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## Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons

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# CYCLES OF PUNISHMENT: THE CONSTITUTIONALITY OF RESTRICTING ACCESS TO MENSTRUAL HEALTH PRODUCTS IN PRISONS

**Abstract:** Despite the recent passage of federal legislation requiring free access to menstrual health products in federal prisons, many women in state and local prisons continue to have inadequate access to these products. Not only do most prisons provide subpar menstrual health products in terms of quality, prisons often do not provide enough of these products to allow for individuals to change their pads and tampons at the doctor-recommended frequency. As a result, incarcerated women are at a heightened risk of toxic shock syndrome, sepsis, and ovarian cancer. This Note argues that, because differential treatment on the basis of menstruation is a form of sex discrimination, the practice of restricting access to menstrual health products discriminates on the basis of sex. The practice is neither related to a valid penological interest nor an important governmental interest, and therefore violates the Equal Protection Clause of the Fourteenth Amendment. Moreover, this practice exposes inmates to an unreasonable risk of future harm stemming from inadequate menstrual hygiene in violation of the Eighth Amendment. In jurisdictions where advocacy groups have been successful in drawing significant attention to health issues related to diminished menstrual hygiene in prisons, it could be established that prison officials are acting with deliberate indifference towards this risk. Thus, this Note will conclude that incarcerated women could assert a colorable challenge to the practice of restricting access to menstrual health products under either the Fourteenth Amendment or the Eighth Amendment. It is crucial that courts institute constitutional barriers to these practices in order to protect the health and wellbeing of all prisoners, regardless of gender.

## INTRODUCTION

Kimberly Haven, an inmate at the Maryland Correctional Institution for Women, was provided with twenty-four sanitary pads per month.<sup>1</sup> Haven quickly realized that the pads provided were hopelessly flimsy, and regularly caused women to cancel visits with family or lawyers to avoid the embarrass-

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<sup>1</sup> Ann E. Marimow, *A New Law Promised Maryland Female Inmates Free Tampons. They're Still Paying*, WASH. POST (June 5, 2009), [https://www.washingtonpost.com/local/legal-issues/a-new-law-promised-marylands-female-inmates-free-tampons-theyre-still-paying/2019/06/04/cc5442da-86d7-11e9-a491-25df61c78dc4\\_story.html](https://www.washingtonpost.com/local/legal-issues/a-new-law-promised-marylands-female-inmates-free-tampons-theyre-still-paying/2019/06/04/cc5442da-86d7-11e9-a491-25df61c78dc4_story.html) [<https://perma.cc/7ESF-Z93D>] (discussing Maryland's legislative efforts to provide free tampons to women in prison and Kimberly Haven's legislative advocacy).

ment of leaks from the pads and bloodstained clothes.<sup>2</sup> In an effort to reduce leaks and make the short supply of pads last a full menstrual cycle, Haven began manipulating the pads into makeshift tampons.<sup>3</sup> Following Haven's release from prison, she suffered from toxic shock syndrome, a direct result of her poor menstrual hygiene throughout her fifteen-month sentence.<sup>4</sup> Haven eventually had to undergo an emergency hysterectomy.<sup>5</sup>

Christine, a twenty-four-year-old inmate at Bedford Hills Correctional Facility in New York, was denied access to menstrual health products before a visit with her father.<sup>6</sup> As the correctional officers strip searched her after the visit, she started bleeding on herself.<sup>7</sup> The female correctional officer conducting the search called Christine "disgusting."<sup>8</sup>

The #MeToo movement and the passage of the federal First Step Act in 2018, which requires federal prisons to provide free pads and tampons to female inmates, have shed significant light on the problem of access to menstrual health products in prison.<sup>9</sup> Importantly, the First Step Act only requires that

<sup>2</sup> *Id.* Although it is difficult to discuss menstruation without recognizing the experience of transgender men and women, for the sake of clarity, "women" in this Note refers to cisgender women. A cisgender person is someone whose gender identity matches the gender assigned at birth. *What Do Transgender and Cisgender Mean?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-transgender-and-cisgender-mean> [<https://perma.cc/FGM9-55PP>]. Conversely, a person who is transgender has a gender identity that does not match the gender assigned at birth. *Id.* A transwoman is someone who was assigned male at birth but identifies as female, whereas a transman is someone who was assigned female at birth but identifies as male. *Id.* Because cisgender women have ovaries, they are capable of menstruating whereas transwomen are not. *Id.* Similarly, because some transmen have ovaries, they are capable of menstruating whereas cisgender men are not. *Id.*

<sup>3</sup> Marimow, *supra* note 1.

<sup>4</sup> Brian Witte, *No Tampons in Prison? #MeToo Helps Shine Light on Issue*, ASSOCIATED PRESS (Mar. 27, 2018), <https://apnews.com/6a1805c4e8204e5b84a0c549ff9b7a31> [<https://perma.cc/7M9D-MNX2>] (discussing advocacy by Haven and leaders in the #MeToo movement to encourage state legislators to require free, unrestricted access to pads and tampons in prison).

<sup>5</sup> *Id.*

<sup>6</sup> Zoe Greenberg, *In Jail, Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), [https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html?\\_r=0](https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html?_r=0) [<https://perma.cc/FHS3-4S7L>] (outlining the state of access to pads and tampons in prison, as well as the ways in which the policies affect women).

<sup>7</sup> *Id.*

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

<sup>9</sup> First Step Act of 2018, Pub. L. No. 115-391 § 611, 132 Stat. 5194, 5274 (mandating that federal prisons provide free pads and tampons to female inmates); Chandra Bozelko, Opinion, *I Was a Prisoner. Access to Menstrual Products Isn't a Luxury. It's a Basic Human Right*, NEWSWEEK (Mar. 26, 2019), <https://www.newsweek.com/prison-menstruation-sanitary-products-human-rights-1375695> [<https://perma.cc/3J2L-XBSF>] (arguing for unrestricted access to pads and tampons in prison from the perspective of a former inmate); see also Witte, *supra* note 4 (discussing the impact of the #MeToo movement on women in prison). One activist noted that, although access to menstrual health products in prison has been a concern for a long time, the issue is gaining attention because of #MeToo and women's changing status in American society. Witte, *supra* note 4. In this way, women in prison have also specifically benefitted from the activism of the women behind #MeToo. See *id.*

prisoners in *federal* prisons receive an adequate supply of quality menstrual health products; for women in state prisons, the First Step Act does not apply.<sup>10</sup> Thirty-eight states currently do not have any legislation requiring prisons to provide adequate supplies of pads or tampons, and instead leave the distribution of menstrual health products to individual prison officials.<sup>11</sup> In states where legislation is not being considered or is unlikely to pass, a judicial remedy is the only hope for incarcerated women seeking adequate menstrual hygiene.<sup>12</sup> This issue is made even more pressing by the fact that the vast majority of incarcerated women are held in state prison.<sup>13</sup>

Two constitutional amendments have the power to provide relief to incarcerated women: the Fourteenth Amendment and the Eighth Amendment.<sup>14</sup> The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying their citizens equal protection of the law on the basis of sex.<sup>15</sup> The Eighth Amendment forbids states from engaging in cruel and unusual punishment, including the denial of necessary medical care.<sup>16</sup> This Note explores the requirements of each of these amendments and evaluates the validity of constitutional challenges to the practice of restricting access to menstrual health products in prison.<sup>17</sup> Part I discusses the current state of access to menstrual health products in prison, as well as the potential health problems that result from inadequate access to these products.<sup>18</sup> Part II outlines the constitutional framework of the Fourteenth and Eighth Amendments and discusses how each

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<sup>10</sup> Aleks Kajstura, *Women's Mass Incarcerations: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/44SK-5EJU>] (noting that the majority of prisoners are held in state prisons).

<sup>11</sup> Taylor Walker, *The Dehumanizing Effects of Inadequate Access to Menstrual Products in Prisons and Jails*, WITNESSLA (Nov. 17, 2019), <https://witnessla.com/due-to-inadequate-access-to-menstrual-products-periods-in-prison-can-be-stigmatizing/> [<https://perma.cc/RZJ8-L45Q>] (discussing the current status of access to menstrual health products in prison and its effect on incarcerated women).

<sup>12</sup> See Samantha Michaels, *Jail Is a Terrible Place to Have a Period. One Woman Is on a Crusade to Make It Better.*, MOTHER JONES (Feb. 21, 2019), <https://www.motherjones.com/crime-justice/2019/02/jail-california-tampons-menstruation-paula-canny-sanitary-pads/> [<https://perma.cc/868H-TUHE>] (discussing a lawsuit filed in a California state court arguing that California's current practice of restricting access to menstrual health products violates the Equal Protection Clause and Due Process Clause of the California Constitution).

<sup>13</sup> Kajstura, *supra* note 10 (discussing the breakdown of women in local, state, and federal prisons).

<sup>14</sup> See U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishment"); *id.* amend. XIV (mandating equal treatment under the law).

<sup>15</sup> *Id.* amend. XIV, § 1; see also *United States v. Virginia*, 518 U.S. 515, 532 (1996) (establishing that the Equal Protection Clause prohibits differential treatment on the basis of sex unless the treatment is substantially related to an important government interest).

<sup>16</sup> U.S. CONST. amend. VIII; see also *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing that failure to provide necessary medical care may violate the Eighth Amendment if the harm is sufficiently severe and the prison officials exhibited deliberate indifference).

<sup>17</sup> See *infra* notes 23–371 and accompanying text.

<sup>18</sup> See *infra* notes 23–65 and accompanying text.

amendment is applied in the prison context.<sup>19</sup> Part III analyzes the constitutionality of restricting access to tampons and pads in prison under the Equal Protection Clause and concludes that the practice is an unconstitutional facial classification on the basis of sex.<sup>20</sup> Finally, Part IV analyzes the constitutionality of these restrictions under the Eighth Amendment, and argues that many prisons violate the Eighth Amendment by exposing women to an unreasonable risk of future harm by denying access to menstrual health products.<sup>21</sup> This Note seeks to emphasize that pursuing a judicial remedy is important to ensure that women in every state are able to receive the menstrual health products they need.<sup>22</sup>

## I. MENSTRUAL HEALTH IN PRISON

On any given day, more than 2.2 million people are incarcerated in America's prisons and jails.<sup>23</sup> Approximately 231,000 of those 2.2 million people are women.<sup>24</sup> Although women constitute only a small percentage of the total prison count, women's prison populations have grown at a significantly higher rate than men's prison populations in recent decades.<sup>25</sup> In fact, women are now the fastest-growing population within the prison system.<sup>26</sup> As a result, women's health within the prison system is a growing concern.<sup>27</sup> Section A of this Part discusses the varying levels of access to menstrual health products in prison

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<sup>19</sup> See *infra* notes 66–194 and accompanying text.

<sup>20</sup> See *infra* notes 195–332 and accompanying text.

<sup>21</sup> See *infra* notes 333–371 and accompanying text.

<sup>22</sup> See *infra* notes 195–371 and accompanying text.

<sup>23</sup> Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/VP7T-YTC9>] (providing statistics on incarceration in the United States and discussing why incarceration rates are so high). Jails are used for holding criminal defendants prior to trial or sentencing as well as those with short sentences. Michelle Mark, *Felicity Huffman Was Just Sentenced to 14 Days Behind Bars. Here's the Difference Between a Jail and Prison Sentence*, INSIDER (Sept. 13, 2019), <https://www.insider.com/difference-between-jail-and-prison> [<https://perma.cc/D45V-UWP4>]. Conversely, prisons hold those who have been sentenced to a longer prison term, generally more than a year. *Id.*

<sup>24</sup> Kajstura, *supra* note 10. Of these 231,000 incarcerated women, approximately 101,000 are in local jails, 99,000 are in state prisons, 16,000 are in federal prisons, 7,700 are in immigration detention centers, and 6,600 are in youth detention centers. *Id.*

<sup>25</sup> Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) [<https://perma.cc/G2B8-E3QP>] (analyzing data trends regarding prison populations and discussing the growing issue of women in prison). Although the overall prison population has declined since 2009, men have disproportionately benefitted from this decline. *Id.* Over the past four decades, the number of women in prison has increased by 834% whereas the number of men in prison has increased by less than half of that number. *Id.*

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

<sup>27</sup> See Witte, *supra* note 4 (discussing the growing campaign, spearheaded by the #MeToo movement, to encourage state legislators to require free and unrestricted access to pads and tampons in prison).

across states and counties.<sup>28</sup> Section B then illustrates how prisons limiting access to menstrual health products jeopardizes imprisoned women's health.<sup>29</sup>

### A. Access to Menstrual Health Products

Because many prisons promulgate their own policies in the absence of controlling state legislation, access to menstrual health products in prisons varies significantly across states and counties.<sup>30</sup> In some prisons, women can access pads on their own as needed, free of charge.<sup>31</sup> But in the majority of prisons, correctional officers are responsible for distributing free pads.<sup>32</sup> Tampons are almost never provided for free in state prisons and prisoners must instead purchase them at the commissary.<sup>33</sup>

In states and counties where women are only permitted to receive a certain amount of pads per month, the number of pads provided is often insufficient.<sup>34</sup> Doctors recommend that women change their pads every four to eight hours throughout their menstrual cycles, but jails that limit access to pads provide, on average, only ten pads per month.<sup>35</sup> Given that a typical cycle lasts

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<sup>28</sup> See *infra* notes 30–55 and accompanying text.

<sup>29</sup> See *infra* notes 56–65 and accompanying text.

<sup>30</sup> See Walker, *supra* note 11 (describing how policies differ across various jurisdictions). Approximately thirteen states have introduced legislation that would require prisons to provide access to menstrual health products free of charge. *Id.* In these states, prison officials must comply with the laws and therefore do not maintain discretion over when to distribute products. See *id.* In the remaining thirty-seven states, however, prison officials retain significant discretion over the distribution of menstrual health products, including what products to carry, what may be provided for free, and how many products each inmate may receive. *Id.*

<sup>31</sup> Lauren Shaw, Note, *Bloody Hell: How Insufficient Access to Menstrual Hygiene Products Creates Inhumane Conditions for Incarcerated Women*, 6 TEX. A&ML. REV. 475, 478 (2019) (analyzing access to menstrual health products in prison and arguing that current practices violate human decency).

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

<sup>33</sup> Shaw, *supra* note 31, at 479 (noting that pads and tampons are available for purchase at the commissary); Francine Barchett, *Pads in Prison: Addressing Gender Disparities in New York State*, ROOSEVELT INST. (2017), <https://www.scribd.com/document/349869206/Pads-in-Prisons-Addressing-Gender-Disparities-in-New-York-State> [<https://perma.cc/RB9V-ZDAK>] (summarizing the current state of access to menstrual health products in New York and providing policy solutions). Tampons are now provided for free in federal prisons under the First Step Act. First Step Act of 2018, Pub. L. No. 115-391 § 611, 132 Stat. 5194, 5274. State prisons have not explicitly stated why pads are provided for free instead of tampons, despite the fact that many women prefer using tampons. Barchett, *supra* (noting that more than 40% of women prefer using tampons over pads). A difference in price could account for this discrepancy. Jeanne Mah, *Ladies, Here's How Much Your Period Costs You Over Your Lifetime*, DOLLARS & SENSE (June 27, 2019), <https://dollarsandsense.sg/ladies-heres-much-period-costs-lifetime/> [<https://perma.cc/3NUK-9FSC>] (noting that pads cost approximately \$0.24 each, whereas tampons cost approximately \$0.33 each).

<sup>34</sup> Barchett, *supra* note 33.

<sup>35</sup> See Shaw, *supra* note 31, at 484 (providing doctor recommendations for switching out pads and tampons during menstrual cycles); Barchett, *supra* note 33 (describing jail restrictions to pad and tampon access).

five to seven days, women can only change their pads every twelve to seventeen hours under this distribution scheme.<sup>36</sup> Moreover, because many women wear multiple pads at once to avoid bleeding through their uniforms, they are often only able to change their pads once per day or, in some cases, once every other day.<sup>37</sup> The problem of insufficient access to menstrual health products is particularly pronounced for women who experience longer periods or heavier flows.<sup>38</sup> Some states do allow women to receive extra pads if they submit a doctor's note, but the appointment to get that note costs, on average, \$3.47 and is unaffordable for many incarcerated women.<sup>39</sup>

The access problem is exacerbated by the fact that the criteria for how and when officers may provide pads differs significantly among prisons where the correctional officers are responsible for distributing free pads.<sup>40</sup> Where there are no set limits on the quantity of pads that must be provided to inmates, correctional officers have discretion to provide inmates with as many pads as the inmate requires.<sup>41</sup> But even in prisons where there is technically unlimited access, correctional officers still retain control of distribution, presenting serious issues for women.<sup>42</sup> For instance, many correctional officers use this pow-

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<sup>36</sup> See Shaw, *supra* note 31, at 484.

<sup>37</sup> See Barchett, *supra* note 33 (establishing that prisons provide women with, on average, only ten pads per month); Michaels, *supra* note 12 (discussing how women must wear multiple pads to avoid bleeding through their uniform because of how thin the pads are).

<sup>38</sup> See Barchett, *supra* note 33 (acknowledging that some women have a heavier menstrual flow or a longer period than others).

<sup>39</sup> Wendy Sawyer, *The Steep Cost of Medical Co-pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [<https://perma.cc/S69D-DHAF>]. The average minimum wage in prisons is \$0.14 per hour. *Id.* Therefore, a prisoner who makes minimum wage would have to work more than twenty-five hours to afford a copay to see a doctor. *Id.* Only eight states do not require prisoners to pay a copay to see a doctor. *Id.* Out of the remaining forty-two states, copays range from \$2.00 to \$8.00. *Id.* Therefore, the number of hours needed to work to afford a doctor's appointment varies from state to state. *Id.* For example, in South Dakota, a doctor's appointment costs only \$2.00 and prisoners make \$0.25 per hour, so it only takes eight hours of work to afford a doctor's appointment. *Id.* Comparatively, a doctor's appointment in West Virginia costs \$5.00 but prisoners only make \$0.04 per hour, so it takes 125 hours of work to afford an appointment. *Id.*

<sup>40</sup> See Shaw, *supra* note 31, at 478 (discussing various policies on how to distribute menstrual health products); Michaels, *supra* note 12 (examining the status of access to menstrual health products in California prisons).

<sup>41</sup> Shaw, *supra* note 31, at 478 (explaining how some states and individual prisons have a policy of providing inmates with as many pads as needed).

<sup>42</sup> See Bozelko, *supra* note 9 (discussing problems stemming from allowing correctional officers to distribute menstrual health products, even when officers are permitted to distribute an unlimited amount). Correctional officers may use menstrual health products as a means of control over the inmates, including by denying access to "disfavored" women and providing extra products to those who are in the officers' good graces. *Id.* Correctional officers occasionally treat the pads or tampons as a reward to be earned, rather than a right. *Id.* This results in a social hierarchy in the prison that may undermine prison cohesion and safety in its own right, as well as potentially makes women disfavored by guards unable to access menstrual health products. *Id.*

er over prisoners as a means of controlling inmate behavior, and, in some instances, even “charge” women sexual favors to receive pads.<sup>43</sup>

And regardless of how pads in prisons are distributed, the provided pads are generally of such poor quality that women are unable to use them effectively.<sup>44</sup> The pads are generally wingless and low-absorbency.<sup>45</sup> As a result, women often need to wear multiple pads to avoid bleeding through their uniforms.<sup>46</sup> Women who bleed through may be subject to disciplinary action.<sup>47</sup> Others may be forced to wear their soiled uniform for up to a week before they are allowed to exchange their dirty laundry for clean clothing.<sup>48</sup>

Although some women may purchase tampons at the commissary to augment their supply of free, low-quality pads, prices are often inflated such that many women are unable to afford them.<sup>49</sup> The average commissary charges \$0.56 per tampon, whereas tampons are available on Amazon.com for as low as \$0.19 per tampon.<sup>50</sup> In many states, prison jobs are completely unpaid.<sup>51</sup> And in states where prisoners are paid for their work, the average minimum wage worker makes \$0.14 per hour.<sup>52</sup> Thus, an inmate making minimum wage would need to work sixty-four hours in order to afford a sixteen-count box of tampons.<sup>53</sup> Because women are advised to change their tampons every

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<sup>43</sup> Memorandum from Jocelyn Samuels, Acting Assistant Att’y Gen., to the Honorable Robert Bentley, Governor of Ala. 14–15 (Jan. 17, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf) [<https://perma.cc/MC25-T69X>]. In 2014, the Civil Rights Division of the United States Department of Justice (DOJ) launched an investigation into the Julia Tutweiler Prison for Women in Alabama. *Id.* at 1. In a memorandum summarizing its findings, the DOJ noted that prison staff had a history of sexual abuse and harassment against prisoners. *Id.* The investigation revealed that women frequently had to “barter” with prison guards to receive necessities, including menstrual health products, which led to coerced sexual acts. *Id.* at 14–15. Although Tutweiler was aware of these abuses, the administration failed to remedy them or adequately discipline those responsible for the abuse. *Id.* at 19. As a result, the DOJ concluded that Tutweiler violated the Eighth Amendment by neglecting to protect its prisoners from the abuse and harassment caused by its correctional staff. *Id.* at 1.

<sup>44</sup> Shaw, *supra* note 31, at 478–79.

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

<sup>46</sup> Michaels, *supra* note 12.

<sup>47</sup> *Id.*

<sup>48</sup> *Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245, 2015 WL 9906265, at \*8 (W.D. Mich. 2015) (considering a prisoner’s claim that failure to provide access to menstrual health products combined with the laundry schedule constituted an Eighth Amendment violation).

<sup>49</sup> Michaels, *supra* note 12.

<sup>50</sup> *Id.* Prison commissaries tend to inflate the prices of many goods in addition to tampons. Kate Wheeling, *Are Prison Commissaries Fair?*, PAC. STANDARD (May 30, 2018), <https://psmag.com/social-justice/are-prison-commissaries-fair> [<https://perma.cc/5NQ5-5NVV>]. For example, a bottle of shampoo costs up to \$1.69 for prisoners in Illinois while the same shampoo costs only \$0.99 at a supermarket. *Id.* Commissary sales in prison net approximately \$1.6 billion per year, with the average prisoner spending approximately \$950 per year at the commissary. *Id.*

<sup>51</sup> Shaw, *supra* note 31, at 480.

<sup>52</sup> Sawyer, *supra* note 39.

<sup>53</sup> *See id.*



four hours, a sixteen-count box of tampons would not carry many women through one cycle.<sup>54</sup> For indigent prisoners, this means they are often unable to even work enough hours to afford tampons at the commissary.<sup>55</sup>

### B. Health Risks of Current Practices

In response to their inability to access adequate menstrual health products, women in prison must often improvise to manage their periods.<sup>56</sup> Women have reported rolling up toilet paper or pads to make their own tampons.<sup>57</sup> Other women remove mattress stuffing from their bedding to use as tampons.<sup>58</sup> Still others use unwashed rags as pads or tampons.<sup>59</sup>

These practices, among others, jeopardize women's health in both the short and long term.<sup>60</sup> Leaving a tampon inserted for too long or using unsanitary items as makeshift tampons may result in toxic shock syndrome.<sup>61</sup> This risk is magnified by the fact that many items used to make tampons are difficult to re-

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> Shaw, *supra* note 31, at 481; Rachel Baye, *State Lawmakers Seek to Give Tampons to Prisoners*, WYPR (Feb. 13, 2018), <http://wypr.org/post/state-lawmakers-seek-give-tampons-prisoners> [<https://perma.cc/TW3L-SCZL>] (discussing Maryland's legislative efforts to provide female inmates with free tampons).

<sup>57</sup> Shaw, *supra* note 31, at 481.

<sup>58</sup> Baye, *supra* note 56.

<sup>59</sup> Shaw, *supra* note 31, at 481.

<sup>60</sup> *See id.* at 480–84 (outlining negative health consequences of poor menstrual hygiene in prison).

<sup>61</sup> Michaels, *supra* note 12. Toxic shock syndrome is a life-threatening condition caused by bacterial infections. *Toxic Shock Syndrome*, MAYO CLINIC (May 4, 2017), <https://www.mayoclinic.org/diseases-conditions/toxic-shock-syndrome/symptoms-causes/syc-20355384> [<https://perma.cc/D47B-A36A>]. Toxic shock syndrome can result in high fever, low blood pressure, vomiting or diarrhea, confusion, muscle aches, and headaches. *Id.* Toxic shock syndrome progresses rapidly and, if left untreated, can lead to a number of complications potentially resulting in death or permanent disability. *Id.* Although the overall prevalence of toxic shock syndrome is low, the majority of cases are the result of poor menstrual health. Adam Ross & Hugh W. Shoff, *Toxic Shock Syndrome*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (June 22, 2019), <https://www.ncbi.nlm.nih.gov/books/NBK459345/> [<https://perma.cc/4D7Z-E5RP>]. Some people are more susceptible to toxic shock syndrome than others. Rachel Nussbaum, *Here's What Really Happens if You Leave a Tampon in for Too Long*, GREATIST (Sept. 4, 2019), <https://greatist.com/live/tampon-toxic-shock> [<https://perma.cc/5H82-SSCX>]. For example, some women can develop toxic shock syndrome after leaving a tampon inserted for just eight hours, whereas other women can leave a tampon inserted for over twelve hours without any adverse side effects. *Id.* The likelihood of developing toxic shock syndrome depends on individual risk factors, which can be impossible to know ahead of time. *See id.* (noting that the risk of developing toxic shock syndrome increases with heightened levels of staph bacteria, itself a health condition of which many women are unaware). But, it is clear that the longer a tampon or object is left inserted, the higher the risk of developing toxic shock syndrome. Jessie Gill, *What Happens if I Keep a Tampon in for Longer Than Eight Hours?*, VICE (July 28, 2017), [https://www.vice.com/en\\_us/article/yw8j5/what-happens-if-i-keep-a-tampon-in-for-longer-than-8-hours](https://www.vice.com/en_us/article/yw8j5/what-happens-if-i-keep-a-tampon-in-for-longer-than-8-hours) [<https://perma.cc/JR8G-XWCX>].

move.<sup>62</sup> If toxic shock syndrome is not promptly and adequately treated, it can require a hysterectomy and may result in sepsis or death.<sup>63</sup> Furthermore, wearing the same pad for a prolonged period of time can lead to serious bacterial infections.<sup>64</sup> Even prisoners who avoid short-term health dangers still face long-term health effects, as women who practice poor menstrual healthcare over a long period of time are at a significantly heightened risk of cervical cancer.<sup>65</sup>

## II. CONSTITUTIONAL STANDARDS IN PRISONERS' RIGHTS LITIGATION

The 2.2 million adults in the United States living behind bars are not stripped entirely of their constitutional rights just because they have been convicted of a crime.<sup>66</sup> Two constitutional provisions are relevant to the denial of menstrual health products in prison: the Fourteenth Amendment's Equal Pro-

<sup>62</sup> Victoria Law, *A New Memo Orders Federal Prisons to Provide Tampons—But How Well Is It Being Followed?*, REWIRE NEWS (Oct. 23, 2017), <https://rewire.news/article/2017/10/23/new-memo-orders-federal-prisons-provide-tampons-well-followed/> [<https://perma.cc/HUS8-5FZZ>].

<sup>63</sup> *Id.* (discussing a 2017 memo from the Bureau of Prisons requiring all federal prisons to provide menstrual health products). A hysterectomy is a surgery to remove the uterus, which results in infertility. *Hysterectomy*, AM. C. OBSTETRICIANS & GYNECOLOGISTS (Oct. 2018), <https://www.acog.org/patient-resources/faqs/special-procedures/hysterectomy> [<https://perma.cc/E7T4-K8XZ>]. Sepsis is a life-threatening response to a prolonged infection. *What Is Sepsis?*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 27, 2019), <https://www.cdc.gov/sepsis/what-is-sepsis.html> [<https://perma.cc/67L7-B258>]. Sepsis may result in a high heart rate, confusion, extreme pain, fever, and shortness of breath. *Id.* If left untreated, sepsis can lead to tissue damage, organ failure, and death. *Id.*

<sup>64</sup> Shaw, *supra* note 31, at 484.

<sup>65</sup> Jennifer Weiss-Wolf, *America's Very Real Menstrual Crisis*, TIME (Aug. 11, 2015), <http://time.com/3989966/america-menstrual-crisis/> [<https://perma.cc/PTE2-VW5R>] (discussing the current state of access to menstrual health products in America, as well as the negative effects of poor menstrual health). Cervical cancer occurs within the cells of the cervix. *Cervical Cancer*, MAYO CLINIC (July 31, 2019), <https://www.mayoclinic.org/diseases-conditions/cervical-cancer/symptoms-causes/syc-20352501> [<https://perma.cc/RR68-2RMQ>]. Approximately 34% of women who are diagnosed with cervical cancer die within five years of their diagnosis. *Survival Rates for Cervical Cancer*, AM. CANCER SOC'Y (Jan. 3, 2020), <https://www.cancer.org/cancer/cervical-cancer/detection-diagnosis-staging/survival.html> [<https://perma.cc/2KV5-AUPP>].

<sup>66</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987) (establishing the standard for constitutional violations within prisons); Kann, *supra* note 23 (noting that there are approximately 2.2 million people in American prisons). The Supreme Court has noted that prisoners retain all rights except those that are removed through lawful process, either explicitly or by necessity of incarceration. See *Procunier v. Martinez*, 416 U.S. 396, 422–23 (1994) (Marshall, J., concurring) (noting that a prisoner “retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law” (quoting *Coffin v. Richard*, 143 F.2d 443, 445 (6th Cir. 1944))), *overruled on other grounds by Thornburgh v. Abbot*, 490 U.S. 401 (1989). For example, prisoners retain most of the rights provided by the Bill of Rights, albeit in a more limited state than others. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 296 (1991) (noting that inmates retain rights protected by the Eighth Amendment); *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987) (stating that inmates retain their First Amendment right to freedom of religion); *Turner*, 482 U.S. at 84 (recognizing that inmates retain their First Amendment right to freedom of expression and their Fourteenth Amendment right to marry); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (holding that prisoners have a Fourteenth Amendment right to access the courts); *Lee v. Washington*, 390 U.S. 333, 333–34 (1968) (noting that prisoners have a Fourteenth Amendment right to be free from racial discrimination).

tection Clause and the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>67</sup>

Section A of this Part discusses the constitutional standards of the Equal Protection Clause of the Fourteenth Amendment.<sup>68</sup> It first reviews the standards for a prima facie equal protection case and then outlines two standards of scrutiny upon which lower courts rely: intermediate scrutiny and the 1987 Supreme Court *Turner v. Safley* standard.<sup>69</sup> Section B then discusses the constitutional standards of the Eighth Amendment.<sup>70</sup> It first focuses on the test applied to Eighth Amendment claims based on denial of medical care and then outlines precedent that evaluates the relationship between personal hygiene items and the Eighth Amendment.<sup>71</sup>

### A. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment states that “nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>72</sup> Accordingly, the government cannot treat certain classes of people differently from other similarly situated people unless it can show that its action serves a legitimate governmental interest.<sup>73</sup> In the landmark

<sup>67</sup> See *infra* notes 72–193 and accompanying text; see also U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>68</sup> See *infra* notes 72–135 and accompanying text.

<sup>69</sup> See *infra* notes 72–135 and accompanying text.

<sup>70</sup> See *infra* notes 136–194 and accompanying text.

<sup>71</sup> See *infra* notes 136–194 and accompanying text.

<sup>72</sup> U.S. CONST. amend. XIV, § 1.

<sup>73</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (establishing that the government cannot discriminate on the basis of race unless the action is narrowly tailored to a compelling state interest), *abrogated on other grounds by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); see also, Jillian R. Friedmann, Note, *A Girl’s Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes*, 60 B.C. L. REV. 2547, 2550 n.27 (2019) (outlining equal protection jurisprudence under the Fourteenth Amendment). Courts subject distinctions made on the basis of suspect classifications, such as race and national origin, to a higher form of scrutiny, referred to as strict scrutiny. See *Korematsu*, 323 U.S. at 216 (noting that racial classifications are “immediately suspect” and subject to “the most rigid scrutiny”). Under strict scrutiny, classifications will be deemed unconstitutional unless the classifications are narrowly tailored to further a compelling government interest. Ryan James & Jane Zara, *Equal Protection*, 4 GEO. J. GENDER & L. 1, 5–6 (2002) (outlining Supreme Court equal protection jurisprudence). Classifications that are “quasi-suspect,” such as sex, are subject to intermediate scrutiny, which requires a regulation to be substantially related to an exceedingly persuasive government interest. *Id.* at 8–9; see also *infra* notes 77–109 (discussing intermediate scrutiny in the context of sex discrimination claims). Classifications based on qualities that are not suspect, such as income or disability, receive the lowest form of scrutiny, also known as rational basis review. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (holding that intellectual disability is not a suspect or quasi-suspect class and therefore does not warrant a heightened level of scrutiny); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (holding that socioeconomic status is not a suspect classification and therefore not subject to strict scrutiny analysis).

1971 case *Reed v. Reed*, the Supreme Court found that sex was a quasi-suspect class under the Equal Protection Clause and therefore would subject sex-based classifications to heightened scrutiny.<sup>74</sup> Accordingly, individuals who believe that the government has treated them differently based on their sex may challenge the government's actions in federal court.<sup>75</sup>

### 1. Establishing a Prima Facie Case

To establish a violation of the Equal Protection Clause based on sex discrimination, a plaintiff must demonstrate that (1) the act was carried out by a government official, (2) he or she was treated differently because of his or her sex, and, in some circumstances, (3) that the government actor intended the act to differentiate on the basis of sex.<sup>76</sup> The first requirement—that the act be carried out by a state official—is key because the Fourteenth Amendment applies only to governmental action. Unless a plaintiff can establish that the government official carried out the act in question, the claim will fail.<sup>77</sup> Both local and state government officials are considered “state actors” and therefore any

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<sup>74</sup> *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that a law that mandates preferring men over women in naming an administrator of an estate is unconstitutional because it makes a distinction based solely on stereotypes about sex). “Quasi-suspect” is a term used to describe classes which the court has found deserving of a heightened level of scrutiny, but not the more stringent strict scrutiny. *James & Zara*, *supra* note 73, at 8. Although sex is the most well-known quasi-suspect class, illegitimate children and children of undocumented immigrants are also considered quasi-suspect classes. *Id.*

<sup>75</sup> *See Reed*, 404 U.S. at 74 (holding in favor of a plaintiff who challenged sex discrimination by the state in federal court). A person who believes he or she was subject to discrimination on the basis of sex is permitted to sue state actors under § 1983 of the Civil Rights Act of 1871. 42 U.S.C. § 1983 (2019) (“Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of rights, privileges, or immunities of the United States Constitution and laws, shall be liable to the party injured in an action at law . . .”). To file a § 1983 suit, the plaintiff must first establish that the responsible actor was acting in his or her official capacity as a state official. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 n.10 (1989). The plaintiff must also establish that the official acted “under the color of state law,” meaning the actor was empowered by the state and acted under the authority of the state. *West v. Atkins*, 487 U.S. 42, 49 (1988). Next, the plaintiff must establish that the actor violated a right under federal law, which includes constitutional rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980). Plaintiffs who satisfy these elements may obtain legal relief, or a monetary award, as well as equitable relief, such as an injunction. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723 (1999) (Scalia, J., concurring).

<sup>76</sup> *James & Zara*, *supra* note 73, at 3.

<sup>77</sup> The *Civil Rights Cases*, 109 U.S. 3, 11 (1883). The *Civil Rights Cases* established that the constitution only prohibits “[s]tate action of a particular character,” but not “[i]ndividual invasion of individual rights.” *Id.* The Supreme Court thus created a distinction between “private wrong[s],” which are not governed by the Constitution, and “state actions,” which are subject to the Constitution. *Id.* at 17. This concept is commonly referred to as the state action doctrine and, although it was formulated in the context of the Fourteenth Amendment, has been applied to all constitutional protections. Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893, 893 n.2 (2017) (explaining the development and application of the state action doctrine).

laws or regulations promulgated by such officials, including prison officials, may be considered state action.<sup>78</sup>

Next, plaintiffs must establish that the government officials treated them differently because of their sex.<sup>79</sup> Plaintiffs can establish discriminatory treatment in two ways.<sup>80</sup> First, they can show that the law facially classifies based on sex, meaning it explicitly mandates that men and women be treated differently.<sup>81</sup> Alternatively, plaintiffs can demonstrate government officials treated them differently because of their sex by showing that a facially neutral law was either applied in a discriminatory manner or imposed a disparate impact.<sup>82</sup>

When plaintiffs assert a Fourteenth Amendment violation based on a theory of discriminatory enforcement or disparate impact, they must also prove

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<sup>78</sup> 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:15 n.4 (2019) (explaining the constitutional standards under the Fourteenth Amendment and how they are applied to § 1983 claims).

<sup>79</sup> *Reed*, 404 U.S. at 75–76.

<sup>80</sup> See *United States v. Virginia*, 518 U.S. 515, 532 (1996) (evaluating a claim of sex discrimination based on a law that facially classified on the basis of sex); *Casteneda v. Partida*, 430 U.S. 482, 493 (1977) (considering a claim of racial discrimination based on a law that had a disparate impact on Mexican-Americans); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (evaluating a claim of racial discrimination based on a law enforced by the government in a discriminatory manner against Chinese-Americans).

<sup>81</sup> See *Virginia*, 518 U.S. at 532. The State of Virginia ran a public university, called the Virginia Military Institute, that only admitted men. *Id.* at 520. In its 1996 decision, *United States v. Virginia*, the Supreme Court determined that Virginia's policy facially classified based on sex. *Id.* at 519. The court subjected the policy to intermediate scrutiny, and ultimately held it unconstitutional because the government failed to demonstrate that the policy was substantially related to an exceedingly persuasive and important government interest. *Id.* at 534.

<sup>82</sup> *Casteneda*, 430 U.S. at 493 (examining a claim of racial discrimination based on a neutral law that had a disparate impact); *Yick Wo*, 118 U.S. at 373–74 (examining a claim of racial discrimination based on a neutral law that was enforced in a discriminatory manner). Discriminatory enforcement of a neutral law occurs when officials use their discretion to enforce a law against members of one group, but not the other. *Yick Wo*, 118 U.S. at 373–74. In *Yick Wo*, the City of San Francisco passed a law requiring permits for any resident operating a laundry in a wooden structure. *Id.* at 368. Following the passage of the law, two hundred Chinese-Americans applied for permits, but none were approved. *Id.* at 374. Conversely, the eighty non-Chinese individuals who applied for permits were all approved. *Id.* Although the law itself was facially neutral, the Supreme Court found that the city, nonetheless, violated the Fourteenth Amendment by enforcing the law in a discriminatory manner. *Id.* 373–74. The Supreme Court held that when a neutral law is applied unequally among similarly situated people, the government violates the Fourteenth Amendment's Equal Protection Clause. *Id.* Similarly, a neutral law imposes a disparate impact when it disproportionately burdens one group more than another. *Casteneda*, 430 U.S. at 493.

In *Casteneda v. Partida*, the plaintiff alleged that the state's policy for selecting a grand jury violated his Fourteenth Amendment rights because, despite the fact that 79.1% of the county was Mexican-American, only 39% of people called for a grand jury over an eleven-year period were Mexican-American. *Id.* at 495. The Supreme Court found that the statistical evidence alone established prima facie evidence of a Fourteenth Amendment violation. *Id.* at 496. In this way, the Court accepted disparate impact as a basis for an equal protection claim. See *id.* The statistics proved disparate impact because the state grand jury selection policy, despite being facially neutral, had the effect of burdening Mexican-Americans by disproportionately excluding Mexican-American jurors. *Id.*

that the law was enacted “because of, not merely in spite of,” its discriminatory effect.<sup>83</sup> Consequently, the plaintiff must prove that the state actor intended the law to have a disparate impact or purposefully enforced the law in a discriminatory way.<sup>84</sup> Absent such intent, the state action will not be subject to a heightened level of scrutiny and will instead be evaluated under the deferential rational basis standard.<sup>85</sup>

The court does not need to find invidious motive to infer intent.<sup>86</sup> Thus, a state actor can intentionally discriminate against a particular class even if he or she is not motivated by a desire to harm that class.<sup>87</sup> Instead, the key inquiry is

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<sup>83</sup> Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). The Supreme Court in 1979, in *Personnel Administrator of Massachusetts v. Feeney*, considered the constitutionality of a state statute that required all civil service positions to give preference to veterans. *Id.* at 262. The plaintiffs claimed that the preference violated the Equal Protection Clause because it imposed a disparate impact on women given that very few women were veterans. *Id.* at 270. The Court upheld the statute as constitutional because, although it benefitted men over women, it did not show an intentional decision to discriminate on the basis of sex. *Id.* at 281. The Court determined that intent is a necessary element of an equal protection claim based on disparate impact because “the Fourteenth Amendment guarantees equal laws, not equal results.” *Id.* at 273. Such a showing is not required, however, for laws that facially classify. *See id.*

<sup>84</sup> Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 256, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). In 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court identified a non-exhaustive list of factors that courts may consider in determining whether discriminatory intent is present. *Id.* at 266. These factors include: (1) the historical background predating the decision; (2) the specific sequence of events leading to the challenged classification; (3) the presence or absence of departure from normal procedure; (4) the legislative history of the action, including statements made by decisionmakers; and (5) the extent of the disparate impact, including whether there exists a clear pattern that can only be explained by animus. *Id.* at 267–68.

<sup>85</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976). In its 1976 opinion *Washington v. Davis*, the Supreme Court was concerned that, if disparate impact or discriminatory enforcement were sufficient to state a Fourteenth Amendment claim without the need to establish intent, it would potentially invalidate a host of tax, welfare, public service, regulatory, and licensing statutes that benefit certain groups over others. *Id.* at 248. Therefore, the Supreme Court determined that, although evidence of disparate impact and discriminatory enforcement is not irrelevant, “it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution.” *Id.* at 242.

Both strict scrutiny and intermediate scrutiny are considered heightened levels of scrutiny. *See supra* note 73 and accompanying text (discussing heightened scrutiny standards). The proper level of heightened scrutiny depends on the characteristic upon which the law discriminates. *See supra* note 73 and accompanying text. Unlike both strict scrutiny and intermediate scrutiny, a rational basis of review standard only requires that the law is “rationally related to a legitimate state interest.” *City of Cleburne*, 472 U.S. at 440.

<sup>86</sup> BODENSTEINER & LEVINSON, *supra* note 78, § 1:15 (noting that the “intent” element of a Fourteenth Amendment violation is satisfied when a state intentionally differentiates between members of a protected class, regardless of its motive for doing so).

<sup>87</sup> *See, e.g., Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676, 694 (6th Cir. 2006) (noting that there can be “an intent to treat two groups differently” even when there is not “an intent to harm”); *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part) (“[T]here can be intentional discrimination without an invidious motive.”); *United States v. Sch. Dist. of Omaha*, 521 F.2d 530, 535 (8th Cir. 1975) (noting that the Fourteenth Amendment does not require an intent to harm, but rather an intentional differentia-

whether the state actor intended to differentiate between classes.<sup>88</sup> But, even if a plaintiff is able to demonstrate that a decision was motivated in part by discriminatory intent, a court may still uphold the law if the state can prove that the same decision would have resulted had the impermissible purpose not been considered.<sup>89</sup>

## 2. Applying the Appropriate Level of Scrutiny

Once the plaintiff states a prima facie case, the court will determine the proper level of scrutiny to apply.<sup>90</sup> Notably, there is no consensus regarding what level applies to claims of sex discrimination in prisons.<sup>91</sup> Outside of the prison context, however, state action found to discriminate on the basis of sex is subject to intermediate scrutiny because of sex's status as a quasi-suspect class.<sup>92</sup> Yet, in 1987 in *Turner*, the Supreme Court stated that constitutional

tion); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013) (stating that courts do not require "ill will, enmity, or hostility" in order to find intentional discrimination (quoting *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472–73 n.7 (11th Cir. 1999))).

<sup>88</sup> See, e.g., *Mitchell v. Washington*, 818 F.3d 436, 444–46 (9th Cir. 2016) (holding that a prison doctor impermissibly considered race when he refused to administer a particular drug to a black prisoner because studies found the drug had not been successful on black men despite the fact that his driving motivation was the prisoner's well-being); *Hassan v. City of New York*, 803 F.3d 277, 294–98 (3d Cir. 2015) (holding that surveillance schemes targeting Muslim Americans were intentional discrimination, despite the fact that the surveillance was motivated by a desire to increase public safety rather than a desire to burden Muslims).

<sup>89</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (concluding that a school did not violate the Constitution when it fired a teacher after the teacher engaged in protected First Amendment speech). Although the protected speech was a substantial part of the school's decision to fire the teacher, the school could have reached the same decision even if it did not consider the teacher's views. *Id.* When asserting this defense, the government must demonstrate that the permissible considerations were influential at the time and not simply a post-hoc justification. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (rejecting a state's argument that events that occurred between the enactment of a statute and the court case justified the statute because the original motivation for enacting the statute was discriminatory).

<sup>90</sup> Friedmann, *supra* note 73, at 2550–51 n.27.

<sup>91</sup> See, e.g., *May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000) (articulating the *Turner* standard as the appropriate test for equal protection claims in the prison context); *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (applying the *Turner* test to an equal protection claim regarding a hair length regulation); *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990) (noting that the *Turner* standard applies to equal protection claims, despite the fact that it was established based on a First Amendment claim); *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. Cir. 1989) (applying intermediate scrutiny to a sex-based equal protection claim in prison); *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 570 (W.D. Va. 2000) (finding that intermediate scrutiny should apply to sex discrimination in prison because *Turner* did not state that all rights in the prison context are subject to its standard); *Klinger v. Neb. Dep't of Corr.*, 824 F. Supp. 1374, 1388 (D. Neb. 1993) (finding that intermediate scrutiny, rather than the *Turner* test, is the proper test for equal protection claims based on sex in the prison context), *overruled on other grounds by* 31 F.3d 727 (8th Cir. 1994).

<sup>92</sup> *Virginia*, 518 U.S. at 531 (noting that distinctions based on sex are only constitutional if they substantially relate to important government interests, and thus satisfy an intermediate scrutiny inquiry).

violations in prisons are to be upheld whenever the violation is “reasonably related to valid penological interests.”<sup>93</sup> Thus, the *Turner* standard articulated a lower standard than intermediate scrutiny.<sup>94</sup>

The Supreme Court has never considered whether the *Turner* standard or intermediate scrutiny applies to equal protection claims based on sex discrimination within prisons,<sup>95</sup> and lower courts are split as to which test to apply.<sup>96</sup> Until the Supreme Court addresses the issue, the test for equal protection claims based on sex discrimination will differ by jurisdiction.<sup>97</sup> This Section details the two approaches lower courts have taken to address sex discrimination claims in the prison context.<sup>98</sup> Subsection A will review intermediate scrutiny as it is applied to sex discrimination.<sup>99</sup> Subsection B will outline the origins of the *Turner* standard and how courts have applied it to equal protection claims.<sup>100</sup>

### a. Intermediate Scrutiny

Intermediate scrutiny is applied in all cases of sex-based discrimination outside of the prison context.<sup>101</sup> To survive intermediate scrutiny, the state must prove that its discriminatory action is substantially related to an important government interest that is exceedingly persuasive.<sup>102</sup> Although what constitutes an important government interest is subject to judicial interpretation, the Supreme Court has been more likely to find that distinctions based on bona fide biological differences between the sexes, such as the ability to become pregnant, serve an important government interest.<sup>103</sup> Conversely, the Supreme Court has been reluctant to find interests based on sex stereotypes to be im-

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<sup>93</sup> *Turner*, 482 U.S. at 89.

<sup>94</sup> *Id.*; see *infra* notes 110–135 and accompanying text (providing an in-depth explanation of the standard articulated in *Turner* and the Supreme Court’s reasoning for establishing this standard).

<sup>95</sup> 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 5:15 (5th ed. 2019).

<sup>96</sup> See *supra* note 91 and accompanying text (illustrating how courts vary in their application of the *Turner* standard).

<sup>97</sup> See *supra* note 91 and accompanying text (collecting lower court cases that apply the *Turner* test and lower court cases that apply intermediate scrutiny).

<sup>98</sup> See *infra* notes 101–135 and accompanying text.

<sup>99</sup> See *infra* notes 101–109 and accompanying text.

<sup>100</sup> See *infra* notes 110–135 and accompanying text.

<sup>101</sup> *Virginia*, 518 U.S. at 532–33.

<sup>102</sup> *Id.* at 534.

<sup>103</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53, 65 (2001). In 2001 in *Nguyen v. INS*, the Supreme Court upheld a law that imposed additional requirements for proving parental status on men which did not apply to women. *Id.* at 60. In doing so, the Court recognized that there was an important government interest in ensuring there was a meaningful relationship between the parent and the child, and noted that a woman’s ability to become pregnant and eventually give birth ensured the requisite meaningful relationship. *Id.* at 65. Therefore, the law was based on bona fide biological differences between the sexes that related to an important government interest and consequently satisfied intermediate scrutiny. *Id.*



portant government interests.<sup>104</sup> Administrative convenience, such as governmental efficiency and cost effectiveness, may never constitute an important government interest.<sup>105</sup>

For a state action to be substantially related to its government purpose, the action must be a genuine attempt to achieve the stated objective, which may not be fabricated or invented post-hoc.<sup>106</sup> Furthermore, actions are not substantially related to a stated government purpose if they are underinclusive, meaning they fail to regulate activities that pose fundamentally the same threat to the government's interests.<sup>107</sup> Similarly, actions that are overinclusive because the government could achieve the same result via less intrusive means will also fail the inquiry.<sup>108</sup> If the state action is unable to survive intermediate scrutiny, the action will be deemed unconstitutional and therefore invalidated.<sup>109</sup>

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<sup>104</sup> Friedmann, *supra* note 73, at 2554 n.49 (collecting cases where the Supreme Court has been hesitant to find that sex stereotypes constituted an important government interest). A sex stereotype is a preconceived notion about how an individual should behave or present based on his or her sex. Bridget Miller, *What Is Sex Stereotyping?*, HR DAILY ADVISOR (June 22, 2017), <https://hrdailyadvisor.blr.com/2017/06/22/what-is-sex-stereotyping/> [<https://perma.cc/QH8K-9S2Q>].

<sup>105</sup> *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). In its 1973 decision *Frontiero v. Richardson*, the Supreme Court invalidated a statute that permitted servicemen to claim their wives as dependents without proof of actual dependency but required servicewomen to prove actual dependency in order to claim the same benefit from their husbands. *Id.* at 678–79. In doing so, the Court rejected the government's assertion that administrative efficiency and convenience justified such a distinction. *Id.* at 690. The Supreme Court noted that a law which differentiates based on sex for the sole purpose of administrative convenience is arbitrary and unconstitutional. *Id.*

<sup>106</sup> *Hunter*, 471 U.S. at 233 (relying on the circumstances that existed at the time the contested action occurred, and declining to consider circumstances following the contested action, in order to determine whether the action was discriminatory).

<sup>107</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). In 1994 in *City of Ladue v. Gilleo*, the Supreme Court considered a First Amendment challenge to a law that prohibited displaying residential signs, except for signs that satisfied one of ten statutory exemptions. *Id.* at 45. In considering the constitutionality of the city's action, the Court noted that the presence of the ten exemptions made the law underinclusive. *Id.* at 51. The Court determined that the regulation was not closely related to the government's interest in reducing clutter because, by providing so many exemptions, the government failed to regulate activities that posed the same fundamental threat of increased clutter. *Id.* at 52–53.

<sup>108</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). In its 2004 decision *Ashcroft v. ACLU*, the Supreme Court considered a First Amendment challenge to the Child Online Protection Act, which criminalized obscene speech on the internet. *Id.* at 661. To determine whether the law was narrowly tailored to achieve the government's interest in protecting children on the internet, the court asked whether the law was "the least restrictive means among available, effective alternatives." *Id.* at 666. The plaintiffs identified blocking and filtering software as an available, effective alternative to the statute. *Id.* at 666–67. The Court then considered the viability of the stated alternative, as well as whether the alternative would be less restrictive than the law in question. *Id.* The Court reasoned that the law could not survive Constitutional muster because the state failed to demonstrate that blocking software would be less effective than the regulation. *Id.* at 670.

<sup>109</sup> *Virginia*, 518 U.S. at 534.

*b. The Turner Standard*

In 1987, the Supreme Court in *Turner* articulated a substantially lower standard than intermediate scrutiny.<sup>110</sup> In *Turner*, the Court considered the constitutionality of two prison restrictions.<sup>111</sup> The first restriction prohibited inmates from corresponding via mail with other inmates at a separate correctional institution absent special permission.<sup>112</sup> The plaintiffs claimed that this restriction violated their First Amendment right to free speech.<sup>113</sup> The second restriction prohibited inmates from getting married during their period of incarceration absent a “compelling reason,” such as an illegitimate pregnancy or childbirth.<sup>114</sup> The plaintiffs claimed that this restriction violated their fundamental right to marry under the Fourteenth Amendment.<sup>115</sup>

In considering these questions, the Supreme Court confirmed that prisoners are not stripped of all constitutional protections upon entering prison.<sup>116</sup> The Court acknowledged, however, that judges are not well-versed in the unique challenges of running a prison and determined that a significant amount of deference must be afforded to prison officials.<sup>117</sup> Therefore, rather than evaluating the plaintiffs’ claims under strict scrutiny—the normal constitutional standard for laws abrogating fundamental rights—the Supreme Court held that “when a prison regulation impinges on inmates’ constitutional rights, the

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<sup>110</sup> *Turner*, 482 U.S. at 81; see also *Johnson v. California*, 543 U.S. 499, 514 (2005) (referring to the test designed in *Turner* as “the *Turner* standard”).

<sup>111</sup> *Turner*, 482 U.S. at 81.

<sup>112</sup> *Id.* at 81–82. Inmates were only permitted to correspond with inmates in other facilities if (1) the other inmates were immediate family members, (2) the correspondence concerned legal matters, or (3) prison officials believed that permitting correspondence would be in the best interest of the inmates. *Id.* Yet, in practice, the District Court for the Western District of Missouri found that the rule effectively made it so that inmates could not write to non-family members. *Id.* at 82.

<sup>113</sup> *Id.* at 93. The Court ultimately determined that the correspondence regulations did not violate the inmates’ First Amendment rights because the regulation was reasonably related to a valid correctional goal: institutional security. *Id.*

<sup>114</sup> *Id.* at 82.

<sup>115</sup> *Id.* at 83. In *Zablocki v. Redhail*, the Supreme Court established that the right to marry is a fundamental right protected by the Fourteenth Amendment. 434 U.S. 374, 398 (1978). The Court in *Turner* acknowledged that the right to marry is still afforded to inmates, but may be subject to additional restrictions, similar to other rights that are limited when incarcerated. *Turner*, 482 U.S. at 95. Nonetheless, the Court found the regulation unconstitutional because it was not reasonably related to legitimate penological interests. *Id.* at 97. The court supported this decision by noting that the regulation was more restrictive than necessary to achieve institutional security. *Id.* at 97–98. The fact that there were “obvious, easy alternatives” to the regulation that would respect the inmates’ rights while imposing a minimal burden on the prison’s objectives further persuaded the Court. *Id.* at 98.

<sup>116</sup> *Turner*, 482 U.S. at 84 (“[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” (citations omitted)).

<sup>117</sup> *Id.* at 84–85.

regulation is valid if it is reasonably related to legitimate penological interests.”<sup>118</sup>

To evaluate whether a prison regulation satisfies the *Turner* standard, the Supreme Court instructed lower courts to consider four factors.<sup>119</sup> First, courts should determine whether there is a valid, rational, and neutral connection between the regulation in question and governmental interests.<sup>120</sup> Legitimate governmental interests within the prison context include security and safety, prisoner rehabilitation, and conservation of resources.<sup>121</sup> If this first factor is not satisfied, many lower courts will end the inquiry and find for the plaintiff-prisoner.<sup>122</sup> The second factor asks whether inmates are provided alternative ways to exert their rights.<sup>123</sup> If prisoners are provided with such alternatives,

<sup>118</sup> *Id.* at 89. At a minimum, legitimate penological interests include the safety of prisoners and staff, rehabilitation, and crime prevention. *Shabazz*, 482 U.S. at 348. Although the Supreme Court has not designed an exact test for determining whether a stated penological interest is legitimate, it is clear that the Court provides substantial deference to prison officials in determining such interests. *See generally* Jennifer N. Wimsatt, Note, *Rendering Turner Toothless: The Supreme Court's Decision in Beard v. Banks*, 57 DUKE L.J. 1209, 1224 (2008) (discussing the level of deference to prison officials in post-*Turner* Supreme Court cases).

<sup>119</sup> *Turner*, 482 U.S. at 89–90.

<sup>120</sup> *Id.* at 89. Under this first prong of the test, courts will require prisons to articulate why the restriction furthers a valid penological interest. MUSHLIN, *supra* note 95, § 2:5. The reason must be genuine rather than manufactured. *Id.* Although prison officials have significant discretion to determine how to run a prison, they cannot offer justifications that are “arbitrary, exaggerated and pretextual.” *Williams v. Lane*, 851 F.2d 867, 875 (7th Cir. 1988); *see, e.g., Jones v. Brown*, 461 F.3d 353, 363 (3d Cir. 2006) (rejecting a policy as insufficiently related to the prison’s interest that required prison guards to open legal mail outside of the presence of prisoners, despite the fact that the prison was concerned the mail could contain anthrax); *Conyers v. Abitz*, 416 F.3d 580, 585 (7th Cir. 2005) (determining that a deadline for Ramadan participation may not be related to penological interest when a deadline was not imposed for other religious observations); *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000) (rejecting a prison regulation that prohibited access to sexually explicit material because, although the prison had an interest in promoting security and rehabilitation, the regulation was overly broad and therefore not reasonably related to the penological interest).

<sup>121</sup> *Shabazz*, 482 U.S. at 348 (“The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security.”); *see also* MUSHLIN, *supra* note 95, § 2:5.

<sup>122</sup> MUSHLIN, *supra* note 95, § 2:9.

<sup>123</sup> *Turner*, 482 U.S. at 90. The Supreme Court has yet to provide guidance as to whether lower courts should look for particular alternative means or generic alternative means. MUSHLIN, *supra* note 95, § 2:6. A lower court searching for particular alternative means will ask if the prison offers a way for the prison to engage in the specific protected activity burdened by the regulation. *Id.* Comparatively, a court following the generic alternative means approach would ask if prisoners had other ways to exercise the right at issue, regardless of whether they could engage in the exact activity in question. *Id.* For example, in the 1989 case *Whitney v. Brown* before U.S. Court of Appeals for the Sixth Circuit, Jewish prisoners claimed that the prison violated their First Amendment rights when it prohibited them from congregating for Passover service. 882 F.2d 1068, 1069 (6th Cir. 1989). The Sixth Circuit followed the particular alternative means approach and asked if there were other reasonable ways for prisoners to observe Passover. *Id.* at 1073. The Sixth Circuit ultimately found that the restriction violated the prisoners’ First Amendment rights in part because the prison did not provide an alternative means for the prisoners to celebrate Passover. *Id.* at 1077. Had the Sixth Circuit in *Whitney* utilized the generic alternative means approach, it would have asked whether the prisoners had other ways to

the court will be more likely to uphold the regulation in question.<sup>124</sup> Third, courts are instructed to consider the “ripple effect” that accommodating the right in question would have on the institution, including the effect on other inmates, correctional officers, and government resources.<sup>125</sup> Finally, courts inquire as to whether there are obvious and easy alternatives to the regulation that would have a de minimis effect on government interests while accommodating the inmates’ rights.<sup>126</sup> The burden is on the plaintiff, rather than the state, to articulate valid alternatives.<sup>127</sup>

Although the Supreme Court articulated the *Turner* standard in the context of First Amendment and due process claims, the plain language of the decision implies that the test applies to all constitutional claims by prisoners.<sup>128</sup> In 2005, however, the Supreme Court undermined this implication in *Johnson v. California*.<sup>129</sup> In *Johnson*, the Court held that the *Turner* test is not the proper standard for equal protection claims based on racial discrimination in prison.<sup>130</sup> Rather, the Court decided that such claims should be evaluated under the

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practice Judaism, even if they were not permitted to observe Passover. See MUSHLIN, *supra* note 95, § 2:6 (discussing the distinction between the particular alternative means approach and the generic alternative means approach). Assuming the prison permitted the prisoners to practice Judaism in other respects, such as through observing the Sabbath or keeping kosher, the court may have come out differently under the generic alternative means approach. See *id.*

<sup>124</sup> MUSHLIN, *supra* note 95, § 2:6.

<sup>125</sup> *Turner*, 482 U.S. at 90. If a court finds that the ripple effect of accommodating a prisoner’s constitutional rights would be significant and undesirable, it should uphold the prison’s restriction. *Id.* One common negative ripple effect asserted by prisons is jealousy; prisons are often concerned that institutional security will be compromised if prisoners are permitted to engage in certain rights because other prisoners will be jealous that some people are receiving special treatment. See, e.g., Dawson v. Scurr, 986 F.2d 257, 260–61 (8th Cir. 1993) (reasoning that a regulation permitting inmates who are “psychologically fit” to view pornographic materials could have an undesirable ripple effect); Pella v. Adams, 723 F. Supp. 1394, 1396 (D. Nev. 1989) (recognizing that a policy permitting prisoners to purchase alternative drug tests could have a negative ripple effect because not all prisoners can afford alternative drug tests).

<sup>126</sup> *Turner*, 482 U.S. at 90–91. See, e.g., Morrison v. Hall, 261 F.3d 896, 905 (9th Cir. 2001) (establishing that it would be a de minimis alternative for prison guards to distinguish between junk mail and magazine subscriptions); Williams v. Bitner, 359 F. Supp. 2d 370, 379 (M.D. Pa. 2005) (finding that there was a de minimis alternative to disciplining a Muslim inmate for refusing to prepare pork because the prison could have removed the inmate from his job), *aff’d in part, remanded in part*, 455 F.3d 186 (3d Cir. 2006).

<sup>127</sup> *Turner*, 482 U.S. at 91.

<sup>128</sup> See *id.* at 89. In articulating the *Turner* standard, the Supreme Court stated that, “when a prison regulation impinges on an inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* A plain reading of the phrase “an inmates’ constitutional rights” seems to imply that the stated standard applies to *all* constitutional rights, not just the First Amendment right at issue in *Turner*. See *id.*

<sup>129</sup> *Johnson*, 543 U.S. at 509.

<sup>130</sup> *Id.* In its 2005 opinion *Johnson v. California*, the Court considered whether the practice of automatically rooming new inmates with other inmates of the same race violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 502. The Court determined that “[t]he right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*.” *Id.* at 510. Rather,

strict scrutiny analysis used to assess claims of racial discrimination outside the prison context.<sup>131</sup> The Court reasoned that equal protection claims based on race warrant strict scrutiny, rather than the less stringent *Turner* standard, because the right to be free from racial discrimination does not conflict with proper prison administration.<sup>132</sup> The Court found the strict scrutiny test forgiving enough to allow prison officials to effectively run safe prisons while protecting prisoners' rights.<sup>133</sup> Therefore, despite the apparently all-inclusive language of the *Turner* decision, the Supreme Court carved out at least one exception where the *Turner* standard does not apply to a prison regulation that infringes on an inmate's constitutional rights.<sup>134</sup> The Supreme Court, however, has never considered whether there should be a similar exception for equal protection claims based on sex discrimination.<sup>135</sup>

### B. Eighth Amendment Protections

In addition to the Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment can be used to evaluate whether it is constitutional to restrict access to menstrual health products in prison.<sup>136</sup> The Eighth Amendment prohibits the government from inflicting "cruel and unusual punishments" on convicted prisoners.<sup>137</sup> The Eighth Amendment requires prisons to

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such claims should be evaluated under the strict scrutiny analysis used for all other claims of racial discrimination. *Id.* at 509.

<sup>131</sup> *Id.* Strict scrutiny requires a showing that the regulation in question is narrowly tailored to fit a compelling government interest. Friedmann, *supra* note 73, at 2550; *see also supra* note 73 and accompanying text (describing the tiers of scrutiny employed in equal protection claims).

<sup>132</sup> *Johnson*, 543 U.S. at 510.

<sup>133</sup> *Id.* at 514.

<sup>134</sup> *Id.* at 509. In 1968, the Supreme Court determined that de jure racial segregation in prisons was unconstitutional. *Lee v. Washington*, 390 U.S. 333, 333 (1968) (per curiam). Nonetheless, inmates are quick to point out that de facto segregation is still alive and well in many prisons. *See* VICTOR HASSINE ET AL., *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 69 (3d ed. 2004) ("An inmate's race may still determine where he can stand, sit, or work, and what he can say and to whom he may speak."); JEFFREY IAN ROSS & STEPHEN C. RICHARDS, *BEHIND BARS: SURVIVING PRISON* 51 (2002) ("With few exceptions, black prisoners associate with blacks, whites with whites, and Hispanics with Hispanics."). The Supreme Court has primarily concerned itself with de jure segregation, rather than de facto segregation. James E. Robertson, *Separate but Equal in Prison: Johnson v. California and Common Sense Racism*, 96 J. CRIM. L. & CRIMINOLOGY 795, 803 (2006) (noting that, despite the holdings in *Johnson* and *Lee*, prisons are still racially segregated in practice).

<sup>135</sup> MUSHLIN, *supra* note 95, § 5:15.

<sup>136</sup> *See* U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments").

<sup>137</sup> *Id.* The protections of the Eighth Amendment are extended to pretrial detainees as well. William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3d 111 § 2(a) (1973). Because a pretrial detainee has not yet been convicted of a crime, courts often find that practices intended to punish the detainee violate the detainee's due process rights under the Fifth and Fourteenth Amendment, as well as the Eighth Amendment's prohibition against cruel and unusual punishments. *Id.* Therefore, any punishment that is cruel and unusual if imposed on a convicted prisoner is also cruel and unusual if imposed on a pretrial detainee. *Id.* But, not all pun-

provide adequate medical care and certain personal hygiene articles for prisoners and could possibly extend to menstrual health products in particular.<sup>138</sup>

## 1. Development of Eighth Amendment Jurisprudence

Originally, the Eighth Amendment prohibited only torture and similarly violent methods of punishment.<sup>139</sup> Over the years, however, the Supreme Court has found that the Eighth Amendment prohibits more than “physically barbarous punishment”; rather, it “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”<sup>140</sup> The Supreme Court has developed a number of touchpoints for evaluating whether punishment is cruel and unusual.<sup>141</sup>

First, courts consider punishments that are inherently cruel or barbaric to be cruel and unusual because they inflict unnecessary pain.<sup>142</sup> In determining whether a punishment inflicts unnecessary pain, courts have considered mental and emotional distress in addition to physical suffering.<sup>143</sup> Second, courts may consider sentences that are excessive or disproportionate to the crime alleged cruel and unusual.<sup>144</sup> A punishment is often considered excessive if it bears no relation to legitimate penal objectives, such as deterrence, isolation, or rehabilitation.<sup>145</sup> In making this determination, lower courts often have upheld practices upon which correctional institutes widely rely or are otherwise accepted by penologists.<sup>146</sup> In contrast, courts often consider practices that pe-

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ishments that are cruel and unusual if imposed on a pretrial detainee will be considered cruel and unusual if imposed on a convicted prisoner. *Id.*

<sup>138</sup> *See, e.g., Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245, 2015 WL 9906265, at \*9 (W.D. Mich. 2015) (providing for the possibility that denying access to menstrual health products could violate the Eighth Amendment under certain circumstances).

<sup>139</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>140</sup> *Id.*

<sup>141</sup> *Rummel v. Estelle*, 445 U.S. 263, 271 (1980) (“This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.”); *Furman v. Georgia*, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring) (considering the discriminatory application of the death penalty as evidence that it is arbitrary and therefore unconstitutional); *Louisiana v. Resweber*, 329 U.S. 459, 464 (1947) (holding that carrying out a second execution attempt after the first execution attempt failed due to a mechanical error does not violate the Eighth Amendment because the purpose was not to inflict unnecessary pain).

<sup>142</sup> *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding that handcuffing a prisoner to a hitching post for seven hours in the summer heat without access to water or a bathroom violated the Eighth Amendment because it caused an extreme and unnecessary amount of pain and suffering).

<sup>143</sup> *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that the penalty of expatriation violates the Eighth Amendment, even though it does not involve physical suffering, because of the extreme mental distress that it may cause).

<sup>144</sup> *Rummel*, 445 U.S. at 271 (noting that the Eighth Amendment requires that the severity of the sentence be roughly equivalent to the severity of the crime).

<sup>145</sup> *Danne*, *supra* note 137, § 5(a).

<sup>146</sup> *Id.*; *see, e.g., Sostre v. McGinnis*, 442 F.2d 178, 192 (2d Cir. 1971) (holding that solitary confinement does not violate the Eighth Amendment in part because this practice is widely used across

nologists have abandoned or rejected cruel and unusual.<sup>147</sup> Third, punishments that are inflicted arbitrarily against some but not others may be considered cruel and unusual.<sup>148</sup> Finally, a punishment can be cruel and unusual if modern society believes it to be abhorrent or unacceptable.<sup>149</sup> An Eighth Amendment violation may be based on a particular act of punishment or aggregate conditions of confinement.<sup>150</sup> Courts generally consider harsh or uncomfortable prison conditions an appropriate aspect of punishment, but prison conditions may not be so harsh as to be inhumane.<sup>151</sup>

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the country and has been a disciplinary tool used in prisons for years); *Glenn v. Wilkinson*, 309 F. Supp. 411, 415 (W.D. Mo. 1970) (holding that housing death sentence prisoners in a separate facility does not violate the Eighth Amendment in part because it is a widely accepted and utilized practice); *Akamine v. Murphy*, 238 P.2d 606, 607 (Cal. Ct. App. 1951) (holding that it was not cruel and unusual to prohibit an inmate from seeing his wife because the practice was long practiced in San Francisco prisons and approved by the Federal Bureau of Prisons). Penologists are experts in prison management and criminal punishment. *Penology*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>147</sup> *Danne*, *supra* note 137, § 5(a); *see, e.g.*, *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (holding that the use of corporal punishment in a prison violates the Eighth Amendment in part because public opinion opposed the practice and it had been abolished in nearly every other state penal system); *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971) (finding that imposing a bread and water diet on an inmate violates the Eighth Amendment in part because penologists widely disapproved of the practice); *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970) (finding that the practice of using other inmates as prison guards violates the Eighth Amendment in part because it is "universally condemned by penologists" and was abolished in all but three states).

<sup>148</sup> *See Furman*, 408 U.S. at 249–50 (Douglas, J., concurring) (determining that the death penalty is unconstitutional in part because it is applied arbitrarily insofar as it is disproportionately and discriminatorily imposed against poor people, black people, and other unpopular minorities). Justice Brennan echoed this same concept in his *Furman* concurrence where he stated that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." *Id.* at 274 (Brennan, J., concurring).

<sup>149</sup> *Id.* at 277. The Court considers the social acceptability of a punishment as relevant insofar as "[r]ejection by society . . . is a strong indication that a severe punishment does not comport with human dignity." *Id.* Judges, however, must be careful not to mistake their own viewpoint for that of society. *Id.* Thus, it is preferable to rely on objective standards of societal sentiments, rather than the judge's own perception. *Id.* at n.21.

<sup>150</sup> *See, e.g.*, *Owens-Eli v. Robinson*, 442 F. Supp. 1368, 1379 (W.D. Pa. 1978) (finding that the combined effect of the prison's failure to provide adequate beds, appropriate clothing, and facilities for personal hygiene violated the Eighth Amendment). Conditions of confinement include conditions formally imposed as a sentence for a crime, such as a judicial order to attend certain programming, as well as those that are not formally imposed, such as the cleanliness of the prison. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (noting that the Eighth Amendment "could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment"). In the 1991 Supreme Court case *Wilson v. Seiter*, the plaintiff alleged that the aggregate conditions of the prison, including "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates," violated the Eighth Amendment. *Id.* at 296. The Supreme Court noted that such conditions, although not formally imposed as a part of his punishment, could still constitute an Eighth Amendment violation. *Id.* at 297.

<sup>151</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) ("To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."); *Rummel*, 445 U.S. at 287 (Powell, J., dissenting) ("[W]e can be certain that the Framers intended to proscribe inhumane methods of punishment.").

## 2. Standard for Denial of Medical Care

In 1976, the Supreme Court established in *Estelle v. Gamble* that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”<sup>152</sup> The Supreme Court recognized that needlessly denying medical care to inmates often results in unnecessary pain and suffering which cannot serve any legitimate penological purpose, and is therefore inconsistent with contemporary standards of decency.<sup>153</sup> Prisoners who claim an Eighth Amendment violation based on conditions that are not part of a formal punishment, including medical care, must satisfy a two-part test, containing both a subjective and objective component.<sup>154</sup> The subjective component asks if the official exhibited deliberate indifference to the inmate’s wellbeing.<sup>155</sup> The objective prong requires the plaintiff to show that the medical need ignored by the official was sufficiently serious to form the basis of an Eighth Amendment violation.<sup>156</sup>

### *a. Deliberate Indifference*

To satisfy the subjective deliberate indifference prong, officials must have known that they were exposing a plaintiff to a significant risk of harm.<sup>157</sup> This prong requires more than negligence but does not require purpose or knowledge that harm will occur.<sup>158</sup> Accordingly, the standard is most often

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<sup>152</sup> *Estelle*, 419 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

<sup>153</sup> *Id.* at 102–03.

<sup>154</sup> *Substantive Rights Retained by Prisoners*, 48 GEO. L.J. ANN. REV. CRIM. PROC. 1157, 1186 (2019) (analyzing constitutional rights within prisons). Claims of Eighth Amendment violations based on formally imposed sanctions are evaluated under the multiple tests devised to determine whether a punishment is cruel and unusual. See *supra* notes 142–149 and accompanying text (explaining how courts approach Eighth Amendment claims).

<sup>155</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (evaluating a prisoner’s claim that the prison violated her Eighth Amendment rights when it failed to respond appropriately to her safety concerns by examining the prison’s subjective awareness of the threat to the prisoner’s safety).

<sup>156</sup> *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (evaluating whether a prisoner’s claim that prison guards used excessive force against him violated the Eighth Amendment by determining whether the excessive force resulted in serious injuries).

<sup>157</sup> *Farmer*, 511 U.S. at 837 (noting that deliberate indifference requires that “the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”). Prison doctors as well as correctional officers can exhibit deliberate indifference. *Estelle*, 419 U.S. at 104. If a plaintiff claims that a doctor exhibited deliberate indifference, the plaintiff must show that it goes beyond mere medical malpractice. *Id.* at 105–06. Without more, the conduct is not a wanton infliction of unnecessary pain and consequently cannot support an Eighth Amendment claim. *Id.*

<sup>158</sup> *Farmer*, 511 U.S. at 835. The Court recognized that deliberate indifference requires more than mere negligence. *Id.* Yet deliberate indifference can be “satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id.* Therefore, the Court found that “deliberate indifference [lies] somewhere between the poles of negligence at one end and purpose or knowledge at the other.” *Id.* at 836. Although many lower courts equated the “middle ground” between the poles with recklessness, the Supreme Court noted that recklessness can carry



equated with criminal recklessness, which occurs when an actor disregards a known risk even without knowing that the harm will actually occur.<sup>159</sup> Therefore, because actual knowledge of risk is required, prison officials cannot be held responsible for failure to perceive a significant risk even if the risk was obvious.<sup>160</sup> Officials may, however, be held responsible for failing to act where they knew there was a serious risk of harm but believed the harm would not actually materialize.<sup>161</sup> Prison officials may also escape liability if they take reasonable steps to ameliorate the risk, even if the harm still occurs.<sup>162</sup>

To prove deliberate indifference, plaintiffs may rely on circumstantial evidence.<sup>163</sup> Accordingly, if a substantial risk is plainly obvious, a factfinder may conclude that the actor possessed the requisite knowledge.<sup>164</sup> Prison officials may rebut the assertion that they were aware of an obvious risk but will still be held liable if they purposefully ignored or refused to investigate facts that they suspected to be true.<sup>165</sup> The Supreme Court implied that this sort of “willful blindness” may be considered a form of deliberate indifference in its decision in 1994 in *Farmer v. Brennan*.<sup>166</sup>

### *b. Serious Medical Need*

The Supreme Court has made it clear that only indifference towards serious medical needs may rise to the level of an Eighth Amendment violation.<sup>167</sup> Therefore, deprivations that do not implicate basic needs or are otherwise de

more than one definition. *Id.* Civil recklessness occurs when an individual acts, or fails to act, despite a substantial known or obvious risk. *Id.* Conversely, criminal recklessness occurs only when an individual acts despite a substantial risk that is actually known to the individual. *Id.* at 836–37.

<sup>159</sup> *Id.* at 836 (noting that lower courts frequently treat deliberate indifference as synonymous with recklessness).

<sup>160</sup> *Id.* at 837.

<sup>161</sup> *Id.* at 842. (“[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”).

<sup>162</sup> *Id.* at 844.

<sup>163</sup> *Id.* Circumstantial evidence refers to evidence that can be inferred from a situation, rather than directly observed. *Evidence*, BLACK’S LAW DICTIONARY, *supra* note 146.

<sup>164</sup> *Farmer*, 511 U.S. at 842.

<sup>165</sup> *Id.* at 843 n.8.

<sup>166</sup> *See id.* (“While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him . . . he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist . . .”). Willful blindness is defined as taking deliberate action to avoid confirming one’s suspicions that a crime occurred. *Willful Blindness*, BLACK’S LAW DICTIONARY, *supra* note 146.

<sup>167</sup> *Estelle*, 429 U.S. at 106 (“In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”).

minimis do not meet this standard.<sup>168</sup> The Supreme Court has yet to articulate a test for evaluating what constitutes a serious medical need,<sup>169</sup> but lower courts have devised a number of tests to evaluate whether an asserted medical need is sufficiently harmful.<sup>170</sup>

Most lower courts focus on five factors to determine whether there is a serious medical need.<sup>171</sup> These courts assess whether (1) a physician has determined that the inmate's condition requires treatment;<sup>172</sup> (2) the condition is one that a typical lay person could recognize as requiring medical attention;<sup>173</sup> (3) the condition causes significant pain;<sup>174</sup> (4) the condition inhibits the inmate's daily acts;<sup>175</sup> and (5) the condition threatens permanent handicap or loss.<sup>176</sup> When evaluating these factors, courts only look to what officials knew at the time of the alleged violation.<sup>177</sup>

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<sup>168</sup> *Wilson*, 501 U.S. at 298. A deprivation is considered de minimis if it is “trifling” or “negligible” such that it is “so insignificant that a court may overlook it in deciding an issue or case.” *De Minimis*, BLACK’S LAW DICTIONARY, *supra* note 146.

<sup>169</sup> MUSHLIN, *supra* note 95, § 4:4.

<sup>170</sup> *Estelle*, 419 U.S. at 106; MUSHLIN, *supra* note 95, § 4:4.

<sup>171</sup> MUSHLIN, *supra* note 95, § 4:4.

<sup>172</sup> *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994) (“A serious medical need is one that has been diagnosed by a physician as mandating treatment.”), *overruled in part on other grounds by Hope v. Pelzer*, 536 U.S. 730 (2002); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (noting that a medical need is sufficiently serious if a physician finds that it requires treatment).

<sup>173</sup> *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) (“A serious medical need is one that . . . is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977))); *see also Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (same); *Sheldon v. Pezler*, 49 F.3d 1312, 1316 (8th Cir. 1995) (same); *Mahan v. Plymouth Cty. House of Corr.*, 64 F.3d 14, 18 (1st Cir. 1995) (same); *Hill*, 40 F.3d at 1186 (same); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (same).

<sup>174</sup> *Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996) (noting that the Eighth Amendment prohibits ignoring injuries if they are “sufficiently serious or painful to make the refusal of assistance uncivilized”); *Boretti v. Wiscomb*, 930 F.2d 1150, 1154–55 (6th Cir. 1991) (“[A] prisoner who suffers pain needlessly when relief is readily available has a cause of action against those whose deliberate indifference is the cause of his suffering.”); *East v. Lemons*, 768 F.2d 1000, 1001 (8th Cir. 1985) (finding that a prisoner-plaintiff stated a possible constitutional violation because he may have suffered “undue pain”).

<sup>175</sup> *Chance v. Armstrong*, 143 F.3d 698, 702–03 (2d Cir. 1998) (noting that one touchpoint for an Eighth Amendment violation is whether an individual has a medical condition that interferes with daily life); *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992) (same), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

<sup>176</sup> *Lanzaro*, 834 F.2d at 347 (“[W]here denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious.”); *see also Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 785 (7th Cir. 2014) (finding that a ruptured shoulder tendon which resulted in permanent impairment was a serious medical need).

<sup>177</sup> *See, e.g., Davis v. Jones*, 936 F.2d 971, 972–73 (7th Cir. 1991) (holding that a small cut which ultimately resulted in a serious injury was not a serious medical need because a reasonable individual would not view a one-inch cut as high-risk). For this reason, officials are not responsible for conditions that turn out to be objectively serious but initially appear innocuous. *Id.*

In addition to immediate harm, the Supreme Court has held that the Eighth Amendment also covers future harm to inmates if the harm is sufficiently serious.<sup>178</sup> In future harm case, plaintiffs must show only that they were exposed to unreasonably high levels of harm likely to implicate serious medical needs in the future.<sup>179</sup> When determining whether exposure to a risk of future harm violates the Eighth Amendment, courts look to the gravity of the potential harm as well as the statistical likelihood that the harm will materialize.<sup>180</sup> Courts also assess whether society's modern standards of decency tolerate the risk.<sup>181</sup>

### 3. Personal Hygiene and the Eighth Amendment

The Supreme Court has never considered whether denying a plaintiff access to items for personal hygiene, such as menstrual health products, could constitute an Eighth Amendment violation.<sup>182</sup> Lower courts, however, indicate that such a denial could form the basis for an Eighth Amendment claim if the denial poses a risk to an inmate's physical health or safety.<sup>183</sup>

For example, in 1978 in *Owens-El v. Robinson*, the United States District Court for the Western District of Pennsylvania found that a prison's failure to provide essential personal hygiene items including toilet paper, clothing, and towels, violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>184</sup> The prison provided no process for indigent inmates to request

<sup>178</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993). The plaintiff in the Supreme Court's 1993 decision *Helling v. McKinney* filed a § 1983 suit claiming the state violated his Eighth Amendment rights when it roomed him with an inmate who smoked cigarettes heavily and exposed him to secondhand smoke. *Id.* at 28. The Court determined that exposure to the secondhand smoke posed an unreasonable risk to his future health, which could form a basis for an Eighth Amendment claim. *Id.* at 35.

<sup>179</sup> *Id.* at 34.

<sup>180</sup> *Id.* at 36.

<sup>181</sup> *Id.* To evaluate evolving standards of decency, the Court will often look to state and federal legislatures as well as sentencing juries. Matthew C. Matusiak et al., *The Progression of "Evolving Standards of Decency" in U.S. Supreme Court Decisions*, 39 CRIM. JUST. REV. 253, 257 (2014) (tracing the history of how the Supreme Court analyzes and applies standards of decency in Eighth Amendment jurisprudence). Additionally, courts will often look to prior judicial decisions as well as international and comparative law in evaluating evolving standards of decency. *Id.* at 259. Occasionally, courts will consider their own judgment, principles of proportionality, and social science research to examine the standard. *Id.*

<sup>182</sup> See *James v. O'Sullivan*, 62 F. App'x 636, 639 (7th Cir. 2003) (considering whether failure to provide personal hygiene items constitutes an Eighth Amendment violation in the absence of Supreme Court guidance); *McCray v. Burrell*, 516 F.2d 357, 369 (4th Cir. 1975) (same); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1288–89 (S.D.W. Va. 1981) (same); *Owens-El*, 442 F. Supp. at 1379 (same).

<sup>183</sup> See, e.g., *McCray*, 516 F.2d at 369 (determining that a prison's denial of certain personal hygiene items could violate the Eighth Amendment because of the risk to inmates of developing health issues without those items); see also *infra* notes 184–194 and accompanying text (discussing cases where lower courts considered whether denial of personal hygiene items violated the Eighth Amendment).

<sup>184</sup> 442 F. Supp. at 1379. Historically, courts tended to evaluate Eighth Amendment claims by examining each allegedly violative deprivation independently. Danne, *supra* note 137, § 24. In recent

toilet paper when they could not afford it at the commissary, and the limited supply of bath towels forced some inmates to airdry.<sup>185</sup> Therefore, the court found that the prison functionally deprived the inmates of necessary items, despite the fact that the items were technically available to the inmates.<sup>186</sup> Possession of these articles was not a privilege, but rather a necessary entitlement under modern standards of decency, according to the court.<sup>187</sup>

Similarly, in 1975 in *McCray v. Burrell*, the United States Court of Appeals for the Fourth Circuit found that a prison violated the Eighth Amendment when it failed to provide the inmate-plaintiff with personal hygiene items, including soap, razors, toilet paper, and toothbrushes.<sup>188</sup> And in 1981 in *Dawson v. Kendrick*, the United States District Court for the Southern District of West Virginia found that a prison's denying access to items necessary for personal hygiene, such as soap, razors, combs, toothpaste, toilet paper, and pads, violated the Eighth Amendment.<sup>189</sup> In reaching this conclusion, the court was particularly concerned with the fact that these denials could, and often did, result in prisoners developing parasitic skin conditions.<sup>190</sup>

The United States Court of Appeals for the Seventh Circuit expressed similar sentiments in 2003 in *James v. O'Sullivan* when it discussed the health

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years, however, courts have moved towards an approach that considers the totality of the circumstances when determining whether the conduct rises to a level of cruel and unusual punishment. *Id.*

<sup>185</sup> *Owens-El*, 442 F. Supp. at 1378.

<sup>186</sup> *Id.* at 1384. Although the prison made bath towels available in the showers, there were not enough towels for each prisoner. *Id.* Therefore, inmates often could not receive a towel after their showers.

<sup>187</sup> *Id.* at 1378.

<sup>188</sup> 516 F.2d at 369. The plaintiff in *McCray v. Burrell* was held in a mental observation cell because he displayed "mentally disturbed behavior." *Id.* at 366. The mental observation cell did not contain a mattress or blanket and did not have anywhere to sit other than the concrete floor. *Id.* at 369. The cell did not contain a sink, and the toilet was a hole in the floor covered with feces and urine. *Id.* The United States Court of Appeals for the Fourth Circuit found that these conditions in the aggregate, combined with the denial of personal hygiene items, were a violation of the Eighth Amendment because no "decent society would tolerate it even for a suspected mental patient who had been convicted of a crime." *Id.*

<sup>189</sup> *Dawson*, 527 F. Supp. at 1288–89. The plaintiff in *Dawson* articulated several conditions that he alleged violated the Eighth Amendment. *Id.* at 1258. In addition to the lack of personal hygiene articles, the plaintiff claimed that: the plumbing was inadequate and unsanitary; the lighting was too dim to read without suffering visual damage; poor housekeeping resulted in unsanitary living conditions, there were too few sheriffs to adequately protect the prisoners; the prison was severely overcrowded; the food did not satisfy prisoners' nutritional needs; inmates were not permitted enough time to exercise; and the medical care was inadequate. *Id.* at 1287–1306. Unlike the court in *McCray*, the District Court for the Southern District of West Virginia analyzed each of the plaintiff's claims in isolation rather than in the aggregate. *Id.* Therefore, the court was able to find that the lack of access to personal hygiene items standing on its own violated the Eighth Amendment, without regard for the other conditions. *Id.* at 1289.

<sup>190</sup> *Id.* at 1289 ("The resulting danger to the prisoners' health is manifest in the parasitic skin conditions which often plague the prisoners. Defendants have not presented, nor is there otherwise apparent, any legitimate purpose served by this deprivation. The court therefore finds this condition to be violative of . . . the Eighth Amendment as to convicted prisoners.")

risks associated with denying prisoners access to articles of personal hygiene.<sup>191</sup> Accordingly, the court found that denial of soap, toothbrushes, and toothpaste could be a violation of the Eighth Amendment if the inmate could show that this deprivation could lead to an excessive health risk.<sup>192</sup> Being denied a comb, deodorant, and cleaning supplies, however, did not satisfy the objective prong of the Eighth Amendment test for the Seventh Circuit because these denials posed no serious threat to the plaintiff's health.<sup>193</sup> Therefore, many lower courts will find that denying access to personal hygiene items violates the Eighth Amendment only if the plaintiff can demonstrate that the denial poses a serious risk to inmate health.<sup>194</sup>

### III. DENIAL OF MENSTRUAL HEALTH PRODUCTS AS AN EQUAL PROTECTION CLAUSE VIOLATION

No federal court has considered whether restricting access to menstrual health products violates the Equal Protection Clause.<sup>195</sup> Courts have largely evaluated the issue under the Eighth Amendment without much analysis under the Fourteenth Amendment.<sup>196</sup>

If a court were to consider a prison's restriction of access to menstrual health products under the Equal Protection clause, it would first need to evaluate whether the policy facially classifies on the basis of sex or, in the alterna-

<sup>191</sup> *James*, 62 F. App'x at 639.

<sup>192</sup> *Id.* The United States Court of Appeals for the Seventh Circuit in *James* reviewed the United States District Court for the Central District of Illinois's decision to dismiss the plaintiff's complaint for failure to state a claim. *Id.* at 638. Therefore, the Seventh Circuit only considered whether the plaintiff's complaints could form the basis of an Eighth Amendment violation without determining whether such a violation occurred. *See id.*

<sup>193</sup> *Id.* at 639. The objective prong of the Eighth Amendment test requires an excessive risk to health or safety. *Id.*

<sup>194</sup> *See, e.g., id.* (finding that denying inmates access to personal hygiene items that directly implicated their health violated the Eighth Amendment); *McCray*, 516 F.2d at 369 (determining that preventing an inmate from brushing his teeth or bathing with soap violated the Eighth Amendment); *Dawson*, 527 F. Supp. at 1288–89 (holding that a prison's denial of necessary hygiene items to inmates constituted an Eighth Amendment violation); *Owens-El*, 442 F. Supp. at 1379 (finding that failure to provide clothing, towels, and toilet paper violated the Eighth Amendment).

<sup>195</sup> *See Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245, 2015 WL 9906265, at \*9 (W.D. Mich. 2015) (challenging failure to provide menstrual health products on Eighth Amendment grounds, but not equal protection grounds); *Atkins v. Cty. of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005) (same); *Dawson*, 527 F. Supp. at 1288–89 (same).

<sup>196</sup> *See, e.g., Shaw supra* note 31, at 491 (arguing that the practice of denying access to menstrual health products in prison could violate the Eighth Amendment without considering the issue under the Equal Protection Clause); Kate Walsh, Note, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 COLUM. J.L. & SOC. PROBS. 45, 66 (2016) (arguing that New York's policy of limiting access to menstrual health products in prison constitutes an Eighth Amendment violation without considering whether it could also violate the Equal Protection Clause).

tive, imposes a disparate impact on women.<sup>197</sup> Next, a court would need to determine whether intermediate scrutiny or the standard dictated in *Turner v. Safley* applies to sex-based equal protection claims in prison.<sup>198</sup> Section A of this Part reviews relevant literature and court decisions that could impact a court's application of the Equal Protection Clause to menstrual health in prison.<sup>199</sup> Section B then analyzes the likelihood of a successful sex-based equal protection claim.<sup>200</sup> This Part concludes that an equal protection challenge would succeed under either intermediate scrutiny or the *Turner* standard so long as a court would be willing to accept menstruation-based classification as a form of sex-based classification.<sup>201</sup>

### A. Equal Protection and Menstrual Health in Prison

Because inadequate access to menstrual health products in prison has never been examined under the Fourteenth Amendment, it is helpful and necessary to turn to similar challenges for guidance.<sup>202</sup> This Section considers what scholars and courts have said about the proper standard for evaluating sex-based classification claims within the prison context and whether menstruation-based classification could be considered sex-based classification.<sup>203</sup>

#### 1. Unequal Treatment Based on Menstruation as a Form of Sex Classification

Only those who are born biologically female are capable of menstruating.<sup>204</sup> For this reason, scholars have argued that menstruation-based classifica-

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<sup>197</sup> See *supra* note 82 and accompanying text (explaining that a law can either facially discriminate on the basis of sex, or it can be facially neutral but impose a disparate impact on one sex). If a plaintiff establishes that the law facially discriminates, she has satisfied her prima facie case and the law will be evaluated under the appropriate level of scrutiny—either intermediate scrutiny or the *Turner* standard, depending on the jurisdiction. MUSHLIN, *supra* note 95, § 5:15. Alternatively, if a plaintiff demonstrates that the law is facially neutral but imposes a disparate impact on one sex, the plaintiff must prove that Congress passed the law because of its discriminatory effect, and not just in spite of it. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (establishing that a law will not be found in violation of the Fourteenth Amendment absent a showing of intent).

<sup>198</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987); see, e.g., *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. Cir. 1989) (considering whether the *Turner* standard or intermediate scrutiny should apply to claims of sex discrimination in prison); *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 570 (W.D. Va. 2000) (same); *Klinger v. Neb. Dep't of Corr.*, 824 F. Supp. 1374, 1388 (D. Neb. 1993) (same), *overruled on other grounds* by 31 F.3d 727 (8th Cir. 1994).

<sup>199</sup> See *infra* notes 202–266 and accompanying text.

<sup>200</sup> See *infra* notes 267–332 and accompanying text.

<sup>201</sup> See *infra* notes 267–332 and accompanying text.

<sup>202</sup> See *infra* notes 204–242 and accompanying text.

<sup>203</sup> See *infra* notes 204–266 and accompanying text.

<sup>204</sup> See generally KAREN GRAVELLE, *THE PERIOD BOOK: A GIRL'S GUIDE TO GROWING UP* (2017) (explaining the biology behind menstruation). Note, though, that many transgender men assigned female at birth menstruate, yet transgender women cannot menstruate. Shazia Ahmad & Mat-

tions are a form of facial sex classification or, at a minimum, impose a disparate impact on women.<sup>205</sup> The Supreme Court, however, has never considered whether differential treatment on the basis of menstruation is a form of sex classification and few lower courts have offered guidance.<sup>206</sup> The following subsections will analyze the strengths and challenges of litigating menstruation-based classifications under both a facial classification theory and a disparate impact theory.<sup>207</sup>

### *a. Facial Classification*

One way to challenge restricted access to menstrual health products in prison is to claim that the practice constitutes facial sex classification.<sup>208</sup> But

thew Leinug, *The Response of the Menstrual Cycle to Initiation of Hormonal Therapy in Transgender Men*, 2 *TRANSSEXUAL HEALTH* 176, 177 (2017).

<sup>205</sup> Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 *U. RICH. L. REV.* 439, 472 (2019); see also Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 *WIS. L. REV.* 491, 496 (referring to taxes on menstrual hygiene products as “blatant gender discrimination”); Victoria Hartman, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 *NW. U. L. REV.* 313, 319 (2017) (arguing that taxation on menstrual hygiene products violates the Equal Protection Clause of the Fourteenth Amendment because it imposes a disparate impact on women); Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 *OHIO ST. L.J.* 1095, 1098 (2009) (arguing that the Supreme Court’s decisions demonstrate that discrimination on the basis of pregnancy is connected to discrimination on the basis of sex).

<sup>206</sup> See Crawford & Waldman, *supra* note 205, at 462–66 (discussing lower courts’ consideration of whether differential treatment on the basis of menstruation is a form of sex classification in the absence of Supreme Court guidance). In 2016, attorneys filed a class-action lawsuit against New York State alleging that a sales tax on menstrual health products violated the Fourteenth Amendment because it drew a classification based on sex that could not survive intermediate scrutiny. *Id.* at 461; see *Seibert v. N.Y. State Dep’t of Taxation & Fin.*, No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016). Before the court could hear the complaint, New York repealed the tax and the court subsequently dismissed the case. Crawford & Waldman, *supra* note 205, at 462. Later that same year, attorneys filed a similar lawsuit against the State of Florida, but the court dismissed the lawsuit after Florida repealed the tax. *Id.* at 463–64; see *Wendell v. Fla. Dep’t of Revenue*, No. 2016-CA-001526 (Fla. Leon County Ct. July 7, 2016). In 2019, California attorneys sued the state, the governor, and the administrator responsible for administering a tax on menstrual health products, claiming that the tax violated the Fourteenth Amendment. Crawford & Waldman, *supra* note 205, at 465. The court dismissed the claim against the state and the governor, finding that both were improper parties. *Id.* The court then granted the remaining defendant’s motion for summary judgment on procedural grounds and therefore did not issue a holding on the constitutionality of the tax. Crawford & Waldman, *supra* note 205, at 465–66.

<sup>207</sup> See *infra* notes 208–242 and accompanying text.

<sup>208</sup> See *supra* notes 72–85 and accompanying text (discussing the elements of a prima facie case for an equal protection claim). If a court determines that the prison regulations were not a form of sex-based classification, the court would evaluate them under a rational basis of review rather than under intermediate scrutiny. See *supra* note 73 and accompanying text (explaining the tiers of scrutiny). Although it is possible to invalidate a law under rational basis review, it is rare as this level of review is very forgiving. See *Williamson v. Lee Optical of Okla., Inc.*, 348 *U.S.* 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.”). In order to satisfy rational basis review, the government only needs to demonstrate that the

many scholars believe that discrimination based on menstruation cannot be considered a form of sex-based facial classification under the precedent set by the 1974 Supreme Court decision *Geduldig v. Aiello*.<sup>209</sup> In *Geduldig*, the Supreme Court found that excluding pregnancy from disability coverage did not violate the Fourteenth Amendment because legislation concerning pregnancy was not sex-based.<sup>210</sup> The Supreme Court stated that laws classifying people based on pregnancy divided them into two groups: pregnant individuals and non-pregnant individuals.<sup>211</sup> The Court ultimately determined that this division was not the same as dividing people based on sex because, although the former group is composed exclusively of women, the latter group included both men and women.<sup>212</sup> Therefore, the Court concluded that differential treatment based on pregnancy was not a prohibited sex-based classification.<sup>213</sup>

Those who believe that differential treatment based on menstruation is not a form a sex classification argue that, much like *Geduldig*, legislation based on menstruation divides people into two groups: those who menstruate and those who do not.<sup>214</sup> Therefore, these scholars posit that, as with pregnancy, laws that differentiate based on menstruation cannot be considered sex-based discrimination.<sup>215</sup> Under this view, legislation that differentiates based on menstruation would be evaluated under the more deferential rational basis standard of review and not the heightened intermediate scrutiny standard.<sup>216</sup>

Other scholars have suggested that the Supreme Court has moved beyond the reasoning in *Geduldig* based on the Court's 2003 decision, *Nevada Department of Human Resources v. Hibbs*, and its 2015 decision, *Obergefell v.*

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law or regulation is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>209</sup> See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (holding that distinctions based on pregnancy are not considered sex discrimination because, while all pregnant people are women, not all non-pregnant people are men), *superseded by statute as stated in* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1998); John D. Nagy, Recent Developments, *Geduldig v. Aiello*, 3 HOFSTRA L. REV. 141, 143 (1975) (arguing that the logic in *Geduldig* forecloses the possibility that discrimination based on biological distinctions between the sexes will qualify as sex discrimination); Diane L. Zimmerman, Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442 (1975) (same).

<sup>210</sup> *Geduldig*, 417 U.S. at 494, 496 n.20.

<sup>211</sup> *Id.* at 496 n.20.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 494.

<sup>214</sup> See Zimmerman, *supra* note 209, at 442 (discussing the Supreme Court's reasoning in *Geduldig* as dividing people based on biological capabilities rather than sex).

<sup>215</sup> See Nagy, *supra* note 209, at 143 (analyzing the reasoning of *Geduldig* and its impact on future sex discrimination cases); Zimmerman, *supra* note 209, at 442 (discussing the Supreme Court's reasoning in *Geduldig* as dividing people based on pregnancy status rather than sex).

<sup>216</sup> See *Geduldig*, 417 U.S. at 494 (determining that differential treatment based on pregnancy is not a form of sex-based discrimination because, although all pregnant people are women, not all non-pregnant people are men).



*Hodges*.<sup>217</sup> In *Hibbs*, the Supreme Court recognized that the Family and Medical Leave Act (FMLA) was a valid exercise of Congress's enforcement powers under Section 5 of the Fourteenth Amendment.<sup>218</sup> The Court noted that although Congress cannot use its power to substantively enlarge rights guaranteed by the Fourteenth Amendment, it can use Section 5 to enact legislation to prophylactically prevent Fourteenth Amendment violations.<sup>219</sup> The Court ultimately held that the FMLA was a constitutional use of Congress's powers because it sought to prophylactically prevent sex discrimination by ensuring that paternity leave benefits are equal to maternity leave benefits.<sup>220</sup> Some scholars argue that the Court's decision implied that preventing discrimination based on pregnancy is the same as preventing sex-based discrimination.<sup>221</sup> Under this view, differential treatment based on pregnancy must be a form of sex-based discrimination because, if it were not, it would be an enlargement of Fourteenth Amendment rights which could not be justified under Section 5.<sup>222</sup> In this way, some argue that *Hibbs* abrogates the reasoning of *Geduldig*.<sup>223</sup>

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<sup>217</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding that laws prohibiting same-sex marriage violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (determining that the Family and Medical Leave Act (FMLA) is a valid exercise of Congress's powers under Section 5 of the Fourteenth Amendment); *Geduldig*, 417 U.S. at 494 (finding that discrimination based on pregnancy is not a form of sex discrimination).

<sup>218</sup> *Hibbs*, 538 U.S. at 735. Section 5 of the Fourteenth Amendment provides Congress with the power to enact legislation necessary to enforce the provisions of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. For example, Congress has used Section 5 to pass the Americans with Disabilities Act (ADA), which helped to ensure that individuals with disabilities receive equal protection under the law. *Armstrong v. Wilson*, 942 F. Supp. 1252, 1261 (N.D. Cal. 1996) (finding that the ADA was a valid exercise of congressional power under Section 5 of the Fourteenth Amendment). Congress has also used Section 5 to pass the Voting Rights Act, which prohibits discrimination in voting. *Katzenbach v. Morgan*, 384 U.S. 641, 646 (1966) (upholding the Voting Rights Act as constitutional under Section 5 of the Fourteenth Amendment).

<sup>219</sup> *Hibbs*, 538 U.S. at 727–28 (noting that in the exercise of its Section 5 power, “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct” but may “not ‘attempt to substantively redefine the States’ legal obligations’” (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000))).

<sup>220</sup> *Id.* at 735. The FMLA stated that “due to the nature of the roles of men and women in our society, the primary responsibility for caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” 29 U.S.C. § 2601(a)(5) (2018). To remedy this, the FMLA required that companies ensure both paternity and maternity leave is available. *Id.* § 2601(b)(4)–(5).

<sup>221</sup> See, e.g., Crawford & Waldman, *supra* note 205, at 471–72; Siegel & Siegel, *supra* note 205, at 1107.

<sup>222</sup> Crawford & Waldman, *supra* note 205, at 471–72.

<sup>223</sup> See, e.g., Siegel & Siegel, *supra* note 205, at 1107 (arguing that *Hibbs* abrogates the assertion in *Geduldig* that pregnancy has no relationship to sex discrimination).

Some scholars argue that the holding in *Obergefell* also demonstrated a shift away from the logic in *Geduldig*.<sup>224</sup> In *Obergefell*, the Supreme Court held that states violated the Fourteenth Amendment by depriving same-sex couples the right to marry.<sup>225</sup> Scholars have noted that, although *Geduldig* determined pregnancy discrimination was not sex-based discrimination because not all women will become pregnant, *Obergefell* found a Fourteenth Amendment violation despite the fact that many gay people will never marry.<sup>226</sup> Based on this logic, some argue that unequal treatment based on menstruation is a form of sex-based discrimination despite the fact that not all women menstruate, including prepubescent girls, postmenopausal women, or women with certain medical conditions.<sup>227</sup>

### b. Disparate Impact

Other scholars assert that policies burdening those who menstruate violate the Fourteenth Amendment because such policies disparately impact women.<sup>228</sup> Disparate impact occurs when a facially neutral law disproportionately burdens a particular group of people.<sup>229</sup> