

Menstrual Product Deprivation in Prison: A Sex-Neutral Litigation Strategy

Avery Broome[†]

I. INTRODUCTION

Prisons at both the state and federal levels routinely deny or severely restrict access to menstrual supplies for those who need them.¹ Detainees and prisoners alike are left to bleed onto their clothes and the floor of their cells.² As a result, incarcerated people often resort to unhygienic means of managing their periods, such as leaving a tampon inserted for longer than recommended³ or using unsterilized items like toilet paper to absorb blood.⁴ The consequences of unhygienic period management can be acute, like toxic shock syndrome, or chronic, like cervical cancer.⁵

Although denial of period products to incarcerated people is widespread and systemic, there has been little litigation on the topic, and have been even fewer successful outcomes.⁶ In *Semelbauer v. Muskegon County*,⁷ the court issued a judgement on the pleadings and dismissed

[†] B.A., The University of Chicago, 2018; J.D. Candidate; M.A. SciencesPo, 2020; The University of Chicago Law School, 2023. My sincere thanks to Professor Hubbard for his excellent guidance and help shaping this paper, along with the staff of *The University of Chicago Legal Forum* for their hard work and editorial support.

¹ See AM. CIV. LIBERTIES UNION, *THE UNEQUAL PRICE OF PERIODS: MENSTRUAL EQUITY IN THE UNITED STATES* 3 (2019) [hereinafter *THE UNEQUAL PRICE OF PERIODS*].

² *Id.*

³ See *The Facts on Tampons—and How to Use Them Safely*, FOOD AND DRUG ADMIN. (Sept. 9, 2020), <https://www.fda.gov/consumers/consumer-updates/facts-tampons-and-how-use-them-safely> [<https://perma.cc/6WRH-EW7L>] (noting that no tampon can safely be worn longer than eight hours); *Preparing Your Child for Menstruation*, MAYO CLINIC (Aug. 11, 2020), <https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/menstruation/art-20046004> [<https://perma.cc/5SWC-KUXT>] (explaining the importance of changing menstrual pads every four to eight hours).

⁴ Mitchell O'Shea Carney, Note, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products*, 61 B.C. L. REV. 2541, 2548–49 (2020).

⁵ *Id.*

⁶ See *id.* at 2549.

⁷ No. 1:14-cv-1245, 2015 WL 9906265 (W.D. Mich. Sept. 11, 2015).

the case because each plaintiff had only alleged a single instance where delivery of period products was delayed, making the deprivations *de minimis*.⁸ This was in spite of six different plaintiffs testifying that they had been left without pads after begging the guards for them.⁹ Two other cases have survived summary judgment, but one ended in a settlement and the other has not yet been resolved.¹⁰

Although menstrual product deprivation cases have seen varying levels of success, they all share one characteristic: period products are discussed as a uniquely female need.¹¹ In some cases, the litigation explicitly excludes non-women by bringing an Equal Protection claim based on sex discrimination.¹² Any prisoner who is not a woman but who also needs period products and suffers from their deprivation would be unable to join in the litigation or reap the benefits of a favorable judgment.

This Comment will critique sex as a description of the class facing discrimination in menstrual product deprivation cases and assess other forms of litigation that include every menstruating prisoner. It will first lay out how pervasive period product deprivation is in prisons and attendant harmful effects on prisoners, then detail the policy-based and legal attempts to solve the issue. Finally, this Comment will describe how suits under the Fourteenth Amendment may be brought successfully without implicating sex. Instead, menstruators will be established as the class, allowing suits to center around the locus of discrimination and include everybody who needs relief. It will also demonstrate that a sex-neutral Fourteenth Amendment suit is a necessary addition to cases bringing Eighth Amendment claims.

II. EXTENT AND CONSEQUENCES OF PERIOD PRODUCT DEPRIVATION

Lack of access to period products causes physical and mental harm and fosters corrupt uses of power in prison. This Part will explore the extent of this lack of access and how these harms degrade prisoners' health and personal dignity. It will also review the legal action prisoners have taken so far to gain better access to menstrual products and

⁸ *Id.* at *10.

⁹ *Id.* at *9–10.

¹⁰ See *Turano v. Cnty. of Alameda*, No. 17-cv-06953 (N.D. Cal. May 23, 2019) [hereinafter *Turano III*] (ordering the parties to file a dismissal due to the settlement); *Flores v. City of New York*, No. 19-CV-5763, 2021 WL 663977 (E.D.N.Y. Feb. 19, 2021).

¹¹ See *Semelbauer*, 2015 WL 9906265, at *8 (specifying female prisoners as the ones suffering the deprivation); *Turano v. Cnty. of Alameda*, No. 17-cv-06953, 2018 WL 5629341, at *5–6 (N.D. Cal. Oct. 30, 2018) [hereinafter *Turano II*] (bringing an Equal Protection claim based on sex discrimination); *Flores*, 2021 WL 663977, at *5 (also bringing a sex-based discrimination Equal Protection claim).

¹² See *Turano II*, 2018 WL 5629341, at *5–6; *Flores*, 2021 WL 663977, at *5.

explore why this litigation has been largely unsuccessful. On the policy side, this Part will provide a summary of the efforts by the federal and state government to provide adequate menstrual products, along with the shortcomings of those efforts. Finally, there will be a brief overview of housing policies for transgender prisoners to determine the likelihood of a menstruating person being placed in a male housing facility and, therefore, the likelihood of excluding some prisoners with sex-based litigation strategies.

A. The Deprivation of Period Products in Prison

Barriers to access to menstrual hygiene in prison take several forms, but all result in many prisoners going through their periods without the ability to manage them hygienically. These barriers generally consist of inadequate supply by the prison, combined with high commissary prices for pads and tampons that most prisoners cannot afford. The barriers do not just mean prisoners are unable to manage their periods—it also creates an opportunity for abusive relationships with guards, who use their control over menstrual product supply to coerce prisoners.

Period products supplied by the prisons suffer from deficiencies in quantity and quality. In some cases, large groups of incarcerated individuals are expected to compete for a small number of pads, while other prisoners are given just a few pads or tampons for the duration of their periods.¹³ This is barely enough to cover one day of bleeding, let alone an entire cycle.¹⁴ Moreover, the products are often of such low quality that prisoners must change out the products more frequently than is normally necessary to compensate for the lack of absorbency.¹⁵

Period products are offered at prison stores called commissaries, but the prices are out of reach for many prisoners. In Florida, an incarcerated person who needed to buy tampons would have to pay more

¹³ THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 3.

¹⁴ See Jerilynn Prior, *Very Heavy Menstrual Flow*, CTR. FOR MENSTRUAL CYCLE AND OVULATION RSCH. (Oct. 4, 2017), <https://www.cemcor.ubc.ca/resources/very-heavy-menstrual-flow> [<https://perma.cc/QM64-Q8Q8>]; *The Ultimate Guide to Feminine Hygiene*, DUQUESNE UNIV. SCH. OF NURSING, <https://onlinenursing.duq.edu/master-science-nursing/the-ultimate-guide-to-feminine-hygiene/> [<https://perma.cc/L5LT-WT8L>]; *Heavy Periods: Overview*, INST. FOR QUALITY & EFFICIENCY IN HEALTH CARE (May 4, 2017), <https://www.ncbi.nlm.nih.gov/books/NBK279294/> [<https://perma.cc/3E5G-GNYM>]. Typically, people bleed enough to completely soak one to seven period products during a cycle. However, since a cycle generally lasts three to five days and disposable period products must be changed out every four to eight hours, people often switch their pad or tampon before it is fully saturated. For example, one report found that seventy percent of menstruators use about twenty tampons per cycle. Additionally, nine to fourteen percent of menstruators have heavy periods, meaning they will bleed enough to completely soak sixteen disposable menstrual products.

