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# MENSTRUAL JUSTICE IN THEORETICAL CONTEXT

## REVIEWING *MENSTRUATION MATTERS*: *CHALLENGING THE LAW'S SILENCE ON PERIODS*

VIVIAN EULALIA HAMILTON\*

### *Abstract*

*This Essay reviews and places into theoretical contexts Bridget Crawford and Emily Waldman's invaluable book Menstruation Matters. Although the authors themselves do not explicitly label the theoretical approach that undergirds their work, much of Menstruation Matters: Challenging the Law's Silence on Periods falls within the liberal feminist legal tradition typical of post-civil rights second-wave feminism. Their work also embodies aspects of critical feminist approaches to law. Crawford & Waldman expose the discriminatory effects of facially neutral laws, the limits of formal equality, and the pitfalls of essentializing or making universal claims about categories of individuals—including women and menstruators. In addition to exploring the theoretical lenses employed by the authors, this Essay suggests that other critical perspectives, including critical and global critical race feminism, might further elucidate the nature of the menstrual injustices the authors expose. This Essay posits that Menstruation Matters convincingly illustrates that feminist legal theory—comprising a whole variety of perspectives and approaches—is as relevant as ever.*

*Crawford & Waldman emphasize that menstrual equity is necessary to facilitate menstruators' full participation in public life. The Essay suggests that this instrumental conception of menstrual equity may insufficiently recognize the inherent dignity of menstruators, irrespective of whether and how that equity enables their societal contributions. It suggests instead that menstrual equity*

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\* Copyright © 2023 by Vivian Eulalia Hamilton, Professor of Law, William & Mary Law School and Director, William & Mary Center for Racial & Social Justice. I thank Bridget Crawford and Emily Waldman for inviting me to contribute to this Symposium, Margaret Johnson for first introducing me (and students at William & Mary Law School) to the many dimensions of menstrual injustice, and Ella Ginsburg for excellent research assistance.

*is necessary and justified, not principally for any instrumental purpose, but simply because it affords menstruators the dignity to which they are entitled as full and equal members of society.*

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## INTRODUCTION

In *Menstruation Matters*, Professors Bridget Crawford and Emily Waldman join a growing number of scholars who examine the social and legal treatment of girls, women, and other menstruators.<sup>1</sup> The book

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<sup>1</sup> See BRIDGET CRAWFORD & EMILY WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS* (2022) [hereinafter *MENSTRUATION MATTERS*]; see, e.g., THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES (Chris Bobel et al. eds., 2020) (gathering articles written by scholars from various disciplines and nations). See also *infra* note 32 (listing book-length treatments of menstruation-related topics). A note on terminology: Most people who menstruate are women, and most women menstruate. But “not all girls and women menstruate and . . . not all who menstruate are girls and women.” *MENSTRUATION MATTERS* at 132. For various reasons, some biological females do not menstruate, and some men and others who do not identify as women—including some trans men, genderqueer individuals, and others who eschew the gender binary—do menstruate. The term “menstruators” is more inclusive. See also *infra* notes 93–100 and accompanying text (discussing anti-essentialism in menstrual equity advocacy).

catalogues a range of inequities—including economic burdens, discrimination, and cultural stigma—endured by menstruators in the United States and abroad.<sup>2</sup> It critiques the status quo, focusing on law and policy, and proposes reform. The authors’ aim is to eliminate menstruation-related challenges and thus advance the goal of menstrual equity.<sup>3</sup> Scholars from other disciplines have labeled this emerging field “critical menstruation studies”; *Menstruation Matters* represents the most significant contribution to the nascent field from the legal academy to date.<sup>4</sup>

In their book, Crawford & Waldman describe the work of activists who have leveraged traditional and social media to publicize the ways in which menstruation leads to social disadvantage.<sup>5</sup> They describe campaigns that have led to legislative progress, including the adoption of measures in many jurisdictions exempting menstrual products from sales taxes.<sup>6</sup> In addition to taking stock of progress, Crawford & Waldman address remaining barriers, with chapters focusing on discriminatory treatment in employment, education, and other public spaces.<sup>7</sup> They also address challenges facing menstruators across the globe,<sup>8</sup> as well as the risks to public health, individuals’ privacy, and the environment largely resulting from the actions of corporate actors profiting from the business of menstruation.<sup>9</sup>

The authors’ overarching and most vital contribution, however, is to exhaustively examine the intersection of law and menstruation. They describe their vision for the book as “seek[ing] to more fully conceptualize a robust role for law in eliminating period poverty and achieving menstrual equity.”<sup>10</sup>

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<sup>2</sup> See generally *MENSTRUATION MATTERS*, *supra* note 1.

<sup>3</sup> See Chris Bobel, *Introduction: Menstruation as Lens—Menstruation as Opportunity*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES* 1, 4 (Chris Bobel et al. eds., 2020) (noting that menstruation-based analysis is important for revealing and addressing inequality’s different factors).

<sup>4</sup> Bobel, *supra* note 3, at 1, 5 (observing in the introduction to a 2020 edited collection of academic articles and essays on menstruation—the first volume of its kind—that “the field of critical menstruation studies, a . . . constellation of scholarship and advocacy[,] . . . is finally coming into its own”).

<sup>5</sup> See, e.g., *MENSTRUATION MATTERS*, *supra* note 1, at 6, 16, 37 (describing various media campaigns started by period activists).

<sup>6</sup> See *id.* at ch. 2 (addressing the taxation of menstrual products).

<sup>7</sup> *Id.* at ch. 3 (education); *id.* at ch. 4 (public spaces, with a focus on prisons); *id.* at ch. 5 (employment).

<sup>8</sup> *Id.* at ch. 9.

<sup>9</sup> *Id.* at ch. 7.

<sup>10</sup> *Id.* at 25. The authors note that activists and scholars have advanced more or less capacious conceptions of “menstrual equity.” The website Period Equity (now Period Law) described menstrual equity as encompassing “the [tampon] tax, access, and safety.” *Id.* at 16. Voices of the Earth, an advocacy group, added that menstrual equity “is also about education and reproductive care . . . [and] ending the stigma around periods . . .” *Id.* And legal scholar Margaret Johnson has advanced a broader conception of “menstrual justice” aimed at ending “‘oppression of

Crawford & Waldman are helping to chart a course in an emerging field of study. The authors occasionally allude to theory, but their project is eminently professional and pragmatic. Their goal is to advance menstrual equity, and they propose legal reforms (accounting for both the utility and limits of using existing constitutional and statutory frameworks) intended to advance that goal.<sup>11</sup>

This Review endeavors, however, to situate *Menstruation Matters* within theoretical context, as feminist legal theory heavily influenced by both liberal and critical feminist traditions. It also observes that other theoretical lenses, not necessarily utilized, might nonetheless offer additional insight into the phenomena analyzed by the authors.

