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## Title IX & Menstruation

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## TITLE IX & MENSTRUATION

MARGARET E. JOHNSON,\* EMILY GOLD WALDMAN† AND  
BRIDGET J. CRAWFORD‡

“Oh no. Could I borrow a tampon or pad?” These (or similar) words are familiar to almost everyone who has ever had a period. Even for adults, menstruation can at times be a challenge. For some schoolchildren, it can be an insurmountable obstacle to receiving an education. Students are subject to constant observation by classmates and teachers; they may not have autonomous access to a bathroom during the school day; or they may not be able to afford menstrual products. They may experience menstruation-related peer harassment, restrictive school policies, a lack of access to menstrual products, and inadequate menstruation-related education. As a result, a menstruating student may find it difficult to concentrate in school or even attend school at all, depending on the circumstances. This Article explores the intersection of menstruation and education to uncover the related impediments students face. Because menstruation is uniquely associated with female biology, a school’s failure to address the needs of menstruating students amounts to a denial of educational opportunities on the basis of sex under Title IX.

In recent years, students themselves have played notable roles in successful efforts to cause schools to provide free pads or tampons to students. Currently most states do not require schools to do so. Even in states where schools have a legal obligation to provide menstrual products to students, availability is only one part of a larger problem. Unless students can access bathroom facilities in response to their biological needs, and do so without shame, stigma or restriction, students may risk bleeding during class, failing to change tampons or pads as medically recommended, or even leaving (or skipping) school. This Article argues that pursuant to Title IX, schools should provide students with an education free of unnecessary anxiety about the biological process of menstruation. This freedom from anxiety is a necessary precondition for having meaningful opportunities to fully participate in school and all aspects of public life. The Article buttresses its analysis by employing multiple theoretical frameworks to examine the intersection of menstruation and education, concluding that menstruation is a foundational issue that the law must take into account so that society can benefit from the full participation of all of its members.

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## INTRODUCTION

In 2019, three seventh-grade girls staged a “cookie protest” with tampon-shaped cookies after a school principal denied their request to make free menstrual products available in school bathrooms.<sup>1</sup> Social media brought

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<sup>1</sup> See Alexis Morillo, *Middle School Students Baked Tampon Cookies to Prove Menstrual Products Should Be Free in Schools*, DELISH (Nov. 7, 2019), <https://www.delish.com/food-news/a29727313/tampons-shaped-cookies> [<https://perma.cc/C3UE-HDEM>] (detailing cookie protest in light of decision of middle school students to protest princi-

wide attention to the girls' cause (and cookies).<sup>2</sup> The principal was forced to reconsider his argument that students would "abuse the privilege" of freely receiving such products.<sup>3</sup> *Cosmopolitan* magazine even reported the story as an example of young women "taking over the world."<sup>4</sup>

The *Cosmopolitan* story reflects an increasing public awareness of the ways that menstruation affects daily life. In 2015, four years earlier, menstruation had entered the public discourse in a new way: activists created an online petition in opposition to the tampon tax (i.e., the state sales tax on menstrual products).<sup>5</sup> This petition garnered significant attention.<sup>6</sup> It ultimately led to ongoing legislative efforts around the country, along with a parallel litigation campaign, to repeal these state taxes so that menstrual products can receive the same sales tax exemptions afforded to other necessities.<sup>7</sup>

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pal's decision not to provide menstrual products in bathrooms and decision of students to remain anonymous but call themselves the Revolutionary Girls Baking Society, "[b]ecause really, we are Every Girl in Every Town across the U.S. and the world who is finding her way in a society that doesn't want to hear us talk about our bodies and something that is perfectly healthy and perfectly normal.")

In this article, we use "menstrual products" to refer primarily to pads and tampons. Although we recognize that "menstrual products" can also more generally include items like heating pads or aspirin that some people use to manage menstrual pain, or even newer items like menstrual underwear or menstrual cups, we prefer this terminology to the "menstrual hygiene products" label, which can imply that menstruation itself is unclean.

<sup>2</sup> See Morillo, *supra* note 1 (displaying picture of the cookies and describing them as "some sort of sugar cookies sandwiched together with red frosting, dipped in white frosting, and baked with a 'string' coming out.")

<sup>3</sup> See Morillo, *supra* note 1 (reporting that principal changed his mind about the wisdom of providing free menstrual products in school bathrooms).

<sup>4</sup> Shannon Barbour, *Middle Schoolers Protest After Their Principal Said They'd "Abuse the Privilege" of Free Tampons*, COSMOPOLITAN.COM (Oct. 30, 2019), <https://www.cosmopolitan.com/health-fitness/a29640103/middle-school-protest-principal-abuse-privilege-free-tampons-cookies-twitter/> [<https://perma.cc/EKQ6-FZG2>] (reporting on tampon-shaped cookies prepared as part of "cookie protest" by seventh-grade girls whose school principal refused to make free menstrual products available in bathrooms because students would "abuse the privilege").

<sup>5</sup> See, e.g., Prachi Gupta, *Why the Hell Are Tampons Still Taxed?* COSMOPOLITAN.COM (Oct. 15, 2015), <https://www.cosmopolitan.com/politics/news/a47780/abolish-tampon-tax-america> [<https://perma.cc/KT9L-7UFW>]. See Petition, *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG (Oct. 10, 2015), <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/D38W-DR4G>]; see also Bridget Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST L. PROFESSORS (Nov. 22, 2016), <https://www.feministlawprofessors.com/2016/11/interview-jennifer-weiss-wolf-new-york-attorney-menstrual-equity-advocate/> [<https://perma.cc/6PCA-6CMU>] (describing origins of Weiss-Wolf's menstrual equity activism).

<sup>6</sup> See Petition, *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG (Oct. 10, 2015), *supra* note 5 (showing over 72,000 supporters).

<sup>7</sup> Currently more than 30 states have the tampon tax. Natalie Gontcharova, *Does Your State Have a Period Tax?*, REFINERY29 (Nov. 20, 2019, 11:00 AM), <https://www.refinery29.com/en-us/tampon-tax-us-states> [<https://perma.cc/P2SR-Q73C>]; PERIOD EQUITY, <https://www.periodequity.org/> [<https://perma.cc/EDK9-F25J>].

The increased awareness about the existence and unfairness of the tampon tax<sup>8</sup> helped inspire many people to discuss and advocate against other menstrual injustices such as lack of workplace accommodations for menstrual needs and lack of access to affordable products.<sup>9</sup> Menstruation's new salience in public discourse increased the number of charitable organizations and community groups organizing menstrual product drives for those who could not afford them.<sup>10</sup> The dialogue raised awareness about the fact that transgender boys and men, as well as gender non-binary and intersex persons, menstruate as well.<sup>11</sup> It also amplified existing litigation and advocacy.<sup>12</sup> Plaintiffs brought new lawsuits seeking remedies for, among other things, being fired from their jobs for menstruating, or for being left isolated in a cell bleeding with no menstrual products, water, soap, or change of clothes.<sup>13</sup> These efforts, too, inspired change, with some states passing legislation that requires free products in settings like prisons, schools, and shelters.<sup>14</sup>

Activism around menstruation is often referred to as the movement for “menstrual equity,” a phrase originally coined by Jennifer Weiss-Wolf, one of the co-founders of Period Equity, which is a non-profit organization “dedicated to ensuring accessible, affordable and safe menstrual products.”<sup>15</sup> The term has evolved to include education, health care, and anti-stigma advocacy.<sup>16</sup> Underlying these commitments is the broader goal of “menstrual justice,” which involves addressing the stigma and taboo of menstruation, and the resultant discrimination toward and harassment of those who are menstruating.<sup>17</sup>

<sup>8</sup> See Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 483–87 (2019) (describing how tax law brings discrimination and unfairness clearly into focus).

<sup>9</sup> See generally Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1 (2019) (explaining and analyzing the wide range of menstrual injustices including exclusion and essentializing of menstruators, discrimination, harassment, and constitutional violation against menstruators, insults and indignities towards menstruators, health disadvantages face by menstruators, and economic disadvantages faced by menstruators).

<sup>10</sup> *Id.* at 55–56.

<sup>11</sup> *Id.* at 26–28.

<sup>12</sup> See, e.g., PERIOD, [www.period.org](http://www.period.org) (last visited Feb. 29, 2020) (founded in 2014, Period.org “serv[es] menstruators in need by distributing tampons, pads and menstrual cups; running educational workshops to change the way people think, talk, and learn about periods; and fighting for systemic change towards menstrual equity.”); Johnson, *supra* note 9 at 28–45 (discussing constitutional and employment discrimination cases focused on menstruation since 1980).

<sup>13</sup> Johnson, *supra* note 9, at 30–33, 44.

<sup>14</sup> *Id.* at 47–49.

<sup>15</sup> *Mission & History*, PERIOD EQUITY, <https://www.periodequity.org/mission-and-history> [<https://perma.cc/2ECD-B77N>].

<sup>16</sup> *What Does Menstrual Equity Mean to You*, WOMEN'S VOICES FOR THE EARTH, <https://www.womensvoices.org/what-does-menstrual-equity-mean-to-you/> [<https://perma.cc/3ASL-WMD3>].

<sup>17</sup> See generally Johnson, *supra* note 9.

Students have been on the forefront of efforts to address menstrual stigma and make menstrual products available in their schools. The girls who staged the “cookie protest,” as well as other students, are media-savvy.<sup>18</sup> Students (and their adult allies) have also become increasingly vocal about the ways that menstruation can limit access to educational opportunities. This Article attempts to identify the particular intersections of menstruation with primary and secondary schools (as opposed to the university setting). The onset of menstruation typically ranges from ages eight to fifteen; thus, high schools, middle schools, and even some elementary schools will have menstruating students. These educational settings are particularly fraught: schools exercise tight authority and control over students; students are in close contact with each other; and many students are just beginning to menstruate and adjust to that process. In considering these intersections, this Article examines how Title IX does and should protect against menstruation-related disruptions in students’ school lives.<sup>19</sup> The Article then locates these investigations within the larger intellectual landscape of feminist legal theory. In fact, the argument that Title IX can and does provide a remedy for menstruation-related discrimination does not represent a single feminist theory. Rather, the position builds on and challenges traditional feminist approaches to law, employing multiple feminist theories.

This Article proceeds in three parts. Part I provides a brief overview of menstruation, discussing both the biology of menstruation and the long-held stigmas that surround it. Part II then frames the discussion of menstruation in the school context. It introduces four points of intersection: menstruation-related peer harassment; the failure of school policies (particularly those surrounding bathroom access) to accommodate the half of the student population that menstruates every month; the inaccessibility of menstrual products in schools; and the insufficient state of menstrual education. Each of these issues, as we show, impedes equal access to education. Accordingly, Title IX—which prohibits discrimination on the basis of sex in federally-funded schools and programs, and which has the ultimate goal of ensuring equal access to education—should address them. Currently, Title IX provides a starting point for dealing with these sorts of educational barriers, but to fully implement equal opportunity, Title IX regulations and guidance should go even further. Menstruation is a product of female biology and hence is sex-specific, even if not gender- or gender-identity specific.<sup>20</sup> As a result, barri-

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<sup>18</sup> See *infra* Part II. A. 1. (discussing a menstruation-related podcast created by eighth-grade students at a middle school in the Bronx, New York).

<sup>19</sup> See Jhumka Gupta et al., *How Do Adolescent Girls and Boys Perceive Symptoms Suggestive of Endometriosis Among Their Peers? Findings From Focus Group Discussions In New York City*, BMJOPEN (June 4, 2018), <https://bmjopen.bmj.com/content/bmjopen/8/6/e020657.full.pdf> [<https://perma.cc/XUS3-5F5X>] (citing study of teenage menstrual disorders and referring to “[a]cademic and social disturbances” experienced by students).

<sup>20</sup> “Female biology” refers to the reproductive health system, which is involved in menstruation. See *infra* note 22. By using this terminology, we do not mean to exclude

ers due to menstruation are barriers due to sex.<sup>21</sup> Thus, just as Title IX regulations (and related guidance) were promulgated to address pregnancy, so too should regulations and guidance be adopted to address menstruation.

Part III explores how arguments about Title IX's application to menstruation-based disturbances in a student's education connect with multiple feminist legal theories, showing how the arguments borrow from, depart from, and intertwine them. Formal equality has a certain cognitive appeal, but it is an incomplete foundation for addressing all of the issues identified above. In particular, although formal equality arguments are relevant to situations involving menstruation-based harassment, they are less applicable to claims about accommodations and access to products. Similarly, anti-essentialist arguments are in tension with Title IX's embedded sex binarism. Anti-stereotyping, anti-subordination, and intersectional arguments, by contrast, are more helpful. They challenge the notion of menstruation as a "private" matter (a characterization that stems from menstruation's association with female bodies), invite consideration of the ways that privacy and stigma around menstruation operate as instruments of control over women and girls, and illuminate the ways in which sex overlaps with poverty and power in the context of schools' policies toward menstruation. This Part further locates activism around menstruation in the context of third-wave feminist legal theory and suggests that menstrual advocacy can be understood as a unique engagement with law and social media in the service of legal and cultural change. Moreover, menstruation-related work has broader implications, demonstrating that laws in a just society must address the biological needs and experiences of half the population.

The Article concludes by emphasizing Title IX's potential role as a tool for addressing educational barriers caused by schools' policies toward menstruation. Until all students can attend school with the confidence that their biology is no obstacle to achievement, there will be continued need for advocacy around menstruation and education. And by taking into account the biological fact of menstruation, lawmakers can help effectuate a society where all people can participate fully in public life.

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those who do not identify as "female" and yet menstruate. *See infra* notes 228–231 and accompanying text (discussing differences between and among "sex," "gender" and "gender-identity").

<sup>21</sup> While this paper focuses on discrimination on the basis of "sex" as including discrimination on the basis of biological sex, it does not embrace biological sex as the only meaning of "sex" under Title IX. This paper's argument is also consistent with an understanding of "sex" that includes sexual orientation, gender identity, or socio-cultural definitions of sex.

## I. MENSTRUATION: AN OVERVIEW

Menstruation is a fact of life for most girls, women, and other individuals who menstruate.<sup>22</sup> The menstrual cycle results from a biological process that is not optional, unless repressed by medications.<sup>23</sup> Unfortunately, a variety of obstacles can arise for students at the intersection of menstruation and education.<sup>24</sup> After providing a brief overview of both the biology of menstruation and the long-held stigma surrounding it, this Part identifies these obstacles and their potential to impede menstruating students' ability to attend school and fully access educational opportunities.

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<sup>22</sup> Many ciswomen and girls menstruate. This is because their anatomy contains the reproductive system of ovaries, fallopian tubes, uterus, and vaginas that interact with the hormones of estrogen and progesterone that regulate ovulation and the menstrual cycle. If the released mature egg is not fertilized, the uterine lining of blood and tissue that was built up in expectation of nourishing a fertilized egg is shed; this is menstruation, or a period. See *Menstruation*, PLANNED PARENTHOOD, [www.plannedparenthood.org/learn/health-and-wellness/menstruation](http://www.plannedparenthood.org/learn/health-and-wellness/menstruation) [<https://perma.cc/5LB8-4Y4G>] [hereinafter *Menstruation*]. Some cis women and girls do not menstruate. Pre-menopause, this condition is called amenorrhea, which can occur for a host of reasons, such as pregnancy, breastfeeding, or hormonal problems. See *Menstrual Cycle: Period Problems*, U.S. DEPT OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/period-problems> [<https://perma.cc/LBN2-DEJ3>] (explaining that amenorrhea is “[t]he absence of menstrual periods before menopause” for three months in a row or no first period by age fifteen and can be caused by pregnancy, breastfeeding, hormonal problems, eating disorders, weight loss or gain, stress, or other health problems). Mary Cain provides one athlete's narrative regarding amenorrhea. Mary Cain, *I Was the Fastest Girl in America, Until I Joined Nike*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html> [<https://perma.cc/EPN4-8ZZV>] (elite runner's description of three years of exercise-related amenorrhea, including injury, risk of osteoporosis and infertility, and suicidal thoughts as a result of the severe dieting and exercise regimens required by her elite training team).

Individuals other than women and girls may menstruate. Transgender men and boys, gender nonbinary persons, and intersex persons may also menstruate if they too have the reproductive system to do so and are not on consistent hormonal treatment to suppress their menstrual cycle. See *Menstruation*, *supra*. For one transgender man's personal narrative of menstruation, see Kenny Jones, *Getting My Period Made Me Feel Like Less of a Man – Even Though I Knew I Was*, SELF (May 24, 2018), <https://www.self.com/story/male-period-trans-model-kenny-jones> [<https://perma.cc/Y5PR-LACM>] (stating “my period pain and cramps came knocking on my door monthly like a bill collector, and I could not ignore it.”).

Where possible, this Article endeavors to be gender-inclusive. To that end, this article uses the term “menstruating students” in multiple locations. Scientific research and media coverage of menstruation is largely focused on “women” and “girls,” however. To the extent that this Article relies on that work, references to those gender-specific or gender binary discussions do not intend to imply that harassment, lack of accommodations, lack of menstrual products, or menstrual education are the exclusive domain of “women” and “girls,” as opposed to all who menstruate.

<sup>23</sup> For a more extensive discussion of the menstrual cycle, see Johnson, *supra* note 9, at 9–16. See also *Your Menstrual Cycle and Your Health*, U.S. DEPT OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle-and-your-health> [<https://perma.cc/XH6Z-NXAJ>].

<sup>24</sup> This article focuses mostly on secondary schools, but depending on a school's grade divisions and age cut-offs, the issues discussed herein can arise in primary (elementary) schools as well.



### A. *The Biology of Menstruation*

Typically, menstruation begins at age twelve, but it can begin as early as age eight and as late as age fifteen.<sup>25</sup> Menstruation ordinarily continues until menopause.<sup>26</sup> Young people do not typically know exactly when they will first get their “period” (the common term for the bleeding that occurs as a result of menstruation, usually lasting four to seven days). Menstrual cycles are not always predictable or regular, and lengths of adolescent menstrual cycles are especially variable and irregular, often lasting anywhere between twenty and forty-five days.<sup>27</sup>

During a menstrual cycle, the amount of discharge is usually two to five tablespoons of blood per cycle; the discharge can include large clots.<sup>28</sup> When menstruating, most individuals use products or items to absorb the flow, and these products include tampons, pads, liners, menstrual cups, period underwear, and cloth menstrual pads.<sup>29</sup> These products must be changed often, sometimes as frequently as every two hours, depending on the individual’s flow.<sup>30</sup> This is necessary to decrease the risk of disease<sup>31</sup> and to avoid leaking blood onto one’s body, clothes, and other items because the product is full and can no longer absorb the menses.<sup>32</sup> Because the timing of the onset of menstruation may vary each month, “menstruators are often caught off guard by . . . their period. One study showed that sixty-one percent of menstruators reported having at least one unexpected period.”<sup>33</sup>

In addition, pain from menstrual cramps often accompanies menstruation.<sup>34</sup> Cramps are “usually caused by contractions of the uterus (womb) . . . to help the uterine lining leave the body” during one’s period.<sup>35</sup> Adolescents

<sup>25</sup> *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/H2J3-JGM4>] [hereinafter *Menstrual Cycle*].

