkyl substances (PFAS) in their underwear products.<sup>119</sup> PFAS are human-made chemicals and repeated exposure can have severe health consequences.<sup>120</sup> The complaint filed alleged that Thinx "knowingly and willfully concealed and misrepresented" the contents of their underwear products by marketing them as nontoxic, sustainable, and free of harmful chemicals.<sup>121</sup> In addition to providing cash reimbursement, Thinx will also implement multiple procedural steps to ensure PFAS are not intentionally added to the underwear and will edit its marketing language.<sup>122</sup> While this is a great first step towards product transparency, the lawsuit did not address the potential harm from negative health effects; it focused on the marketing of the products.

The FDA should require that menstrual product manufacturers disclose the ingredients used in their products. Increased ingredient disclosure requirements would allow for consumer

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115. FDA, *Obstetrical and Gynecological Devices*, 21 C.F.R. § 884 (last amended Apr. 14, 2023).

116. Meghan Scott, *How are Menstrual Products and Intimate Care Products Regulated?*, (May 10, 2021) <https://www.womensvoices.org/2021/05/10/how-are-menstrual-and-intimate-care-products-regulated> [<https://perma.cc/K9BX-X3YV>].

117. Johnson, *supra* note 76, at 65.

118. Roni Caryn Rabin, *Period Activists Want Tampon Makers to Disclose Ingredients*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/well/live/period-activists-want-tampon-makers-to-disclose-ingredients.html> [<https://perma.cc/ZNC5-N38S>].

119. Rachel Treisman, *Thinx Settled a Lawsuit Over Chemicals in Its Period Underwear. Here's What to Know*, NPR (Jan. 19, 2023) <https://www.npr.org/2023/01/19/1150023002/thinx-period-underwear-lawsuit-settlement> [<https://perma.cc/B2R5-XQCD>].

120. *Id.*

121. *Dickens v. Thinx, Inc.*, No. 1:22-cv-4286 (S.D.N.Y. 2022).

122. Treisman, *supra* note 119

advocacy groups to research more about the potential harms of certain substances contained in menstrual products. Additionally, if serious harms were found, manufacturers of menstrual products would then be forced to change their manufacturing process to protect the health of menstruators. Currently, the lack of information on what goes into the manufacturing of menstrual products makes it difficult to gather enough knowledge to launch a full-scale policy campaign. Menstruators deserve to have the knowledge to make informed decisions regarding what products they use to manage their periods.

### G. *State Sex Education Policies*

Medically accurate and gender-inclusive sex education policies for young people are lacking across the United States.<sup>123</sup> Only seventeen states require that sex education content is medically accurate.<sup>124</sup> During sex education lessons, teachers often split up girls and boys to discuss biological specific puberty changes. Not only does this mark menstruation as a biological instance that only females can experience, but it also increases the social stigma and shame associated with menstruation. Menstrual stigma is at the root of menstrual inequality, and it is essential that we pair policy initiatives with quality education as well. Further, the lack of comprehensive sex education sets young menstruators up to fail with how to manage their period and how to use products. Increased education about the risks of TSS, the variety of products available (for example, menstrual cups and period underwear), and how to use different menstrual products would increase the health of young menstruators. People who menstruate should have all tools at their disposal for how they choose to manage their menstrual period in order to be best set up for success.

## CONCLUSION

The achievements of the legal advocacy menstrual movement will continue to be minimal and limited as long as it continues to operate out of an equity-based framework and focus on sex discrimination litigation and legislation. The exclusion of gender-expansive menstruators and menstruators who operate outside Title IX and Title VII continues to leave out menstruators most in need of additional support and resources. Shifting to a reproductive justice

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123. *Sex and HIV Education*, GUTTMACHER INST. (July 1, 2022) <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/8VBK-DF7U>].

124. *Id.*

and gender inclusive lens when advocating for menstrual justice will lend greater support to the most marginalized menstruators. Greater focus on menstruators' intersecting identities and unique community contexts is essential. This shift will force activists to focus on the daily struggles of people who menstruate and work to achieve tangible improvements in their specific community contexts. Advocacy through a menstrual justice framework is crucial if the menstrual movement desires to continue as a leader in the next wave of social justice legal activism.