¹⁵ See Carney, *supra* note 4, at 2547.

than four dollars for just four tampons yet earns less than fifty cents per hour on average.¹⁶ A box of tampons in Colorado can run a prisoner two weeks of wages.¹⁷ For comparison, a box of thirty-six tampons currently costs less than six dollars at Walgreens.¹⁸

Resources from non-incarcerated family members are also scarce for many prisoners. A recent study indicates that 65 percent of families are unable to meet basic needs like food and housing while their family member is incarcerated, meaning they are very likely incapable of putting any funds into their imprisoned relative's commissary account.¹⁹ As such, the option to purchase menstrual products does not represent a viable alternative to free, prison-provided pads and tampons.

Exacerbating the quality and access issues is the discretion that prison officers exercise over distributing menstrual health products.²⁰ In jurisdictions where the number of pads and tampons is not specified by law or prison policies, correctional officers can decide when and in what quantities to distribute the products, even in facilities where there is no cap on the number of products prisoners are allowed to have.²¹ This provides officers with an additional source of power, which they use as a bargaining chip to control how prisoners behave. This coercion can take the form of withholding adequate supplies as a punishment for unwanted behavior or forcing prisoners into sex acts²² in exchange for pads and tampons.²³

B. Health Impacts of Inadequate Period Products

There are myriad negative effects of denying prisoners the means to hygienically manage menstruation.²⁴ Those who do not have access to pads and tampons resort to inserting toilet paper, mattress filling, or

¹⁶ THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 4.

¹⁷ *Id.*

¹⁸ *Multipack Perfection Silk Unscented Tampons*, WALGREENS (Oct. 17, 2022), <https://www.walgreens.com/store/c/walgreens-multipack-perfection-silk-unscented-tampons/ID=300424512-product>.

¹⁹ *See Half of Americans Have Family Members Who Have Been Incarcerated*, EQUAL JUST. INITIATIVE (Dec. 11, 2018), <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated/> [<https://perma.cc/4L4E-5A7J>].

²⁰ *Id.* at 2546–47.

²¹ *Id.*

²² It should be noted that sexual misconduct by guards is rarely disciplined. A 2016–2018 Bureau of Prisons report found that while 45,581 staff-on-inmate sexual assaults were reported in all federal, state, and local prisons, only 2,816 were “substantiated,” meaning there was enough evidence to prove it had occurred. As such, simply reporting the offending official is not an adequate remedy to protect prisoners from this form of coercion. EMILY D. BUEHLER, U.S. DEP’T OF JUST., SPECIAL REPORT: SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018 6 (2021).

²³ Carney, *supra* note 4, at 2546–47; THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 3–4.

²⁴ *See* THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 3–4.

dirty rags to absorb blood or leaving in the tampons they are issued for longer than is recommended.²⁵ Internal use of items that are not only unsanitary but difficult to remove creates a serious risk of toxic shock syndrome, which is a complication of certain bacterial infections.²⁶ Toxic shock syndrome can cause, among other things, high fevers, low blood pressure, vomiting, and seizures, which can finally result in death if an emergency hysterectomy is not performed.²⁷ Pads, although not used internally, can also cause a bacterial infection when used for excessive periods of time, which frequently happens when products are so restricted.²⁸

Since prisons also regulate when prisoners can wash themselves and their clothing, the lack of products creates other hygiene issues. In federal prisons, showers are not open at night.²⁹ If a prisoner were to bleed through their pad or tampon while sleeping, they would be unable to clean themselves until the morning. Laundry facilities are only available once a week,³⁰ meaning that some people are forced to live in soiled, blood-soaked uniforms for days on end. While this may seem like a mere discomfort, staying in perpetually wet clothing can cause other health problems, like yeast infections.³¹ Moreover, some bloodborne pathogens can survive in dried blood for up to a week, creating a potential health risk for any other prisoners who come across leaked period blood.³²

The effects are not solely physical. Because prison officials have broad discretion over how they distribute menstrual products,³³ prisoners undergo the humiliation of having to beg for basic hygienic supplies and the fear of having their requests ignored.³⁴ Some incarcerated individuals are even mocked or called disgusting for having period blood on their legs and describe the lack of menstrual products as “one of the most degrading aspects of incarceration.”³⁵ Since almost three-quarters

²⁵ Carney, *supra* note 4, at 2548.

²⁶ See *Toxic Shock Syndrome*, MAYO CLINIC (Mar. 18, 2020), <https://www.mayoclinic.org/diseases-conditions/toxic-shock-syndrome/symptoms-causes/syc-20355384> [<https://perma.cc/8WTX-CRN9>].

²⁷ Carney, *supra* note 4, at 2548–49.

²⁸ See Carney, *supra* note 4, at 2549.

²⁹ FED. BUREAU OF PRISONS, INMATE INFORMATION HANDBOOK 10 (2012).

³⁰ *Id.* at 7.

³¹ *You've Been Sitting in Wet Clothes—Now That Troubling Itch May Mean a Yeast Infection*, NORTON HEALTHCARE (Sept. 12, 2018), <https://nortonhealthcare.com/news/that-troubling-itch-may-mean-a-yeast-infection/> [<https://perma.cc/YH9JY9H>].

³² See Nat'l Inst. for Occupational Safety and Health, *Correctional Health Care Workers: Cross-Contamination*, CTRS. FOR DISEASE CONTROL (Aug. 18, 2010), <https://www.cdc.gov/niosh/topics/correctionalhcw/cross.html> [<https://perma.cc/5HCF-X62Q>].

³³ Carney, *supra* note 4, at 2546–47.

³⁴ See THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 4.

³⁵ See *id.*; Margaret Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 47 (2019).

of federal prison staff are cisgender men³⁶ and male officers are routinely staffed in both male and female prison facilities,³⁷ menstruating prisoners are likely to have to beg for basic hygiene items from guards who have never experienced a period and have no firsthand concept of the physical and mental effects it has on the body. This lack of understanding exacerbates the feelings of degradation and helplessness that prisoners who menstruate experience every month.

Aside from the psychological toll this takes, such humiliation has detrimental effects on access to outside resources. Many incarcerated people say they decline visits from family or counsel while on their periods due to shame because they are covered in blood.³⁸ Constant humiliation for a natural bodily function and fear that they will be unable to manage it hygienically is a mental burden for menstruators that non-menstruating prisoners do not have to bear.

C. Legal Action

Due to legal and economic barriers to courts that the incarcerated population faces, there have only been a few cases brought by prisoners that allege inadequate access to menstrual products—despite the severity of this issue.³⁹ Of these plaintiffs, most have characterized the deprivation of period products as sex discrimination and brought Fourteenth Amendment claims.⁴⁰ In *Turano v. County of Alameda*,⁴¹ the plaintiff was denied any menstrual hygiene products for hours while she banged on the windows of her cell and bled through her clothes.⁴² When the prison eventually provided her with two pads, she got blood on her hands, and the guards denied her soap to wash up.⁴³ The District Court for the Northern District of California initially dismissed the

³⁶ *Staff Gender*, FED. BUREAU OF PRISONS (Feb. 5, 2022), https://www.bop.gov/about/statistics/statistics_staff_gender.jsp [<https://perma.cc/P6W9-HURB>] (the BOP does not provide a breakdown of how many guards are cisgender, but since the majority of the population is cisgender, it stands to reason that most guards are as well).

³⁷ Linda L. Zupan, *Men Guarding Women: An Analysis of the Employment of Male Correction Officers in Prisons for Women*, 20 J. CRIM. JUST. 300 (1992).

³⁸ THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 4.

³⁹ See Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POLY INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [<https://perma.cc/ZJ69-9PHN>] (detailing how the Prison Litigation Reform Act requires plaintiffs to exhaust all internal administrative remedies, makes incarcerated people ineligible for filing fee waivers, restricts available remedies, and caps attorney's fees at below market rates).

⁴⁰ See generally *Turano v. Cnty. of Alameda*, No. 17-cv-06953, 2018 WL 3054853 (N.D. Cal. June 20, 2018) [hereinafter *Turano I*]; *Flores*, 2021 WL 663977.

⁴¹ No. 17-cv-06953, 2018 WL 3054853 (N.D. Cal. June 20, 2018).

⁴² *Id.* at *2.

⁴³ *Id.*

plaintiff's Fourteenth Amendment claim because the prison's failure to provide a "gender-specific requirement" could not be interpreted as the automatic "result of an intent to discriminate based on gender."⁴⁴

In the opinion handed down on Ms. Turano's amended complaint, the court once again explicitly gendered the deprivation of period products.⁴⁵ The District Court found that because the prison had failed to enforce a policy that "applies *only* to female inmates," the plaintiff did not need to establish discriminatory intent.⁴⁶ There is nothing to suggest that the second complaint alleged significantly different facts from the first or had a different argument. Instead, the court issuing the second opinion sought out and relied on caselaw that supported the inference of intent from the assumed gender specificity of the policy, while the first did not.⁴⁷ This suggests that proving sex discrimination from menstrual product deprivation is far from a given. Success may depend on the willingness of a particular court to view the nonenforcement of a supposedly sex-specific policy as sex discrimination. The case settled before the court issued a final ruling on whether the detainment facility had committed a Fourteenth Amendment violation.⁴⁸

In *Flores v. City of New York*,⁴⁹ the plaintiff was arrested on misdemeanor charges while menstruating. She requested period products at the precinct and was informed that none were available.⁵⁰ Ultimately, Ms. Flores was forced to wait six hours for her attorney to bring her tampons, at which point her clothes were ruined.⁵¹ When she brought suit for this treatment, the district court held that Ms. Flores's case should be allowed to proceed to discovery because she had shown that the prison policy around menstrual hygiene products disparately affected women.⁵² Nevertheless, the court did warn Ms. Flores that she would need to show more than just the failure to provide a "unique female requirement," citing the opinion handed down in *Turano I*, in which Ms. Turano's complaint was dismissed.⁵³ Unlike that *Turano* opinion, the court in *Flores* concluded that disparate impact was enough to proceed past summary judgment—further demonstrating that the

⁴⁴ *Id.* at *8.

⁴⁵ See *Turano II*, 2018 WL 5629341, at *6.

⁴⁶ *Id.* (emphasis in original).

⁴⁷ Compare *Turano II*, 2018 WL 5629341, at *5–6, with *Turano I*, 2018 WL 3054853, at *7–8.

⁴⁸ See *Turano III*.

⁴⁹ 19-CV-5763, 2021 WL 663977 (E.D.N.Y. Feb. 19, 2021).

⁵⁰ *Id.* at *1.

⁵¹ *Id.*

⁵² *Id.* at *6.

⁵³ *Id.* (citing *Turano I*, at *8).

success of sex-based discrimination claims is at least in part at the mercy of how a court interprets the relevant law.⁵⁴

The *Turano* and *Flores* cases were preceded by *Semelbauer*, which differed in that it framed the deprivation of period products as an Eighth Amendment rather than a Fourteenth Amendment violation.⁵⁵ Six different plaintiffs testified that they had been denied menstrual hygiene products for spans of time ranging from several hours to two days.⁵⁶ Nevertheless, the District Court found that their complaints amounted to a *de minimis* violation of rights that did not rise to an Eighth Amendment violation.⁵⁷ To justify this conclusion, the court pointed out that each complaint had only represented a one-time occurrence and, in each case, the plaintiffs had eventually received products.⁵⁸

D. Policy Efforts

The issue of access to menstrual products has gained more legislative attention in recent years.⁵⁹ New York was the first state to take action, passing legislation requiring correctional facilities to provide free feminine hygiene products in 2016.⁶⁰ In 2017, Colorado required the budget for state prisons to include funding for tampons.⁶¹ Currently, twenty-three states and the District of Columbia require free access to menstrual products in their prisons and correctional facilities, although some laws do place caps on the number of products, while others specifically exclude any non-woman prisoner.⁶² This leaves twenty-seven states without any regulation at all on what prisons will provide to those they incarcerate. In the states that do regulate access to menstrual products, reports indicate that the products were less absorbent

⁵⁴ *See id.*

⁵⁵ *Semelbauer v. Muskegon Cnty.*, No. 1:14-cv-1245, 2015 WL 9906265, at *8 (W.D. Mich. Sept. 11, 2015).

⁵⁶ *Id.* at *8–10.

⁵⁷ *Id.*

⁵⁸ *Id.* at *9–10.

⁵⁹ *See* Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM & MARY J. RACE, GENDER & SOC. JUST. 493, 511–12 (2019).

⁶⁰ MOST POLY INITIATIVE, FEMININE HYGIENE PRODUCTS AND PRISONS 2 (2021).

⁶¹ Weiss-Wolf, *supra* note 59, at 511–12.

⁶² *State Laws Around Menstrual Products in Prison*, THE PRISON FLOW PROJECT (Nov. 11, 2021), <https://thepriprisonflowproject.com/state-laws-around-access/> [<https://perma.cc/9T33-Y2EE>].

than the industry standard,⁶³ implying that the legislation has not addressed the quality issues.⁶⁴

On the federal level, Congress passed the First Step Act in 2018.⁶⁵ It mandated that the Director of the Bureau of Prisons make free menstrual hygiene products available “in a quantity that is appropriate to the healthcare needs of each prisoner.”⁶⁶ This legislation followed a Bureau of Prisons policy change which dictated that federal prisons must provide free menstrual hygiene products to female prisoners.⁶⁷ While this legislation seems to represent progress, the language is quite broad and leaves distribution mainly up to the discretion of prison officials.⁶⁸ This means prisoners still face the humiliation of having to beg for period products and the danger of officers using the power of distribution in coercive ways.

Moreover, there is evidence at the state and federal levels that prison administrations have ignored or delayed adopting the new policies.⁶⁹ In Maryland, for example, Robert Green, the Public Safety and Correctional Services Secretary for the state, confirmed that their women’s prison was not consistently following the new policy as of 2019.⁷⁰ Similarly, the Virginia Menstrual Equity Coalition provided empirical evidence to suggest that distribution of products was “low and inconsistent” after that state’s law change.⁷¹ Prisoners continued to use many of the same unsanitary measures to manage their periods that they had been forced to resort to before the legislation was passed.⁷² In

⁶³ See FOOD & DRUG ADMIN., MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (501(K)S) 7 (July 2005); 21 C.F.R. § 884.5425 (1980). The FDA regulations assume that pads have a “core,” which is the absorbent portion. The regulatory definition also describes their purpose as “absorb[ing] menstrual or other vaginal discharge.” However, many products that prison officials give for free are described as entirely nonabsorbent, indicating that they do not satisfy the FDA definition of a pad.