<sup>26</sup> *Id.*

<sup>27</sup> Paula J. Adams Hillard, *Menstruation in Adolescents: What’s Normal?*, 10 MED-SCAPE J. MED. 295 (2008).

<sup>28</sup> Abigail Durkin, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 133 (2017); *Menstrual Cycle*, *supra* note 25.

<sup>29</sup> *Menstrual Cycle*, *supra* note 25.

<sup>30</sup> *Id.*

<sup>31</sup> Toxic shock syndrome (TSS) is a possibly fatal condition “caused by bacteria that make toxins or poisons.” *Menstrual Cycle*, *supra* note 25. One can “be at risk for TSS if [they] use more absorbent tampons than [they] need for [thei]r bleeding or if [they] do not change [thei]r tampon often enough (at least every four to eight hours).” *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Johnson, *supra* note 9, at 10 (2019) (citing ELISSA STEIN & SUSAN KIM, *FLOW: THE CULTURAL STORY OF MENSTRUATION* 189 (2009)). Others believe the percentage of menstruating individuals experiencing unexpected cycles is much higher. *Id.* at 10, n.51 (citing Elissa Stein and Susan Kim’s discussion of the contrasting data on this issue).

<sup>34</sup> *Period Problems*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/period-problems> [<https://perma.cc/X39B-K5ZF>].

<sup>35</sup> *Id.*

often experience period pain, called dysmenorrhea, after their first period and the pain may (or may not) lessen gradually with age.<sup>36</sup> For some, extreme menstrual pain is life-long.<sup>37</sup> In particular, endometriosis (an illness characterized by the extra-uterine growth of tissue that the body nevertheless attempts to shed monthly) may cause chronic lower back and pelvic pain and extremely painful menstrual cramps.<sup>38</sup> With no pathway for exiting the body, this shedding causes inflammation and irregular bleeding.<sup>39</sup>

### B. Menstrual Stigma

Historically speaking and across many cultures, menstruation has been (and remains) a taboo topic.<sup>40</sup> Even in the United States, unconscious bias affects interactions with and opinions of those who are menstruating. One recent study called the “Tampon Experiment” demonstrated that the average individual sees menstruating women as “less competent, [and] less likeable” than women who are not menstruating.<sup>41</sup> The study also found that people avoid sitting close to women believed to be menstruating and are more likely to objectify them.<sup>42</sup>

In a culture of discomfort with menstruation, it is not surprising that some people internalize this bias and stigma. A study of 1,000 teenagers who menstruate reveals that eighty percent of respondents “feel there is a negative association with periods, that they are gross or unsanitary” and sixty-nine percent “feel embarrassed when they have to bring period prod-

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Glossary*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/glossary/> [<https://perma.cc/X72P-83U8>]; *Endometriosis*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/a-z-topics/endometriosis> [<https://perma.cc/67D5-K7VV>].

<sup>39</sup> *Glossary*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/glossary/> [<https://perma.cc/X72P-83U8>].

<sup>40</sup> For a discussion of negative cultural attitudes toward menstruation, see Johnson, *supra* note 9 at 15–23 (2019) and Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 Wis. L. REV. 491, 506–12 (exploring cultural roots of misunderstandings of and taboos around menstruation).

<sup>41</sup> See Tomi-Ann Roberts et al., “*Feminine Protection*”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCHOL. WOMEN Q. 131, 136 (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). In the “Tampon Experiment,” researchers studied participants’ evaluations of a woman who seemingly accidentally pulled out from her purse a tampon or a hair clip. Roberts et al., *supra*, at 134–5.

<sup>42</sup> See Roberts et al., *supra* note 41, at 131, 136. Chris Bobel, a scholar in the area of menstrual health and stigma, reports that “Stigma compromises healthy engagement with one’s body. It undermines self-care, critical thinking, and informed decision-making. It also hurts self-esteem and social status.” See Malaka Gharib, *New Book Busts Myths about Menstruation Spread by Public Health Groups*, NPR (Jan. 30, 2019 3:27 PM), <https://www.npr.org/sections/goatsandsoda/2019/01/30/689943045/new-book-busts-myths-about-menstruation-spread-by-public-health-groups> [<https://perma.cc/7SSZ-PKL3>].

ucts to the bathroom.”<sup>43</sup> Fifty-seven percent of respondents report that they “have felt personally affected by the negative association surrounding periods.”<sup>44</sup>

### C. *Menstruation at School*

In the school context, menstruation can pose particular challenges for students. Anyone who has ever been a student at a primary or secondary school knows what a controlling environment a school can be. Students are often told what they can and cannot wear, when they are allowed to go to the bathroom, which bathrooms they can use, and what items they can bring to school and/or borrow from one another.<sup>45</sup> They are subject to observation by their teachers and scrutiny from their peers. Students also receive various messages about menstruation from school officials, from formal health education to informal comments to signage in the bathroom about accessing and disposing of menstrual products.<sup>46</sup> And students engage in constant intercommunication—some supportive, some hostile—with each other.<sup>47</sup> These factors can combine to make school an especially fraught environment for menstruating students.

Part II, to which this Article now turns, groups the challenges faced by menstruating students into four categories: (1) menstruation-based harassment; (2) insufficient menstrual accommodations; (3) insufficient access to menstrual products; and (4) insufficient menstrual education. For each category, the Article outlines the scope of the problem and explores the extent to which Title IX currently serves—and ultimately *should* serve—as a vehicle for addressing it.

## II. MENSTRUATION’S NEXUS WITH EDUCATIONAL OPPORTUNITIES AND TITLE IX

Title IX of the Educational Amendments of 1972 is a federal law that provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” subject to certain exceptions.<sup>48</sup> The statute’s underlying

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<sup>43</sup> Thinx and PERIOD, *State of the Period: The Widespread Impact of Period Poverty on U.S. Students*, 1, 2, [https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper\\_Thinx\\_PERIOD.pdf?455788](https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper_Thinx_PERIOD.pdf?455788) [<https://perma.cc/N3CM-UJ3T>] [hereinafter *State of the Period*]; Laura Blackburn, *The Hidden Effects of Period Poverty in the US*, Thinx Piece, THINX, <https://www.shethinx.com/blogs/thinx-piece/hidden-effects-period-poverty-us> [<https://perma.cc/FV3J-DXJJ>].

<sup>44</sup> *Id.*

<sup>45</sup> See *infra* Part II. B. 1.

<sup>46</sup> See *infra* Part II. A. 1.

<sup>47</sup> See *infra* notes 53–54 and accompanying text.

<sup>48</sup> 20 U.S.C. §§ 1681–1688 (1994).

goal, as the United States Department of Justice puts it, is to ensure “equal access to education”—to “ensure that no educational opportunity is denied to women on the basis of sex and that women are granted ‘equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.’”<sup>49</sup>

Because menstruation is a biological process linked to female sex, educational deprivations connected with schools’ treatment of menstruation should be understood as a violation of Title IX’s core proposition.<sup>50</sup> Below, we categorize those deprivations and explain how Title IX should be expanded through interpretation, regulation, and guidance to provide more comprehensive and robust protections for menstruating students.

### A. *Menstruation-Based Harassment in Schools*

#### 1. *Impediments Resulting from Harassment*

As one scholar puts it, school is “an environment where girls are constantly watched for signs that they are menstruating and have failed to keep their female bodies secret and under control.”<sup>51</sup> Teachers and schools can intentionally or unintentionally play a role in perpetuating menstrual stigmas, and those stigmas help lay the groundwork for harassment. For example, at one school in Virginia, students are instructed to refer to pads as “penguins” and tampons as “turtles.”<sup>52</sup> Similarly, thirteen-year-old student Caroline Abreu reports that at Bronx Prep Middle School, “[i]f we want a pad and we don’t have it, we have to go to the main office and we have to ask for a marshmallow.” That student aptly observed: “It shouldn’t be like, oh - (whispering) I need a marshmallow or I need a pad. It should just be like, I need a pad. I’m on my period.”<sup>53</sup> In the same school, the messages literally on the bathroom walls reinforce menstrual stigmas:

<sup>49</sup> See United States Department of Justice, *Equal Access to Education: Forty Years of Title IX* (June 23, 2012), 1, <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<https://perma.cc/5A6L-B9VN>] (quoting *US v. Virginia*, 518 U.S. 515, 532 (1996)).

<sup>50</sup> 20 U.S.C. § 1681(a).

<sup>51</sup> See Katherine R. Allen et al., *More Than Just a Punctuation Mark: How Boys and Young Men Learn About Menstruation*, 32 J. FAM. ISSUES 129, 152 (2011) (citation omitted). See also Crawford & Spivack, *supra* note 40, at 510–511 (discussing difference between soldiers’ valorized “voluntary bleeding” and menstruating women’s disparaged “involuntary bleeding”).

<sup>52</sup> 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* (2018), 7 [https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018\\_periods\\_policy\\_report.pdf](https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf) [<https://perma.cc/CBR8-8W3Y>].

<sup>53</sup> Elissa Nadworny & Clare Lombardo, *Periods! Why These 8th-Graders Aren’t Afraid To Talk About Them*, NPR MORNING EDITION (May 15, 2019, 5:02 AM), <https://www.npr.org/transcripts/721729850> [<https://perma.cc/QGP2-ZFLR>] (transcript of conversation with the eighth-grade students and creators of the podcast “Shhh! Periods”).

In the second-floor girls' restroom at Bronx Prep Middle School in New York, there's a sign taped to the back of the toilet stall doors. It's a guide on how to "properly dispose feminine products." On the list? "Make sure that no one views or handles product."<sup>54</sup>

As Kathaleen Restitullo, age thirteen, pointed out about this signage, even in the girls' restroom, the sign does not use the words "pad" or "tampon." She reflected, "It's not even saying the word pad. It just says product . . . Just, like, don't let anyone see that you are on your period."<sup>55</sup>

By telling students to use code words for menstrual products—or not to mention them at all—school officials are contributing to a culture that treats menstruation as something shameful and something to be hidden.<sup>56</sup> These sorts of messages stigmatize menstruating students and normalize discomfort with menstruation. The stigma influences students' behaviors and perceptions.<sup>57</sup> And menstruating students who do not conform to expectations of secrecy and control can become the targets of harassment. A recent United Kingdom study, for instance, found "[o]ne in five girls and young women in the UK are teased or bullied about their periods, with many suffering in silence."<sup>58</sup> Only half of those who were targeted spoke to anyone about the harassment.<sup>59</sup> And "[a]bout 67% said abuse mainly happened at school, and 66% said they had missed classes because of their period."<sup>60</sup>

In particular, male students are a notable source of menstruation-based harassment.<sup>61</sup> One ongoing research study features girls' self-reports of boys labeling girls as "moody" and concluding that they must be "on [their]

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; EVANS ET AL., *supra* note 52, at 7.

<sup>57</sup> Nadworny & Lombardo, *supra* note 53. Discussing menstruation, another student at Bronx Prep Middle School in New York, Raizel Febles, age fourteen, states, "[y]ou kind of are ashamed for having it, which sucks because it's something so natural and so normal." *Id.* The Bronx Prep Middle School students describe how their shame affects how they behave, such as "trying to hide a tampon in their tight jean pockets." *Id.* They investigated how their peers felt about their periods. The students found that "[s]ixty-seven percent of female students polled at Bronx Prep Middle School said that they feel uncomfortable discussing their periods at school because it's not anybody's business." *Id.* In the same poll, "[t]hirty-three percent of students said periods were a dirty topic." *Id.* They found that it is no wonder that "[y]oung girls carry this stigma into adulthood." *Id.*

<sup>58</sup> *One in Five Girls and Young Women Bullied about Periods—Study*, THE GUARDIAN (May 28, 2019, 2:59 EDT), <https://www.theguardian.com/society/2019/may/28/one-in-five-girls-and-young-women-bullied-about-their-periods-study> [<https://perma.cc/2LXE-828K>].

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* In addition, a 2018 study found a link between early menarche and bullying at school. Qiru Su et al., *Association Between Early Menarche and School Bullying*, 63 J. ADOLESCENT HEALTH 213, 213 (2018); Lisa Rapaport, *Early Puberty in Girls Tied to Bullying in Schools*, PHYSICIAN'S WEEKLY (May 17, 2018), <https://www.physiciansweekly.com/early-puberty-in-girls/> [<https://perma.cc/BA8C-XWBE>] (reporting on the school bullying study).

<sup>61</sup> Nadworny & Lombardo, *supra* note 53.

period.”<sup>62</sup> In a 2011 study of college-aged men, the men reflected on their earlier school experiences and recalled “severe incidents of girls being teased, although no boy actually admitted to teasing a girl in this manner.”<sup>63</sup> The men also recalled incidents in which it was clear that “for boys . . . being associated with menstruation or even being in the same room when it is being discussed is something shameful or dirty, and some boys hold onto these attitudes into adulthood.”<sup>64</sup>

## 2. *Title IX and Menstruation-Based Harassment*

Under Title IX, menstruation-based harassment can be addressed in a relatively straightforward manner. For egregious menstruation-based harassment, Title IX clearly provides the basis for a legal claim for harassment on the basis of sex, whether the source of the harassment is fellow students, teachers or school administrators. It is true that neither Title IX’s text nor its regulations explicitly address sexual harassment. But both the Supreme Court and the Department of Education’s Office for Civil Rights (OCR)—which has primary responsibility for administrative enforcement of Title IX—have long recognized that sexual harassment, including peer-based sexual harassment, is a form of discrimination that can violate Title IX.

In the 1999 case of *Davis v. Monroe County School Board of Education*,<sup>65</sup> the Supreme Court first held that peer sexual harassment, “if sufficiently severe, can . . . rise to the level of discrimination actionable under [Title IX],” giving rise to damages liability.<sup>66</sup> Even prior to 1999, OCR had already concluded that Title IX prohibited peer sexual harassment, issuing detailed guidance in 1997 about schools’ responsibility to address such harassment.<sup>67</sup> These conclusions drew on the Supreme Court’s earlier recognition that workplace sexual harassment violates Title VII’s prohibition on sex discrimination.<sup>68</sup>

Moreover—and notably for menstruation-based harassment—that same 1997 OCR guidance explained that “if a young woman is taunted by one or

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<sup>62</sup> Girls recount being upset that boys, who do not have much knowledge of menstruation, could make such a stereotyped comment about them. Informal communications with menstrual health researcher Margaret (Maggie) Schmitt, MPH, Associate Director, Gender, Adolescent Transitions & Environment (GATE) Program, Department of Sociomedical Sciences, Columbia University Mailman School of Public Health (Dec. 5, 2019) (notes on file with co-author Margaret E. Johnson) [hereinafter Schmitt]. Ms. Schmitt is conducting qualitative public health research regarding adolescent girls and menstruation. *Id.*

<sup>63</sup> Allen et al., *supra* note 51, at 152.

<sup>64</sup> *Id.*

<sup>65</sup> *Davis v. Monroe Cty. Sch. Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>66</sup> *Id.* at 630.

<sup>67</sup> See OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT GUIDANCE 1997, 15 n. 3 <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/CR2J-V4JD>].

<sup>68</sup> *Id.*

more young men about her breasts or *genital area* or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, takes place throughout the school, or if the taunts are made by a number of students.<sup>69</sup> Menstruation-based harassment certainly relates to students' genital areas, so it is straightforward to argue that it counts as a form of sexual harassment.

That said, not all sexual harassment rises to the level of being actionable under Title IX. In *Davis*, the Supreme Court held that to recover damages against a school in a Title IX claim, a victim of sexual harassment must show that (1) the sexual harassment was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," (2) the school exercised "substantial control over both the harasser and the context in which the known harassment occur[red]," (3) the school had "actual notice" of the harassment, and (4) the school's response reflected "deliberate indifference," i.e., that the school's response was "clearly unreasonable."<sup>70</sup> Thus, in a situation where a student is severely and pervasively harassed for menstruating—especially where the student misses school as a result—and a school official is informed about the situation and chooses to do nothing, there would be a good case for holding the school liable for damages under *Davis*.

By contrast, OCR has set the threshold somewhat lower in its administrative enforcement of Title IX (which it accomplishes through reviews, investigations, informal dispute resolution, and, if necessary, suspension or termination of federal funding<sup>71</sup>). In a 2001 guidance letter, OCR made clear that it was retaining the approach that it had outlined in 1997, rather than adopting the *Davis* Court's stringent standard for damages liability in Title IX suits.<sup>72</sup> In particular, when defining harassment, OCR never adopted the "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" test that the *Davis* Court had articulated. Instead, OCR retained its own language: conduct that is "sufficiently serious that it denies or *limits* a student's ability to participate in or benefit from the school's program based on sex."<sup>73</sup> Similarly, OCR made clear that notwithstanding *Davis*, it would continue to hold schools

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Davis*, 526 U.S. at 629–647.

<sup>71</sup> See JARED P. COLE & CHRISTINE J. BECK, CONG. RESEARCH SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 19–21 (2019).

<sup>72</sup> See U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) ("The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages. . . ."). *Id.* at i.

<sup>73</sup> *Id.* at 5 (emphasis added).

responsible for peer harassment even in the absence of actual notice. The OCR guidance explained:

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or *reasonably should know* about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.<sup>74</sup>

Likewise, rather than requiring only that a school's response to sexual harassment not be deliberately indifferent, OCR required the school's response to be reasonable.<sup>75</sup> Thus, unlike the *Davis* standard for damages liability, OCR's administrative enforcement standard sweeps in cases where schools have been negligent but not deliberately indifferent, and where harassment has limited a student's ability to benefit from school even if it has not outright barred the student from benefitting.

The Department of Education has never issued actual regulations to codify the approach to harassment contained in the OCR guidance documents, and such guidance documents do not themselves carry the force of law.<sup>76</sup> But because OCR guidance is used for the administrative enforcement of Title IX, it remains important.

Thus, under the OCR guidance for administrative enforcement, and even the *Davis* standard for damages liability, there is a clear, albeit narrow, path to Title IX protection against menstruation-based harassment. In this sense, Title IX already protects against significant menstruation-based harassment, even providing for damages in extreme cases. But under the stringent *Davis* standard and even the broader administrative standard, Title IX does not provide a remedy for lower-grade forms of menstruation-based harassment (or other sexual harassment). This is problematic because even subtle harassment can make menstruating students feel anxious and unwelcome in school, regardless of whether it tangibly and provably limits their opportunities there.

Worse, there is now a real possibility that OCR will be abandoning its broader standard for what constitutes actionable harassment under Title IX. On November 16, 2018, the Department of Education issued a notice of

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<sup>74</sup> *Id.* at 12 (emphasis added). OCR added that, “[A]lthough a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation.” *Id.* at iv.