Part I of this Review draws from *Menstruation Matters* to briefly summarize the injustices that have historically accompanied menstruation, the work of advocates seeking to redress these injustices, and the potential for constitutional and statutory law to advance menstrual equity. Part II places *Menstruation Matters* into a broader theoretical context. Part III suggests that explicitly incorporating intersectional, (global) critical race feminist lenses, and intentionally centering menstruators, can further clarify the nature of menstruation-related injustice and help chart a path forward.

## I

### MENSTRUATION IN SOCIETY: INJUSTICES, ACTIVISM, SCHOLARSHIP

Approximately half of the world's population menstruates for a significant portion of their lives.<sup>12</sup> Yet menstruation is anything but normalized; to the contrary, it is rendered invisible or stigmatized nearly everywhere.<sup>13</sup> This invisibility and stigmatization, *Menstruation Matters* teaches us, perpetuates myriad indignities and poses barriers to women's and other menstruators' full participation in civic and public life.<sup>14</sup>

#### A. Menstrual Injustices and Global Perspective

Crawford & Waldman organize the first chapters of their book around

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menstruators.” *Id.* at 16–17 (citing Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 8–9 (2019)). That oppression comprises, for example, work- and school-based discrimination and failure to recognize the dignity of vulnerable people including the incarcerated, unsheltered, and those who do not identify as women. *Id.* at 17. Crawford & Waldman refer to “menstrual equity” as the removal of barriers to public participation. *See infra* notes 12–28, and accompanying text.

<sup>11</sup> *See* MENSTRUATION MATTERS, *supra* note 1, at 2.

<sup>12</sup> *See* *The World Factbook*, CIA, <https://www.cia.gov/the-world-factbook/countries/world/#people-and-society> [<https://perma.cc/V7VR-P76S>] (providing sex ratios for the world's population, indicating that the global population is approximately half male and half female).

<sup>13</sup> *See* MENSTRUATION MATTERS, *supra* note 1, at 13–14.

<sup>14</sup> *Id.* at 2.

the different areas in which menstruation yields inequitable results—access to and payment for menstrual products, and menstruation at work, school, and in institutional and public facilities—and explain the operation of law in each of those areas. For example, women and other menstruators who purchase menstrual products must pay taxes usually imposed on only nonessential goods (a so-called “tampon tax”), and many struggle to afford or otherwise access them when needed (“period poverty”);<sup>15</sup> students miss school and lose out on educational opportunities during their periods because of lack of access to menstrual products in schools or fear of being shamed;<sup>16</sup> individuals who are jailed or imprisoned are denied products and suffer humiliating treatment when on their periods;<sup>17</sup> employees endure menstruation-based discrimination and suffer adverse action by their employers when menstruating at work;<sup>18</sup> and menstruators who do not identify as women endure both additional social stigma and erasure.<sup>19</sup>

The authors then explore menstruation in its broader social context. They explore the role of corporations, who profit from the sale of menstrual products while governments do little to ensure products are safe for the menstruators who rely upon them.<sup>20</sup> And they explain that neither manufacturers nor governments have made meaningful efforts to stem the negative effects of these universally necessary (but typically disposable) products on the environment.<sup>21</sup>

In their final chapter, Crawford & Waldman offer a global perspective, discussing cultural conceptions of menstruation and menstruators, and the work of menstrual justice activists, in nations around the world.<sup>22</sup> The authors focus on a handful of countries (Australia, India, New Zealand, Scotland, and Kenya) that have each enacted reforms, illustrating both the progress made and ongoing challenges faced with respect to menstrual

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<sup>15</sup> See *id.* at 13–16 (discussing the difficulty many menstruators face to afford menstrual products, the average cost of products, and associated taxes). The authors describe a tampon tax as “national or local taxes . . . impose[d] on the sale, manufacture, and/or production of a range of menstrual products, including pads, tampons, and menstrual cups.” *Id.* at 34–35.

<sup>16</sup> See *id.* at ch. 3 (reporting rates at which students, particularly those who cannot afford menstrual products, are late to school, leave school early, or miss school altogether due to periods).

<sup>17</sup> See *id.* at ch. 4 (describing prison systems’ policies of limiting access to menstrual products in ways that humiliate and exercise further control over prisoners).

<sup>18</sup> See *id.* at ch. 5 (recounting workers’ experiences of adverse employment actions including disciplinary write-ups and terminations).

<sup>19</sup> See *id.* at ch. 6 (describing the identity-related disruption experienced by trans men and nonbinary individuals caused by menstruation, exacerbated by the hyper-gendered nature of discourse around, and marketing and sale of, menstrual products).

<sup>20</sup> See *id.* at chs. 7 & 8 (describing corporate marketing practices around menstrual products, along with the intersection between corporate interests, public health, and environmental concerns).

<sup>21</sup> See *id.* at ch. 7 (discussing the absence of comprehensive studies of the environmental impact of disposable menstrual products, challenges to making the products sustainable, and the likely long-term environmental harms resulting from unsustainable manufacture and disposal of menstrual products).

<sup>22</sup> *Id.* at ch. 9.

equity.<sup>23</sup>

Crawford & Waldman explain that Scotland, for example, has acted proactively to reduce period poverty, by enacting legislation in 2020 making menstrual products available without cost to anyone who needs them and providing these products free in schools and public buildings.<sup>24</sup> Australia eliminated its tax on menstrual products in 2018.<sup>25</sup> In New Zealand, a 2017 tampon-tax-repeal campaign generated some public support but failed to prompt legislative action.<sup>26</sup> New Zealand and the Australian states of South Australia and Victoria all now provide free menstrual products in schools.<sup>27</sup>

The authors also describe significant reforms in India and Kenya. Kenya was the first country to remove the tax on menstrual products; India followed soon after.<sup>28</sup> At the same time, the authors explain, other factors—widespread poverty, cultural stigma, and inadequate menstruation-related education—impede equity efforts.<sup>29</sup> For example, studies suggest that commercial menstrual products are out of financial reach for a majority of Kenyan and Indian girls and women, and a significant percentage of girls in these countries miss school during their periods because of the challenges they face in managing menstruation.<sup>30</sup> The authors also note that menstrual taboos and shaming are still common and manifested in varying degrees across the globe.<sup>31</sup>

### B. Menstrual Justice Advocacy in the United States

A small number of scholars have been engaged in menstrual studies since the late twentieth century, though their work did not before engender mainstream attention.<sup>32</sup> In more recent years, however, activists and scholars

<sup>23</sup> See *id.*

<sup>24</sup> MENSTRUATION MATTERS, *supra* note 1, at 202–04.

<sup>25</sup> *Id.* at 199.

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

<sup>27</sup> *Id.* at 199–200. New Zealand began providing free period products to all schools in 2021. *Id.* Victoria and South Australia began providing free products in 2019 and 2021, respectively. *Id.* at 200. The state of New South Wales developed a pilot program to do so in 2021. *Id.*

<sup>28</sup> *Id.* at 191–93.