⁶⁴ See FEMININE HYGIENE PRODUCTS AND PRISONS, *supra* note 60.

⁶⁵ First Step Act, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

⁶⁶ *Id.* § 611 (“The Director of the Bureau of Prisons shall make [tampons and sanitary napkins] available to prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner.”).

⁶⁷ See Derek Gilna, *New Policies for Federal and State Prisoners Guarantee Feminine Hygiene Products*, PRISON LEGAL NEWS (Apr. 2, 2018), <https://www.prisonlegalnews.org/news/2018/apr/2/new-policies-federal-and-state-prisoners-guarantee-feminine-hygiene-products/> [<https://perma.cc/R9EQ-PTTR>].

⁶⁸ Jean Lee, *5 Pads for 2 Cellmates: Period Inequity Remains a Problem in Prisons*, THE 19TH (June 29, 2021), <https://19thnews.org/2021/06/5-pads-for-2-cellmates-period-inequity-remains-a-problem-in-prisons/> [<https://perma.cc/DR6K-FL6D>].

⁶⁹ See Gilna, *supra* note 67; Lee, *supra* note 68.

⁷⁰ Lee, *supra* note 68.

⁷¹ Alexa Doiron, *Despite 2019 Law, Some Jails Still Don’t Provide Free Menstrual Products to Female Inmates*, WY DAILY (Mar. 9, 2020), <https://wydaily.com/local-news/2020/03/09/despite-2019-law-some-jails-still-dont-provide-free-menstrual-products-to-female-inmates/> [<https://perma.cc/PR62-8TUX>].

⁷² *Id.*

federal prisons, a 2017 survey found that even after the BOP policy change, prisoners continued to suffer from irregular allocation, restrictions on products, or even a complete lack of free products.⁷³ These continuing inadequacies suggest that litigation is still necessary even at the federal level and in states with laws about menstrual product supply.

E. Housing Transgender Prison Populations

Litigation around period products in prison based on sex discrimination necessarily only includes female plaintiffs. When solely female prisoners are involved in a suit, there is no rationale for asking that the proposed relief be applied to male and female facilities. As a result, the scarcity of period products would continue for prisoners who menstruate but are not housed in a women's facility. To determine the scope of this concern, we must determine the extent to which menstruating prisoners who are not women are housed in male facilities. As such, a review of federal and state housing policies for transgender prisoners is in order.

The federal policy on transgender prisoners has been in flux with the change of presidential administrations. Under President Obama, the Transgender Offender Manual required housing by gender identity "as appropriate."⁷⁴ However, the policy was changed under President Trump to make what is termed "biological sex" the "initial determination for designation," with assignments based on identified gender "appropriate only in rare cases."⁷⁵ However, with the Biden administration has come another change—the Director of the Bureau of Prisons has issued a new version of the Offender Manual that reinstates the Obama-era policy of housing transgender prisoners on a case-by-case basis, considering both lived identity and prisoner safety.⁷⁶

State policies vary widely, from basing the determination of housing solely on genitalia to basing it solely on gender identification.⁷⁷ How-

⁷³ See Amy Ralston Povah, *BOP Report Card – Feminine Hygiene*, CAN-DO JUST. THROUGH CLEMENCY (Oct. 9, 2017), <http://www.candoclemency.com/bop-report-card-feminine-hygiene/> [<https://perma.cc/TU4M-MYVA>].

⁷⁴ See BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL CHANGE NOTICE (Jan. 18, 2017) (The cited document is the Trump-era regulations, with the prior regulations included but struck out).

⁷⁵ *Id.*

⁷⁶ See BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL 6 (Jan. 13, 2022).

⁷⁷ See *Project on Addressing Prison Rape*, WASH. COLL. OF L., <https://www.wcl.american.edu/impact/initiatives-programs/endsilence/state-by-state-transgender-housing-policies/> [<https://perma.cc/DV57-XVQT>]; Adam Beam, *California Will House Transgender Inmates By Gender Identity*, ABC NEWS (Sept. 26, 2020), <https://abcnews.go.com/US/wireStory/california-house-transgender-inmates-gender-identity-73268318> [<https://perma.cc/E4DL-QPWB>].

ever, the majority of states have something in between, with determinations to be made “on a case-by-case basis.”⁷⁸ Additionally, many states expressly prohibit guards from searching the detainee with the goal of discovering their genital status.⁷⁹ This is significant because it suggests that prisons may base their case-by-case determinations in part on the legal sex of the prisoner. Indeed, certain policies mention that prison officials are allowed to base housing decisions on their own impressions of the gender of the prisoner, which would reasonably be informed by their legal sex on any identification documents.⁸⁰ Since twenty-four states and the District of Columbia allow for individuals to change their legal sex without any proof of surgery or other physical transitions, one’s genitalia and legal sex may very well not be linked when prisons determine housing.⁸¹

The scarcity of states that house based solely on genital status indicates that not all menstruating prisoners are housed in women’s facilities. As a result, verdicts requiring adequate supplies in a women’s facility would not benefit all prisoners in need. Concern about leaving out transgender prisoners with litigation strategies based on sex discrimination is therefore warranted.

III. DEVELOPING A SEX-NEUTRAL LITIGATION STRATEGY

This Part will advance two main arguments. The first is that a more inclusive and effective means of bringing litigation for access to menstrual products in prison is a Fourteenth Amendment claim on the basis of discrimination against menstruators. Such a strategy would include everybody in the affected group while still emphasizing that these prisoners are the subject of unjust discrimination. I will begin by walking through the process to establish a Fourteenth Amendment claim based on discrimination against menstruators and the application of the *Turner* test to such a claim.

The second argument is that a potential claim for plaintiffs under the Eighth Amendment is not a substitute for a sex-neutral Fourteenth Amendment case, given the heightened standard to which Eighth Amendment violations must rise. This Part will explain that it is extremely difficult to prove an Eighth Amendment violation in the current analytical context, meaning such claims should be bolstered with a Fourteenth Amendment claim.

⁷⁸ See *Project on Addressing Prison Rape*, *supra* note 77.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Aug. 3, 2021), https://www.lgbtmap.org/equality-maps/identity_document_laws/birth_certificate [<https://perma.cc/RNQ9-FXXA>].

A. Non-Suspect Classes

Menstruation is not one of the protected classes defined under federal or state law. As such, any suit alleging discrimination on the basis of menstruation would receive rational basis review, which sustains the official action if it is rationally related to a legitimate state interest.⁸²

Although rational basis review is the most difficult standard under which to invalidate a government policy, there has been success for incarcerated plaintiffs who have brought complaints as a non-suspect class.⁸³ One particularly instructive case is *Turner v. Safley*,⁸⁴ an equal protection case brought by a Missouri prisoner alleging that the prison's refusal to allow him to get married constituted discrimination on the basis of his status as a prisoner.⁸⁵ Applying a rational basis standard, the Supreme Court first articulated the principle that "when a prison regulation impinges upon inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁸⁶

The Court further identified four factors that went into determining the reasonableness of a prison practice.⁸⁷ The first factor is whether the regulation has a rational relation to the stated goal, which must be a legitimate government interest.⁸⁸ The second factor is whether there are other avenues for prisoners to exercise their rights.⁸⁹ The third factor is what impact the accommodation will have on guards and other prisoners.⁹⁰ The fourth and final factor is the existence of ready alternatives to the regulation in question.⁹¹

B. Prerequisites to the *Turner* Test

To apply the *Turner* test, a court must first establish that the prison has impinged on a prisoner's constitutional rights. If it has, *Turner* will be applied to determine if the infringement is justifiable in the prison context. The right in question here is, of course, the right to equal protection under the Fourteenth Amendment. Under the color of

⁸² See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985).

