

# MENSTRUATION IN A POST-*DOBBS* WORLD

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*In this Essay, we re-examine our 2022 book, Menstruation Matters: Challenging the Law’s Silence on Periods, through multiple related lenses, including the human rights, sustainability, and workplace issues emphasized by our three reviewers; the COVID-19 pandemic; and the Supreme Court’s decision in Dobbs v. Jackson Women’s Health Organization. All of these perspectives converge on the inherent dignity and autonomy interests in being able to manage one’s own body. Menstruation and related conditions like breastfeeding, pregnancy, and menopause should not be sources of shame or stigma. Nor should they be vectors of formal control by the government or de facto exclusion from school, work, or any aspect of public life. Yet the Supreme Court’s overturning of Roe v. Wade means that reproduction-associated bodily processes likely will be the focus of legal battles for years to come. As we continue to emphasize the many ways that menstruation matters in life and law, we strive for a legal future that recognizes the full humanity of all people and safeguards our equal rights.*

INTRODUCTION .....	191
I. MENSTRUATION AND HUMAN RIGHTS .....	192
II. THE COST OF EQUITY .....	195
III. THE COMPARATIVE PERSPECTIVE .....	199
IV. MENSTRUATION MATTERS NOW MORE THAN EVER.....	201
CONCLUSION .....	204

## INTRODUCTION

When an old painting receives a cleaning, viewers get to see the artwork in a new way. Colors dulled by accumulated dust or dirt become as vibrant as they were the day the artist painted them.<sup>1</sup> Images obscured by aging varnish become crisp and detailed.<sup>2</sup> Occasionally, a never-before-noted

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+ University Distinguished Professor of Law, Elisabeth Haub School of Law at Pace University. Thanks to Mac McMechan, Francesca Merrick, and Arjun Patel for their guidance and insight. We are grateful to Vivian Hamilton, Claudia Polsky, and Deborah Widiss for their engagement with our work and to the students of the *NYU Law Review* for hosting this symposium. Copyright © 2023 by Emily Gold Waldman & Bridget J. Crawford.

<sup>1</sup> See, e.g., The Museum of Mod. Art, *A Long-Overdue Cleaning Reveals the Vibrant Colors in this 1928 Painting*, YOUTUBE (June 18, 2021), <https://www.youtube.com/watch?v=ziORYvL24LU> [<https://perma.cc/Y2TB-2ADS>] (discussing conservation of *Tree of Paradise*, an oil painting by Séraphine Louis in the Museum of Modern Art).

<sup>2</sup> See, e.g., Valentina Di Liscia, *Genuine Rembrandt Revealed Under Layers of Varnish After Restoration*, HYPERALLERGIC (Feb. 19, 2020), <https://hyperallergic.com/543647/rembrandt->

image within the painting even reveals itself for the first time.<sup>3</sup> Likewise, the essays by Professors Vivian Hamilton,<sup>4</sup> Claudia Polsky,<sup>5</sup> and Deborah Widiss<sup>6</sup> have brought new and different perspectives to our book, *Menstruation Matters: Challenging the Law's Silence on Periods*.<sup>7</sup> In this Essay, we explore the insights that each of these readers brings to the intersection of law and menstruation. First, we discuss Professor Hamilton's emphasis on the importance of identifying and situating what is at stake with menstrual equity—both for substantive law reform and for legal scholarship.<sup>8</sup> Next, we turn to Professor Polsky's engagement with quantifying the costs of both ignoring menstruation and taking it into account.<sup>9</sup> Then we explore Professor Widiss's understanding of menstruation as deeply implicated in other forms of gender-based discrimination, especially in the employment context.<sup>10</sup> The last part of this Essay discusses how the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*<sup>11</sup> has raised the stakes and made menstruation even more relevant to today's legal and cultural landscapes. The Supreme Court's repeal of *Roe v. Wade*<sup>12</sup> means that reproduction-associated bodily processes likely will be the focus of legal battles for years to come.

## I

### MENSTRUATION AND HUMAN RIGHTS

A core theme of our book is the importance of reducing the barriers that

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allentown-art-museum [https://perma.cc/QH47-6SXB] (describing a restoration of the painting *Portrait of a Young Woman* in which layers of varnish were removed to reveal that Rembrandt had been the original creator).

<sup>3</sup> See, e.g., Roya Nikkhah, *Hidden Portrait 'Found Under Mona Lisa', Says French Scientist*, BBC (Dec. 8, 2015), <https://www.bbc.com/news/entertainment-arts-35031997> [https://perma.cc/8ZVU-T2AK] (exploring claims by French scientist of the existence of another image underneath DaVinci's *Mona Lisa*); Jennifer Ouellette, *Restored Vermeer Painting Finally Reveals Hidden Cupid in Background*, ARS TECHNICA (Sept. 21, 2021, 5:30 AM), <https://arstechnica.com/science/2021/09/restored-vermeer-painting-finally-reveals-hidden-cupid-in-background> [https://perma.cc/3GX7-ZGNK] (reporting that the restoration of Vermeer's *Girl Reading a Letter at an Open Window* revealed that after the artist's death, someone painted over a portrait of Cupid in the background).