<sup>75</sup> *Id.* at vi (explaining that “[e]ffectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps”).

<sup>76</sup> *See, e.g.,* C.C. v. Paradise High Sch., No. 2:16-cv-02210-KJM-DMC, 2019 WL 6130439, at \*6 (E.D. Cal. Nov. 19, 2019).



proposed rulemaking on various aspects of Title IX, including sexual harassment. The Department's proposed new regulations, which would supersede any previous conflicting OCR guidance, would ratchet up the administrative standard to the damages liability standard articulated in *Davis* so that the new standards are aligned.<sup>77</sup> The proposed regulations adopt the "actual notice" and "deliberate indifference" requirements for liability, as well as the *Davis* definition of actionable peer sexual harassment ("[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity").<sup>78</sup> These proposed regulations received over 100,000 comments and generated much critical commentary.<sup>79</sup>

Although OCR's existing 2001 guidance on harassment currently remains in effect with respect to administrative enforcement of Title IX, it is unclear what form the final rulemaking from the Department of Education will take and how it will ultimately fare in court.<sup>80</sup> If the Department of Education's final regulations proceed with ratcheting the OCR standard up to

<sup>77</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106). A summary version is available at <https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-title-ix-regulation.pdf> [<https://perma.cc/933E-VBEK>]. For a summary of the specific changes related to the aspects of sexual harassment described in this Article, see *id.* at 3–4.

<sup>78</sup> *Background & Summary of the Education Department's Proposed Title IX Regulation*, 3 (last visited Feb. 29, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf> [<https://perma.cc/5BVL-SZCW>]. The Department explained that this definition of harassment "is imported directly from the Supreme Court's *Davis* decision and promotes protection of free speech and academic freedom in a way that the more expansive and subjective definition of harassment used in Department guidance has not." *Id.* It similarly explained that its "actual. . . notice" and "deliberate indifference" requirements are drawn directly from Supreme Court precedent. *Id.* at 3–4.

<sup>79</sup> See, e.g., Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Undermine Protections for Students Against Sexual Harassment and Assault*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTICIA, <https://verdict.justia.com/2018/11/27/a-sharp-backward-turn-department-of-education-proposes-to-undermine-protections-for-students-against-sexual-harassment-and-assault> [<https://perma.cc/TFG4-LD4D>] (describing the change as "a complete game-changer for the administrative enforcement of Title IX," and "effectively remov[ing] OCR from any meaningful administrative enforcement role in guarding the rights of students who experience sexual harassment"); Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, THE NEW YORKER (Feb. 1, 2019) <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/4AW5-XBAJ>] (noting that "more than a hundred thousand [comments were submitted to the agency] by the close of the comment period," and speculating that "[p]erhaps the comments will result in some amendments to the final regulations. . . . This process could take years—and it's all but guaranteed that the moment the final rules are issued, the agency will be sued over them").

<sup>80</sup> See *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, Congressional Research Service (CRS) Report for Congress (April 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf> [<https://perma.cc/82C9-GJ6A>] (stating that although OCR has withdrawn certain previous guidance documents, "it would continue to rely on the 2001 Guidance" during the process of new rulemaking).

the *Davis* level, then Title IX will provide less protection against menstruation-based harassment than its previous longstanding formulation had offered. Students who become victims of menstruation-based harassment will not have a valid Title IX claim unless they can show that the harassment is severe enough to effectively bar them from educational opportunities. This prospect—whereby OCR would be precluded from taking administrative action in all but the most extreme cases—is worrisome. But even if the OCR standard remains unchanged, it will still not provide comprehensive protection on this issue.

Ideally, Title IX would not only cover menstruation-based harassment that demonstrably limits students' ability to benefit from school, but also call upon schools to respond to all menstruation-based harassment. Indeed, schools should strive to be proactive in addressing *all* levels and variations of sexual harassment, menstruation-based and otherwise. Doing so furthers the fundamental goal of Title IX: that no student is deprived of equal access to education because of sex.

### *B. Insufficient Menstrual Accommodations*

#### *1. Impediments Resulting from Restrictive Policies*

Because of design and policy choices, schools can be places that are unintentionally inhospitable to students who menstruate. In particular, schools' bathroom break policies, toilet facilities, and dress codes can impose challenges for menstruating students.

##### *a. Bathroom Access*

Schools understandably want to limit students' visits to the bathroom in order to minimize misconduct and dilatory trips from the classroom. Nevertheless, strict limitations on bathroom access may have the unintended consequence of keeping some students from coming to school at all because they fear that they may not be able to access the bathroom while menstruating. Such strict limitations are particularly anxiety-producing for middle- and high-school students because pre-adolescents and adolescents have more unpredictable periods than adults, which means that they may need to quickly and unexpectedly access the bathroom. Indeed, even students who already know that they have their periods, and have brought menstrual products to school, may bleed onto their clothes if they cannot access the bathroom in time.<sup>81</sup>

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<sup>81</sup> See Hillard, *supra* note 27 (noting that menstrual cycles “tend to vary among adolescents,” that an adolescent who complains of “irregular periods” may mean “her cycles are not always exactly 28 days[,] that the period does not always come on the same day of the week or date of the month[, or] that the number of bleeding days varies from

An anecdote from student Josephine Kwan illustrates this point: Kwan recounts that in tenth grade during a volleyball game, her coach refused to let her run to the bathroom to attend to a sudden menstrual flow.<sup>82</sup> Knowing her underwear was blood-soaked and feeling confused, anxious, and fearful, Kwan found the entire experience traumatic.<sup>83</sup> She never played volleyball again.<sup>84</sup> Caroline Abreu, a Bronx Prep Middle School student, similarly recounts that she repeatedly finds herself “bleeding out” at school, explaining, “[i]t’s not usually my fault; it’s because I can’t go to the bathroom during class.”<sup>85</sup>

In May 2018, National Public Radio reported that a network of Chicago charter schools had such a strict bathroom break policy that menstruating girls were bleeding through their clothes.<sup>86</sup> Former teachers found the bathroom access policy “dehumanizing.”<sup>87</sup> A similar story came out in July 2018 about KIPP DC Northeast Academy, a charter school in Washington, D. C.<sup>88</sup> Such policies may cause menstruating students to worry about leaking or bleeding onto their clothes, and can even pose a health risk by leading students to change their tampons or pads later than recommended.<sup>89</sup> In addition

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month to month”; and that “adolescents who have recently achieved menarche may have accidents while they are learning how to manage their periods and how frequently they need to change their sanitary protection”).

<sup>82</sup> Kristi Pahr, *Period Shaming: A Not-So New Type of Bullying Parents Need to Know About*, PARENTS (Nov. 4, 2019), <https://www.parents.com/kids/problems/bullying/period-shaming-is-a-kind-of-bullying-parents-need-to-be-aware-of/> [<https://perma.cc/JC9D-Q92G>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Nadworny & Lombardo, *supra* note 53.

<sup>86</sup> Dusty Rhodes, *Feedback: Noble Charter Schools Story Hit a Nerve*, NPR ILLINOIS (April 30, 2018), <https://www.nprillinois.org/post/feedback-noble-charter-schools-story-hit-nerve#stream/0> [<https://perma.cc/TQQ4-2NYR>] (recounting text messages from teachers that described school policy of not letting students go the bathroom without a rarely available escort, forcing students to choose between walking out of class and staining themselves, and quoting teachers as saying that the school had responded by allowing “girls to tie a Noble sweater around their waist, to hide the blood stains”).

<sup>87</sup> See Maiysha Kai, *Dressed for Success? This Charter School’s Policies Are Humiliating Its Female Students*, ROOT (May 1, 2018, 4:05 PM), <https://theglowup.theroot.com/dressed-for-success-one-charter-schools-policies-are-h-1825694277> [<https://perma.cc/YHU3-FZX>] (explaining “Noble Charter Schools network of Chicago was recently accused of instituting what several former teachers call ‘dehumanizing’ policies to monitor their high school students. . . most strikingly, there is a bathroom policy that requires that students be escorted to the bathroom rather than go on their own”).

<sup>88</sup> Nathan Baca, *What Some Kids Who Get One Bathroom Pass a Week Say They Face Daily at a DC Charter School*, wjla.com (July 19, 2018), <https://wjla.com/features/7-on-your-side/kipp-dc-northeast-academy-bathroom-lunch-policy-investigation> [<https://perma.cc/KM7R-ZZCE>] (quoting one parent as reporting that “Young ladies have started their menstrual cycle and there have been several girls [who] have had accidents in their pants”). It is important to note here that charter schools are subject to Title IX. See 20 U.S.C. § 1681(a) (1994) (Title IX applies to educational activities or programs receiving federal funds).

<sup>89</sup> Doha Madani, *Girls Reportedly Bleeding Through Pants Due to Charter School Bathroom Policy*, HUFFPOST (Apr. 30, 2018, 9:44 PM), [https://www.huffpost.com/entry/charter-school-bathroom-policy-periods\\_us\\_5ae7a19be4b04aa23f26463c](https://www.huffpost.com/entry/charter-school-bathroom-policy-periods_us_5ae7a19be4b04aa23f26463c) [<https://perma.cc/F8LP-5928>]. For instance, to avoid toxic shock syndrome, menstruating indi-

to the problems caused by schools' rigid policies about bathroom access, similar challenges can result from teachers' informal rules about bathroom breaks during class.<sup>90</sup> For instance, one news account described a teacher's policy of limiting her students' access to the restroom during class to one visit every two months.<sup>91</sup> A menstruating student who has already used that one visit might choose to skip school rather than risk bleeding through clothes while in class.

*b. Inadequate Toilet Facilities*

Even if a well-supplied student is able to leave class to go to the bathroom in time, once the student arrives there, immediate access to a toilet is not guaranteed. There may be fewer bathroom stalls than the number of students needing them.<sup>92</sup> For a transgender boy or a gender nonbinary student, using the boys' restroom may provide less access to privacy for addressing menstrual needs (given that there are fewer stalls and more urinals).<sup>93</sup> Public health researchers working in low- and middle-income countries have identified "toilet insecurity" as an obstacle for girls' and women's health.<sup>94</sup> To assist policymakers, these researchers have created a list of the characteristics of what they call "female friendly" sanitation facilities, repurposed for this discussion as "menstruation-friendly" facilities. The key features include:

[a] safe and conveniently located toilet, [individual or] separated by gender (if communal or public), which provides privacy (doors, locks), a culturally appropriate menstrual waste disposal option

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viduals are advised to change their tampons at least every eight hours. Menstrual Cycle, *supra* note 25 (discussing "How often should I change my pad, tampon, menstrual cup, sponge, or period panties?"). Pads should be changed before they become "soaked through or full," which most commonly means "every few hours." *Id.*

<sup>90</sup> See, e.g., Alia Wong, *When Schools Tell Kids They Can't Use the Bathroom*, THE ATLANTIC (Feb. 26, 2019), <https://www.theatlantic.com/education/archive/2019/02/the-tyranny-of-school-bathrooms/583660/> [<https://perma.cc/8KKS-ZMVV>] ("Absent official policies, parents and doctors tell me, many teachers come up with their own regulations, which anecdotes suggest can border on the absurd").

<sup>91</sup> *Id.*

<sup>92</sup> See Schmitt, *supra* note 62.

<sup>93</sup> See Joe Pinsker, *The Long Lines for Women's Bathrooms Could Be Eliminated. Why Haven't They Been?*, THE ATLANTIC (Jan. 23, 1989), <https://www.theatlantic.com/family/archive/2019/01/women-men-bathroom-lines-wait/580993/> [<https://perma.cc/W4EW-W753>] (explaining that since the late 1980s, states have required new buildings to have a greater number of toilets for women's versus men's restrooms due to the increased time it takes women to "enter a stall to pee" and "because they menstruate"). In addition, if menstrual products are placed only in girls' restrooms, transgender boys and gender nonbinary students who may have to use the boys' restrooms are disadvantaged. See *infra* Part II. C. 1.

<sup>94</sup> Margaret L. Schmitt et al., *Making the Case for a Female-Friendly Toilet*, MDPI: WATER 1–2 (Sept. 5, 2018), <https://doi.org/10.3390/w10091193> [<https://perma.cc/DWM2-HQBT>]. While the authors use the term "female" in their work, we use the term "menstruation-friendly" in order to be inclusive of transgender male, gender nonbinary, and intersex persons who menstruate.

(trash bins, chutes, pits), water and soap is available for washing blood off one's hands (water tap or bucket), suitable drainage and accessibility both during the day and night (area and internal lighting).<sup>95</sup>

Although access to water and soap is not usually a problem in most U.S. schools, students have indeed reported embarrassment when disposing of their used menstrual products in the public space of the bathroom, rather than in a private bin inside the stall.<sup>96</sup> Menstruation-friendly bathrooms would address these concerns.

*c. Dress Codes*

Finally, schools' dress code and uniform policies can impose impediments to menstruating students. In the United States, approximately twenty-two percent of all public schools and approximately fifty-five percent of all private schools require their students to wear uniforms.<sup>97</sup> Some specifically require all students to wear khaki-colored trousers, disadvantaging students who risk leaking while menstruating.<sup>98</sup> Uniform policies and dress codes that permit all students to wear dark bottoms would help to alleviate this concern.

*2. Title IX and Menstrual Accommodations*

Compared to menstruation-based harassment, issues involving bathroom break policies, toilet facilities, and dress codes raise more complex legal questions under Title IX. As discussed above, menstruation-based harassment fits neatly into existing Title IX doctrine, since the Supreme Court has already recognized sexual harassment as a form of sex discrimination. By contrast, issues involving strict bathroom break policies or dress codes do not involve the same sort of blatantly disparate treatment that sexual harassment does. Rather, there are two additional models of discrimination that are more applicable to these issues: (1) disparate impact and (2) the failure to

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<sup>95</sup> *Id.* at 2.

<sup>96</sup> Schmitt, *supra* note 62.

<sup>97</sup> See Table 233.50, *Percentage of Public Schools With Various Safety and Security Measures: Selected Years, 1999-2000 through 2015-16*, Nat'l Ctr. for Educ. Stat. 2017, [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_233.50.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_233.50.asp) [<https://perma.cc/7UDT-SJ9T>] (reporting that twenty-one point five percent of all public schools required students to wear uniforms and that fifty-six point nine percent of all public schools enforced a strict dress code in 2015-2016 academic year); Table 233.50, *Percentage of Public and Private Schools With Various Safety and Security Measures, by School Level: 2003-04, 2007-08, and 2011-12*, Nat'l Ctr. for Educ. Stat. 2017, [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_233.50.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_233.50.asp) [<https://perma.cc/8U5M-2DED>] (reporting that 56.9 percent of all private schools at the elementary and secondary level required students to wear uniforms and 71.3 percent of all private schools enforced a strict dress code in the 2011-2012 academic year).

<sup>98</sup> See Coshandra Dillard, *Equity, Period.*, 61 TEACHING TOLERANCE (Spring 2019), <https://www.tolerance.org/magazine/spring-2019/equity-period> [<https://perma.cc/476A-6KMY>].

provide reasonable accommodations. However, although these frameworks are well-developed in the employment discrimination arena, they are much murkier in the Title IX context.

It is helpful to begin by reviewing these two antidiscrimination models. Unlike disparate treatment, the disparate impact model covers situations where there is a facially neutral policy that has a disparate impact as to a statutorily protected characteristic.<sup>99</sup> This framework has been incorporated into the statutory text of Title VII,<sup>100</sup> the Age Discrimination in Employment Act,<sup>101</sup> and the Americans with Disabilities Act;<sup>102</sup> it also appears in numerous federal regulations. The reasonable accommodations model, in turn, holds that in certain instances, the failure to provide reasonable accommodations for covered individuals counts as a form of discrimination. This framework is central to the Americans with Disabilities Act and is also incorporated into Title VII's approach to religious discrimination.<sup>103</sup>

Both frameworks provide useful lenses for thinking through what is so problematic about, for example, a strict bathroom break policy that does not take menstruating students' needs into account. Given that menstruation is a process resulting from female biology, and that ninety-eight percent of females are menstruating by age fifteen,<sup>104</sup> such policies clearly have a disproportionate effect on female students, in addition to the harms that they impose on all students. Moreover, refusals to exempt menstruating students from such policies amount to denials of reasonable accommodations. Indeed, the bathroom break situation exemplifies Professor Christine Jolls' argument about the overlapping nature of the disparate impact and reasonable accommodation frameworks.<sup>105</sup> Both frameworks would clearly counsel adjusting strict bathroom break policies so that menstruating students can visit the bathroom as required and still participate fully in school.

The wrinkle, however, is that neither of these frameworks is on entirely solid footing in the Title IX context. Title IX's statutory text says nothing about disparate impact or reasonable accommodations. Additionally, no Supreme Court case has interpreted Title IX's text to incorporate these

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<sup>99</sup> See, e.g., George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297 (1987).

<sup>100</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (2012).

<sup>101</sup> 29 U.S.C. § 623(f) (2012).

<sup>102</sup> 42 U.S.C. § 12112(b)(6) (2012).

<sup>103</sup> *Id.* § 12112(b)(5)(A) (2012). In the Title VII context, the failure to reasonably accommodate religion is viewed as a form of disparate treatment. *EEOC. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2032–33 (2015) (analyzing 42 U.S.C. § 2000e-2(a)(1) and § 2000e(j) (2012)).

<sup>104</sup> American College of Obstetricians and Gynecologists, *Menstruation in Girls and Adolescents: Using the Menstrual Cycle as a Vital Sign*, Adolescent Health Care Committee Opinion 651, (2003) <https://m.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Adolescent-Health-Care/Menstruation-in-Girls-and-Adolescents-Using-the-Menstrual-Cycle-as-a-Vital-Sign> [<https://perma.cc/MP97-XN V9>].

<sup>105</sup> Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 652–666 (2015).

frameworks—to the contrary, Supreme Court precedent suggests that there is no private right of action under Title IX for a disparate impact claim.<sup>106</sup> That said, the Department of Education has promulgated numerous Title IX regulations related to both disparate impact and accommodations. These regulations apply for administrative purposes, even if not for damages liability, and they are a useful starting point here.

Title IX's existing disparate impact regulations arise in contexts distinct from menstruation. Rather, they apply to admissions testing,<sup>107</sup> preferential admissions based on having attended single-sex schools,<sup>108</sup> preferential recruiting at single-sex schools,<sup>109</sup> sex-specific scholarships,<sup>110</sup> and various employment and contractual decisions.<sup>111</sup> In all of these arenas, the regula-

<sup>106</sup> In *Alexander v. Sandoval*, the Supreme Court held that disparate impact claims for damages were not available under Title VI. 532 U.S. 275, 280, 293 (2001). Given the Supreme Court's indications that Title IX and Title VI should be interpreted in the same manner, some courts have reasoned that *Sandoval* also applies to Title IX. See, e.g., *Yu v. Vassar College*, 97 F. Supp. 3d 448, 461 n.6 (2015) (citing numerous cases that have reached that conclusion). On the other hand, some scholars have argued that *Sandoval* does not necessarily foreclose disparate impact damages claims under Title IX. See, e.g., David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 276–77 (2005) (pointing out that “although *Sandoval* forecloses a disparate impact lawsuit based on Title VI, and Title IX and Title VI phrase their prohibitions against discrimination against discrimination with substantially the same language, the Court has stated that the two are to be given independent interpretations when their distinct histories require”).

<sup>107</sup> 34 C.F.R. § 106.21 (b)(2) (2019) (“A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.”).

<sup>108</sup> 34 C.F.R. § 106.22 (2019) (“A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.”).

<sup>109</sup> 34 C.F.R. § 106.23(b) (2019) (“A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.”).

<sup>110</sup> 34 C.F.R. § 106.37(b) (2019) (“A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.”).

<sup>111</sup> See, e.g., 34 C.F.R. § 106.51(a)(2) (2019) (“A recipient shall make all employment decisions in any education program or activity operated by such recipient in a non-discriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.”); *id.* § 106.51(a)(3)(2019). (“A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with

tions counsel that covered entities cannot use practices that have a discriminatory *effect* based on sex.<sup>112</sup>

Title IX's accommodation-related regulations likewise arise in contexts distinct from menstruation. The only Title IX regulation that *explicitly* uses the word "accommodate" appears in the athletic context. This regulation states that in determining whether equal opportunities are available to both sexes, one factor is "[w]hether the selection of sports and levels of competition *effectively accommodate* the interests and abilities of members of both sexes."<sup>113</sup> Here, the very word "accommodate" connotes something quite different than what it typically means in the antidiscrimination context. Accommodation is not about "special" treatment to facilitate individual access to the same program,<sup>114</sup> but instead about a comparative standard for measuring and ensuring overall equity across different programs.<sup>115</sup> This approach has been further articulated in some of OCR's guidance documents about intercollegiate athletics—in particular, in its famous three-part test for intercollegiate athletic programs, which can be satisfied as long as "it can be demonstrated that the interests and abilities of the members of that sex have been *fully and effectively accommodated* by the present program."<sup>116</sup>

We move closer to the more standard meaning of accommodations—and to the context of menstruation—by turning to Title IX's treatment of pregnancy. Like menstruation, pregnancy is a biological process linked to female sex. Title IX's pregnancy regulations do not explicitly use the word "accommodate." But they do state that "a recipient shall not discriminate against any student, or exclude any student from its education program or activity. . . on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom."<sup>117</sup> Moreover, one of the provisions states that schools

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organizations providing or administering fringe benefits to employees of the recipient."); *id.* § 106.51(a)(4) (2019) ("A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.").

<sup>112</sup> In one area—admissions tests—there is a carve-out: tests with disparate impacts can still be used if they are "shown to predict validly success in the education program or activity in question" and "alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable." 34 C.F.R. § 106.21 (b)(2) (2019).

<sup>113</sup> 34 C.F.R. § 106.41(c) (2019) (emphasis added).

<sup>114</sup> Examples of this more typical meaning appear in the Americans with Disabilities Act, which lists as examples of reasonable accommodations "the provision of qualified readers or interpreters" and "acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(b) (2012).

<sup>115</sup> See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 48–49 (2000–2001).

<sup>116</sup> Russlyn Ali, Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part 3* (April 20, 2010) 3 (emphasis added).

<sup>117</sup> 34 C.F.R. § 106.40(b)(1) (2019).



shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom *as a justification for a leave of absence* for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.<sup>118</sup>

Thus, even without using the word “accommodate,” Title IX’s regulatory language does prescribe at least one accommodation for pregnant students: leaves of absence, with the opportunity to return to school without punishment or sanction, regardless of whether those leaves are available to other students.<sup>119</sup> In its guidance documents, OCR has gone even further. In 2013, OCR issued a guidance letter and accompanying pamphlet (the former is framed as a “Dear Colleague” letter, while the latter is entitled “Supporting the Academic Success of Pregnant and Parenting Students”) that instructs schools about how to deal with pregnant students.<sup>120</sup> Significantly, the pamphlet includes two accommodation-related passages in its “Frequently Asked Questions Pertaining to *Title IX* Requirements Regarding Pregnant and Parenting Students”:

Q. What types of assistance must a school provide to a pregnant student at school?

A. To ensure a pregnant student’s access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student’s pregnancy status. For example, a school might be required to provide a larger desk, allow frequent trips to the bathroom, or permit temporary access to elevators.<sup>121</sup>

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Q. What if some teachers at a school have their own policies about class attendance and make-up work?

A. Every school that receives federal financial assistance is bound by *Title IX*. Schools must ensure that the policies and practices of

<sup>118</sup> 34 C.F.R. § 106.40(b)(5) (2019) (emphasis added).

<sup>119</sup> For further discussion of Title IX’s accommodation mandate for pregnancy, see Deborah L. Brake, *The Invisible Pregnant Athlete and The Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 339 (2008).

<sup>120</sup> SETH GALANTER, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OFF., DEAR COLLEAGUE LETTER: SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS, 1–2 (2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf> [<https://perma.cc/N5UH-QMWL>], with attached pamphlet U.S. DEP’T OF EDUCATION, OFFICE FOR CIVIL RIGHTS, SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (2013) [hereinafter “OCR Pregnancy Pamphlet”].

<sup>121</sup> OCR Pregnancy Pamphlet, *supra* note 120, at 9.

individual teachers do not discriminate against pregnant students. For example, a teacher may not refuse to allow a student to submit work after a deadline that she missed because of absences due to pregnancy or childbirth.<sup>122</sup>

These two passages suggest that OCR has started interpreting Title IX's pregnancy regulations as requiring a broad array of accommodations, such as larger desks, bathroom breaks, access to elevators, and deadline extensions, even though the actual regulations themselves only mention medical leaves.

It is true that OCR's guidance here is equivocal (in stating that a school "might be required" to provide the larger desk, bathroom break, or elevator access).<sup>123</sup> However, a subsequent section of the pamphlet (entitled "Strategies to Assist Educators in Supporting Pregnant and Parenting Students") goes on to provide "examples of possible strategies[ that. . .] are not legally mandated by *Title IX* or its regulations," such as "allowing excused absences for parenting students (both male and female) who need to take their children to doctors' appointments" or "[d]esignat[ing] a private room for young mothers to breastfeed, pump milk, or address other needs related to breastfeeding during the school day."<sup>124</sup> In suggesting that these additional accommodations are *not* legally mandated, OCR implies that the accommodations mentioned earlier in the pamphlet *are* mandated, at least for administrative purposes.

OCR's growing recognition of accommodations as one aspect of Title IX compliance is relevant to the question of whether schools must accommodate students' menstrual needs. Menstruation, unlike pregnancy, is not specifically mentioned in Title IX's regulations. But it is certainly related to the regulatory heading of "pregnancy and related conditions."<sup>125</sup> Both pregnancy and menstruation are biological processes connected to the female sex; indeed, menstruation results from the shedding of the uterine lining when an ovulated egg is not fertilized, while pregnancy results when the ovulated egg has been fertilized. It is difficult to see why Title IX's prohibition of sex discrimination would require schools to give pregnant students frequent bathroom breaks, but impose no comparable requirement to give menstruating students the very same sorts of breaks. The failure to do so means that some students, by reason of their sex, will not have equal access to an education, either because they feel they must stay home from school or because they cannot effectively learn and participate while there.

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<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.* at 9 (emphasis added).

<sup>124</sup> *Id.* at 15–16.

<sup>125</sup> *Cf.* *Coleman v. Bobby Dodd Institute*, No. 4:17-CV-29, 2017 WL 2486080, at \*4–5 (M.D. Ga. June 8, 2017) (rejecting Title VII plaintiff's argument that menstruation is itself a pregnancy-related condition).

Title IX's pregnancy-specific regulations are the most factually relevant analogue, but all of Title IX's disparate impact and accommodation regulations point toward a larger underlying point: Title IX, as discussed further in Part III, is not just about formal equality. As Professor David Cohen has written, these different provisions suggest that Title IX "looks beyond formal equality and reaches into the realm of substantive equality."<sup>126</sup> Title IX's disparate impact regulations, Cohen writes, are in keeping with "[m]ore substantive conceptions of equality[, which] tend to accept that a showing of disparate impact is enough to prove discrimination," while Title IX's approach toward athletic equity similarly "jettison[s] the simplistic theory of formal equality," with the goal of "equaliz[ing] athletic opportunity."<sup>127</sup> Title IX's treatment of pregnancy likewise results from this broader view: as Cohen explains, "[p]rohibiting discrimination based on pregnancy, a form of discrimination that subordinates women based on a unique biological difference [for which there is no male comparator], naturally follows from this more substantive version of equality."<sup>128</sup>

In keeping with this underlying approach, and in order to fulfill Title IX's promise of equal access to education, OCR should expand its pregnancy-related guidance to make clear that schools should accommodate menstruating students' needs. Ideally, the Department of Education itself should amend the Title IX regulations about "pregnancy and related conditions" to explicitly cover menstruation. In the meantime, schools themselves should examine their practices, in terms of bathroom facilities, breaks, and dress codes, to ensure that they are not limiting menstruating students' ability to fully participate in school.

### C. Menstrual Products in Schools

#### 1. Impediments Resulting from Lack of Access to Products

While schools routinely provide students with bathroom necessities like soap and toilet paper, most schools do not provide another necessity: menstrual products.<sup>129</sup> Professor Christopher Cotropia's study of almost 700 fe-

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<sup>126</sup> Cohen, *supra* note 106, at 263.

<sup>127</sup> *Id.* at 265, 277.

<sup>128</sup> *Id.* at 275.

<sup>129</sup> Reports about access to menstrual products for transgender boys or gender nonbinary students in K-12 schools are difficult to find. Some colleges and universities, like Brown University and New York University, have taken steps to ensure that menstrual products are in all restrooms: men's, women's, and gender neutral. Chloe Atkins, *For Transgender Men, Pain of Menstruation is More than Just Physical*, NBC NEWS (Jan. 11, 2020, 4:38 PM) <https://www.nbcnews.com/feature/nbc-out/transgender-men-pain-menstruation-more-just-physical-n1113961> [<https://perma.cc/A2HE-HDJ8>]; Katie Mettler, *Free Tampons for All at Brown University this School Year—Even in the Men's Room*, WASH. POST (Sept. 9, 2016, 4:44 AM), <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/> [<https://perma.cc/N36N-5TVL>]. It is critical that menstrual products be

males ages eighteen to twenty-five, which focused on their access to menstrual products while in high school, found that ninety-two percent had required a new pad or tampon during the school day.<sup>130</sup> Ninety-one study participants stated that they had “trouble affording” menstrual products and that only a quarter of their schools provided products for free.<sup>131</sup> Overall, only forty-two percent of all respondents attended schools where menstrual products were provided.<sup>132</sup> When schools did provide products, the most common place was at the nurse’s or front office, and some of those schools also provided menstrual products in the bathrooms, either for free or for purchase.<sup>133</sup> The respondents opined that a school’s provision of menstrual products in the restroom, as opposed to the nurse’s or front office, would reduce stigma.<sup>134</sup> The failure to provide menstruating students with free and easily accessible tampons and pads thus negatively affects their access to equal educational opportunities.

There are two factors undergirding any discussion of a school’s decision to provide (or not) accessible and free menstrual products for students.<sup>135</sup> First, the inability to afford menstrual products causes some students to feel they must stay home and thus miss school. Second, even for those who can afford products, school-provided products are crucial to assist students faced with the reality of an unpredictable period.

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provided for students who do not identify as girls in order to address their menstrual needs. As activist Kenny Ethan Jones states, having a period contributes to gender dysphoria and if access to menstrual products is only in identified female spaces (like the girl’s bathroom) the gender dysphoria is heightened. Atkins, *supra* note 129.

<sup>130</sup> Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 6 WOMEN’S REPROD. HEALTH 289, 292 (2019).

<sup>131</sup> *Id.* at 294–95.

<sup>132</sup> *Id.* at 292.

<sup>133</sup> *Id.* (reporting that at the schools of eighty percent of respondents, menstrual products were available in the nurse’s or front office, with forty percent of those respondents further indicating that menstrual products were also available in school bathrooms; availability was divided approximately evenly between free and for-purchase).

<sup>134</sup> *Id.* at 299.

<sup>135</sup> According to the Simmons National Consumer Survey, over 58.29 million women in the U.S. used menstrual pads and approximately 40 million used tampons in 2019. *See U.S. population: Usage of Sanitary Pads and Napkins From 2011 to 2023*, STATISTA (Aug. 20 2019), <https://www.statista.com/statistics/287048/usage-of-sanitary-pads-and-napkins-in-the-us-trend/> [<https://perma.cc/3SQM-5B9J>]; *U.S. Population: Do You Use Tampons?*, STATISTA (Aug. 20, 2019), <https://www.statista.com/statistics/278085/us-households-usage-of-tampons/> [<https://perma.cc/LASD-L775>]. Pads represent a 55% share of the market for menstrual hygiene products. *Breakdown of the Feminine Hygiene Market Worldwide in 2018, by Segment*, STATISTA (Nov. 26, 2019), <https://www.statista.com/statistics/1075218/market-share-of-feminine-hygiene-worldwide-by-type> [<https://perma.cc/XG2Y-LLHH>]. This in no way suggests that noncommercial items are inappropriate for use. *See Gharib, supra* note 42 (including explanation by Chris Bobel that there is no research that causally links using an improperly washed or dried cloth to staunch menstrual blood to infections in the individual menstruating).

a. *Educational Access Limited by Income*

“Period poverty,” or the inability to afford menstrual products, is an obstacle to educational attainment by many secondary school students.<sup>136</sup> According to one recent study of 1,000 teenagers ages thirteen to nineteen, approximately twenty percent report that they “have struggled to afford period products or were not able to purchase them at all.”<sup>137</sup> The same number “have missed class because of lack of access to period products.”<sup>138</sup> Two-thirds of the surveyed adolescents report that they “have experienced the stress of inaccessible period products.”<sup>139</sup> Students relate that it is difficult to attend school or be productive in school if they do not have the necessary menstrual products.<sup>140</sup> The Cotropia study echoes those results, finding that “[t]he inability to afford [menstrual products] was . . . significant[ly] and positively correlated with missing school, being late, and leaving early.”<sup>141</sup> Similarly, the Cotropia study demonstrates “statistically significant correlations between not providing [menstrual products] at school and missing school, leaving school early, and negative impacts on learning.”<sup>142</sup> Separate and apart from other disadvantages that low-income students may face once they are in school,<sup>143</sup> low-income menstruating students encounter the difficulty of not being able to afford the products they need to leave the house and go to school. When they do attend school, worries about access to menstrual products distract low-income menstruating students from their studies.

Poverty is pervasive in public schools. Nation-wide, approximately fifty-one percent of all public students qualify for free or low-cost lunches.<sup>144</sup>

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<sup>136</sup> See *State of the Period*, *supra* note 43, at 1; see also Nadya Okamoto & Maria Molland, *The Cost of Tampons is Hurting Low-Income Girls. Let's Fix That*, CNN (Oct. 21, 2019, 3:55 PM), <https://www.cnn.com/2019/10/21/perspectives/period-poverty-menstrual-products/index.html> [<https://perma.cc/65ZX-6T3U>] (“Public awareness about period poverty, the inability to access menstrual hygiene products, has ignited a movement calling for free and accessible pads and tampons in restrooms and public spaces around the world. Period poverty impacts millions of people every day and is pervasive in US schools.”).

<sup>137</sup> *State of the Period*, *supra* note 43, at 2.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 85–86 (2017).

<sup>141</sup> Cotropia, *supra* note 130, at 296.

<sup>142</sup> *Id.* at 299.

<sup>143</sup> See, e.g., Lea Hubbard, *College Aspirations Among Low-Income African American High School Students: Gendered Strategies for Success*, 30 ANTHROPOLOGY & EDUC. Q. 363, 363 (1999) (discussing gender-specific strategies employed to encourage academic success among studied population).

<sup>144</sup> See Kelley Taylor, *Poverty's Long-Lasting Effects on Students' Education and Success*, INSIGHT INTO DIVERSITY (May 30, 2017), <https://www.insightintodiversity.com/povertys-long-lasting-effects-on-students-education-and-success/> [<https://perma.cc/N98C-LLAP>] (reporting poverty data based on U.S. Census Bureau Statistics).

In New York City, that number is seventy-four percent.<sup>145</sup> Jennifer Weiss-Wolf, the co-founder of Period Equity, frames it this way:

[A] majority of public school students – 51 percent – come from low-income families. Nearly one in five teenagers age twelve to seventeen live in poverty, which for a family of four, means getting by on \$24,600 each year. After rent, food, and other bills, even with the help of public benefits, that doesn't leave much room for anything else. Not all the things a student needs. Like books. Like shoes. Like maxi pads.<sup>146</sup>

As compared to adults, students are “more prone to be caught off guard by the arrival of their period (which is less likely to be regular), more embarrassed by it, and more likely to be without budgets of their own to buy what they need, when needed,”<sup>147</sup> giving rise to a greater need for them to be able to access menstrual products in schools at little to no cost to students.

*b. Educational Access Limited by Biology*

A menstruating pre-teen or teenager is uniquely vulnerable to needing products on unpredictable schedules,<sup>148</sup> further underscoring the importance of providing free menstrual products at school.<sup>149</sup> Placing the products where

<sup>145</sup> BTNY Students Excel, Despite the Devastating Effects Poverty Can Have on Educational Outcomes, BREAKTHROUGH NEW YORK (Dec. 19, 2018), <http://www.btny.org/blog/2018/12/19/btny-students-excel-despite-the-devastating-effects-poverty-can-have-on-educational-out-comes> [https://perma.cc/8VLN-EAWD] (reporting seventy-four percent of public school students in New York qualify for free or reduced-priced lunches).

<sup>146</sup> WEISS-WOLF, *supra* note 140, at 85–86.

<sup>147</sup> *Id.* at 86.

<sup>148</sup> See Hillard, *supra* note 27 (discussing wide variation in length of adolescent's menstrual cycles).

<sup>149</sup> To be sure, the link between access to products and school attendance is not limited to K-12 students alone. For instance, a student at the University of Baltimore School of Law reported, “On more than one occasion, I've either unexpectedly gotten my period or bled through the stash of tampons in my purse. If none of my friends have any products, and because there is nowhere to get any within the school, I will often skip the rest of my classes and head home to get a tampon.” University of Baltimore School of Law Students and Faculty Free Menstrual Hygiene Products Proposal, 2, (Jan. 28, 2019), [http://law.ubalt.edu/centers/caf/pdf/Universal\\_Menstrual\\_Hygiene\\_Product\\_Access\\_Proposal.pdf](http://law.ubalt.edu/centers/caf/pdf/Universal_Menstrual_Hygiene_Product_Access_Proposal.pdf) [https://perma.cc/84GG-5ECE]. In the fall of 2019, responding to student need, the University of Baltimore School of Law installed dispensers and began providing free menstrual products in restrooms, regardless of gender. Correspondence to co-author Margaret E. Johnson (on file with Johnson). In addition, Harvard Law School now provides them to students. See Megan Woolhouse, *She's Thawed Harvard Law*, BOSTON GLOBE (Jan. 4, 2009), [http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes\\_thawed\\_harvard\\_law/](http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes_thawed_harvard_law/) [https://perma.cc/UR2H-WLAZ] (reporting that former Harvard Law School Dean Elena Kagan required the provision of free tampons to women at Harvard Law School over a decade ago). College campuses throughout the United States are providing access to menstrual products to support and assist their menstruating students and hopefully, more law schools will as well. 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/> [https://perma.cc/35E6-7MWQ]; Mettler, *supra* note 129.

students are most likely to need them—in the bathrooms, as opposed to at a nurse’s station—reduces students’ barriers to access, whether the barrier is the physical location of a nurse’s station or a school administrator’s office,<sup>150</sup> the authority of a school administrator, a culture of stigma surrounding menstruation, or the student’s own shyness.<sup>151</sup> As the Cotropia study shows, seventy-three percent of those who need menstrual products are embarrassed to ask a school administrator for them.<sup>152</sup>

Having access to menstrual products makes students of all income levels less likely to miss school. Natalie Baumeister, then a twelfth-grade student at a public school in Fairfax County, Virginia, observes:

Students need free and easy access to feminine hygiene products. . . . Before providing pads in the school bathrooms, girls would roll toilet paper in their underwear, tie sweaters around their waists, or go home early because they did not have feminine hygiene products. Some girls used to miss entire school days because they did not have a sufficient way to manage their periods. Now that pads are available in the bathrooms, girls are using them more. Not only is this a healthier solution, but it also allows girls to stay in school. Without easy access to menstrual products, girls miss critical instructional time, which can be detrimental to their academic performance.<sup>153</sup>

As Baumeister’s description suggests, access to free menstrual products benefits all who menstruate and who might otherwise skip school if they are caught unaware by their period, even if the school is located in one of the

<sup>150</sup> Traveling to a nurse’s station or a school administrator’s office is not always practical in the event of sudden flow. Schmitt, *supra* note 62. In Colorado, students advocated for a bill to provide menstrual products in schools, arguing that “[w]hile students have access to feminine hygiene products in nurses’ offices, they’re not easily accessible and sometimes students are too embarrassed to ask for them. Some schools . . . have dispensers in bathrooms for the products, but many don’t.” Saja Hindi, *Student-Advocated Bill Would Help Colorado Public Schools Provide Free Tampons And Other Feminine Hygiene Products*, THE DENVER POST (Nov 27, 2019, 6:13 PM), <https://www.denverpost.com/2019/11/27/colorado-schools-tampons-feminine-hygiene-products/> [<https://perma.cc/95AE-A47V>].

<sup>151</sup> Schmitt, *supra* note 62; see also Weiss-Wolf, *supra* note 140, at 87; see also Cotropia, *supra* note 130, at 293–301. For instance, one respondent in the Cotropia study stated “Periods are a stigmatized topic – asking for assistance made others aware of the situation. Then, if you acted ‘off’ or ‘moody’ others could blame that.” *Id.* at 294.

<sup>152</sup> Cotropia, *supra* note 130, at 293–94, 299 (for instance, one respondent stated “[t]he nurse made it seem like it was bad that I had to ask for a pad”).

<sup>153</sup> Press Release, U.S. Rep. Grace Meng, Meng Unveils Bold Proposal to Provide Menstrual Equity to All (Mar. 26, 2019), <https://meng.house.gov/media-center/press-releases/meng-unveils-bold-proposal-to-provide-menstrual-equity-to-all> [<https://perma.cc/G6PQ-VSEH>]. Ms. Baumeister, then a senior at Justice High School, expressed her support for a federal bill that would require free menstrual products in schools. *Id.* The argument that menstrual product availability is tied to school attendance was echoed by Holly Seibold, Founder and Executive Director of Bringing Resources to Aid Women’s Shelters (BRAWS) in the same Press Release. *Id.*

wealthiest counties in the country.<sup>154</sup> By providing accessible products in schools, the school facilitates the education of both those who cannot afford the products at all and those who “may not be prepared for their period to start at school.”<sup>155</sup>

A school’s decision to provide menstrual products (or not) also has expressive value. Approximately fifty-one percent of surveyed teens “feel like their school does not care about them if they do not provide free period products in their bathrooms.”<sup>156</sup> By contrast, when a school places products in the bathrooms, it signals that it supports all students, and cares about them having what they need to thrive at school.<sup>157</sup>

## 2. *Action at the Municipal, State and Federal Legislative Levels*

In recent years, state and local governments have begun addressing this issue: New York,<sup>158</sup> New Hampshire,<sup>159</sup> Illinois,<sup>160</sup> California,<sup>161</sup> and Georgia<sup>162</sup> have all taken government action requiring school districts to provide

<sup>154</sup> See Carol Morello & Dan Keating, *D.C. Region is Nation’s Richest, Most Educated*, WASH. POST (Dec. 15, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121407680.html> [<https://perma.cc/895D-NSX6>] (reporting that Fairfax County, Virginia and neighboring Loudon County, Virginia, “were the only two U.S. counties with median household incomes surpassing \$100,000” in a recent five-year period).

<sup>155</sup> Society for Women’s Health Research, *Survey of School Nurses Reveals Lack of Bathroom Policies and Bladder Health Education* (Nov. 26, 2018), <https://swhr.org/survey-of-school-nurses-reveals-lack-of-bathroom-policies-and-bladder-health-education/> [<https://perma.cc/4H4F-LNZ4>] [hereinafter *Survey of School Nurses*].

<sup>156</sup> *State of the Period*, *supra* note 43 at 2.

<sup>157</sup> The podcasting Bronx Prep Middle School girls suggested that their middle school could be made better if schools would “supply girls’ restrooms with free pads and tampons.” Nadworny & Lombardo, *supra* note 53.

<sup>158</sup> N.Y. PUB. HEALTH L. § 267 (McKinney 2019) (providing, “[a]ll elementary and secondary public schools in the state serving students in any grade from grade six through grade twelve shall provide feminine hygiene products in the restrooms of such school building or buildings. Such products shall be provided at no charge to students.”); see also Meghan Finnerty, *Free Tampons Available in Schools (Period)*, ROCHESTER DEM. & CHRON., (Sept. 10, 2018, 7:00 AM), <https://www.democratandchronicle.com/story/news/local/communities/2018/09/10/free-feminine-hygiene-products-schools-districts-spend-thousands/990572002> [<https://perma.cc/SJK2-G6FY>] (reporting on cost to local school districts of New York State law requiring free menstrual hygiene products in girls’ bathrooms in public schools).

<sup>159</sup> N.H. REV. STAT. ANN. § 189:16-a (2019). Under the New Hampshire law, the law is inclusive of all menstruating students by requiring schools to provide free “menstrual hygiene products” in gender-neutral bathrooms and bathrooms designated for females in all public schools; Alanna Vagianos, *New Hampshire Passes Law Requiring Free Menstrual Products In All Public Schools*, HUFFPOST (July 19, 2019, 11:10 AM), [https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools\\_n\\_5d31bd0de4b0419fd32bd119](https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools_n_5d31bd0de4b0419fd32bd119) [<https://perma.cc/XR8L-Q6K3>].

<sup>160</sup> 105 Ill. Comp. Stat. Ann. 5/34-18.56 (West 2019); 105 Ill. Comp. Stat. 5/10-20.63 (West 2019). (“A school district shall make feminine hygiene products available, at no cost to students, in the bathrooms of school buildings.”).

<sup>161</sup> CAL. EDUC. CODE § 35292.6 (West 2019).

<sup>162</sup> Maya T. Prabhu, *Georgia OKs Providing Menstrual Products to Low-Income Girls, Women*, ATLANTA J.-CONST. (April 9, 2019),



free menstrual products in their restrooms. Mayor Martin Walsh and the Boston Public Schools announced in June 2019 that they would similarly provide free menstrual products to students in grades six to twelve<sup>163</sup> (an action also taken by New York City prior to the enactment of legislation by New York State<sup>164</sup>).

Notably, the rhetoric surrounding these developments has specifically emphasized the importance of equal access to education and linked provision of menstrual products to the achievement of that goal. New York Governor Andrew Cuomo, for example, described the legislation as a “critical step forward in ensuring every girl in New York has the same opportunities to grow into a confident, successful woman,” emphasizing the importance of “providing all students with equal access to these products.”<sup>165</sup> New Hampshire Governor Chris Sununu likewise explained that New Hampshire’s legislation “will help ensure young women in New Hampshire public schools will have the freedom to learn without disruption—and free of shame, free of stigma,”<sup>166</sup> echoing the statement of Representative Polly Campion, a co-sponsor of the bill, who described it as a “basic, essential measure for equality.”<sup>167</sup> Illinois’s legislation similarly included the statement that “when students do not have access to affordable feminine hygiene products, they may miss multiple days of school every month,”<sup>168</sup> and that access to such products enables them “to continue with their daily lives with minimal interruption.”<sup>169</sup> This rhetoric also dovetails with other state and federal rules that emphasize the importance of school attendance.<sup>170</sup>

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gional-govt—politics/georgia-oks-providing-menstrual-products-low-income-girls-women/8wRDKwffieuhFslCsg0TML/ [https://perma.cc/J2Z5-68NY] (explaining that through the budgeting process, the legislature allocated money to the Department of Education for schools’ menstrual product supplies).

<sup>163</sup> *Pilot Program Launched To Provide Free Menstrual Supplies To BPS Students*, CITY OF BOSTON (JUNE 17, 2019), <https://www.boston.gov/news/pilot-program-launched-provide-free-menstrual-supplies-bps-students> [https://perma.cc/4BMZ-NZDB] (Boston Mayor announced pilot program providing free menstrual products to all seventy-seven BPS schools that teach students in grades 6 to 12 beginning Fall 2019 with funding from the FY20 budget).

<sup>164</sup> N.Y.C., N.Y., ADMIN. CODE § 21-968.

<sup>165</sup> Press Release, Governor Andrew Cuomo, *Governor Cuomo Reminds Schools of New Law Requiring School Districts to Provide Free Feminine Hygiene Products in Restrooms*, Sept. 10, 2018, <https://www.governor.ny.gov/news/governor-cuomo-reminds-schools-new-law-requiring-school-districts-provide-free-feminine-hygiene> [https://perma.cc/4BWF-TJYB].

<sup>166</sup> Nancy West, *Sununu Signs Bill Requiring that Menstrual Care Products Be Available in Schools*, INDEPTHNH.ORG (July 17, 2019), <http://indepthnh.org/2019/07/17/sununu-signs-bill-requiring-menstrual-care-products-be-available-in-schools/> [https://perma.cc/KAC7-Y29S].

<sup>167</sup> *Id.*

<sup>168</sup> Learn with Dignity Act, Pub. Act 100-0163, 2018 Ill. Laws.

<sup>169</sup> *Id.*

<sup>170</sup> See Evie Blad, *Give Students Free Tampons, Pads, Advocates Say. Here’s Why Some Schools Already Do*, EDUC. WK. (Jan. 28, 2019, 4:26 PM), [http://blogs.edweek.org/edweek/rulesforengagement/2019/01/give\\_students\\_free\\_tampons\\_pads\\_advocates\\_say\\_heres\\_why\\_some\\_schools\\_already\\_do.html?override=web](http://blogs.edweek.org/edweek/rulesforengagement/2019/01/give_students_free_tampons_pads_advocates_say_heres_why_some_schools_already_do.html?override=web) [https://perma.cc/8DLW-LZB5] (“[A]s state and federal education laws put a growing emphasis on school at-

In addition, advocacy surrounding free menstrual products falls under the umbrella of the larger “menstrual equity” movement which—as discussed above—has taken aim at the tampon tax.<sup>171</sup> The focus on menstrual equity has even recently been picked up at the federal legislative level, when Representative Grace Meng of New York introduced a proposed bill—the “Menstrual Equity for All Act of 2019”—that would, among other things, give states the option of using federal grant funds to provide students with free menstrual products in schools, require large employers to provide free menstrual products for their employees in the workplace, and require all public federal buildings to provide free menstrual products in their restrooms.<sup>172</sup>

### 3. *Title IX and Menstrual Products in Schools*

The rhetoric surrounding period poverty and government action to provide free menstrual products resonates with Title IX’s emphasis on ensuring equal access to education, regardless of sex. The statute’s underlying purpose—to ensure that students’ sex does not deprive them of equal access to education—would suggest that schools *should* be required to provide these products. Students who menstruate and cannot afford to bring menstrual products to school—or who are unable to do so for other reasons (such as an unexpected period)—face a significant roadblock to their education that male students do not experience.

And yet, nothing in Title IX’s statutory text or regulations, nor in OCR guidance, addresses this issue. Although it is straightforward to extrapolate OCR’s guidance about bathroom breaks for pregnant students to bathroom breaks for menstruating students, the link between its pregnancy guidance provisions and the widespread provision of menstrual products in schools is more attenuated.

The omission of any reference to menstrual products means that there is a significant void in the current Title IX regulatory framework. States and individual school districts have begun to close the gap in the past few years, as discussed above. But this piecemeal approach would be much more effective and comprehensive if developed at the federal level. That is particularly true because not all school districts can afford to provide such products on their own, and thus federal financial support—as Representative Meng’s proposed bill calls for—may be necessary. As with menstrual accommodations, this is an area where further Title IX regulations and OCR guidance, and perhaps even additional legislation, are needed.

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tendance, more schools may consider providing such products in an effort to address every obstacle that may keep students out of the classroom.”).

<sup>171</sup> See Gontcharova, *supra* note 7, and accompanying text.

<sup>172</sup> See Menstrual Equity for All Act of 2019, H.R. 1882, 116th Cong. (2019).

#### D. Menstrual Education in Schools

##### 1. Impediments Resulting from Inadequate Menstrual Education

Menstrual education in the United States is deficient in several respects. First, numerous states do not require schools to offer any instruction in the topic (or, indeed, any sex education at all).<sup>173</sup> Furthermore, even in states that mandate sex education, teachers are not necessarily required to provide accurate information to students.<sup>174</sup> It is not surprising, then, that seventy-nine percent of teens report that they “feel that they need more in-depth education around menstrual health.”<sup>175</sup> Girls in particular report that there is not sufficient discussion time in their menstrual education classes, that the content is not taught in a memorable way, and that the courses do not sufficiently take into consideration students’ embarrassment about asking questions.<sup>176</sup>

Another key deficiency in existing menstrual education is that it may come too late. Typically, states that provide puberty education do so for students in the fifth or sixth grade;<sup>177</sup> this is after some students have begun menstruating.<sup>178</sup> During the past twenty five years, the age of menarche “has declined steadily,” and although the average onset of menstruation is twelve years old (approximately sixth or seventh grade), a not-insubstantial portion of menstruating students begin to menstruate earlier.<sup>179</sup> Specifically, one study of 17,077 girls ages three to twelve found that forty-eight percent of African-American girls and almost fifteen percent of Caucasian girls showed

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<sup>173</sup> Guttmacher Institute, *State Laws and Policies: Sex and HIV Education* (Dec. 1, 2019), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/Y3FG-SJBN>].

<sup>174</sup> In the thirty-nine states that do require some sex education, only seventeen of those states require that the education be medically accurate. *Id.*

<sup>175</sup> *State of the Period*, *supra* note 43, at 3.

<sup>176</sup> See Ann C. Herbert et al., *Puberty Experiences of Low-Income Girls in the United States: A Systematic Review of Qualitative Literature From 2000 to 2014*, 60 J. OF ADOLESCENT HEALTH 363, 376 (2017).

<sup>177</sup> In 1999, the Guttmacher Institute reported that “seventy-two percent of fifth- and sixth-grade teachers report that sexuality education is taught in their schools at one or both grades. Fifty-six percent of teachers say that the subject is taught in grade five and 64% in grade six.” David J. Landry et al., *Sexuality Education in Fifth and Sixth Grades in U.S. Public Schools*, 32 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 212, 212 (1999), <https://www.guttmacher.org/journals/psrh/2000/09/sexuality-education-fifth-and-sixth-grades-us-public-schools-1999> [<https://perma.cc/2YUY-SPLJ>].

<sup>178</sup> *Menstrual Cycle*, *supra* note 25; Table 5.3: *Types of State and District Requirements for Kindergarten Entrance and Attendance, Waivers and Exemptions for Kindergarten Entrance, by State: 2018*, Nat’l Ctr. for Educ. Stat., [https://nces.ed.gov/programs/statereform/tab5\\_3.asp](https://nces.ed.gov/programs/statereform/tab5_3.asp) [<https://perma.cc/R44F-EX4T>] (last visited Dec. 12, 2019) [hereinafter Table 5.3] (showing kindergarten begins at age five).

<sup>179</sup> Herbert et al., *supra* note 176, at 364; see also Table 5.3, *supra* note 178 (showing twelve-year-olds attend sixth or seventh grade).

physical development of puberty as early as eight years of age, or in approximately third grade.<sup>180</sup>

Timely school-based education may be especially important for those students who are not learning about menstruation at home or elsewhere.<sup>181</sup> As one former student explains, “[s]ome girls find out about their periods when they actually get them. It’s just never talked about in schooling.”<sup>182</sup> In line with the research on the early onset of menarche, at a minimum, third grade would be the appropriate point to introduce the topic, given the possibility that some third-graders will start menstruating over the course of the school year. Providing earlier menstrual education provides menstruating students necessary information before they get their first period.

Students of all ages benefit from knowing the facts of the reproductive system and puberty, and also about the practicalities and management of menstruation.<sup>183</sup> School-based education that is medically accurate provides information (and therefore some comfort and confidence) to menstruating individuals. One study reports that low-income girls “who felt unknowledgeable or unprepared for menstruation were more likely to report having worse experiences of menarche, negative attitudes about menarche, and more menstrual distress.”<sup>184</sup> The study further reports that, unfortunately, those girls viewed the education they received as “inaccurate, negative, and late.”<sup>185</sup> Exemplifying this point, one lower-income African American girl recounts, “First I had my period, and then they started talking about it. It wasn’t helpful; it was a little late.”<sup>186</sup>

Research suggests that inadequate menstrual education disproportionately affects lower-income students, who otherwise may not learn about menarche and menstruation at home or from other sources. In a 2013 study, low-income girls had significantly lower scores on “knowledge, menarche preparedness, and positive attitudes about menstruation”<sup>187</sup> compared to

<sup>180</sup> Herbert et al., *supra* note 176, at 364; see also Ashley Reese, *Black Blood*, 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).

<sup>181</sup> Herbert et al., *supra* note 176, at 376 (stating “[s]chools were more important in situations where mother-daughter conversations were nonexistent.”).

<sup>182</sup> Gupta et al., *supra* note 19, at 5.

<sup>183</sup> For instance, during a focus group on menstruation, one student asked into “which hole” a menstrual cup should be inserted because she had never learned this. Schmitt, *supra* note 62. In addition to a biological understanding, students also need information about menstrual management. As one student explained, “Your period is not really, it’s so scientifically talked about in our health classes . . . and some people have questions, but they’re too ashamed or scared to ask them, which is terrible.” Gupta et al., *supra* note 19, at 5.

<sup>184</sup> Herbert et al., *supra* note 176, at 364. Specifically, the lower-income girls in the survey population described their experiences with menstruation and menarche as “embarrassing, traumatic, scary, and confusing and associated with feeling gross, dirty, smelly, and disgusting.” *Id.* at 366. The students also reported having “felt unprepared and ill equipped for this transition.” *Id.*

<sup>185</sup> *Id.* at 376.

<sup>186</sup> *Id.* at 377; see also *id.* at 366–67, 378.

<sup>187</sup> See *id.* at 364.

high-income girls, regardless of race. “This suggests that in the United States, there may be disparities by socioeconomic status in relation to preparation for puberty.”<sup>188</sup> Schools can help even the information gap among students. Empowering students with knowledge may diminish negative thoughts about menstruation and help students as they go through this transition.<sup>189</sup>

In addition to affecting a student’s developing self-identity, insufficient menstrual education may also perpetuate stigmas around menstruation. Participants in one research study “linked lack of menstrual health education with girls’ fear of discussing such issues.”<sup>190</sup> As one adolescent participant reports:

It’s the fact that women don’t like to talk about having their period because, alright, because it’s gross to men. And men don’t like to hear it and men are the more dominant people in society, and if a man doesn’t like it being talked about then women are not going to talk about it in front of people in general. And so it’s kind of seen as taboo to talk about your period. Something that has to do with your vagina, that’s taboo you can’t talk about that you know?<sup>191</sup>

The failure of schools to provide accurate information about menstruation thus contributes to a culture of silence and stigma. Such a culture is an incubator for harassment.<sup>192</sup>

Another concern is that when schools do offer puberty-related classes, the classes are often divided into two separate groups based on sex, with different content for each group. Female students learn about menstruation, but boys often do not.<sup>193</sup> Such differential instruction is problematic for two reasons. First, it is based on the premise that there are no transgender boys.<sup>194</sup> By the same token, there may well be transgender girls in the girls’ class, underscoring the need for both classes to cover male and female reproductive biology. Second, if boys do not gain an understanding of this basic process of human biology, they not only miss out academically, but also miss the opportunity to develop understanding and empathy. By contrast, providing boys with menstrual education decreases the likelihood of negative atti-

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 378.

<sup>190</sup> Gupta et al., *supra* note 19, at 5.

<sup>191</sup> *Id.*

<sup>192</sup> Appropriate education offered to all students can address the taboo of menstruation and “help reframe the idea that menstruation is a punishment or a deviant function that makes bodies that menstruate inferior to bodies that don’t. Instead, schools can treat menstruation as an important process for everyone to understand—for the sake of body literacy and reproductive and sexual health.” Dillard, *supra* note 98.

<sup>193</sup> See Allen et al., *supra* note 51, at 140–42.

<sup>194</sup> See Wiley Reading, *My Period and Me: A Trans Guy’s Guide to Menstruation*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 91–101 (Feiwei and Friends, 1st ed. 2018); see also Dillard, *supra* note 98.

tudes toward those who are menstruating.<sup>195</sup> Bronx Prep Middle School student Litzzy Encarnacion frames it simply: “If the boys learned about periods, too, it would be way less awkward.”<sup>196</sup>

Finally, to the extent that school personnel are themselves uninformed or untrained on menstruation-related matters, they may be ineffective as educators and support personnel. For example, participants in an endometriosis research study reported their perceptions that school nurses do not have enough knowledge to address endometriosis and tend to be suspicious of a menstruating student who presents with the pain and irregular bleeding symptoms caused by endometriosis.<sup>197</sup> If students fear that they will not be treated with respect, they will be reluctant to seek help with managing endometriosis.<sup>198</sup> Meaningful and scientifically accurate education delivered by trained personnel will make menstruating students more likely to seek any help they need.

## 2. Title IX and Menstrual Education

Menstrual education, like availability of menstrual products, is another area where Title IX interpretation, regulation, and guidance should be expanded. The Title IX regulations regarding access to classes provide that “classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.”<sup>199</sup> Outside of that narrow context (and other similarly nar-

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<sup>195</sup> See Allen et al., *supra* note 51, at 130, 149. One 2011 study stated that “[t]he exemption or omission of boys from sexuality education in general and menstruation education in particular is problematic and may have implications for their attitudes and treatment of women, intimate relationships, and reproductive decision making.” *Id.* at 130. This study showed that without school-based puberty classes, there was no consistent source of knowledge for boys on menstruation. *Id.* at 138–142. The study also “found that because boys rarely were educated about menstruation, when they grew to be college-aged 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.” Johnson, *supra* note 9, at 52 (citing Allen, *supra* note 51). Because they gathered bits and pieces of through a random process, boys had many misunderstandings that precluded comprehension of menstruation until they gathered more information later in life. See Allen, *supra* note 51, at 151–52. Some misunderstanding led to a distancing by the boys and men from menstruating women because they menstruated. As boys, the study participants admitted they had been ignorant about menstruation in their youth. *Id.* at 138–40. That ignorance makes boys unlikely to be effective bystander intervenors against menstruation-based harassment. For effective bystander intervention training relating to gender-based harassment in the workplace, see Chai R. Feldblum & Victoria A. Lipnic, EEOC REPORT, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_Toc453686311](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686311) [<https://perma.cc/9DZW-DHQV>].

<sup>196</sup> Nadworny & Lombardo, *supra* note 53.

<sup>197</sup> Gupta et al., *supra* note 19, at 6.

<sup>198</sup> *Id.* at 8.

<sup>199</sup> 34 C.F.R. § 106.34(a)(3) (2018).

row contexts, such as contact sports and choruses),<sup>200</sup> single-sex classes can be offered only within strict parameters. Specifically, Title IX's regulations state that a school may provide "single classes or extracurricular activities," under these conditions:

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities. . . ; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.<sup>201</sup>

In such situations, the school must ensure that "[s]tudent enrollment in a single-sex class. . . is completely voluntary" and that the school "provides to all other students, including students of the excluded sex, a substantially equal coeducational class."<sup>202</sup>

Thus, Title IX leaves some space for schools—if they so choose—to provide menstrual education in a single-sex setting. In particular, menstrual education, when provided in the context of a human sexuality class, can occur in a single-sex setting. That said, there is no *requirement* that human sexuality classes be conducted in separate sessions for boys and girls. Title IX simply *allows* schools to take this approach. Title IX says nothing about whether, for schools that do take that approach, the substantive content in the boys' and girls' human sexuality classes can entirely diverge. Given Title IX's focus on equal access to educational opportunities regardless of sex, it is much more consistent for such classes to provide a basic understanding of reproductive biology, even if the precise emphases of the classes differ. Doing so means that all students gain the same scientific knowledge, and has the added benefit of creating a climate where menstruation-based harassment is less common. This is an area where more regulation and guidance under Title IX would be helpful in order to promote equal opportunity to gain sufficient understanding of all aspects of reproductive biology.

Additionally, to the extent that menstrual education is provided outside of human sexuality classes—for example, in biology courses—the regulations make clear that both male and female students should receive comparable information. For example, even if a school were to offer a girls-only biology class, to satisfy Title IX requirements, the school would also need to offer a substantially equal coeducational class in biology. As such, it would directly contravene existing Title IX regulations for a girls-only biology

<sup>200</sup> *Id.* at § 106.34(a)(1), (4).

<sup>201</sup> *Id.* at § 106.34(b)(1)(i).

<sup>202</sup> *Id.* at § 106.34(b)(1)(iii)-(iv).

class to cover menstruation, while the counterpart co-ed biology class did not.

### *E. Connecting Doctrine to Theory*

Harassment, restrictions on student access to bathrooms, non-availability of menstrual products, and the lack of meaningful menstruation-related instruction can prevent students' equal access to education. Because only people with female biology menstruate, the failure to remedy situations where menstruation impedes education can amount to a denial of educational opportunities on the basis of sex.<sup>203</sup> Title IX, with its mandate of ensuring equal access to education without regard to sex, thus serves as an important tool in addressing issues that menstruating students face.<sup>204</sup>

The next Part explores the insights that feminist legal theory adds to the examination of the juncture of Title IX and menstruation. Three preliminary observations frame the discussion. First, there is no single "feminist legal theory," but rather different feminist legal theories, each with unique histories, concerns, and focal points.<sup>205</sup> The application of multiple feminist legal theories to the intersecting issues of Title IX and menstruation reveals the diverse intellectual range of the field. For that reason, the examination of Title IX and menstruation through the lens of multiple feminist legal theories is a useful exercise on its own. Indeed, instructors and students can use the next Part as a stand-alone illustration of the application of various theories to a particular legal problem.

Second, feminist legal theory—or more accurately, feminist legal theories—rarely lead to a single normative legal conclusion. Feminist theorists might agree, for example, that education unimpeded by anxiety about menstruation is a worthy goal. But this does not mean that theorists will necessarily come to consensus on what this means for the law.

Third, and perhaps most important, examining the intersection of Title IX and menstruation reveals the (perhaps counterintuitive) value of maintaining partial and simultaneous commitments to multiple feminist legal theories. A robust legal strategy may need to borrow ideas from different feminist theories. Using feminist legal theory does not require a declaration of allegiance to a particular strand. Advocates, instead, can fashion the best arguments that emerge from the collective body of work. Ultimately, feminist legal theory, as we understand it, provides a broad set of tools—

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<sup>203</sup> See *supra* Part II. A. 2, B. 2, C. 3, and D. 2.

<sup>204</sup> See United States Department of Justice, *Equal Access to Education: Forty Years of Title IX* (June 23, 2012), *supra* note 49, at 1 and accompanying text (describing aims of Title IX).

<sup>205</sup> See *infra* Part III.



grounded in, but not limited by, their particular intellectual, social, political, and legal histories—to be deployed in service of justice for all people.<sup>206</sup>

### III. THEORETICAL FRAMEWORKS FOR UNDERSTANDING TITLE IX AND MENSTRUATION

This Part considers the needs of menstruating students from the perspective of multiple feminist legal theories. Arguments that Title IX guarantees students the right to be free from menstruation-based harassment, to have access to menstrual accommodations and menstrual products, and to receive adequate and accurate menstrual education in schools do not proceed from a single “feminist” perspective. These arguments are grounded in—but also reveal the limitation of—traditional feminist approaches to law. Understanding the diverse range of feminist legal theoretical frameworks enables scholars and activists to construct more effective legal claims under Title IX, and to advocate for state-specific legislation that could help remove educational obstacles faced by menstruating students.

#### A. Formal Equality

The predominant approach to equality in American jurisprudence is formal equality: the idea that the law should make no formal distinction between men and women.<sup>207</sup> This belief fueled the early women’s rights movement in the United States.<sup>208</sup> Elizabeth Cady Stanton and others who had been active in the abolitionist movement convened the first large public gathering for women’s rights in Seneca Falls, New York in 1848.<sup>209</sup> One hundred of the nearly three hundred attendees—including Frederick Douglass—

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<sup>206</sup> In this sense, we share the definition of “feminism” adopted by the conveners of the U.S. Feminist Judgments Project. See Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 3, 3–23 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (“We recognize ‘feminism’ as a movement and perspective historically grounded in politics, and one that motivates social, legal, and other battles for women’s equality. We also understand it as a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law.”).

<sup>207</sup> See, e.g., MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 19 (3d ed. 2013) (“Liberal feminists share a commitment to individual autonomy and choice and insist that these freedoms be afforded to women as well as men.”); see also CYNTHIA GRANT BOWMAN ET AL., *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 27 (5th ed. 2018) (“Liberal feminism came to dominate understandings of sexual equality in law and throughout society.”).

<sup>208</sup> See, e.g., JoEllen Lind, *The Clinton/Palin Phenomenon and Young Women Voters*, 30 *HAMLIN J. OF PUB. L. & POLY* 527 (describing nineteenth century women’s rights activism as “focused on securing woman suffrage and represent[ing] an idealistic view of the power of formal equality in political rights to help women”).

<sup>209</sup> See, e.g., TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* 7 (2016) (describing planning for Seneca Falls gathering).

signed a Declaration of Sentiments that began, “We hold these truths to be self-evident: that all men and women are created equal.”<sup>210</sup> The Declaration proclaimed, “That woman is man’s equal. . . she should be recognized as such,” “[t]hat it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise,” and “[t]hat the equality of human rights results necessarily from the fact of the identity of the race in capabilities and responsibilities.”<sup>211</sup> Stanton and others sought to remove legal restrictions on women’s right to vote, serve as jurors, own property, and receive an education.<sup>212</sup>

In the 1970s, lawyers with a similar conception of women and men as equally capable autonomous actors brought challenges to laws that discriminated on the basis of sex.<sup>213</sup> In 1971 in *Reed v. Reed*, the Supreme Court found unconstitutional an Idaho intestacy statute that preferred men over women in the appointment of any administrator of an intestate decedent’s estate.<sup>214</sup> Writing for a unanimous Court (but without stating what standard of review it applied), Chief Justice Burger held that “[t]o give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”<sup>215</sup> Two years later, in *Frontiero v. Richardson*, the Court found unconstitutional a military policy of providing automatic spousal benefits to married male personnel, but requiring married female personnel to prove they provided over half of the support for their spouses.<sup>216</sup> Many other cases followed, and slowly intermediate scrutiny emerged as the standard for evaluating sex-based classifications drawn by the government.<sup>217</sup>

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<sup>210</sup> MODERN HISTORY SOURCEBOOK: THE DECLARATION OF SENTIMENTS, SENECA FALLS CONFERENCE, 1848 (Jan. 21, 2020), <https://sourcebooks.fordham.edu/mod/senecafalls.asp> (reprinting text of Declaration of Sentiments).

<sup>211</sup> ELIZABETH CADY STANTON & OTHERS, HISTORY OF WOMAN SUFFRAGE 72 (1881), <http://utc.iath.virginia.edu/abolitn/abwmat.html> [<https://perma.cc/GRD9-RG3S>] (discussing resolutions passed, including “[t]hat woman is man’s equal—was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such.”).

<sup>212</sup> See *id.*; see also Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. REV. 25, 49 (Spring 1990) (describing Stanton’s autonomy-based approach to rights); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1157–58 (1994) (discussing nineteenth-century rights discourse around married women’s property rights).

<sup>213</sup> See, e.g., Clare Cushman, *Supreme Court Decisions and Women’s Rights: Milestones to Equality 37–55* (2001).

<sup>214</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>215</sup> *Id.* at 76.

<sup>216</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although eight of the nine justices agreed that the military policy violated the Constitution, only four justices joined Justice Brennan’s opinion that applied strict scrutiny. *Id.* at 684. The other justices applied *Reed* without elaborating on the precise standard that should be applied. *Id.* at 691–92.

<sup>217</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (invalidating state law that set sex-based age minimums for the purchase of 3.2% beer, reasoning that “classifications by gender must serve important governmental objectives and must be substantially re-

The Supreme Court's classic liberal construction of equality has two important ramifications for discussion of students' rights in connection with the menstrual issues explored above. First, the Court's jurisprudence is organized around a gender binary: male and female. This is true for equal protection purposes, and for Title IX purposes, given Title IX's focus on ensuring that students are not discriminated against because of "sex." Thus, in its current state, the doctrine fits less easily with claims that do not line up with that binary.<sup>218</sup> In this sense, menstrual advocates' gender-inclusive language (i.e., referring to "menstruating students" rather than to girls or women) must be used carefully in the context of legal claims, to avoid delinking menstruation from sex, or at least biology.<sup>219</sup> To be sure, not all who menstruate are girls or women, but emphasizing the connection between menstruation and female biology (as opposed to gender) is an important thread of Title IX argumentation.<sup>220</sup>

Second, although formal equality theory is helpful in framing menstruation-based harassment as a form of sex discrimination, given that the harassment is directed toward students on account of their female biology, it is of limited utility for analyzing some of the other issues raised by sex-specific biological processes. Recall that in *Geduldig v. Aiello*, for example, the Court upheld a state disability insurance program that excluded pregnancy from coverage, saying that the program's distinction between pregnant women and non-pregnant persons was not based on sex, just pregnancy.<sup>221</sup> Similarly, an approach solely grounded in formal equality risks the argument

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lated to the achievement of those objectives"); *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating the male-only admission policy at the Virginia Military Institute on the grounds that the state did not show an "exceedingly persuasive" rationale for the policy).

<sup>218</sup> See, e.g., Kathryn M. Stanchi, Bridget J. Crawford & Linda L. Berger, *Why Women? Judging Transnational Courts and Tribunals*, 34 CONN. J. INT'L. L. 319, 327–28 (2019) (discussing difficulties of classifying people on the basis of sex or gender identity).

<sup>219</sup> Relatedly, there are three pending cases that will require the Supreme Court to determine whether Title VII's prohibitions on discrimination "on the basis of sex" also prohibit gender discrimination on the basis of sexual orientation or gender identity. See *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018), cert. granted sub nom. *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (declining to interpret Title VII to prohibit discrimination in employment on the basis of sexual orientation); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2017), cert. granted sub nom. *Altitude Express Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (interpreting Title VII to prohibit discrimination in employment on the basis of sexual orientation); *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 571, 582 (2018), cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Emp't Opportunity Comm'n*, 139 S. Ct. 1599 (2019) (finding that Title VII prohibits discrimination on the basis of "transgender status" and finding that the employer did not meet the showing of a "substantial burden" under the Religious Freedom Restoration Act). The Supreme Court's analysis of these cases will have important implications for the meaning of sex and sex discrimination in the Title IX context.

<sup>220</sup> See *infra* Part III.B.

<sup>221</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two

that school refusals to exempt menstruating students from strict bathroom break policies or to provide free menstrual products do not reflect sex discrimination, since both sexes are being treated equally. Indeed, just as David Cohen has noted in the context of athletics, formal equality does not always ensure the *equality of opportunity* that is Title IX's ultimate goal.<sup>222</sup>

### B. *Anti-Essentialism*

Some similar tensions about the connections between menstruation and sex are raised by the anti-essentialist strain of feminist legal theory. The formal equality emphasis of some feminist thinking led legal scholars such as Tina Grillo and Angela Harris to question the emphasis on “women’s” experiences. Grillo decries what she calls “essentialism” of the women’s movement:

Essentialism is the notion that there is a single woman’s, or Black person’s, or any other group’s, experience that can be described independently from other aspects of the person — that there is an “essence” to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.<sup>223</sup>

To Grillo, any emphasis on “women’s” experiences effectively ignores the difference that race made (and continues to make) in women’s lives. An African-American woman’s experience of rape, for example, is historically different than a white woman’s experience, as the law treated enslaved African-American women as the chattel property of their owners.<sup>224</sup> So to talk about “women’s” experience requires attention to the way that experience is impacted by multiple factors.