⁸³ See *Turner v. Safley*, 482 U.S. 78, 95–96 (1987); *Campbell v. Quiros*, No. 3:17-cv-946, 2018 WL 888723, at *5 (D. Con. Feb. 13, 2018) (acknowledging that plaintiff pled sufficient facts to state a claim); *Green v. Santiago*, No. 3:16-cv-1724, 2017 WL 2312355, at *9 (D. Conn. May 26, 2017) (also allowing for equal protection claims to proceed based on the alleged facts).

⁸⁴ 482 U.S. 78, 95–96 (1987).

⁸⁵ *Id.* at 81–82.

⁸⁶ *Id.* at 89.

⁸⁷ *Id.*

⁸⁸ *Id.* at 89–90.

⁸⁹ *Id.* at 90.

⁹⁰ *Id.*

⁹¹ *Id.*

state power, prisoners who menstruate are denied the same ability to maintain personal hygiene and health as prisoners who do not menstruate. As in any equal protection claim, the plaintiff would need to demonstrate both disparate impact and discriminatory intent.⁹² The disparate impact is clear—prisoners who menstruate suffer from reduced hygiene by living in bloodstained clothes and cells; they experience shame and humiliation from seeing family members or counsel in an unclean state; they are mocked for bleeding on themselves; and they can contract short- and long-term health consequences, some of which are fatal.⁹³ Prisoners who do not menstruate do not have to face these issues.

Intent, as usual, is the more difficult standard to meet. As seen previously in the *Turano Cases*, judges have rejected the idea that deprivation of menstrual products shows an intent to discriminate on the basis of sex.⁹⁴ However, if the alleged class that experienced discrimination is those who menstruate, it becomes more difficult to deny intent, since the form of discrimination is so closely connected to the defining feature of the class. This is particularly true in the context of the behavior that often surrounds menstrual products in prison. As previously discussed, menstrual products are used as bargaining chips, sometimes to the extent of coercing prisoners to perform sex acts in exchange for a few pads.⁹⁵ In other cases, prisoners are mocked for bleeding and getting covered in their own blood.⁹⁶ Scenarios in which prison officials degrade menstruating prisoners or use menstrual products as tools of coercion clearly demonstrate that those officials are intentionally and maliciously singling out those who menstruate for harsher treatment on the basis of their menstruation.

If there are no derogatory remarks or coercive actions, intent becomes more difficult to prove. However, a comparison of the methods used to supply general use hygiene products and menstrual hygiene products can provide evidence that prison staff withhold menstrual products in particular. Cases of deprivation of menstrual hygiene items necessarily involve a request for products and a subsequent denial of that request, whether explicit or implicit. As a result, deprivations of menstrual products usually occur after prison officials are aware of the need, sometimes because they can clearly see that a prisoner is bleeding on themselves. Those officers choose to continue withholding the necessary supplies in the face of obvious need.

⁹² See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

⁹³ See *infra* Part III.

⁹⁴ *Turano*, 2018 WL 3054853, at *8.

⁹⁵ *Infra* Part 0.

⁹⁶ *Infra* Part 0.

The policy component that allows for this highly discretionary behavior bolsters the argument for intent. The rules dictating distribution of period products is often at odds with how other products are supplied. For example, Hawaii prisons provide “basic hygiene supplies” (including items like razors for short periods of time) and will replenish these items upon request three times a week.⁹⁷ That is, they ensure prisoners are supplied with all hygiene items except menstrual products, which are never mentioned.⁹⁸ Massachusetts’s prisoner hygiene policy provides for toilet paper and soap upon request and spends a page and half detailing the distribution of razors but says nothing about menstrual products.⁹⁹ New Mexico issues “soap, toothbrush[es], toothpaste, cloth towels and razors” so prisoners can maintain personal cleanliness, but does not seem to consider menstrual products to be an essential hygiene item.¹⁰⁰

These guidelines, present in states across the country, suggest that most sanitary items are dispensed as needed. This is even true of items that not every prisoner uses, like razors. Yet menstrual products, which are also not needed by the entire population but are more necessary for hygiene maintenance than a cosmetic item like a razor, are never mentioned in the policy. Ignoring the need for menstrual products while comprehensively providing any other sanitary item a prisoner might need as a matter of policy indicates intent to discriminate against those who do menstruate.

States that either have no policies regarding hygienic items or that do mandate providing menstrual products as needed pose the greatest hurdle to proving intent. Plaintiffs may need to make more specific arguments by collecting testimony that other hygienic items were readily supplied according to need while menstrual products were withheld. If the court allowed access to a prison’s expenses in discovery, plaintiffs might also be able to see whether the defendant prison buys adequate toiletries for the population but neglects to purchase any or enough menstrual hygiene items. This type of evidence would help support the contention that despite the lack of explicit discriminatory policies, there is a widespread systemic practice with the force of policy that does discriminate against menstruators.

There have been successful Fourteenth Amendment prison cases that do not rely on alleging discrimination against a protected class. *James v. Wallace*,¹⁰¹ which later became part of the larger class action

⁹⁷ PUB. SAFETY DEP’T., HAW. CMTY. CORR. CTR., INMATE GUIDELINES 15 (2014).

⁹⁸ *Id.*

⁹⁹ MASS. DEP’T OF CORR., 103 DOC 750, HYGIENE STANDARDS 7 (2022).

¹⁰⁰ S. N.M. CORR. FACILITY, INMATE HANDBOOK 8 (2014).

¹⁰¹ 382 F. Supp. 1177 (M.D. Al., 1974).

Pugh v. Locke,¹⁰² alleged a Fourteenth Amendment Equal Protection violation because of the arbitrary way the prison administration doled out access to educational and vocational programs. In this case, no class was alleged at all; the claim was predicated on the differential treatment of prisoners that lacked any justification.¹⁰³ *Wallace* survived a motion to dismiss because the plaintiffs had alleged differential treatment with regard to access to vocational programs, and the prison had failed to show how this differential treatment served any purpose.¹⁰⁴ The successful resolution of this and similar claims in *Pugh* demonstrates that equal protection suits in the prison context do not need to identify a protected class to prevail.¹⁰⁵

Proving a Fourteenth Amendment violation on the basis of discrimination against menstruators is therefore possible and, in some ways, easier than proving sex discrimination because the nature of the discrimination is linked to the fact that these individuals menstruate. Once plaintiffs demonstrate the Fourteenth Amendment violation, the court will inspect it under the *Turner* test to determine if it is an acceptable restriction of constitutional rights in prison.

C. Application of the *Turner* Test

Applying the *Turner* test to a potential Fourteenth Amendment suit brought on a theory of discrimination against menstruators demonstrates that such a case could very well succeed.¹⁰⁶ This Section will step through each of the four *Turner* factors as they would be applied in these cases.