<sup>4</sup> Vivian Eulalia Hamilton, *Menstrual Justice in Theoretical Context*, 98 N.Y.U. L. REV. ONLINE 133 (2023).

<sup>5</sup> Claudia Polsky, *Schools, Safety, and Semantics: Progress and Possibilities for Menstrual Equity*, 98 N.Y.U. L. REV. ONLINE 155 (2023).

<sup>6</sup> Deborah A. Widiss, *Time Off Work for Menstruation: A Good Idea?*, 98 N.Y.U. L. REV. ONLINE (forthcoming Apr. 2023).

<sup>7</sup> BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS* (2022) [hereinafter *MENSTRUATION MATTERS*].

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> 142 S. Ct. 2228 (2022).

<sup>12</sup> 410 U.S. 113 (1973).

menstruation can impose on full participation in public life.<sup>13</sup> In several chapters of the book, we explore multiple contexts in which this occurs (schools, workplaces, public spaces);<sup>14</sup> the means through which it can happen (lack of products, discrimination, harassment, formal rules, cultural expectations);<sup>15</sup> and possible strategies for reform.<sup>16</sup> As Professor Vivian Hamilton points out, though, this framing can inadvertently push to the background a more foundational issue: that menstrual equity is needed not only for its instrumental effects, but in order to afford people access to a core human right—“the dignity to which they are entitled as [persons].”<sup>17</sup> We agree with this dignity rationale and appreciate how she brings it from the subtext of our analysis to the surface.

The dignity rationale and the public participation rationale are closely related. They particularly intertwine around period poverty, “which includes . . . the lack of access to affordable menstrual products, . . . sanitation[,] and other supplies [and services] for menstrual hygiene.”<sup>18</sup> The inability to afford menstrual products is a persistent problem in the United States that sidelines too many women, girls, and other people who menstruate. One study of low-income women in St. Louis revealed that as many as forty-six percent of respondents had been forced to choose between buying menstrual products and feeding their families.<sup>19</sup> One-third of all students at one high school in that city reported that they had missed class at least once because they lacked period products.<sup>20</sup> A different study of college students found that one in ten of those surveyed reported struggling with being able to afford menstrual

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<sup>13</sup> See, e.g., MENSTRUATION MATTERS, *supra* note 7, at ix, 2.

<sup>14</sup> See *id.* at 59–85 (schools); *id.* at 109–29 (work); *id.* at 86–108 (public spaces and public buildings).

<sup>15</sup> See generally *id.*

<sup>16</sup> See, e.g., *id.* at 68–72 (discussing the potential applicability of Title IX to the provision of menstrual products by schools); *id.* at 125–29 (discussing workplace menstrual leave policies and provision of menstrual products); *id.* at 168–71 (discussing the potential usefulness of government procurement policies and private governance initiatives in increasing availability of more sustainable menstrual products).

<sup>17</sup> Hamilton, *supra* note 4, at 154. See also Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 512–21 (explaining how lack of access to menstrual products implicates multiple human rights concerns); *Every Woman’s Right to Water, Sanitation and Hygiene*, U.N. OFF. HIGH COMM’R (Mar. 14, 2014), <https://www.ohchr.org/en/stories/2014/03/every-womans-right-water-sanitation-and-hygiene> [<https://perma.cc/UE3N-WBN2>] (describing the interrelationship of menstruation, hygiene and human rights).

<sup>18</sup> See MENSTRUATION MATTERS, *supra* note 7, at 7.

<sup>19</sup> See Michelle Li, ‘I Shouldn’t Be Penalized Because I’m Having a Period’: Period Poverty Continues in St. Louis, KSDK (Sept. 19, 2022, 6:44 AM), <https://www.ksdk.com/article/news/local/period-poverty-st-louis/63-9d3dcb01-cae4-45e8-b254-c285dd89421c> [<https://perma.cc/9RQ2-HTA9>].

<sup>20</sup> Anne Sebert Kuhlmann, Mintesnot T. Teni, Rhonda Key & Cryslynn Billingsley, *Period Product Insecurity, School Absenteeism, and Use of School Resources to Obtain Period Products Among High School Students in St. Louis, Missouri*, J. SCH. NURSING, at 4 (Dec. 28, 2021), <https://pubmed.ncbi.nlm.nih.gov/34962178> [<https://perma.cc/AUU6-JQQT>].

products each month.<sup>21</sup> And, more broadly, while some schools, universities, and even public buildings make free menstrual products available, these are the exception, not the norm.<sup>22</sup> Community pantries and organizations that serve unhoused and struggling families cannot keep up with demand for menstrual products.<sup>23</sup> Yet without the ability to manage menstruation, one cannot go to school or work, or otherwise participate in public life. Professor Hamilton notes that the removal of such barriers should not be considered solely an end in and of itself, but part of the broader effort to “attain substantive justice” through recognizing the dignity of all who menstruate.<sup>24</sup> We agree that participation in public spheres, while important, is not the only reason or justification for menstrual equity.