<sup>29</sup> *Id.* at 191–96.

<sup>30</sup> See *id.* at 193–95 (reporting, for example, a Kenyan study finding that girls who cannot afford menstrual products create their own pads using a variety of “make do” materials including bunched rags, mattress cuttings, and grass); *id.* at 191–92 (reporting various Indian studies finding that significant percentages—ranging between 42% and 88%—of menstruating girls and women have no access to commercial menstrual products, relying instead on grass or other materials).

<sup>31</sup> *Id.* at 18–20, 191, 196 (discussing the stigma that has long attended menstruation, across time and cultures).

<sup>32</sup> See, e.g., Bobel, *supra* note 3 (noting that menstruation research has long been considered unorthodox, thereby making the handbook that much more groundbreaking); CHRIS BOBEL, *NEW BLOOD: THIRD-WAVE FEMINISM AND THE POLITICS OF MENSTRUATION* (2010) (exploring activism and the failure of twentieth-century feminists to prioritize menstrual equity); KAREN

have drawn significant attention to issues of menstrual equity, leveraging both social media and traditional mainstream publications to increase public awareness of menstrual injustices and also winning victories in legislatures and courtrooms.<sup>33</sup>

*Menstruation Matters* expands upon and updates the work of menstrual equity scholars, and the project highlights the rapid development in menstrual equity advocacy. For example, menstrual equity advocate Jennifer Weiss-Wolf wrote in 2017 that menstrual products were not typically offered in school or workplace restrooms, nor in public shelters, jails, or prisons.<sup>34</sup> The products were excluded from Flexible Spending Account allowances, and in the “vast majority” of states, subject to sales taxes.<sup>35</sup> A mere five years later, the landscape has changed. Menstrual products may now be purchased with Flexible Spending, Health Savings, and Health Reimbursement Accounts;<sup>36</sup> numerous cities and states have enacted legislation requiring free menstrual products be made available in school restrooms;<sup>37</sup> and products must now be made available to individuals incarcerated in federal prisons and in some jails and homeless shelters.<sup>38</sup> As Crawford & Waldman demonstrate, however, much work remains.

### C. *Menstruation and the Law*

Feminist jurisprudence explores the law’s treatment of gender and sexuality and has, as its fundamental goal, producing better law—i.e., law

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HOUPPERT, *THE CURSE: CONFRONTING THE LAST UNMENTIONABLE TABOO: MENSTRUATION* (1999) (criticizing the stigmatization and culture of invisibility surrounding menstruation). Other books addressing various aspects of menstruation include ELISSA STEIN & SUSAN KIM, *FLOW: THE CULTURAL STORY OF MENSTRUATION* (2009) (focusing on advertising); LARA FREIDENFELDS, *THE MODERN PERIOD: MENSTRUATION IN TWENTIETH-CENTURY AMERICA* (2009) (exploring the adoption of “modern” menstruation management methods by Americans of various ethnicities in the twentieth century); MY LITTLE RED BOOK (Rachel Kauder Nalebuff ed., 2009) (anthology of “first period” stories from around the world, spanning 1916–2008); and LAURA FINGERSON, *GIRLS IN POWER: GENDER, BODY, AND MENSTRUATION IN ADOLESCENCE* (2006) (addressing adolescent experiences of menstruation).

<sup>33</sup> One of the earlier U.S. attempts to publicize issues of menstrual equity is a guest essay in the *New York Times* by Jennifer Weiss-Wolf, who brought the issue to the attention of *Times* columnist Nicholas Kristof. Jennifer Weiss-Wolf, *Helping Women and Girls. Period.* N.Y. TIMES (Jan. 28, 2015), <https://archive.nytimes.com/kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period/?searchResultPosition=1> [<https://perma.cc/DM79-PKVH>]. A few years later, Weiss-Wolf wrote that activism and media coverage increased mainstream recognition of and attention to the issue. JENNIFER WEISS-WOLF, *PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUALITY* 183 (2017) [hereinafter *PERIODS GONE PUBLIC*].

<sup>34</sup> See *PERIODS GONE PUBLIC*, *supra* note 33, at 211–24.

<sup>35</sup> *Id.* at 195–96.

<sup>36</sup> See *MENSTRUATION MATTERS*, *supra* note 1, at 209.

<sup>37</sup> See *id.* at 62–65 (providing an overview of the legislative processes in multiple cities and states surrounding the provision of menstrual products to students).

<sup>38</sup> See *id.* at 90–91, 209 (describing the Bureau of Prisons’s policy requiring that menstrual products be provided without cost in federal prisons and listing states that adopted analogous policies).



that advances justice more effectively than does existing law.<sup>39</sup> Feminist legal theorists, in addition to exploring the intersection of law, gender, and sexuality, thus also advance explicitly normative visions of law.<sup>40</sup> In that tradition, Crawford & Waldman introduce the law's potential to redress the numerous inequities that pervade menstruators' interactions within society.<sup>41</sup>

Crawford & Waldman analyze federal statutory and constitutional provisions and address their potential, as well as the limitations on their use, for addressing discrimination against and requiring accommodation of menstruators.

### *i. Constitutional Challenges to the Tampon Tax*

Crawford & Waldman discuss law reform efforts to date and explain that, in addition to legislative reform, advocates have pursued litigation as a strategy to effectuate change. In addition to leveling lawsuits challenging individual claims of menstruation-based discrimination, advocates have also turned to impact litigation.<sup>42</sup>

The authors describe class action lawsuits challenging tampon taxes in Florida, New York, and Ohio.<sup>43</sup> In those suits, plaintiffs challenged state tampon taxes as sex-based discrimination because menstrual products—used only by women—were taxed, whereas analogous products used by both men and women (e.g., incontinence pads, adult diapers, and bandages) were tax-exempt.<sup>44</sup> The legislatures in all three states repealed the taxes before the cases concluded, but an appellate court in Ohio issued a decision after the legislative repeal of the state tax.<sup>45</sup>

In its decision, the Ohio court rejected the plaintiffs' claims of unconstitutional sex discrimination.<sup>46</sup> Crawford & Waldman provide context for the court's decision, explaining that existing equal protection doctrine developed by the Supreme Court makes it difficult to successfully challenge government actions like the tampon tax, which do not explicitly refer to sex

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<sup>39</sup> See, e.g., Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 *FORDHAM L. REV.* 977, 998 (2018) (noting that feminist legal scholarship focuses on how law should be reformed to reach its goal of law that creates a more "just community").

<sup>40</sup> See, e.g., *id.* Critics of legal scholarship in general argue that its normative aspect is inconsistent with the goal of "true" scholarship, which is uncovering truths—not advocating for change. See Robin West & Danielle Citron, *On Legal Scholarship*, *THE ASS'N OF AM. L. SCHS.* 1 <https://www.aals.org/current-issues-in-legal-education/legal-scholarship> [<https://perma.cc/H2U8-S3PY>].