1. Factor one: relation to penological goals

Assuming the court identified a Fourteenth Amendment violation, it would then first consider the penological goal a prison administration might have in allowing a certain practice. Here, it is difficult to see what penological interest might be advanced by denying prisoners pads and tampons besides the goal of saving money.

Although courts generally accept cost management as a valid penological interest, this does not mean that courts do not question

¹⁰² 406 F. Supp. 318 (M.D. Al. 1976).

¹⁰³ *Wallace*, 382 F. Supp. at 1181–82.

¹⁰⁴ *Id.* at 1182.

¹⁰⁵ See generally *Pugh*, 406 F. Supp. 318.

¹⁰⁶ It should be noted here that another potential hurdle in litigation of this kind is qualified immunity, which could apply if plaintiffs were suing a prison official as an individual. Since deprivation of period products is more a product of systemic failure than individual misbehavior, we will assume for purposes of this Comment that plaintiffs are suing the government entity responsible, which would make qualified immunity inapplicable.

whether a certain practice is truly related to the stated interest. For example, the court in *Roe v. Crawford*¹⁰⁷ criticized the prison administration's defense that allowing hospital abortion procedures would threaten security by increasing the number of "outcounts," or prisoners temporarily exiting the prison.¹⁰⁸ The court noted that the visits needed for prenatal care and labor would result in more outcounts than the single visit needed for an abortion, meaning that allowing abortion access would reduce outcounts and presumably increase prison security.¹⁰⁹

An analogous situation is at play when considering how menstrual products affect prison budgets. While data on how much prisons spend on menstrual products is scarce, some examples indicate prisons could save money by improving their menstrual hygiene policies. In a 2019 interview, a spokesperson for Missouri lawmakers estimated that the cost of providing unlimited free tampons in prisons would be about \$171,000, which is 0.11 percent of Missouri's total prison budget.¹¹⁰ In contrast, a recent report by Pew found that hospitalizations comprise a significant portion of state prisons' healthcare budget, often over twenty percent.¹¹¹ Of course, not all of those hospitalizations are due to poor gynecological health, but the easy preventability of conditions like toxic shock syndrome make them low-hanging fruit for states looking to lower healthcare costs. This is particularly true in light of the costs associated with procedures like hysterectomies, which can cost anywhere from \$30,000 to \$40,000,¹¹² and treatment for toxic shock syndrome, which costs roughly \$25,000.¹¹³ For comparison, non-incarcerated people spend an average of about \$4,000 on period products over their entire reproductive lifetimes.¹¹⁴ In fact, state corrections officers scrutinize preventable hospitalizations like the ones involved in treating toxic

¹⁰⁷ 514 F.3d 789 (8th Cir. 2008).

¹⁰⁸ *Id.* at 795.

¹⁰⁹ *See id.*

¹¹⁰ *See* Samantha Michaels, *Getting Your Period in Prison is Hell. These Numbers Prove It.*, MOTHER JONES, <https://www.motherjones.com/crime-justice/2019/05/getting-your-period-in-prison-is-hell-these-numbers-prove-it/> [<https://perma.cc/P96Z-ZFD7>].

¹¹¹ *State Prisons and the Delivery of Hospital Care*, PEW CHARITABLE TRS. (July 19, 2018), <https://www.pewtrusts.org/en/research-and-analysis/reports/2018/07/19/state-prisons-and-the-delivery-of-hospital-care> [<https://perma.cc/7W7K-S8FR>].

¹¹² Kelly N. Wright et al., *Costs and Outcomes of Abdominal, Vaginal, Laparoscopic, and Robotic Hysterectomies*, 16(4) J. SOC'Y LAPAROSCOPIC & ROBOTIC SURGEONS 519, 522 (2012).

¹¹³ Mark A. Strom et al., *Prevalence, Comorbidities, and Mortality of Toxic Shock Syndrome in Children and Adults in the USA*, 61(11) MICROBIOLOGY & IMMUNOLOGY 463, 465 (2017).

¹¹⁴ *See* Emma Goldberg, *Many Lack Access to Pads and Tampons. What Are Lawmakers Doing About It?*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/tampons-pads-period.html> [<https://perma.cc/GUD9-YGPR>].

shock syndrome particularly carefully, as it could indicate that the facility in question is not using its healthcare budget effectively.¹¹⁵ This data indicates that not only could prison administrations actually save money by providing adequate menstrual care, many state administrations would view the lack of such preventative measures as wasteful.¹¹⁶

The scarcity of data on this issue also cuts against defendants in cases governed by *Turner*. In another circuit court case, the court noted that while prison officials do receive deference, they “must present credible evidence” to support their claims that a particular penological interest is served by the policy in question. Specifically, prisons must present reliable evidence that cost impacts would be more than *de minimis*.¹¹⁷ As such, a prison cannot claim cost management as a valid goal without the data to show that menstrual products would constitute a considerable financial burden.

Finally, although cost is generally seen as a valid interest, courts do not always accept even proven budgetary restrictions as a justification for infringement on constitutional rights. As the opinion in *Pugh* stated:

[T]he response of [prison management] to the matters set forth in this opinion consistently has been that they cannot alleviate the conditions because of inadequate funding by the state legislature. However, a state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget.¹¹⁸

In that case, the equal protection matter at issue was the inadequate number of vocational, educational, and work opportunities and the lack of rational distinctions in assigning prisoners to those opportunities.¹¹⁹ The lack of sufficient opportunities and the lack of standards in distributing the few that were available mirrors the current situation with period products. If prisoners have an interest in equal access to vocational opportunities that takes precedence over a prison’s interest in saving money, surely a prisoner’s interest in equal access to essential

¹¹⁵ See *State Prisons and the Delivery of Hospital Care*, *supra* note 111.

¹¹⁶ There is some concern that forcing prisons to pay for menstrual products would result in forced sterilization or other involuntary medical interventions (like certain types of birth control) that would prevent menstruation and thereby reduce costs. Such an outcome is clearly undesirable but thankfully is unlikely. As mentioned, a hysterectomy (which is a sterilization) is far more expensive than supplying menstrual products over an individual’s entire reproductive life, and hormonal birth control also requires regular supply (reupping birth control pill packs, for example), meaning the prison would still have monthly expenses for all menstruating prisoners.

¹¹⁷ *Beerheide v. Suthers*, 286 F.3d 1179, 1189–90 (10th Cir. 2002) (emphasis in original).

¹¹⁸ *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Al. 1976).

¹¹⁹ *Id.*

hygiene maintenance is more important than budgetary concerns as well.¹²⁰

2. Factor two: other means of exercising rights

The second factor in the *Turner* test is whether prisoners have other means of exercising their rights—here, the right to keep themselves clean and healthy in the same way that non-menstruating prisoners can. Clearly, the use of unsanitary items like toilet paper, mattress stuffing, or rags does not achieve similar levels of health and hygiene to prisoners who are not bleeding and is therefore not a viable alternative to products designed for menstruation.¹²¹ As discussed above, prisons do generally stock pads and tampons in the commissary, but the price is heavily inflated.¹²² Given the pennies prisoners are paid as wages and the large proportion of prisoners who come from poor backgrounds,¹²³ this “alternative” to free prison-issue products is scarcely an option for most of the people who need it.¹²⁴ These products would also only be available when prisoners are allowed to visit the commissary, which in federal prisons is once a week.¹²⁵ This is a significant restriction compared to products provided by the prison, which are generally supposed to be given according to prisoner need.¹²⁶

Other uses of the *Turner* test support the argument that commissary products do not constitute an acceptable alternative means of access. In *Beerheide*, the court noted that even though kosher meals were available for purchase and the cost might seem “like a pittance,” that price “must be assessed in the prison context” and consider how little prisoners are paid.¹²⁷ It also noted that many prisoners are not supported by family outside the prison and therefore are entirely reliant on

¹²⁰ Since *Pugh* was decided in 1976, it does not use the *Turner* test. However, its assertion that budgetary concerns do not justify depriving prisoners of their constitutional rights remains relevant.