Informed by the anti-essentialist vein of feminist legal theory, any discussion of access to menstrual products in schools, the right to be free from menstruation-based harassment, or even reproductive education needs to be aware of the risks of generalization. It is possible to talk about the needs of girls and women to access menstrual products, for example, but as noted

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groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”).

<sup>222</sup> See Cohen, *supra* note 106, at 265.

<sup>223</sup> Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586–87 (1990) (critiquing feminists’ failure to listen to what women say about their own experiences).

<sup>224</sup> See Harris, *supra* note 223, at 598–99 (“[A]s a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime.”).

above, not all girls and women menstruate<sup>225</sup> and not all who menstruate are girls or women.<sup>226</sup> Yet anyone who menstruates has female biology.<sup>227</sup>

Understanding these distinctions requires appreciation of the differences between and among sex, gender, and gender identity. “Sex,” in the broadest sense, may refer to one or more medical markers—external genitalia, chromosomes or hormones (although humans can present with a range of chromosomal combinations and different hormone levels, and intersex individuals represent approximately 0.05 percent to 1.7 percent of the population).<sup>228</sup> “Gender” refers to the social or cultural expectations associated with people of a certain sex.<sup>229</sup> “Gender identity” is one’s self-perception as having a particular sex or gender, which may or may not match the sex one is assigned at birth.<sup>230</sup>

Given the fact that not all girls and women menstruate, but not all who menstruate are girls or women,<sup>231</sup> what type of essentialization of menstruation is appropriate? To be sure, an inclusive movement must recognize that although menstruation may be biologically-based, it is not necessarily gender-based or gender-identity based. Yet, as discussed above, the scientific fact that menstruation is an involuntary biological process unique to most girls and women (as well as those who have female biology) is an important part of Title IX argumentation. For that reason, anti-essentialism should certainly inform social activism, but there is no precise consensus among feminists as to whether legal arguments under Title IX are enhanced or weakened by an anti-essentialist approach to sex and gender.<sup>232</sup> On the one hand, there

<sup>225</sup> Reasons that girls and women might not menstruate include age (i.e., being pre-pubescent or menopausal), pregnancy, breastfeeding, and hormone imbalance, among other factors. *See, e.g., supra* note 22.

<sup>226</sup> *See, e.g., What is Menopause*, NIH: NAT’L INST. ON AGING (June 27, 2017), <https://www.nih.gov/health/what-menopause> [<https://perma.cc/6Z7A-B8EE>] (“menopausal transition most often begins between ages 45 and 55.”); Nat’l Inst. on Aging, *Menopause 2* (Dec. 2013), [https://www.nia.nih.gov/sites/default/files/menopause\\_2.pdf](https://www.nia.nih.gov/sites/default/files/menopause_2.pdf) (giving average age of menopause as fifty-one).

<sup>227</sup> *See, e.g., Reading, supra* note 194, at 91; Johnson, *supra* note 9, at 5, 26 (explaining use of term “menstruators” to include transgender men and boys).

<sup>228</sup> *See* Fact Sheet, *Intersex*, UN Hum. Rts. Office of the High Comm’r, [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) [<https://perma.cc/U9DB-XJFX>] (defining “intersex” as those “born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.”). *Contra* How Common is Intersex? INTERSEX SOCIETY OF NORTH AMERICA (2008), <http://www.isna.org/faq/frequency> [<https://perma.cc/LZU5-GCNW>].

<sup>229</sup> *See* Stanchi et al., *supra* note 218, at 321 (differentiating sex and gender).

<sup>230</sup> *Id.*; *see also* *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/D9FD-D2MF>] (defining gender identity as a person’s “innermost concept of self as male, female, a blend of both or neither — how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.”).

<sup>231</sup> *See supra* notes 22, 228–230 and accompanying text.

<sup>232</sup> Other forms of anti-essentialism arguments are outside the scope of Title IX, but should be considered in advocacy for any legislation relating to menstruation and schools. For instance, recognizing the greater need for products for low-income students,

is a legal risk in using anti-essentialist rhetoric that emphasizes that some transgender boys and men, as well as some gender non-binary and intersex persons, menstruate. After all, an underlying premise of the Title IX arguments outlined above—as well as analogous equal protection arguments for eliminating the tampon tax—is that unfavorable treatment of menstruation and menstrual products amounts to unlawful sex discrimination.<sup>233</sup> On the other hand, there is also a risk that if advocates and scholars only refer to girls and women in their discussion of menstruation, rather than acknowledging others who menstruate, their arguments will exclude some who need access to menstrual products, menstrual accommodations, and protections against harassment. Scholars and advocates must navigate these competing concerns in framing their rhetoric and arguments.

### C. *Anti-Stereotyping*

The anti-stereotyping understanding of the formal equality approach provides a stronger theoretical foundation for Title IX claims that address the issues identified by this Article. Legal scholar Cary Franklin has argued that the equal protection litigation of the 1970s is best understood as grounded in a view that “the state could not act in ways that reflected or reinforced traditional conceptions of men’s and women’s roles. . . . The anti-stereotyping approach was designed to provide such guidance; its aim was to direct courts’ attention to the particular institutions and social practices that perpetuate inequality in the context of sex.”<sup>234</sup> Franklin’s argument helps explain cases like *Moritz v. Commissioner*, in which Ruth Bader Ginsburg, on behalf of the ACLU, challenged the denial of an unmarried man’s eligibility for a tax deduction for caretakers.<sup>235</sup> Ginsburg argued that denial of the deduction to Mr. Moritz because of his sex was rooted in the stereotype that only women (or men who had been married) occupy the caregiving role in families.<sup>236</sup>

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Colorado’s proposed legislation for free menstrual products prioritizes schools with large numbers of low-income students. Saja Hindi, *Student-Advocated Bill Would Help Colorado Public Schools Provide Free Tampons And Other Feminine Hygiene Products*, The Denver Post, (Nov. 27, 2019, 6:13 PM), <https://www.denverpost.com/2019/11/27/colorado-schools-tampons-feminine-hygiene-products/> [<https://perma.cc/63VH-NERH>].

<sup>233</sup> See Crawford & Waldman, *supra* note 8, at 442 (“[W]e argue that a tax on menstrual hygiene products—when roughly analogous male or unisex products are exempt on grounds of ‘necessity’—amounts to an unconstitutional tax on women, because menstrual hygiene products are so inextricably linked to female biology.”).

<sup>234</sup> Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010).

<sup>235</sup> *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466, 467 (10th Cir. 1972).

<sup>236</sup> See Brief of Petitioner-Appellant at 18, 20, *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972) (No. 71-1127) (Ruth Bader Ginsburg, Martin Ginsburg, and Melvin Wulf on brief arguing that “the constitutional sword necessarily has two edges. Fair and equal treatment for women means fair and equal treatment for members of both sexes.”).

In the context of menstrual equity issues, anti-stereotyping theories may not immediately be an obvious fit. After all, decisions to provide (or more often, to decline to provide) menstrual products are not typically grounded in socially-based views about proper roles for males and females. That said, one connective thread linking the various issues identified in this Article is the long-standing social convention that menstruation is a private, “taboo” bodily function inappropriate for public mention or attention.<sup>237</sup> This itself is a sex-based stereotype, resulting in the relegation of female sex-specific bodily functions and needs to the private sphere.<sup>238</sup>

To be sure, the traditional distinction between what is public and what is private, at least with respect to menstruation, has begun to crumble in the wake of increased public awareness.<sup>239</sup> Activists, including young students, are becoming more willing to openly talk about the ordinary bodily function of menstruation.<sup>240</sup> But that long-held stereotype still has force..

Relatedly, stereotypes or misunderstandings about the basic facts of female biology may be underlying the failure of schools to provide menstrual

<sup>237</sup> See Crawford & Spivack, *supra* note 40, at 506–12 (exploring cultural roots of misunderstandings of and taboos around menstruation); see also Crawford & Waldman, *supra* note 8, at 477 (explaining failure of many states’ legislatures to accord non-taxable status to menstrual hygiene products not as discriminatory intent, but rather as “the result of a combination of indifference, lack of understanding, and discomfort with discussions about or consideration of women’s biological processes”).

<sup>238</sup> Indeed, before states like Illinois and New York began requiring free menstrual hygiene products in bathrooms in middle schools and high schools in 2018, see *supra* notes 158–161 and accompanying text, it was not clear that many school boards made an active decision to *not* provide menstrual hygiene products in schools. Rather, school boards may have simply let languish (and not refilled) existing “pay” machines in bathrooms. See, e.g., Alexandra Bruell, *Tech-Savvy Critics Aim to Upgrade the Tampon Dispenser*, WALL ST. J. (May 2, 2019), <https://www.wsj.com/articles/tampon-dispensers-lack-that-high-tech-wow-factor-11556800479> [<https://perma.cc/HF3F-CH98>] (“Most of the dispensers found in women’s bathrooms in department stores, offices and public venues were designed several decades ago. They still require quarters. They often get jammed, or sit empty because no one has manually checked the supply levels, leaving women who forget their own supplies without a basic necessity.”) As society has moved away from a cash economy, it is possible to buy a soda from a vending machine by swiping a credit card, but menstrual hygiene product machines lie empty. See *id.* This inattention is consistent with long-standing social conventions that menstruation is a private bodily function inappropriate for public mention or attention. See Crawford & Waldman, *supra* note 8, at 477–78 (describing general aversion to discussing “private” matters of menstruation). The failure to consider students’ needs for menstrual hygiene products is based on a general stereotype of what is (and is not) a legitimate “public” concern, and a specific relegation of girls’ and women’s sex-specific bodily functions to the private sphere. See Crawford & Spivack, *supra* note 40, at 506–12 (discussing cultural attitudes about women’s bodily fluids).

<sup>239</sup> See, e.g., Shruti Sathish, *Menstrual Products Must Be Available in School Restrooms. Period.*, WOMENSENEWS.ORG (Jan. 29, 2019), <https://womensenews.org/2019/01/menstrual-products-must-be-available-in-school-restrooms-period/> [<https://perma.cc/9VNN-43Q5>] (high-school student’s description of efforts to increase access to menstrual hygiene products in her public school because, “[i]t’s time for everyone to realize that menstrual products are necessities, not luxuries, and that periods should be embraced, not feared.”).

<sup>240</sup> See *supra* notes 1–4 and accompanying text.

products and menstrual accommodations. Menstruation is an involuntary bodily function that most girls and women experience every month for years—and menstrual cycles vary widely, in terms of predictability, discomfort, and heaviness of flow.<sup>241</sup> If decision-makers better understood the biological facts of menstruation, there might be greater understanding of why students cannot always wait for bathroom breaks, and why it is so important to make menstrual products freely and easily accessible.<sup>242</sup> Unless all students, as well as all teachers and administrators, understand these basic facts, policies may unintentionally disadvantage menstruating students. Better school-based education for all students will help combat misinformation and stereotypes about female biology, ultimately reducing the potential for harassment as well.<sup>243</sup> To be sure, uninformed views of female biology are not the traditional target of “anti-stereotyping” theories.<sup>244</sup> But debunking misinformation or misconceptions about female bodies is just as important as challenging socially constructed norms about women as caretakers or as dependents of their spouses.<sup>245</sup>

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<sup>241</sup> See *supra* Part I. A.

<sup>242</sup> See, e.g., Daniel A. Epstein et al., *Examining Menstrual Tracking to Inform the Design of Personal Informatics Tools*, CHI '17 PERSONAL INFORMATICS & SELF-TRACKING, Proceedings of the 2017 CHI Conf. on Hum. Factors in Comp. Systems 6876, 6876 (2017) <https://dl.acm.org/citation.cfm?id=3025635> [<https://perma.cc/JJ2J-86D9>] (“For example, women often track their menstrual cycles without an explicit goal of action, but instead for awareness of their place in their menstrual cycle. Understanding the differences and commonalities between menstrual cycle tracking and other domains of personal informatics extends how we as a field consider personal informatics and design our personal informatics tools.”); see also Martha Hickey & Adam Balen, *Menstrual Disorders in Adolescence: Investigation and Management*, 9 HUM. REPROD. UPDATE 493, 494 (2003) (explaining that in adolescent girls, menstrual cycles may “initially be variable” but that they tend to become more regular “over the first 2-3 years following menarche”).

<sup>243</sup> See, e.g., Bonnie J. Rough, *Why We Shouldn't Be Separating Boys and Girls for Sex Ed*, WASH. POST (Oct. 19, 2018, 6:00 AM), <https://www.washingtonpost.com/life-style/2018/10/19/why-we-shouldnt-be-separating-boys-girls-sex-ed> [<https://perma.cc/6DZW-ZPQJ>] (describing daughter's experience with single-sex “puberty workshop” and daughter's curiosity about, “[h]ow do male teachers talk with fathers and sons about female bodies when girls are not in the room?”); see also Elizabeth Jeglic, *Should Boys and Girls Get Sexual Education Separately?*, PSYCHOL. TODAY, Feb. 24, 2018, <https://www.psychologytoday.com/us/blog/protecting-children-sexual-abuse/201802/should-boys-and-girls-get-sexual-education-separately> [<https://perma.cc/29X5-3XAL>] (reporting that fourth grade daughter's health class was sex-segregated for unit on “‘Family Life Education,’ aka sex ed”).

<sup>244</sup> See, e.g., Franklin, *supra* note 234; see also Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773 (2010).

<sup>245</sup> See generally Moritz, *supra* note 235 (holding that a tax benefit for caregivers must be made available to an unmarried man on an equal basis to other taxpayers), Frontiero, *supra* note 216 (holding that same rules for awarding dependent spouse benefits must apply to female service member and male service member).



#### D. Anti-Subordination

As described above, a rigid formal equality approach tolerates the law's failure to give women a particular benefit, as long as men do not receive it—even if men have no need for that benefit by virtue of their biology.<sup>246</sup> Such an emphasis on formal equality can lead to near-absurd results, as in *Geduldig's* acceptance of a classification between “pregnant women” and “non-pregnant persons.”<sup>247</sup> The failure of schools to provide menstrual accommodations and access to menstrual products presents a similar challenge.

Catharine MacKinnon's approach, commonly referred to as anti-subordination theory,<sup>248</sup> provides a helpful lens through which to view these issues. MacKinnon invites attention to power differentials between women and men:

[A]n equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at the root a question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference.<sup>249</sup>

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<sup>246</sup> Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination (1984)*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 84 (Katharine T. Bartlett & Roseanne Kennedy, eds. 1991). (“Difference doctrine says it is sex discrimination to give women what we need, because only women need it. It is not sex discrimination not to give women what we need because then only women will not get what we need”). One of the main shortcomings of the formal equality approach, as Patricia Williams has explained, is that it is largely mechanical. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 104–110 (1991) (comparing the Supreme Court's approach to equal protection to a machine that produces sausage links regardless of what is fed through the machine).

<sup>247</sup> See *supra* note 221 and accompanying text. *But see* 42 U.S.C. § 2000(e) et seq. (the Pregnancy Discrimination Act of 1978 mandating that employers treat pregnant women the same as other employees with similar work abilities). “Despite sustained criticism, the *Geduldig* decision has never been explicitly overruled and continues to constrain women's access to substantive equality and reproductive liberty.” Maya Manian, *Commentary on Geduldig v. Aiello*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 185–90*, 185 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds. 2016).

<sup>248</sup> See, e.g., Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 *HASTINGS L.J.* 1267, 1269 (2012) (calling Professor MacKinnon “legal feminism's foremost antisubordination theorist”).

<sup>249</sup> MacKinnon, *supra* note 246, at 87. In her early writings, Professor MacKinnon called this the “dominance approach,” but she has explained that “it's as much about subordination as dominance.” Emily Bazelon, *The Return of the Sex Wars*, *N.Y. TIMES MAG.* 56 (Sept. 10, 2015), <https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html> [https://perma.cc/U859-ZPQG].

Her theory grounds sexual harassment law in anti-discrimination law.<sup>250</sup>

Applying anti-subordination theory to the menstruation context, menstrual harassment represents a form of subordination.<sup>251</sup> Indeed, the narratives of menstruating students demonstrate this.<sup>252</sup> In addition, the failure to provide girls and women with the accommodations and products that they need in order to be fully functioning members of society ultimately serves to subordinate them and perpetuate male power. If menstruating students cannot attend class without fear of bleeding through their clothes, they will not be in the room to compete with the boys. If girls are in class, but are concerned about managing their menstruation, they will not be able to focus on their studies. By contrast, if girls can go to the restroom when they need to and access products in privacy—and have the peace of mind of knowing that they will be able to do so—they are more likely to be able to compete on an even footing with boys. Indeed, when schools take affirmative steps to ensure that menstruation does not hinder girls' educational experiences, they are not giving menstruating "special treatment." They are simply leveling the proverbial playing field—an understanding consistent with Title IX's underlying goal of ensuring equal opportunity.<sup>253</sup>

### E. Intersectionality

Intersectionality, too, provides a useful lens for viewing menstrual equity issues.<sup>254</sup> Kimberlé Crenshaw has drawn on the metaphor of a traffic intersection to explain the interlocking forms of oppression that Black women experience.<sup>255</sup> "Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another," Crenshaw explains.<sup>256</sup> "If an accident happens in an intersection, it can be caused by cars traveling

<sup>250</sup> KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 332 (6th ed. 2013) (citing CATHERINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979)).

<sup>251</sup> See Katherine M. Franke, *What's Wrong with Sexual Harassment?* 49 *STAN. L. REV.* 691, 693 (1997) (discussing sexual harassment as a "technology of sexism"); see also Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *HARV. L. REV.* 446, 506 (1997) (framing sexual harassment as a dignitary harm); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *CORNELL L. REV.* 1169, 1172 (1998) (describing sexual harassment as "a practice that preserves male control or entrenches masculine norms in the specific setting of the workplace").

<sup>252</sup> See *supra* Part II.A.

<sup>253</sup> See, e.g., United States Department of Justice, *Equal Access to Education: Forty Years of Title IX*, *supra* note 49 and accompanying text.

<sup>254</sup> See generally Johnson, *supra* note 9 (discussing the universe of "menstrual injustice" issues as structural intersectionality).

<sup>255</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 *U. CHI. LEGAL F.* 139, 148–50 (1989); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244 (1991).