<sup>41</sup> For another example in this tradition, see West, *supra* note 39, at 999 (arguing that, despite critique from other academic disciplines, normative legal scholarship, including feminist scholarship, has significant social value).

<sup>42</sup> See *MENSTRUATION MATTERS*, *supra* note 1, at 142–43.

<sup>43</sup> See *id.* at 39–42 (describing such lawsuits).

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 41.

but nonetheless have a disparate impact on the basis of sex.<sup>47</sup>

The authors explain that facial sex-based classifications (like an all-male military draft) are subject to heightened scrutiny.<sup>48</sup> On the other hand, rules that are facially neutral but disparately impact one group as compared to another (e.g., disadvantage women vis-a-vis men) will be subject to heightened scrutiny only if challengers can show that the government acted with an intent to discriminate.<sup>49</sup> The tampon tax falls under the latter category—tax provisions are facially neutral and do not explicitly tax or refuse to exempt from taxation products used by women.

Those challenging such taxes must thus show that the provisions were motivated by discriminatory intent on the part of government actors. Because challengers—like those in Ohio—will struggle to establish discriminatory intent, these claims are unlikely to succeed under existing interpretations of the Constitution.<sup>50</sup>

To redress the shortcomings of existing doctrine, Crawford & Waldman advocate for expanding the Supreme Court's conception of sex-based discrimination to encompass menstruation-based discrimination. Doing so would require courts to subject to heightened constitutional scrutiny government action relating to menstruation or menstruators.<sup>51</sup>

They also argue that because menstruation has long been linked to female biology, the tampon tax should be viewed as a facially sex-based classification.<sup>52</sup> And if tampon taxes are analyzed pursuant to the legal standard applied to facially neutral rules, courts should recognize that legislators' failure to classify menstrual products with other exempt necessities was the result of discriminatory stigma and taboos surrounding menstruation.<sup>53</sup> In other words, governments' failure to exempt menstrual products from taxation can be viewed as stemming from discriminatory

<sup>47</sup> *Id.* at 42–48.

<sup>48</sup> *Id.* at 42–43.

<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g., id.* at 41 (noting that Ohio's class action failed because of the plaintiffs' inability to show discriminatory intent). The authors also discuss *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), where the Supreme Court found that women who challenged a preference in employment for veterans had failed to show that the state had adopted the classification (which did disparately impact women's ability to secure employment) with the intention of discriminating against women. *Id.* The Court thus subjected the statute to the most deferential standard of review, rational basis, requiring only that the statutorily-imposed distinction be rationally related to a legitimate government purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–72, 276–79, 281 (1979).

<sup>51</sup> MENSTRUATION MATTERS, *supra* note 1, at 42–48 (arguing that under a facial-neutrality model, menstruation-based discrimination should be subject to intermediate scrutiny because of the disparate impact it has on women and because discriminatory intent can be found in longstanding taboos around menstruation and a desire to avoid any conversations surrounding it). Intermediate scrutiny requires an “exceedingly persuasive justification” for government action. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

<sup>52</sup> MENSTRUATION MATTERS, *supra* note 1, at 43–44.

<sup>53</sup> *Id.* at 46–47.

intent.<sup>54</sup>

*ii. Constitutional and Statutory Challenges to Workplace Discrimination*

Crawford & Waldman explain that, in general, discrimination claims require a showing that an individual or group is receiving less favorable treatment than another group. In the context of sex discrimination claims, particularly claims related to female biology (e.g., claims related to pregnancy, breastfeeding), however, perfect comparisons can be impossible in the face of biological differences.<sup>55</sup> This challenge implicates the long-running debate among feminist legal theorists—the “sameness/difference debate”—of whether advocates should “emphasize the need for equal treatment of men and women, or . . . the need for law to accommodate differences between the sexes, particularly in the case of biological differences?”<sup>56</sup>

The authors describe the approach adopted by the Supreme Court in *Young v. United Parcel Service*, requiring plaintiffs claiming discrimination to compare their treatment to that of other employees similarly situated but treated differently.<sup>57</sup> *Young* arose under the Pregnancy Discrimination Act (PDA), which amended Title VII by specifying that sex-based discrimination in employment includes discrimination based on pregnancy, childbirth, or related medical conditions.<sup>58</sup> In *Young*, the Court required the plaintiff, who claimed discrimination on the basis of pregnancy, to make a prima facie showing of discrimination by demonstrating that her employer failed to extend to her an accommodation that was made available to other persons “similar in their ability or inability to work.”<sup>59</sup>

Crawford & Waldman argue, however, that in some cases involving reproductive biology, including menstruation, individuals have specific needs (e.g., access to menstrual products and bathroom breaks) that have no different-sex analogue but are instead sui generis. They argue that these needs must be accommodated in order to achieve menstrual equity.

Because existing legal frameworks are ill-suited to compel affirmative accommodations in cases such as these, the authors advocate pragmatic reform efforts and highlight the importance of combining litigation strategies with legislative advocacy, given that legislative reform may prove more flexible.<sup>60</sup>

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

<sup>55</sup> *Id.* at 51.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 52–56 (discussing *Young v. United Parcel Serv.*, 575 U.S. 206 (2015)).

<sup>58</sup> Equal Employment Opportunities Act, 42 U.S.C. §2000e-2(a)(1), §2000e-(k).

<sup>59</sup> *Young*, 575 U.S. at 212–13.

<sup>60</sup> MENSTRUATION MATTERS, *supra* note 1, at 56–57.

*iii. Challenges to Menstrual Inequity in Schools and Public Facilities*

Crawford & Waldman examine menstruation in schools and observe that Title IX, which prohibits discrimination on the basis of sex in education programs receiving federal aid, like those programs funded by the federal employment statutes, provides weak support for menstruation-based claims.<sup>61</sup> Even while advocates have challenged tampon taxes, they have not pursued constitutional or federal statutory claims that schools must provide menstrual products or otherwise accommodate menstruating students. Crawford & Waldman point to research finding that “[f]emale students are distinctly disadvantaged by restrictive bathroom policies and the lack of free and easily available menstrual products in school bathrooms.”<sup>62</sup> In light of the goal of Title IX, to ensure “equal access to education,” the authors argue that the federal government should issue implementing regulations requiring accommodation of menstruating students.<sup>63</sup>

In other public contexts, Crawford & Waldman discuss lawsuits brought by incarcerated menstruators challenging denial of menstrual products and other humiliating treatment from prison officials.<sup>64</sup> Under cases brought under the Eighth Amendment and the Equal Protection and Due Process Clauses, courts have refused government officials’ requests to dismiss claims involving a variety of extreme mistreatment that included menstruation-specific abuse (e.g., unusable toilets, inadequate food and water, deprivation of hygienic products including menstrual products). The authors report that, after courts ruled that plaintiffs’ cases could proceed, the cases settled out of court, so it is not possible to know how the cases would have been decided.<sup>65</sup>

In cases where incarcerated plaintiffs’ allegations have not been as far-ranging, however, some courts have been more deferential to prison officials.<sup>66</sup> For example, when female inmates in a Michigan county jail alleged that they were provided with insufficient menstrual products and made to wait for both products and clean clothing, the federal district court held that the deprivations were merely *de minimis*.<sup>67</sup> The plaintiffs appealed

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<sup>61</sup> *Id.* at 68–69 (noting that “no part of the statute, its regulations, or any related guidance mentions the issue of menstrual products . . . [making it] difficult to argue that Title IX *clearly* requires schools to provide these products for free”).