Indeed, closely related to Professor Hamilton’s dignity rationale is another human rights rationale: the right to be free from discrimination. The ability to manage menstruation in a safe, affordable, and equitable way can be framed in anti-discrimination terms as well.<sup>25</sup> All people should have the right to health, education, work, and dignity—not contingent on anything, let alone an involuntary biological process like menstruation.<sup>26</sup> To take menstruation into account, then—by making it an expected part of life at work, at school, and in public places—is to recognize the “dignity to which [menstruators] are entitled,” as Professor Hamilton so clearly explains.<sup>27</sup>

In her emphasis on human rights, Professor Hamilton’s commentary invites renewed attention to the importance of language used in staking claims at the intersection of law and menstruation. We believe, as Professor Hamilton does, in the importance of using inclusive language that recognizes that menstruation is not the sole province of “women.”<sup>28</sup> Not all cis girls and

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<sup>21</sup> See, e.g., Lauren F. Cardoso, Anna M. Scolese, Alzahra Hamidaddin & Jhumka Gupta, *Period Poverty and Mental Health Implications Among College-Aged Women in the United States*, 21 BMC WOMEN’S HEALTH, no. 14, 2021, at 3, 5, <https://pubmed.ncbi.nlm.nih.gov/33407330> [<https://perma.cc/KVH3-3PGS>] (reporting that ten percent of college students were unable to afford menstrual products every month and linking period poverty to high rates of moderate and severe depression).

<sup>22</sup> See MENSTRUATION MATTERS, *supra* note 7, at 62–65, 104–08 (describing legislative efforts and challenges in several states to provide access to menstrual products in schools, as well as federal and municipal efforts to provide access to menstrual products in public buildings such as congressional offices and municipal building restrooms).

<sup>23</sup> See, e.g., Sara Aridi, *At Food Pantries, Addressing the Needs of Women*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/neediest-cases/women-poverty-menstrual-hygiene-products.html> [<https://perma.cc/TH3T-QNUH>] (describing a campaign by the Food Bank of New York City to collect donations of menstrual products because of the prevalence of period poverty and lack of availability of these products at community pantries).

<sup>24</sup> Hamilton, *supra* note 4, at 154.

<sup>25</sup> See Crawford & Spivack, *supra* note 17, at 512–21.

<sup>26</sup> See generally *id.* (discussing in depth the right to be free from discrimination, right to health, right to education, right to work, and right to dignity implicated by barriers to menstrual products).

<sup>27</sup> Hamilton, *supra* note 4, at 154.

<sup>28</sup> See MENSTRUATION MATTERS, *supra* note 7, at 130–45 (discussing menstrual equity advocacy for non-cisgendered individuals in a chapter titled “Menstruating While Male”).

women menstruate, and there are trans, gender non-binary, and genderqueer people who do menstruate. We devote an entire chapter of the book to explaining how using inclusive language with respect to menstruation does not undermine the argument that discrimination based on menstruation is a form of sex discrimination.<sup>29</sup> Such discrimination harms all who menstruate, and the goal is to “ensure that menstruation does not limit people’s full participation in public life.”<sup>30</sup>

Professor Hamilton characterizes our book as being aligned with liberal feminism.<sup>31</sup> At the most basic level, this is accurate, if one understands the liberal-legal feminist project as “want[ing] women to have more choices.”<sup>32</sup> We certainly believe, for example, that a student should not be forced to stay home because she is afraid of getting her period at school and does not have ready access to menstrual products at school (or cannot bring such products with her from home). Yet our work seeks far more than *increased choices* for approximately half the population. The book’s ideas—such as making menstrual products available at no charge in schools and public buildings, as Scotland has done, to give just one example<sup>33</sup>—require dismantling centuries of stigma, silence, and shame in order to reimagine foundational societal and legal structures. In this way, as Professor Hamilton suggests, the book is also properly understood as belonging to a “critical” scholarly tradition.<sup>34</sup> We are honored to have our work placed in the context of scholarship that challenges the myth of neutrality discourse, explores limits of formal equality, embraces intersectionality, and eschews essentialism.<sup>35</sup>

## II

### THE COST OF EQUITY

Period poverty became particularly visible in the United States during the COVID-19 pandemic, as did the inability to access menstrual products for reasons other than cost, such as lockdowns and scarcity. This was something we could not have anticipated when we first wrote our book proposal in 2019. But the pandemic’s unique intersection with menstruation became immediately clear. In the early weeks of the COVID-19 public health

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<sup>29</sup> See *id.* at 143–45.

<sup>30</sup> *Id.* at 144.

<sup>31</sup> Hamilton, *supra* note 4, at 146–47 (describing how Crawford and Waldman’s arguments for constitutional protections against menstrual discrimination are rooted in liberal feminist legal traditions).

<sup>32</sup> Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 155 (2000).

<sup>33</sup> See MENSTRUATION MATTERS, *supra* note 7, at 202–03 (detailing Scotland’s leading efforts to reduce period poverty).

<sup>34</sup> Hamilton, *supra* note 4, at 145–49 (discussing examples of the critical approaches in Crawford and Waldman’s work).

<sup>35</sup> *Id.* at 147–50 (citing work of Khiara Bridges and Kimberlé Crenshaw, among others).

crisis, prior to any of the vaccine rollouts, many people were unable or unwilling to leave their homes to buy basic necessities, including menstrual products, due to government stay-at-home orders or general fears of the virus.<sup>36</sup> Those who did go to brick-and-mortar stores or shop online may have found that menstrual products—along with toilet paper and cleaning supplies—were scarce, if not impossible to find.<sup>37</sup> And as schools were closed for instruction, many families, who otherwise normally relied on these institutions to provide students with menstrual products, no longer had access to these necessities.<sup>38</sup>

Professor Polsky astutely notes the “[c]onsequential [c]onvergence” of menstruation and schools.<sup>39</sup> As we discuss in Chapter Three, schools are frequent sites of menstruation-related stigma and harassment, themes that we trace throughout the book.<sup>40</sup> Menstruating students may be teased by peers, shamed by teachers and coaches, or placed in stressful and untenable situations if they get their periods unexpectedly and bleed through their clothes. Depending on school policy, they may or may not be permitted to go to the bathroom on an as-needed basis.<sup>41</sup> And it is well demonstrated that the lack of access to menstrual products at school can negatively impact

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<sup>36</sup> See generally Jennifer Kates, Josh Michaud & Jennifer Tolbert, *Stay-At-Home Orders to Fight COVID-19 in the United States: The Risks of a Scattershot Approach*, KFF (Apr. 5, 2020), <https://www.kff.org/policy-watch/stay-at-home-orders-to-fight-covid19> [https://perma.cc/YQA3-2GB2] (describing state and local responses, including shelter-in-place orders, during early weeks of the COVID-19 pandemic).

<sup>37</sup> See All Things Considered, *There’s a Tampon Shortage*, NPR (June 18, 2022), <https://www.npr.org/2022/06/18/1106094660/theres-a-tampon-shortage> [https://perma.cc/5LWH-QBTN] (referencing the tampon shortage at the beginning of the pandemic in 2020); Sammy Gibbons, *The Pandemic Shed Light on Another Public Health Crisis: Period Poverty*, LOHUD (June 14, 2021, 12:50 PM), <https://www.lohud.com/story/news/2021/06/14/pandemic-shed-light-another-public-health-crisis-period-poverty/7107729002> [https://perma.cc/H89B-WGJK] (citing an increase in requests for menstrual products during COVID-19 stay-at-home orders); Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569 (2021) (discussing lack of access to menstrual products in multiple countries during early months of the COVID-19 pandemic).

<sup>38</sup> See, e.g., Alex Zimmerman, *NYC Schools Served 96 Million Fewer Meals to Children Amid the Pandemic*, *New Data Show*, CHALKBEAT N.Y. (June 2, 2021, 7:48 PM), <https://ny.chalkbeat.org/2021/6/2/22465642/nyc-school-food-hunger-grab-go-pandemic> [https://perma.cc/69XW-C82A] (describing New York City’s school-based food services during the pandemic, with no mention of students’ or families’ needs for menstrual supplies); Chloe Atkins, *Two NYC Students Push to Ensure Period Hygiene Products Are Given Out*, NBC NEWS (May 24, 2020, 4:53 AM), <https://www.nbcnews.com/news/us-news/two-nyc-students-push-ensure-period-hygiene-products-are-given-n1213456> [https://perma.cc/3HJ8-AAV4] (quoting Congresswoman Carolyn Maloney as saying, “[m]any of our students rely on their schools for these products, and we need to make sure that this resource isn’t torn away from students during distance learning”).

<sup>39</sup> Polsky, *supra* note 5, at 157.

<sup>40</sup> MENSTRUATION MATTERS, *supra* note 7, at 80–83.

<sup>41</sup> *Id.* at 76 (citing a study of 362 school nurses which showed that “roughly half” of the schools surveyed did not allow their students to freely access the school bathrooms).

attendance.<sup>42</sup> As we discuss, this can happen for several reasons: students may stay home when they have their period and cannot afford products, or students may leave school when their period unexpectedly starts and they do not have products with them.<sup>43</sup>

We agree with Professor Polsky that data can help drive the discussion about how law can help bring about positive change in schools. Both in our book and in subsequent public comments filed in response to the Department of Education's proposed regulations under Title IX, we have suggested that it would be consistent with Title IX's mandate for schools to provide menstrual products at no charge to students.<sup>44</sup> We further noted the (relatively) small cost of providing free products in schools, using data made available by Cambridge (Massachusetts) Public Schools, which recently implemented such an initiative.<sup>45</sup> Given that school districts have budgets in the billions of dollars, and that spending a few dollars per student on menstrual products could dramatically improve students' lives and keep them in school, there is a practical case that this is a particularly cost-effective use of school funds.<sup>46</sup> Professor Polsky adds to this discussion by pointing out that the provision of free menstrual products in schools may even ultimately be "cash-flow *positive*," given that public school funding is often linked to student attendance.<sup>47</sup> We certainly agree that this further insight should be incorporated into menstrual advocacy efforts.

Professor Polsky's essay also adds support for our recommendations aimed at making menstrual products more "sustainable," a term we use in a

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<sup>42</sup> See *id.* at 69–71.