<sup>256</sup> Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 255, at 149.

from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.”<sup>257</sup> Anti-discrimination law fails, Crenshaw explains, when it lacks the capacity to address discrimination that is not sex-based alone or race-based alone, but the result of both sex *and* race.<sup>258</sup>

Legal scholars and cultural commentators have expanded Crenshaw’s theory of “intersectionality” to embrace consideration of a broad range of identity categories and the multiple oppressions that may be at work with respect to any particular individual or groups of individuals.<sup>259</sup> Indeed, in the context of menstruation at school, particularly relevant structures and systems include class, poverty, gender identity, a school board’s authority over students, and the control of a teacher over the classroom.<sup>260</sup>

In particular, it is important to recognize the ways that poverty and class overlap with sex in the context of access to menstrual products at school. If a student cannot afford menstrual products, and such products are not available through local food banks, pantries, or at school, that student

<sup>257</sup> *Id.*

<sup>258</sup> It is not uncommon for people to use the term out of context and to convey ideas that are not consistent with Crenshaw’s own conception of the theory. See Jane Coaston, *The Intersectionality Wars*, VOX.COM, May 28, 2019, <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/E6TM-D3B3>] (quoting Professor Crenshaw as saying, “Sometimes I’ve read things that say, ‘Intersectionality, blah, blah, blah,’ and then I’d wonder, ‘Oh, I wonder whose intersectionality that is,’ and then I’d see me cited, and I was like, ‘I’ve never written that. I’ve never said that. That is just not how I think about intersectionality.’”). On the left, “intersectionality” is often used to mean multi-cultural or pertaining to racial minorities. See *id.* On the right, conservatives have used it to describe rights claims that they perceive are based on claims of victimhood. *Id.* (quoting political commentator Ben Shapiro saying, “I would define intersectionality as, at least the way that I’ve seen it manifest on college campuses, and in a lot of the political left, as a hierarchy of victimhood in which people are considered members of a victim class by virtue of membership in a particular group, and at the intersection of various groups lies the ascent on the hierarchy.”). As Crenshaw herself has explained, intersectionality is not a concrete plan for change, but rather a mode of inquiry, one that requires individuals and movements to understand multiple forms of oppression. *Id.* (“Indeed, intersectionality is intended to ask a lot of individuals and movements alike, requiring that efforts to address one form of oppression take others into account.”).

<sup>259</sup> See, e.g., Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 69 (2019) (“The idea that discrimination affects people with multiple disadvantages in a unique way is useful in understanding differential outcomes for older black and older white workers.”), Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 74 (2019) (“The concept of intersectionality . . . is particularly relevant to child maltreatment proceedings where many of the respondents are not only women and mothers, but also women of color and women experiencing poverty.”); see also Caroline Mala Corbin, *Essay: Terrorists Are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 463 (2017) (“this Essay applies [critical race theory’s] insights to the brown Muslim/white Christian [hierarchy]”).

<sup>260</sup> See Johnson, *supra* note 9, at 7, 25, 47, 53–63.

may need to miss some or all of a school day.<sup>261</sup> School districts with fewer financial resources may be constrained similarly in their ability to make products available for free to students, underscoring the importance of broader governmental involvement with this issue.<sup>262</sup> Relatedly, using a menstrual cup may not be a viable option for anyone who does not want to clean a device in a school restroom; similarly, if a family is homeless or does not have running water at home, tampons and pads will be the only options.<sup>263</sup> In these ways, the lack of access to such products in schools must be understood as a class-related issue as well.

In addition to class, there is an overarching power imbalance between those who have authority in schools (typically principals and teachers) and students who are subject to school-wide or teacher-specific policies. As discussed above, schools and individual teachers sometimes limit students' bathroom breaks by requiring them to procure passes, wait for an escort, invoke procedures for special permission, or visit the bathroom no more than a specified number of times over the course of a month or school year.<sup>264</sup> These policies impose physical and psychological pressure on menstruating students. If a student knows that she is menstruating and may not be able to attend to her needs during the school day, she may leave school early or not go to school at all. Therefore, it is important to understand the ways in which the school personnel, through their bathroom-related policies,

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<sup>261</sup> See *Nearly 1 in 5 American Girls Have Missed School Due to Lack of Period Protection*, MARKETWATCH (Aug. 7, 2018, 8:00 AM), <https://www.marketwatch.com/press-release/nearly-1-in-5-american-girls-have-missed-school-due-to-lack-of-period-protection-1-always-joins-forces-with-gina-rodriguez-feeding-america-to-help-end-period-poverty-and-keep-girls-in-school-2018-08-07> [<https://perma.cc/3X4T-WPGW>] (reporting results of survey finding that “nearly one in five American girls have either left school early or missed school entirely because they did not have access to period products”).

<sup>262</sup> See Bridget Crawford, *How Much Do “Free” Tampons Cost? #MenstrualCapitalism and Examples from New York State*, THE FACULTY LOUNGE (Sept. 14, 2018), <https://www.thefacultylounge.org/2018/09/how-much-do-free-tampons-cost-menstrualcapitalism-and-examples-from-new-york-state.html> [<https://perma.cc/W3X2-TNQN>].

<sup>263</sup> See, e.g., Aneri Pattani, *Woman Gets Free Pads and Tampons to Teens in Need*, PHILA. INQUIRER (Aug. 3, 2019), <https://apnews.com/414de3619eca4b3fb62539252f4dd017> [<https://perma.cc/YFG4-3M3B>] (describing experience of sexual-health counselor who advised the use of a menstrual cup by a teen who could not afford menstrual products: “When Medley suggested one girl try a menstrual cup — a reusable container that has been shown to safely collect blood inside the vagina — the girl explained she doesn’t consistently have running water at home to clean the cup.”).

<sup>264</sup> See, e.g., Alia Wong, *When Schools Tell Kids They Can’t Use the Bathroom*, THE ATLANTIC (Feb. 26, 2019), <https://www.theatlantic.com/education/archive/2019/02/the-tyranny-of-school-bathrooms/583660/> [<https://perma.cc/G4JG-E6ES>] (reporting on a variety of formal and informal bathroom policies adopted by teacher including “a teacher who allegedly stipulated that her students could only go to the restroom during class time once every two months”); see also *Survey of School Nurses*, *supra* note 155 (reporting that less than 8% of nurses reported that their schools have a written policy on student bathroom use (64% reported no policy, 28% were unsure), while nearly half said students have free bathroom access, with permission required only as a formality, while others reported varying timed and supervised bathroom breaks).

very much control and exercise authority over the bodies of menstruating students.

### F. Third-Wave Feminist Legal Theory

One important development in feminist thought and discourse in the last twenty five years is the rise of third-wave feminism, typically defined as a movement led by activists and writers who came of age in the 1980s and 1990s.<sup>265</sup> Methodologically, third-wave feminists emphasize the power of media and technology to effect cultural change.<sup>266</sup> In the context of activism around access to menstrual products, one can discern a distinctly third-wave feminist engagement with the law.<sup>267</sup>

In 2015, Jennifer Weiss-Wolf took inspiration from international activists and joined forces with *Cosmopolitan* magazine to sponsor the first on-line petition in the U.S. to draw attention to the state sales tax on menstrual

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<sup>265</sup> See, e.g., Sally Ann Drucker, *Betty Friedan: The Three Waves of Feminism*, OHIO HUMANITIES, Apr. 27, <http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism> [<https://perma.cc/JNM2-CLXC>] (providing brief overview of three principal “waves” of feminism in U.S. history). Feminism’s first wave in the nineteenth century culminated in the passage of the Nineteenth Amendment, and feminism’s second wave in the 1970s removed many formal legal (and other) barriers to women’s participation in political, social and economic life. *Id.*; see also Cathryn Bailey, *Making Waves and Drawing Lines: The Politics of Defining the Vicissitudes of Feminism*, 12 HYPATIA 17, 17–18 (1997) (distinguishing feminism’s first and second waves, but critiquing the declaration of a “third wave” as a political act that does not advance feminist interests); see generally Maggie Humm, *Introduction*, in FEMINISMS: A READER 1–8 (Maggie Humm ed. 1992 2d ed. 2013). The precise beginning and end points for the generationally-based third-wave feminism are debated. Compare Leslie Heywood & Jennifer Drake, *Introduction in THIRD WAVE AGENDA: BEING FEMINIST, DOING FEMINISM* 4 (Leslie Heywood & Jennifer Drake eds., 1997) (defining third-wave feminists as those “whose birthdates fall between 1963 and 1973”), with Lisa Jervis, *The End of Feminism’s Third Wave*, Ms., Winter 2004/2005, 57 (“I was born in 1972, right smack in the demographic that people think about when they think about the third wave.”), and DIFFERENT WAVELENGTHS: STUDIES OF THE CONTEMPORARY WOMEN’S MOVEMENT vii (Jo Reger ed. 2005) (“I feel feminist but do not fit into a second (i.e., starting in the 1960s and 1970s and continuing into the backlash 1980s) or third-wave (i.e., argued by some as beginning in the 1990s) description. I am barely a baby boomer and too young for the second wave, and not quite a member of Generation X, making me too old for the third wave.”).

<sup>266</sup> Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & LAW 99, 124, 127–33 (2007) (explaining that “harnessing and interpreting media” is a principal method of third-wave feminism). Some scholars recently have identified what they believe is the emergence of a “fourth wave” of feminism, but that wave’s allegedly distinguishing characteristics—an emphasis on social media—bears a striking resemblance to third-wave feminism. See, e.g., Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, THE GUARDIAN (Dec. 10, 2013), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women> [<https://perma.cc/9PAH-TABL>] (“[T]he fourth wave of feminism . . . [is] defined by technology: tools that are allowing women to build a strong, popular, reactive movement online.”).

<sup>267</sup> See generally Crawford, *supra* note 266 (describing general themes of third-wave feminist writings and preferred methods for addressing gender inequality).

products.<sup>268</sup> The petition, called *Stop Taxing Our Periods. Period*, sparked interest and awareness of a financial injustice that many women have experienced (and mostly overlooked) their entire lives. Weiss-Wolf joined with attorney Laura Strausfeld to begin Period Equity, which, as described above, is the nation's first law and public policy organization devoted to the various aspects of menstrual equity.<sup>269</sup> Period Equity coordinated the class-action litigation that spurred New York's 2016 repeal of its state sales tax on menstrual products.<sup>270</sup> Together with the menstrual products company Lola, Period Equity has launched a national campaign to end the sales tax on menstrual products in the more than thirty states that retain it.<sup>271</sup> The campaign makes heavy use of social media, attention-getting facts and an interactive website to keep focus on the issue.<sup>272</sup>

Generationally, both Weiss-Wolf and Strausfeld are squarely within the age demographic typically associated with third-wave feminism.<sup>273</sup> Separate and apart from any generational-based touchstones, though, what makes the work on menstrual equity issues—eliminating the sales tax on menstrual products, increasing access to menstrual products, ensuring product safety, and making workplaces, schools, and public places hospitable to girls, women, and others who menstruate—distinctly third-wave is the movement's leadership and recognition of individual identities. In the past, prominent third-wave feminist writers have critiqued second-wave feminists for jealously holding leadership positions and for narrowly focusing on issues that

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<sup>268</sup> See, e.g., Prachi Gupta, *supra* note 5, and Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, *supra* note 5 (describing origins of Weiss-Wolf's menstrual equity activism).

<sup>269</sup> See *supra* note 15 and accompanying text (providing details about the mission of Period Equity).

<sup>270</sup> See Complaint at 12, *Seibert v. New York State Dept of Taxation and Finance*, Index No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016) (stating claim for a refund of all sales taxes paid on menstrual hygiene products); see also Crawford & Waldman, *supra* note 8, at 460–63 (discussing New York class action litigation to repeal sales tax on menstrual hygiene products).

<sup>271</sup> See PERIOD EQUITY, *supra* note 7.

<sup>272</sup> See, e.g., Explore Our Interactive Map, TAXFREEPERIOD.COM, <https://www.tax-freeperiod.com> [<https://perma.cc/ZFG7-UQA5>] (“Oklahoma has a tax on tampons, but sun lamps are untaxed”); see also Jennifer Weiss-Wolf & Brigid Kelly, *Your Taxes Shouldn't Be Higher Because of Your Period*, NBCNEWS.COM (Nov. 9, 2019), <https://www.nbcnews.com/think/opinion/your-taxes-shouldn-t-be-higher-because-your-period-let-ncna1076221> [<https://perma.cc/PK8Z-BKH6-825Y>]; Jennifer Weiss-Wolf, *Abolish the “Pink Tax”: There Will be No Women's Equality Without Menstrual Equity*, REWIRE.COM (Oct. 31, 2018, 5:04 PM), <https://rewire.news/article/2018/08/31/abolish-the-pink-tax-menstrual-equity> [<https://perma.cc/2U8B-825Y>].

<sup>273</sup> See Heywood & Drake, *supra* note 265 (describing age demographic typically associated with third-wave feminists as those born between 1963 and 1973). Weiss-Wolf was born in 1967. Email message from Jennifer Weiss-Wolf to co-author Bridget J. Crawford (February 1, 2020, 12:33 PM EST) (on file with the author). Strausfeld was born in 1964. Email message from Laura Strausfeld to co-author Bridget J. Crawford (February 1, 2020, 13:12 EST) (on file with the author).

are relevant only to some women, such as middle-class white women.<sup>274</sup> By contrast, the current menstrual movement has national leadership through Period Equity, but also relies on people of all ages to increase awareness of the issues in a decentralized way.<sup>275</sup> There is no age minimum or status requirement for becoming a local, national, or even international leader.<sup>276</sup> And because menstruation is a basic biological fact, issues of access, safety and structural or institutional recognition of the need to be able to manage menstruation (through break times at school or work, for example) cut across all other identity factors. As Weiss-Wolf has explained, “[o]ur issues aren’t all the same, but whether you’re dissecting it by poverty or gender or any issues that affect things like access, participation, equality, justice, democracy—[menstrual equity touches] all those things. This is why we can’t leave it out.”<sup>277</sup> The issues of girls and women who are poor,<sup>278</sup> homeless,<sup>279</sup> detained,<sup>280</sup> and incarcerated<sup>281</sup> are distinct and important fronts of the menstrual equity movement.

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<sup>274</sup> See, e.g., JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 219 (2000) (critiquing earlier feminist programming such as “Take Our Daughters to Work” day); see also Lillian S. Robinson, *Subject/Position*, in *“Bad” Girls/“Good” Girls: Women, Sex, and Power in the Nineties* 182 (Nan Bauer Maglin & Donna Marie Perry eds., 1996) (“The problem is that the feminism that went public in the late 1960s and early 1970s . . . broke silence about the systemic oppression of women, however we named the system, whereas the newer ‘third-wave’ seems inclined to break silence chiefly about oppressions perceived or experienced within feminism itself.”).

<sup>275</sup> See e.g., Debbie Truong, *Her School’s Restrooms Didn’t Have Pads or Tampons. So She Took Matters Into Her Own Hands*, WASH. POST (Dec. 29, 2018, 5:34 PM), [https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffdc-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffdc-11e8-862a-b6a6f3ce8199_story.html) [<https://perma.cc/Q3PS-45DK>]; Chelsey Sanchez, *Brooklyn Girl Scouts Find City Isn’t Fully Implementing Menstrual Equity Law*, Gotham Gazette (Dec. 28, 2018), <https://www.gothamgazette.com/city/8163-brooklyn-girl-scouts-find-city-isn-t-implementing-menstrual-equity-law-seek-redress> [<https://perma.cc/97MJ-R427>]; Emily Benson, *Meet the Girl Scout Fighting Period Poverty*, AUSTIN WOMAN (Nov. 21, 2018), <https://atxwoman.com/meet-girl-scout-fighting-period-poverty/> [<https://perma.cc/7U7F-YQVJ>].

<sup>276</sup> See, e.g., *supra* note 1 and accompanying text (describing “cookie protest” by middle school students).

<sup>277</sup> Anna Druet, *Menstrual Equity is the Ground We All Need to Stand On*, HELLOCLUE.COM, Sept. 19, 2018, <https://helloclue.com/articles/culture/menstrual-equity-is-the-ground-we-all-need-to-stand-on> [<https://perma.cc/9XUL-4P8G>] (quoting Jennifer Weiss-Wolf).

<sup>278</sup> EVANS et al., *supra* note 52, at 11 (highlighting voices of school children, shelter administrators, teachers and formerly incarcerated women speaking about their experiences of menstrual inequity).

<sup>279</sup> See, e.g., Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPERSBAZAAR.COM (Oct. 9, 2017), <https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/> [<https://perma.cc/B9BV-H32W>] (conveying Weiss-Wolf’s recommendation that advocacy efforts include making menstrual products available in public restrooms and shelters).

<sup>280</sup> See, e.g., Jennifer Weiss-Wolf, *Forcing Immigrant Girls to Bleed Through Their Underwear is Cruel, Degrading and Dangerous*, NEWSWEEK (Aug. 30, 2019), <https://www.newsweek.com/forcing-immigrant-girls-bleed-through-their-underwear-cruel-degrading-dangerous-opinion-1457040> [<https://perma.cc/RD2D-987K>] (decrying treatment

The commitment of menstrual activists to inclusivity reveals both the strength of the movement and potential fault lines. As described above, menstruation is a product of female biology, but not all who menstruate are girls or women.<sup>282</sup> Transgender boys and men need access to menstrual products in safe, clean and private facilities. They need to be free from harassment and bullying, too. Thus, a truly inclusive menstrual equity movement must include all who menstruate, while still being attentive to the sex binarism currently embedded in our legal system.<sup>283</sup>

### CONCLUSION

Public schools need to take menstruation into account in order to provide true freedom of educational opportunity for menstruating students. As described above, menstruating students face many obstacles at school, including menstruation-based harassment, lack of menstrual accommodations, lack of provision of menstrual products, and lack of timely and meaningful menstrual education. At the local, state and national levels, organizers should advocate that schools voluntarily remove these barriers to equal access to education that arise at the multiple intersections of menstruation and education. To the extent that public schools do not take remedial steps on their own, Title IX provides a legal framework for arguments that any educational barriers related to menstruation are impermissible barriers based on sex. Moreover, additional regulations and guidance are needed to ensure that Title IX accomplishes this goal.

Title IX's promise of non-discrimination, complemented by feminist theoretical frameworks, is merely one starting point in menstruation-related justice efforts, albeit an important one. Other efforts include state and federal legislative and other advocacy to provide menstrual products in primary and secondary schools. The efforts to ensure that menstruation does not prevent students from full and equal access to all educational opportunities should be understood as one of many fronts in the larger project of increasing justice for all people.

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of detained immigrant girls who do not have access to adequate menstrual hygiene products while in custody of the U.S. government).

<sup>281</sup> See, e.g., Bridget J. Crawford, et al., *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 37 MICH. J. GENDER & L. 101, 105–06 (2019) (Margaret Johnson's describing student and faculty advocacy affiliated with the Bronfein Family Law Clinic at the University of Baltimore School of Law on behalf of women incarcerated in Maryland prisons and jails to increase their access to menstrual hygiene products).

<sup>282</sup> See *supra* notes 228–230 and accompanying text.

<sup>283</sup> See, e.g., *supra* notes 232–232 and accompanying text (discussing embedded sex binarism).