<sup>62</sup> *Id.* at 69 (citing Soc’y of Women’s Health Rsch., *Survey of School Nurses Reveals Lack of Bathroom Policies and Bladder Health Education*, MED. EXPRESS (Nov. 26, 2018), <https://swhr.org/survey-of-school-nurses-reveals-lack-of-bathroom-policies-and-bladder-health-education> [<https://perma.cc/4QD3-J7LX>]).

<sup>63</sup> *Id.* at 69.

<sup>64</sup> *Id.* at 98–99.

<sup>65</sup> *Id.* at 99–101.

<sup>66</sup> *Id.* at 101.

<sup>67</sup> *Id.* The court did hold, however, that the prisoners’ allegations that opposite-sex guards were viewing them while naked, including while attending to their periods, constituted a cognizable Eighth Amendment claim. *Id.*

the decision, however, and the parties settled the case.<sup>68</sup>

In order to effectuate what ought to be the expansive scope of existing federal antidiscrimination statutes, Crawford & Waldman make a number of suggestions. They suggest, for example, that the Equal Employment Opportunity Commission issue administrative regulations or guidance, or that Congress amend the PDA, to state explicitly that federal antidiscrimination law prevents menstruation-based discrimination.<sup>69</sup> They advocate for workplace policies that accommodate menstruation, including bathroom breaks.<sup>70</sup> They also suggest that the Department of Education adopt regulations requiring menstrual products be made available in schools or, at a minimum, issue guidance to schools clarifying that doing so is consistent with best practices in education.<sup>71</sup> In addition, they propose that schools adopt policies to minimize burdens on menstruating students—for example, by providing menstrual education and enforcing anti-harassment policies, placing menstrual products in bathrooms, allowing more regular bathroom access, avoiding uniform policies requiring only light-colored pants, and ensuring that such policies extend to menstruating students who do not identify as girls.<sup>72</sup>

These and other proposals in *Menstruation Matters* can inform advocates engaged in individual and impact litigation efforts, as well as lawmakers interested in proposing legislation, about tangible ways in which to advance the menstrual justice agenda.

## II

### MENSTRUATION MATTERS IN THEORETICAL CONTEXTS

Employing theoretical lenses to study wide-ranging phenomena like the treatment of menstruation and menstruators across time and cultures can provide explanatory and analytical clarity. This Part and the next thus endeavor to situate both Crawford & Waldman's overall project, as well as some of its various parts, into theoretical contexts. The authors themselves employ some of these lenses to different dimensions of menstrual injustice; this Review suggests others (discussed in Part III) that may further elucidate the many dimensions of their project.

#### A. Contemporary Feminist Legal Theory

*Menstruation Matters* is a work of contemporary feminist legal

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

<sup>69</sup> *Id.* at 115–16.

<sup>70</sup> *Id.* at 116–19 (noting that certain jobs are more likely to restrict access to bathrooms or refuse to allow menstruating workers to use bathrooms, affecting their wellbeing).

<sup>71</sup> *Id.* at 71.

<sup>72</sup> *Id.* at 72, 75–85.

scholarship, influenced by various approaches within feminist legal theory.<sup>73</sup> The varieties of contemporary feminist legal theory share a common endeavor—theorizing the relationship of law to women’s subordination and inequality.<sup>74</sup> Work in this tradition generally consists of (1) analytical critiques of existing law and (2) normative proposals for reform. This book operates in two core insights:<sup>75</sup>

The first *critical* insight echoes a basic theme of critical legal studies (“CLS”) and reflects dissatisfaction with the shortcomings of nondiscrimination doctrines and legal formal equality.<sup>76</sup> It posits that law—including liberal legal commitments to formal equality, nondiscrimination, and privacy—has operated to legitimize and entrench an unjust social order.<sup>77</sup> Work in this tradition commonly explores the shortcomings of liberal legalism and norms of formal equality in achieving women’s substantive equality.<sup>78</sup> It also exposes the gender biases of formally neutral laws.<sup>79</sup>

The second insight is *aspirational* and shares themes with other critical theories, particularly critical race theory, that branched off from and rejected the purely critical nature of CLS.<sup>80</sup> CLS tends to view law as an ideology that operates to legitimate and perpetuate inequality as status quo, but it tends to

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<sup>73</sup> See NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER*, 8–13, 15–39 (2006) (describing varieties of contemporary feminist legal theory).

<sup>74</sup> See *id.*; see also West, *supra* note 39, at 980 (defining feminist legal theory as “an attempt to fashion a broadbased theoretical account of the relationship of law in liberal legal regimes to women’s subordination, patriarchy, and gender and sexual inequality—particularly in a post-civil rights era, when women enjoyed broad access to rights of formal equality, reproductive liberty, and liberal antidiscrimination law”).

<sup>75</sup> West, *supra* note 39, at 985–86 (describing the “two defining, albeit mostly unstated, fundamental insights” espoused by feminist legal theorists).

<sup>76</sup> See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987) (surveying the critical legal studies tradition and work of its major theorists). There are many varieties of critical theory: critical race theory, for example, branched off from critical legal studies, which centered on class and was in turn inspired by earlier Marxist and structural approaches. See, e.g., Joanne Martin, *Feminist Theory and Critical Theory: Unexplored Synergies*, in *STUDYING MANAGEMENT CRITICALLY* 65–86 (Mats Alvesson & Hugh Willmott eds., 2003).

<sup>77</sup> See West, *supra* note 39, at 985–86 (describing one of the fundamental insights of feminist legal theory as the “critical-feminist claim . . . that at least one reason for women’s continuing subordination to men in liberal legal regimes was, in some measure, law itself”).

<sup>78</sup> See, e.g., *id.* at 986 (describing feminist theorist Catherine MacKinnon’s critique of laws that are a product of liberal and feminist political activism).

<sup>79</sup> See LEVIT & VERCHICK, *supra* note 73, at 45–48 (describing the feminist legal method as “unmasking patriarchy” inherent in many facially neutral laws).

<sup>80</sup> See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 309 (1987) (arguing that “[r]acism will not go away simply because Critics show that . . . law is a reflection of the interests of the ruling class. Whatever utility these concepts may have in other settings . . . they have limited application in helping to understand, much less cure, racism”).

stop short of offering alternatives.<sup>81</sup> Feminist legal theory and other critical theories, conversely, posit that the law—despite its potential to entrench hierarchies and legitimate subordination—also has emancipatory potential, and thus utility.<sup>82</sup>

Thus, feminist legal scholars, like critical race scholars, simultaneously critique and venerate law, viewing law as both an instrument of subordination as well as of liberation.<sup>83</sup> Their critiques expose the flawed foundations and resulting inequities of existing law, but their work then generally takes a normative turn and posits alternatives—in other words, a positive vision of what the law *should* be.

Although Crawford & Waldman themselves do not explicitly label their approach, much of *Menstruation Matters* falls within the liberal feminist legal tradition typical of post-civil rights second-wave feminism. Liberal feminism generally focuses on attaining the liberal values of liberty and equality for women, and conceives of those values expansively.<sup>84</sup> The first wave of liberal feminism sought basic legal and political rights for women (e.g., women’s suffrage and married women’s rights to own property).<sup>85</sup> The second wave of liberal feminists has sought, *inter alia*, recognition that constitutional norms broadly guarantee equal protection of the laws and freedom from gender discrimination, operating within existing legal and political frameworks.<sup>86</sup>

Crawford & Waldman’s arguments that constitutional antidiscrimination provisions and the Fourteenth Amendment’s equal protection guarantees should be extended to include menstruation-related discrimination is an example of a liberal feminist approach.<sup>87</sup>

*Menstruation Matters* also relays themes that align with the critical aspect of the feminist legal tradition. These include exposing the discriminatory effects of facially neutral laws, the limits of formal equality,

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<sup>81</sup> See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 416, 430–31 (1987) (responding to Crites’ argument that the attainment of legal rights would do little to liberate society’s marginalized people).

<sup>82</sup> See West, *supra* note 39, at 993–94 (describing the feminist legal theory view that legalism has a long-standing support of the patriarchy while also being grounded in ideals that go against patriarchal ideals).

<sup>83</sup> See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8 (1989) (explaining that “[t]here are times to stand outside the courtroom door and say ‘this procedure is a farce, the legal system is corrupt.’ . . . There are times to stand inside the courtroom and say ‘this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.’”).

<sup>84</sup> Sylvia A. Law, *In Defense of Liberal Feminism*, in RSCH. HANDBOOK ON FEMINIST JURIS. 24, 24 (Robin West & Cynthia Grant Bowman eds., 2019) (describing liberal feminism as “the branch of liberalism committed to women’s liberty and equality and the branch of feminism committed to the attainment of these liberal values for women”).

<sup>85</sup> *Id.* at 26–28.

<sup>86</sup> *Id.* at 28–30.

<sup>87</sup> MENSTRUATION MATTERS, *supra* note 1, at 99–100, 110–20.

and the pitfalls of making universal claims about categories of individuals—including women and menstruators. Examples of each critical approach follow.

### *B. Critiquing the Illusion of Law's Neutrality*

A core tenet of critical and feminist approaches to law is that formal legal tradition, cloaked in a discourse of neutrality, operates to create, entrench, and perpetuate inequality.<sup>88</sup> Professors Levit & Verchick describe feminist legal methods and explain that legal feminist critiques begin by asking “questions designed to uncover male biases hidden beneath supposedly ‘neutral’ laws.”<sup>89</sup> This questioning can unmask patriarchy and entails “examining how the law fails to take into account the experiences and values that seem more typical of women than of men.”<sup>90</sup>

The law's silence with respect to menstruation illustrates what feminist legal scholar Catharine MacKinnon has described as “the substantive way in which man has become the measure of all things.”<sup>91</sup> Menstruation is thus treated as a feature that distinguishes female from male bodies, and that difference is transformed to social inequality—more or less explicitly in different cultures, but prevalent in the United States.<sup>92</sup> The functions and needs of menstruator bodies are treated as additional and exceptional, stigmatized, or ignored altogether. Stated differently, laws need not explicitly disadvantage menstruators in order for them to experience disadvantage; ignoring menstruators and their needs leads to the same result.

Crawford & Waldman show that the law has long been silent—or neutral—with respect to menstruation. Although half of the world's population menstruates, law and culture consider non-menstruators the norm.<sup>93</sup> Cultural and legal treatment of menstruation is embedded within a social context in which the powerful overwhelmingly do not menstruate. Those who have long held political and social power have been non-menstruators (cis men). Their bodies, bodily functions, and needs are accommodated and normalized, through custom and policy.

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<sup>88</sup> See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 25–27 (2019) (describing how the law helped sustain an unjust social order by convincing people that the way society was organized was inevitable, and people of color believed this because of the historical treatment of racial minorities); see also Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986) (noting CLS's different arguments and current debates within CLS).

<sup>89</sup> LEVIT & VERCHICK, *supra* note 73, at 45–46.

<sup>90</sup> Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

<sup>91</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 34 (1987).

<sup>92</sup> Miren Guilló-Arakistain, *Challenging Menstrual Normativity: Nonessentialist Body Politics and Feminist Epistemologies of Health*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUAL STUDIES* 869, 873–74 (Chris Bobel et al. eds., 2020).

<sup>93</sup> MENSTRUATION MATTERS, *supra* note 1, at 10.



That treatment is not inevitable, but rather contingent. Feminist scholar and activist Gloria Steinem made this argument and exposed the arbitrary and sexist nature of societies' conception and treatment of menstruation more than 40 years ago in *If Men Could Menstruate*, a satirical essay published in *Ms.* magazine. She imagined that—in contradistinction to the law's current blind eye towards menstruation, in a world where only men could menstruate—menstrual or “[s]anitary supplies would be federally funded and free.”<sup>94</sup> Steinem also suggested that if the powerful menstruated, periods would be celebrated and talked about openly, rather than stigmatized and kept hidden.<sup>95</sup> In our world, the powerful have instead created cultural and legal milieu that reinforce their social standing vis-à-vis other identities.

### C. Critiquing Formal Equality and Equal Treatment

Formal equality assigns all competent adults equal legal status, privileges, and obligations.<sup>96</sup> The Civil Rights Act of 1964 (of which Title VII and the PDA are a part) embodies this ideal—preventing the dissimilar, discriminatory treatment of protected identity groups.<sup>97</sup>

Critical scholars, led by critical race scholars, have exposed the myriad contexts in which equal treatment of dissimilar individuals will fail to achieve justice or remedy an unjust status quo that is the result of past discrimination or unequal treatment. In many instances, treating unequal individuals alike simply perpetuates the inequality of the status quo.<sup>98</sup>

Rather than *formal* equality, critical scholars advocate for approaches (and particularly, flexible ones) to law and policy to help achieve *substantive* (or experienced, lived) equality. Crawford & Waldman embrace this more pragmatic approach by arguing for a range of accommodations for menstruators. In schools, for example, they support policies requiring schools to provide menstrual products.<sup>99</sup> A commitment to formal equality might reject such a mandate, because non-menstruators do not receive a comparable benefit. But because lack of access to menstrual products frequently results in absenteeism, a commitment to substantive equality would view the same policy as necessary to enabling menstruators to take equal advantage of educational opportunities. Thus, a policy that ostensibly “benefits” only menstruators, rather than being viewed as an extra perk, or worse, unequal treatment, can instead be viewed as necessary to achieve

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<sup>94</sup> Gloria Steinem, *If Men Could Menstruate*, *MS.*, Oct. 1978, reprinted in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUAL STUDIES* 353 (Chris Bobel et al. eds., 2020).

<sup>95</sup> *Id.* at 353–55.

<sup>96</sup> See BRIDGES, *supra* note 88, at 45.

<sup>97</sup> *Id.* (noting that “since the passage of the Civil Rights Act of 1964, formal equality has been the legal order of the day with respect to racial justice”).

<sup>98</sup> *Id.* at 44.

<sup>99</sup> MENSTRUATION MATTERS, *supra* note 1, at 67–80.

actual and substantive equality.

#### *D. Critiquing Universal Truths and Essentialism*

Postmodernist critiques of law have challenged generalized interpretive claims, including claims about gender oppression, women, law, etc.<sup>100</sup>

Categories presuppose homogeneity.<sup>101</sup> The category “women,” for example, presupposes that the individuals in that group are alike in some meaningful way—for example, that all women menstruate. Influenced by postmodern approaches to feminist and other theories, critical scholars have challenged the impulse to “essentialize” identities.<sup>102</sup> They point out that categorizing individuals suggests a homogeneity that masks the inevitable differences among individuals within a category, and the individuals who come to represent a category tend to be those with relatively more power and privilege.<sup>103</sup>

For example, society has long associated menstruation only with cis women. And it remains true that most women menstruate, and most menstruators are women. But not all women menstruate, and menstruators can include people of all genders. Thus, equating menstruation with womanhood risks erasing the experiences of other individuals who menstruate.

Crawford & Waldman work to avoid essentializing the gender identity of menstruators, devoting a chapter to the experiences of menstruators who do not identify as female.<sup>104</sup> In it, they critique existing federal antidiscrimination doctrine as enforcing an essentializing approach. Title VII and the PDA embrace existing legal frameworks that explicitly prohibit sex- and pregnancy-based discrimination but not menstruation-based discrimination; the statutes thus force advocates to argue that menstruation-based discrimination is discrimination against women.<sup>105</sup> Taking a pragmatic approach to legal advocacy, Crawford & Waldman argue for an approach that is both “inclusive and effective.”<sup>106</sup> Their approach recognizes that the historical association between menstruation and women is the genesis of menstruation-based discrimination, so they argue that “negative treatment of menstruation reflects a form of sex discrimination.”<sup>107</sup> At the same time, they note that this form of sex discrimination “then harms all who menstruate,”

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<sup>100</sup> See West, *supra* note 39, at 995.

<sup>101</sup> BRIDGES, *supra* note 88, at 237.

<sup>102</sup> *Id.* at 236–37 (noting that a potential solution is the dissolution of some or all categories altogether).

<sup>103</sup> *Id.*

<sup>104</sup> MENSTRUATION MATTERS, *supra* note 1, at ch. 6.

<sup>105</sup> *Id.* at 44, 132.

<sup>106</sup> *Id.* at 142–43.

<sup>107</sup> *Id.* at 143.

including menstruators who do not identify as women.<sup>108</sup>

### III

#### INTERSECTIONALITY, (GLOBAL) CRITICAL RACE FEMINISM, AND CENTERING MENSTRUATORS

In addition to the lenses directly employed by Crawford & Waldman, other critical perspectives can further elucidate the nature of the menstrual injustices they expose.

##### A. *Critical Race Feminism*

Critical race feminism explicitly injects race into feminist discourse, rejecting the essentialization of all women.<sup>109</sup> Critical scholars, including critical race feminists, show how individuals can experience disadvantage and oppression based on axes of intersecting identities.<sup>110</sup> Thus, while sexism affects all women, “it is the intersection of characteristics like sex, race, wealth, and sexual orientation that really suggests how people will treat you.”<sup>111</sup> In 1989, Professor Kimberlé Crenshaw captured the concept when she coined the term “intersectionality.”<sup>112</sup>

Menstrual justice scholars have also expanded their inquiry beyond a male-female binary, highlighting the intersecting axes of identity that can shape the nature of experienced oppression.<sup>113</sup> In the context of employment, legal scholar Margaret Johnson explained, “[w]omen employees have been fired, demoted, and have suffered harassment on the job because of menstruation and its intersection with gender, race, class, disability, and other identities.”<sup>114</sup>

Crawford & Waldman discuss *Coleman v. Bobby Dodd Institute, Inc.*,

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<sup>108</sup> *Id.*

<sup>109</sup> See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

<sup>110</sup> LEVIT & VERCHICK, *supra* note 73, at 26–27; see also Dorothy E. Roberts, *Critical Race Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 112, 113 (Robin West & Cynthia Grant Bowman eds., 2019) (noting that critical race feminism emerged when women of color pointed to “the failure of mainstream civil rights and feminism paradigms alike to see the intersection of racism and sexism in the oppression of women of color”).

<sup>111</sup> LEVIT & VERCHICK, *supra* note 73, at 26.

<sup>112</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (explaining how looking at discrimination by focusing on one identity leads to marginalizing those who are burdened with multiple defining characteristics, and how looking at the intersection of different identities allows for a more thorough examination of discrimination and policy).

<sup>113</sup> In the legal academy, Professor Margaret Johnson has addressed the operation of intersecting identities at great length. See Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 1–2 (2019) (“Menstrual injustice is the oppression of menstruators, women, girls, transgender men and boys, and nonbinary persons, simply because they menstruate.”).

<sup>114</sup> *Id.* at 28–29.

an Eleventh Circuit case, as illustrative of intersectional effects.<sup>115</sup> In that case, Alisha Coleman, the plaintiff, was fired by her employer from her job as a 911 operator after she accidentally soiled company property during heavy perimenopausal bleeding.<sup>116</sup> Coleman brought suit, alleging that her employers' actions constituted sex- and pregnancy-based discrimination in violation of both Title VII and the PDA.<sup>117</sup>

While Coleman's legal theories were dictated and likely constrained by existing doctrine, her experience of discrimination was almost certainly based on the intersection of various characteristics. Crawford & Waldman explain, for example, how both sex and class shaped Coleman's workplace experience and suggest that "[h]ad Coleman been an executive with a private office," she likely would have been able to manage any unexpected bleeding in private, rather than in view of her supervisor (and likely others).<sup>118</sup>

Margaret Johnson, in also writing about this case, notes that Coleman was a Black woman, and suggested that the intersections of class, sex, and race also likely influenced Coleman's experience of discrimination.<sup>119</sup> Johnson observed that people of color are more likely to work low-status jobs and that "low-wage workers without job security are particularly vulnerable to the whims and biases of their supervisors . . . [and] pervasive cultural disgust can lead to loss of employment and resulting economic hardship for menstruators."<sup>120</sup>

Even if the effect of any single one of these identity characteristics cannot be isolated as determinative, it is important to recognize that sex, race, and class may each have contributed to the experience of the plaintiff in *Coleman*, and likely contribute to the workplace experiences of many others.<sup>121</sup>

### B. Global Critical Race Feminism

Crawford & Waldman address the challenges confronted by menstruators in nations other than the United States, focusing on Kenya and India.<sup>122</sup> They recount both reforms made on behalf of and remaining challenges confronting menstruators in both countries.<sup>123</sup>

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<sup>115</sup> MENSTRUATION MATTERS, *supra* note 1, at 110–15.

<sup>116</sup> *Coleman v. Bobby Dodd Inst., Inc.*, No. 4:17-CV-29, 2017 U.S. Dist. LEXIS 88334, at \*2 (M.D. Ga. June 8, 2017).

<sup>117</sup> The parties settled the case before the circuit court decided the legal arguments. *See* MENSTRUATION MATTERS, *supra* note 1, at 112–13.

<sup>118</sup> *Id.* at 111.

<sup>119</sup> Johnson, *supra* note 113, at 32–33.

<sup>120</sup> *Id.* at 33.

<sup>121</sup> *See* Crenshaw, *supra* note 112, at 148–50 (arguing that courts render invisible the experiences of Black women).

<sup>122</sup> MENSTRUATION MATTERS, *supra* note 1, at 189–98.

<sup>123</sup> *Id.*

Global critical race feminists explore themes of critical race feminism in a global and comparative context.<sup>124</sup> They would observe that both Kenya and India are nonwhite, formerly colonized nations whose people were once subordinated by explicitly racist colonial systems.<sup>125</sup> Today, women and menstruators endure challenges presented by the confluence of colonization and a globalization that has benefited some women but that overwhelmingly benefits Western nations.<sup>126</sup> In addition, reformers must endeavor to confront practices that harm menstruators without slipping into a form of cultural imperialism that denigrates developing-world cultures.<sup>127</sup>

Examining the experiences of menstruators across the globe through this lens invites consideration of the potential of international law to redress inequity. Professor Adrien Wing has expounded on the intersections of international law and feminism, including critical and global critical race feminism, observing that the United States has long expressed a narrow conception of the utility of, and little respect for, international law.<sup>128</sup> However, she notes that the domestic perspective underestimates the reform potential of international law frameworks. For example, the African Union has adopted a Women's Protocol, which Professor Wing described as "the first international treaty intended to protect Black women specifically."<sup>129</sup> The Protocol requires member states to use education and communication to change "social and cultural patterns of conduct" that operate to "perpetuate sex discrimination."<sup>130</sup>

### C. Centering Menstruators

Crawford & Waldman articulate the normative conception of menstrual equity that undergirds and unites the various aspects of their project: that "law and society should become more responsive to human needs by reducing the barriers that menstruation can impose on full participation in

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<sup>124</sup> See Adrien K. Wing, *International Law and Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 468, 477–79 (Robin West & Cynthia Grant Bowman eds., 2019) (discussing the movement for women who are racial and ethnic minorities to be heard within the international law and human rights sphere).

<sup>125</sup> See Adrien K. Wing, *Global Critical Race Feminism: Legal Reform for the Twenty-First Century*, 34 DE JURE 446, 450–52 (2001) (noting the subordination of people of color in the United States and the move towards applying this theoretical lens in the international law sphere).

<sup>126</sup> LEVIT & VERCHICK, *supra* note 73, at 213–14 (describing how the downsides of globalization disproportionately affect women who are often the most vulnerable group in a society, and illustrating this disparity by examining the disproportionate effect of globalization on farmworkers in developing nations while American and European goods remain heavily subsidized).

<sup>127</sup> LEVIT & VERCHICK, *supra* note 73, at 217.

<sup>128</sup> Wing, *supra* note 124, at 468.

<sup>129</sup> *Id.* at 480–81.

<sup>130</sup> *Id.* at 481.

public life.”<sup>131</sup> And to be sure, reducing barriers to public participation is a befitting goal. But a somewhat different conception of menstrual equity—one that centers menstruators’ inherent entitlement to dignity and equality rather than their ability to contribute or participate in public life—may better recognize menstruators’ full personhood and provide a foundation for more robust understanding and addressing of menstrual inequities.

The authors’ articulated conception positions menstrual equity as instrumental—it is the means to an end, but not the end itself. Thus, achieving menstrual equity is desirable because doing so advances the end goal of menstruators’ full participation in and contribution to broader society.

To be sure, eliminating barriers to public participation addresses the larger societal cost imposed by menstrual injustice in all its forms. Social stigma, discrimination, and lack of accommodation impede menstruators’ educational attainment, ability to work, and participation in community and civic affairs. By eliminating these barriers, menstruators desiring public participation benefit, and society at large benefits from their participation.

Drawing attention to the societal cost of menstrual injustice may also, as a political matter, help garner more widespread support for reforms aimed at eliminating barriers. Equal access to education fit comfortably into more traditional notions of equality in the public sphere.

But menstrual equity ought to be the end itself, simply because it is an entitlement possessed by menstruators as full and equal members of society. Equity respects the inherent dignity of menstruators, irrespective of whether and how that equity enables their societal contributions. Chris Bobel, editor of the 2020 *Palgrave Handbook of Critical Menstruation Studies*, advances a similar idea when explaining that “critical menstruation studies is premised upon menstruation as a category of analysis.”<sup>132</sup> In other words, the experiences of menstruators are centered.

Crawford & Waldman’s conception of menstrual equity may thus be more constrained than what is ideally required to attain substantive justice. Law and society should indeed be structured so that menstruation—experienced by some half of the population—poses no unnecessary barrier to public participation to those desiring such participation. Barriers should be removed, however—and menstruation destigmatized—not principally for any instrumental purpose. Instead, these reforms should occur because doing so affords menstruators the dignity to which they are entitled as full and equal members of society.

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<sup>131</sup> MENSTRUATION MATTERS, *supra* note 1, at 2. The authors frame advocacy and reform efforts as advancing this goal throughout the book. They state, for example, that “[w]omen’s rights advocates in India continue to work for elimination of menstrual taboos . . . [and a range of other reforms] to ensure that menstruation does not prevent full participation in public life.” *Id.* at 193.

<sup>132</sup> Bobel, *supra* note 3, at 3 (emphasis omitted).

## CONCLUSION

Crawford & Waldman have contributed an invaluable book of scholarly inquiry, legal strategy, and political advocacy to the still-emerging field of menstrual studies. *Menstruation Matters* is also, however, an important feminist legal contribution to the burgeoning field. It illustrates that feminist legal theory—comprising a whole variety of perspectives and approaches—is as relevant as ever.