<sup>43</sup> See *id.* at 69–70 (citing a study of 693 females between the ages of eighteen and twenty-five which found that "students who could not afford menstrual products were 5.98 times more likely to miss school, 5.82 times more likely to be late for school, and 4.14 times more likely to leave school early than were students who could afford menstrual products").

<sup>44</sup> See *id.* at 71–72; Marcy L. Karin et al., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-227089> [<https://perma.cc/745S-32D2>].

<sup>45</sup> MENSTRUATION MATTERS, *supra* note 7, at 65 (calculating annual expense as \$2.48 per student).

<sup>46</sup> For example, in the 2020 fiscal year, total current spending of all public elementary-secondary school systems was approximately \$667.87 billion nationwide, for approximately forty-eight million students (approximately \$13,494 per pupil). *2020 Annual Survey of School System Finances*, U.S. CENSUS BUREAU, at tbl.8, <https://www.census.gov/data/tables/2020/econ/school-finances/secondary-education-finance.html> [<https://perma.cc/Y6WJ-6U8C>] (nationwide per pupil spending); *id.* at tbl.6 (nationwide total current spending); *id.* at tbl.19 (nationwide population and enrollment). In Texas, the state with the second-largest student population (the largest is in California), total approximate current spending for fiscal year 2020 was \$53.84 billion for approximately 5.16 million students (approximately \$10,342 per pupil). For the same fiscal year in Wyoming, the state with the second smallest student population (Vermont has the smallest), total approximate current spending was \$1.58 billion for 94,234 students (approximately \$16,698 per student). *Id.* at tbl.8 (per pupil spending by state); *id.* at tbl.6 (total current spending by state); *id.* at tbl.19 (population and enrollment by state).

<sup>47</sup> Polsky, *supra* note 5, at 159 (emphasis added).

broad sense to refer to safety, health, and affordability, as well as the preservation of the environment.<sup>48</sup> Drawing on her expertise with California's consumer warning law known as Proposition 65,<sup>49</sup> Professor Polsky understands label disclosure data as more than mere input into consumer decisionmaking. Transparency rules “enable advocacy organizations to mount pressure campaigns that persuade . . . retailers to blacklist certain product chemicals, and facilitate scientific research on products' health effects.”<sup>50</sup> In the context of the few (and relatively toothless) menstrual product labeling laws, our book takes a dimmer view of disclosure laws than Professor Polsky does,<sup>51</sup> given their current rareness (they exist in California and New York only) and weakness (with exceptions that vitiate baseline rules of disclosure).<sup>52</sup> But we are bolstered by her optimism. Indeed, as Professor Polsky notes, it is precisely because data disclosure causes consumers and activist groups to mobilize against certain products that manufacturers oppose these laws in the first place.<sup>53</sup> These insights suggest the potential power of future menstrual product labeling laws, if we take Professor Polsky's good counsel.

Professor Polsky's astute attention to the power of data also sharpens the book's discussion of the environmental consequences of the abundant use of plastics in menstrual products, especially in tampon applicators. As we discuss in *Menstruation Matters*, plastics in menstrual products contribute to landfill waste and are a significant source of problems for residential plumbing and wastewater treatment facilities.<sup>54</sup> Nonbiodegradable plastics clog pipes, sewers, and oceans; plastic applicators that fill the ocean can choke wildlife and wash up on beaches.<sup>55</sup> Professor Polsky adds to that picture the fact that “single-use plastics (including, tampon applicators) . . . will soon *in toto* outweigh fish in the world's oceans.”<sup>56</sup> She includes in her essay a picture of an activist standing next to a sculpture made from 1,200 plastic tampon applicators found in waters in the United Kingdom,<sup>57</sup> and she cites work showing that tampon

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<sup>48</sup> MENSTRUATION MATTERS, *supra* note 7, at 146 (defining “sustainability” in the context of menstrual products); *id.* at 146–71 (calling for more consumer education, public-law interventions, and private-governance initiatives aimed at encouraging manufacture and use of safe and environmentally-friendly menstrual products, as opposed to products with chemicals that are harmful to human health and nonbiodegradable materials that pollute the land and water).

<sup>49</sup> See CAL. HEALTH & SAFETY CODE § 25249.6 (West 2022).

<sup>50</sup> Polsky, *supra* note 5, at 163.

<sup>51</sup> See MENSTRUATION MATTERS, *supra* note 7, at 164–66 (noting the limitations of New York and California's menstrual product disclosure laws).

<sup>52</sup> See *id.*

<sup>53</sup> Polsky, *supra* note 5, at 163–64.

<sup>54</sup> MENSTRUATION MATTERS, *supra* note 7, at 158–59.

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

<sup>56</sup> Polsky, *supra* note 5, at 169.

<sup>57</sup> *Id.* at 165.



applicators can be more common sources of litter on beaches than either drinking straws or single-use plastic bags.<sup>58</sup>

We agree with Professor Polsky that environmental problems associated with menstrual product disposal are deeply intertwined with stigma, shame, and menstrual taboos.<sup>59</sup> As she observes, “embarrassment about disposing of applicators in public view leads many users to flush applicators down the toilet despite contrary instructions on product packaging and in toilet stalls.”<sup>60</sup> This out-of-sight-out-of-mind mentality is likely the reason that these products end up in municipal wastewater and oceans in the first place; consumers in the U.K. flush an estimated two billion menstrual products down toilets every year, to give just one example from the book.<sup>61</sup> The belief that menstruation and, by association, menstrual waste are “private” matters not to be seen or discussed in public likely explains why we have found only one municipality, Mexico City, that has banned single-use plastic tampon applicators.<sup>62</sup> But given how much menstrual waste contributes to planetary degradation, it is imperative to move beyond silence and stigma. Professor Polsky shows the way to do so, with a data-driven analysis.

### III

#### THE COMPARATIVE PERSPECTIVE

Professor Widiss adds to the conversation a comparative perspective that we have increasingly embraced in our own work. She compares menstruation and pregnancy in two distinct employment contexts: protection against discrimination (where she sees both processes as raising similar concerns) and workplace-leave policies (where she sees them as diverging, because “menstruation, at least for most people, is far less disruptive” and more routine than pregnancy and childbirth).<sup>63</sup> We agree, and believe that this sort of scholarship—in which connections are drawn across all of the reproduction-related conditions and processes, from menstruation to pregnancy to breastfeeding to menopause—can be particularly illuminating. Since the publication of our book, we have gone on to explore the links among these different reproduction-related conditions and processes, by evaluating their shared biology and symptoms (such as sleep disturbances, hot flashes, and migraines), their overlapping needs (such as frequent bathroom access, dress code adjustments, break times, and flexible scheduling), and the common social attitudes that these processes trigger

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<sup>58</sup> *Id.* at 164.

<sup>59</sup> *Id.* at 167.

<sup>60</sup> *Id.* at 164.

<sup>61</sup> MENSTRUATION MATTERS, *supra* note 7, at 159.

<sup>62</sup> *Id.* at 163; Polsky, *supra* note 5, at 164.

<sup>63</sup> Widiss, *supra* note 6, at 17, 16–20.

(such as views of women as hormonal or even “hysterical,” a word that tellingly derives from the Greek word for uterus).<sup>64</sup> And we have tried to unpack why pregnancy and breastfeeding are so much more visible in the law than are menstruation and menopause.<sup>65</sup> Several of the reasons that we posit are simply unfortunate and unfair, like the greater silence and stigma surrounding menstruation and menopause, or the fact that pregnancy and breastfeeding accommodations can be framed using “baby-protective” rationales that are inapplicable to menstruation and menopause.<sup>66</sup> But it is certainly true that there are real differences between pregnancy and menstruation when it comes to issues like leave, as Professor Widiss explains. We agree with her that menstruation-specific leaves are less politically viable—and, indeed, probably less effective—than broader workplace policies that guarantee some paid sick leave for all employees. Contextualizing menstruation as one of the numerous legitimate reasons why employees may need to take a day off or work from home, as opposed to singling it out, is consistent with the dignity, freedom from discrimination, and public participation rationales described above.

Our broadened focus on connections across reproduction-related processes and conditions has become even more important in light of a major development that happened just weeks after our book’s release: the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*.<sup>67</sup> In holding that there is no constitutional right to an abortion, and thus freeing states to prohibit it (which numerous states rushed to do), the Supreme Court truly shifted the ground beneath our feet.<sup>68</sup> It also initially made us wonder: How much of our book even matters right now? Our book’s preface included the optimistic, hopeful statement that “[w]ith this book, we imagine law and society transformed to take into account the biological needs of all people.”<sup>69</sup> But with *Dobbs*, we are seeing the opposite: a legal change that has transformed our society into one where people can be made prisoners of their bodies, forced to remain pregnant and give birth against their will. The underlying goals of menstrual advocacy set forth above—the ability to fully participate in public life, be free from discrimination, *and* experience the full extent of human dignity (a framing that now poignantly echoes the plurality

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<sup>64</sup> See Emily Gold Waldman, Naomi R. Cahn & Bridget J. Crawford, *Contextualizing Menopause in the Law*, 45 HARV. J.L. & GENDER 1, 42–56 (2022) (describing the “cultural and physiological threads” that connect pregnancy, breastfeeding, menstruation, and menopause).

<sup>65</sup> See *id.* at 49–53.

<sup>66</sup> See *id.* at 47–48.

<sup>67</sup> 142 S. Ct. 2228 (2022).

<sup>68</sup> See, e.g., *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Dec. 27, 2022, 12:05 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/ZM26-YF69>] (showing, as of December 30, 2022, 4:05 PM ET that most abortions are now banned in thirteen states plus Georgia, which bans abortion after the sixth week of pregnancy).

<sup>69</sup> MENSTRUATION MATTERS, *supra* note 7, at ix.

opinion from *Planned Parenthood v. Casey*, which stated that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”<sup>70</sup>)—seem increasingly out of reach.

#### IV

##### MENSTRUATION MATTERS NOW MORE THAN EVER

That said, we see several ways in which *Dobbs* makes our book particularly (and unfortunately) relevant. First, Chapter Eight of *Menstruation Matters* explores the rise of menstrual apps that enable people to track and monitor their periods, but also flags the potential for that data to be traced back to individuals. We warned that “given efforts to roll back abortion rights in some states, it is even plausible to imagine a scenario in which self-provided data about missing a period could later be used as evidence that someone was pregnant and had an illegal abortion.”<sup>71</sup> Unfortunately, that concern is even greater now. In their article *Femtechnodystopia*, Professors Leah Fowler and Michael Ulrich highlight the irony that the post-*Dobbs* world has made period and fertility trackers simultaneously more useful (in terms of using “natural family planning” as a birth control strategy to avoid an unwanted pregnancy) and more dangerous for their users (by providing evidence that someone might be, or has been, pregnant).<sup>72</sup>

Second, Chapter Three of *Menstruation Matters* called attention to the inadequate and uneven state of menstrual education in the United States. As we described, insufficient menstrual education not only fails to prepare menstruating students for their own first periods, but also contributes to the larger culture of menstrual stigma and silence.<sup>73</sup> Both effects are even more damaging in a post-*Dobbs* world. The failure to understand that it is possible to get pregnant even before one’s first period, or that teenage menstrual cycles are often unpredictable and irregular, can result in a false sense of security about the risks of an unplanned pregnancy. This means that young people may not recognize the need for birth control and/or pregnancy tests, before it is too late. As public health expert Marni Sommer notes, “in

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<sup>70</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>71</sup> *MENSTRUATION MATTERS*, *supra* note 7, at 183–84.

<sup>72</sup> Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 *STAN. L. REV.* (forthcoming 2023). Of course, other digital data, such as search histories, text messages, and smartphone location data can also put people at risk; deleting period trackers is necessary but not sufficient. See, e.g., Kashmir Hill, *Deleting Your Period Tracker Won’t Protect You*, *N.Y. TIMES* (June 30, 2022), <https://www.nytimes.com/2022/06/30/technology/period-tracker-privacy-abortion.html> [https://perma.cc/HDJ4-P6JB] (“While period trackers seem like an obvious source of information about reproductive health decisions, experts say other digital information is more likely to put women at risk.”).

<sup>73</sup> *MENSTRUATION MATTERS*, *supra* note 7, at 83.

contexts where a ban on abortions beyond a very short period of weeks exists, even one missed period could have serious implications for a young person's life."<sup>74</sup>

Similarly, the lack of widespread understanding about the menstrual cycle distorts the discourse around abortion restrictions. For example, when talking about Texas's "heartbeat bill" (passed even before *Dobbs*), which prohibited abortions after six weeks, Governor Greg Abbott stated that "obviously it provides at least six weeks for a person to be able to get an abortion."<sup>75</sup> He thus implied not only that the six-week ban provides a meaningful amount of time to procure an abortion after learning of one's pregnancy, but also that an embryo has been developing for six weeks by the time the ban applies. Far from being "obvious," this is blatantly incorrect. Since pregnancies are measured from the date of the *last menstrual period*, the fact that someone is "six weeks pregnant" does not mean that she has actually been pregnant for six weeks. Rather, it means that she last *menstruated* six weeks ago, and likely ovulated approximately four weeks ago, with fertilization occurring sometime around then.<sup>76</sup> That person's next period would be due approximately two weeks post-ovulation. In other words, someone who is "six weeks pregnant" has actually only been pregnant—in a way that could be picked up by a pregnancy test—for around two weeks. And, of course, many people's menstrual cycles are irregular enough that they do not immediately test themselves for pregnancy as soon as their periods might be late.<sup>77</sup> Functionally, then, the six-week abortion ban is a complete abortion ban—certainly not one that provides six weeks to decide whether to get an abortion. But without sufficient menstrual education, people may not understand this.

Third, and more broadly, an underlying theme of our book is the importance of breaking the silence and stigma surrounding menstruation.

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<sup>74</sup> Marni Sommer, *Opinion: With Abortion Bans on the Rise, Kids Need to Know More About Menstruation*, NPR (Sept. 17, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/09/17/1123311262/menstrual-health-literacy-abortion-ban-girls> [<https://perma.cc/Q7VS-CUNY>].

<sup>75</sup> Tara Subramaniam, *Fact Check: Texas Abortion Law Doesn't Give Full 6 Weeks to Get an Abortion*, CNN (Sept. 9, 2021, 1:09 PM), <https://www.cnn.com/2021/09/09/politics/abbott-abortion-fact-check/index.html> [<https://perma.cc/Y92G-ACFV>].

<sup>76</sup> See Christina Caron, *What Does It Really Mean to be 6 Weeks Pregnant?*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/parenting/abortion-six-weeks-pregnant.html> [<https://perma.cc/NWP7-ADJ4>] (explaining that the way doctors measure the beginning of a pregnancy—as the first day of a woman's last menstrual period—means that "when doctors say a woman is six weeks pregnant, it typically means the embryo started developing about four weeks ago").

<sup>77</sup> *Id.* (quoting Dr. Dana Gossett, vice chair of obstetrics and gynecology at University of California, San Francisco, as explaining that "typically, clinical symptoms [of pregnancy] like fatigue and nausea don't start until after six weeks"). This makes it hard for people—particularly those with irregular menstrual cycles—to realize right away that they are pregnant. See *id.* ("What are they supposed to do? Check pregnancy tests every four or five weeks?").

This sort of frank, honest talk has also long been lacking around abortion, miscarriage, fertility treatments, and the sometimes blurry boundaries between them. Although wanted pregnancies with successful outcomes get discussed and celebrated, there are large swaths of the reproductive experience that are shrouded in silence. In the aftermath of *Dobbs*, the floodgates have begun to open. In September 2022, for instance, model and author Chrissy Teigen stated that she had only recently come to realize—after the *Dobbs* decision—that what she had considered and described as a twenty-week miscarriage was actually an abortion that saved her life.<sup>78</sup> “I told the world we had a miscarriage, the world agreed we had a miscarriage, all the headlines said it was a miscarriage,” she reflected.<sup>79</sup> “And I became really frustrated that I didn’t, in the first place, say what it was, and I felt silly that it had taken me over a year to actually understand that we had had an abortion.”<sup>80</sup> Others have pointed out the ways in which abortion restrictions are now limiting miscarriage care and potentially in vitro fertilization (IVF) as well.<sup>81</sup> The more that we speak openly about *all* of these things, the more we see how interconnected they are, and the more we push society and law to recognize them. Indeed, we see our book as part of a growing trend toward speaking more openly about various aspects of the reproductive system, alongside other recent books like *Vagina Obscura*<sup>82</sup> and *Unwell Women*.<sup>83</sup> As Elinor Cleghorn wrote in *Unwell Women*: “Speaking out about your own body is profoundly feminist. . . . It’s a risk—but at the same time, it’s an act of defiance against those power structures in the manmade world that would

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<sup>78</sup> Kimberly Nordyke & Ryan Gajewski, *Chrissy Teigen Reveals She Had an Abortion to ‘Save My Life for a Baby That Had Absolutely No Chance.’* HOLLYWOOD REP. (Sept. 15, 2022, 6:31 PM), <https://www.hollywoodreporter.com/news/general-news/chrissy-teigen-miscarriage-abortion-john-legend-baby-jack-1235221899> [<https://perma.cc/P85B-D2CU>].

<sup>79</sup> *Id.* (quoting Chrissy Teigen).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> [<https://perma.cc/BY6J-XRF2>] (describing recent instances where miscarriage patients were denied dilation and curettage procedures, known as D&Cs, and quoting one emergency medicine physician as warning that “[i]n this post-Roe world, women with miscarriages may die”); Michelle Jokisch Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment*, NPR (July 21, 2022, 5:04 AM), <https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment> [<https://perma.cc/M8VM-4HQ5>] (quoting Professor Judith Daar as explaining that “[i]f an early embryo is deemed a person for purposes of legal rights and protections, any action short of transfer to the uterus could be seen as violating its right to life under these new laws”).

<sup>82</sup> RACHEL E. GROSS, *VAGINA OBSCURA: AN ANATOMICAL VOYAGE* (2022) (devoting chapters to the glans clitoridis, internal clitoridis, vagina, vaginal microbiome, egg cell, ovaries, uterus, and neovagina, and weaving together current scientific research with historical understandings).

<sup>83</sup> ELINOR CLEGHORN, *UNWELL WOMEN: MISDIAGNOSIS AND MYTH IN A MAN-MADE WORLD* 14–15 (2021) (tracing the history of the relationship between women and medical practice by centering “stories of women’s suffering, resilience, endurance, and activism” and women’s “testimonies about [their] own bodies”).

prefer us not to speak.”<sup>84</sup>

#### CONCLUSION

After Jackson Pollock’s painting “Alchemy” got its first cleaning in almost sixty years, commentators rediscovered the depth of the artist’s colors and the complexity of his composition.<sup>85</sup> Our book is still less than one year old (and we are no Pollocks!), but the commentary of our peers, combined with current events, helps us further contextualize our work. Indeed, the perspectives of Professors Hamilton, Polsky, and Widiss, along with the ongoing COVID-19 pandemic and the realities of the post-*Dobbs* world, suggest that menstruation is an even more important issue than we had realized when we first undertook writing *Menstruation Matters*. There is a fresh urgency to talking about period poverty and the inherent dignity and autonomy interests in being able to manage one’s own body. Menstruation and related conditions like breastfeeding, pregnancy, and menopause should not be sources of shame or stigma. Nor should they be vectors of formal control by the government or de facto exclusion from school, work, or any aspect of public life. As we continue to emphasize the many ways that menstruation matters in life and law, we strive for a legal future that recognizes the full humanity of all people and safeguards our equal rights.

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<sup>84</sup> *Id.* at 10.

<sup>85</sup> See, e.g., Jennifer Landes, *A 1947 Painting, Newly Cleaned, Reveals Pollock’s Methods*, E. HAMPTON STAR (Mar. 17, 2015), <https://www.easthamptonstar.com/archive/1947-painting-newly-cleaned-reveals-pollocks-methods> [<https://perma.cc/ML8F-TW7J>] (describing revelations after the cleaning of “Alchemy”).