¹²¹ *Infra* Part II. One actual alternative to disposable menstrual products is reusable products like a menstrual cup, period underwear, or cloth pads. However, a prison is unlikely to suggest this, since reusable products are more expensive and would require large upfront costs. Even if a prison did offer this as an alternative to providing disposable pads and tampons, it could be countered by the fact that these products must be cleaned or sanitized regularly in order to be safe to use. As discussed above, prison regulations make it very difficult to provide as needed laundering and sanitizing services. *Infra* Part II.B.

¹²² *Infra* Part II.

¹²³ *Infra* Part II.

¹²⁴ *Infra* Part II.

¹²⁵ FED. BUREAU OF PRISONS, *supra* note 29, at 11.

¹²⁶ See, e.g., First Step Act, Pub. L. No. 115–391, 132 Stat. 5194, § 611, (2018).

¹²⁷ *Beerheide v. Suthers*, 286 F.3d 1179, 1188 (10th Cir. 2002). Although cases of this type would generally be reviewed under the Religious Freedom Restoration Act, the Tenth Circuit evaluated this claim under pre-RFRA standards because the Act had just been overturned in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

tiny prison wages, which they also use for other basic needs.¹²⁸ In this analytical context, it is highly unlikely that a court would see period products as “accessible” to prisoners when they are offered at inflated prices in the commissary.

3. Factor three: potential impact of accommodation

The third factor considers how an accommodation would impact the other prisoners and staff. It is difficult to see how providing sufficient menstrual products to everyone who needs them would negatively impact prisoners. On the contrary, the ability to hygienically manage one’s period would improve prisoner health. One potential counterargument could be that prison officials would have to take time away from their other duties to provide adequate menstrual products consistently to everyone who needs them. An easy way to eliminate this potential burden would be to make them freely available in common spaces like bathrooms. This would provide the added benefit of ensuring that prison officials are not using them as bargaining chips with prisoners and is a practice many prison advocates have encouraged.¹²⁹

A prison administration might further counter that free access would allow products to be used in unintended ways or hoarded by certain prisoners so that they can exert power over others. However, the Department of Justice has already looked into these concerns after they issued their 2017 report regarding adequate supply of period products.¹³⁰ Where states had made the products freely available in common areas, any hoarding issues stopped once prisoners were convinced that they would have consistent, regular access to the products they needed.¹³¹ Misuse was also not seen to be a problem; indeed, officials stated that not only were they not misused in fact, but there was also no way free access could pose a security threat.¹³² In the same report, the Department even noted that any distribution regime that tightly controlled access to menstrual products and required prisoners to request more did not meet the federal policy requiring prisons to make products available.¹³³

Another possible argument a prison administration might raise is the increased cost of buying enough pads and tampons for prisoners to manage periods hygienically. As discussed previously in this Part, there

¹²⁸ *Beerheide*, 286 F.3d at 1188–89.

¹²⁹ *See Lee*, *supra* note 68.

¹³⁰ EVALUATION AND INSPECTIONS DIV., U.S. DEP’T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MANAGEMENT OF ITS FEMALE POPULATION 30 (Sept. 2018).

¹³¹ *Id.*

¹³² *Id.* at 30 n.65.

¹³³ *Id.* at 30.

is evidence that adequate menstrual supplies serve as a preventative measure that saves money on healthcare over time.¹³⁴ Given that prisoners often experience severe medical consequences from unsanitary substitutes for pads and tampons, the decrease in emergency services like hysterectomies and treatment for toxic shock syndrome might make up for the increased cost of hygiene products.¹³⁵

Moreover, the federal government and twenty-three other states have passed laws mandating that prisons must provide sufficient menstrual products.¹³⁶ While this does not necessarily imply that those mandates are funded, several of the states in question explicitly require the prison to create a budget that included the purchase of adequate menstrual hygiene products.¹³⁷ This implies that space can be found in prison budgets to buy adequate health supplies. There is also no evidence that states with legislative mandates have seen prison operations suffer under the expense of buying menstrual products. In other words, there are no examples that prison administrations could point to that show that supplying adequate menstrual products constitutes an unreasonable financial burden that would negatively impact the prisoners and staff of the prison.

4. Factor four: alternative policies

The fourth and final factor to consider is whether there are alternative policies that would accomplish similar goals for the prison. The only alternative to providing adequate menstrual supplies is the status quo: delaying the provision of or entirely denying menstrual products to prisoners. A prison would most likely claim, once again, that lower costs are a goal of restricting access. As discussed in prior sections, this argument does not stand up even in light of the limited data available on prison expenses.¹³⁸ Sufficient menstrual supplies are a tiny fraction of prison budgets, especially when compared to the potential costs related to emergency services.¹³⁹ Therefore, the goal of cost-effectiveness would likely be better served by investing in menstrual hygiene supplies. If a prison were to claim that there was another function to denying prisoners necessary hygienic products, their argument is weakened by the fact that several states and the federal government have passed

¹³⁴ *Infra* Part III.C.

¹³⁵ See Phil Schaenman et al., *Opportunities for Cost Savings in Corrections Without Sacrificing Service Quality: Inmate Health Care*, URB. INSTIT. (Feb. 2013) (explaining that preventative care can bring down costs through eliminating the need for emergency services later).

¹³⁶ See *Feminine Hygiene Products and Prisons*, *supra* note 60.

¹³⁷ See Weiss-Wolf, *supra* note 59, at 511–12.

¹³⁸ *Infra* Part III.C.

¹³⁹ *Infra* Part III.

laws recognizing the need to supply adequate menstrual products.¹⁴⁰ Clearly, denying them is not serving an indispensable function in the prison systems of the federal government, almost two dozen states, and the District of Columbia. The defendants would have to explain what differentiates their prison system from those that have legislated for adequate provision of menstrual health products.

This overview of what analysis under *Turner* might look like for a claim based on discrimination against menstruators shows that these cases have a chance of success even under rational basis review. Protected class status is not a necessary predicate to fighting for the right to protect one's health and dignity.

D. Redefining Sex

A potential alternative to menstruation-based discrimination cases is that sex could simply be redefined to be more inclusive. This way, no prisoners would be shut out of the changes forced by successful litigation, and the plaintiffs could still benefit from intermediate scrutiny by bringing their case as a protected class. For example, an advocate for the plaintiffs might argue that "sex" should be understood in this context to rely upon reproductive organs like a uterus and a vagina. A case could then allege sex-based discrimination while including everyone who menstruates. Although it is tempting to keep the heightened scrutiny demanded by cases involving protected classes, there are legal and practical problems with this approach.

Legally, there is no single definition of sex.¹⁴¹ Even within single statutes, like Title IX, courts and administrative bodies have reached disparate decisions on what the term should mean.¹⁴² This certainly gives advocates room to maneuver to a definition that best suits their litigation, but it also means that their success would largely depend on which judge heard their case. It would add a third hurdle to any case: the plaintiffs would first have to convince a court that their definition of sex was a valid one in this context, then show there had been a violation of Equal Protection, and finally demonstrate that the practice did not pass intermediate scrutiny.

The practical problem with this definition of "sex" is that some plaintiffs will be referred to in ways with which they are uncomfortable because sex discrimination claims still require that everybody bringing

¹⁴⁰ THE UNEQUAL PRICE OF PERIODS, *supra* note 1, at 5.

¹⁴¹ JARED P. COLE, CONG. RSCH. SERV., LSB10229, TITLE IX: WHO DETERMINES THE LEGAL MEANING OF "SEX"? 1 (2018).

¹⁴² *Id.*

the litigation be of the same sex. For transgender plaintiffs, being legally identified as of the female sex and potentially having to self-identify as such could very well worsen any gender dysphoria they may have, which is “a feeling of discomfort or distress that might occur in people whose gender identity differs from their . . . sex-related physical characteristics.”¹⁴³ When an individual lacks the resources to change their physical characteristics to match their lived identity, dysphoria can lead to serious health consequences ranging from anxiety to an increased risk of self-harm.¹⁴⁴ Litigation that classifies people who may be suffering from dysphoria as “female” when their lived identity is that of a man or a nonbinary person could increase the pain those individuals feel from living in a body that does not feel like their own. In short, this strategy may end up harming the very population it seeks to include. Focusing on the fact of menstruation avoids pushing unwanted labels on people who have already suffered numerous violations of their personal dignity in prison.

E. Eighth Amendment Suits

At first glance, an Eighth Amendment suit might seem like a more inclusive way of bringing a suit for inadequate period products, as it does not tie the claim to the sex of the plaintiffs. However, Eighth Amendment claims must hurdle a high bar in terms of the conditions that would rise to a violation, meaning only the most egregious cases would have a good chance of succeeding.¹⁴⁵ While this certainly does not mean that advocates should abandon Eighth Amendment suits altogether, they should not be seen as a stand-in for a gender inclusive Fourteenth Amendment suit.

The Eighth Amendment establishes that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁴⁶ Given the substantial physical and mental harm prisoners sustain from insufficient period products, it may seem that such deprivations rise to an Eighth Amendment violation. However, the Supreme Court has interpreted “cruel and unusual” through the lens of an “evolving standard of decency,” which currently translates to “deprivations of the minimal civilized measure of life’s necessities.”¹⁴⁷ To de-

¹⁴³ *Gender Dysphoria*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> [<https://perma.cc/9BXS-FJY8>].

¹⁴⁴ *Id.*

¹⁴⁵ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁴⁶ U.S. CONST. amend. VIII.

¹⁴⁷ *Hudson v. McMillan*, 503 U.S. 1, 8–9 (1992) (quoting *Rhodes v. Chapman*, 453 U.S. 337, 346 (1981)).

cide what the prevailing standard of decency is, courts often turn to actions taken by state legislatures to see if any sort of consensus is forming about unacceptable conduct or punishments.¹⁴⁸ Given that under half the states have passed any kind of legislation about adequate menstrual supplies,¹⁴⁹ it is unlikely that a court would see a consensus worthy of motivating an expansion of Eighth Amendment protections.¹⁵⁰

In the context of claims related to the conditions of imprisonment, plaintiffs must allege deliberate indifference to prisoner health or safety.¹⁵¹ In the case of *Estelle v. Gamble*,¹⁵² for example, a prisoner was forced to work for four months with a back injury and was only treated with pain medication.¹⁵³ The Court found this to not rise to the level of an Eighth Amendment violation on the part of the medical professionals because the “inadvertent failure” to provide medical care was not evidence of deliberate indifference.¹⁵⁴

The reasoning in *Estelle* demonstrates the difficulty of showing that prisoner health or safety is threatened. The Court focused on “unnecessary and wanton infliction of pain” as the standard for an Eighth Amendment violation.¹⁵⁵ While going without period products is humiliating, degrading, unsanitary, and extremely uncomfortable, it would be difficult to argue that it caused immediate physical pain, which is the only type of harm courts have readily recognized in Eighth Amendment cases.¹⁵⁶ To prove to a court that the denial of menstrual products inflicted pain, plaintiffs would likely need to have suffered severe health consequences, like toxic shock syndrome, and be able to show that it stemmed directly from poor period hygiene. For a litigation strategy that seeks to remedy the harm before it creates these kinds of medical issues, reliance on prisoners suffering lifelong health consequences to succeed is clearly counterproductive. Of course, Fourteenth Amendment cases also require that plaintiffs demonstrate they have suffered harm, but the standards are not so high as to require danger to health or safety.

The law surrounding Eighth Amendment cases means they face a steeper uphill battle than Fourteenth Amendment ones. Of course,

¹⁴⁸ See *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

¹⁴⁹ See *State Laws Around Menstrual Products in Prison*, *supra* note 62.

¹⁵⁰ See *Atkins*, 536 U.S. at 344–45 (Scalia, J., dissenting) (criticizing the evidence of eighteen state law changes as “embarrassingly feeble”).

¹⁵¹ *Id.*

¹⁵² 429 U.S. 97 (1976).

¹⁵³ *Id.* at 99–101.

¹⁵⁴ *Id.* at 105.

¹⁵⁵ *Id.* at 103.

¹⁵⁶ See generally Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250 (2015).

plaintiffs can and in many cases should bring both types of claims in one case; however, bringing an Eighth Amendment claim on its own would be unwise when there is a plausible gender-neutral avenue for a Fourteenth Amendment suit as well.

IV. CONCLUSION

Denial of menstrual products to prisoners who need them is rampant throughout the prison system, even in federal facilities and states with laws mandating the distribution of menstrual hygiene supplies on an as-needed basis. Currently, there is sparse litigation on the topic, and all of it focuses on pads and tampons as exclusively feminine needs. Even in Eighth Amendment cases, the assumption is that relief applies only to women's prisons. This view is increasingly at odds with the reality of the prison population. Many states have made it possible for their citizens to legally change their sex without accompanying proof of physical changes, and prisons are often forbidden from demanding to know the genital status of prisoners or assigning them to a facility based on their genitalia. As such, there is no guarantee that a prisoner in a male facility does not menstruate. Litigation strategies need to catch up. Sex discrimination claims both muddy the basis of the discrimination—the fact of menstruation—and either exclude some potential plaintiffs or require them to identify in ways they do not feel comfortable with for the purposes of the litigation.

Claiming discrimination on the basis of menstruation solves both issues. Focusing on the fact of menstruation makes the discrimination clear and frees plaintiffs from identifying as any particular sex. Although it may seem a clear disadvantage to give up the intermediate scrutiny that comes with a claim of sex discrimination, analysis of a hypothetical claim under rational basis review and the *Turner* test nevertheless shows promise of succeeding.

Of course, there are other barriers that plaintiffs must overcome. Access to courts, resources for pursuing litigation, and lack of recognition of menstrual products as a basic human need all stand in the way of a successful case. However, when overcoming these obstacles, we should have a goal in mind that is inclusive and supportive of every prisoner experiencing harms related to the deprivation of essential menstrual hygiene products. Advocating for menstrual hygiene rights for incarcerated plaintiffs starts with respecting their lived identity. A litigation strategy that is shaped to fit that identity will do far more to respect the plaintiffs than one that expects them to erase a part of themselves to benefit from it.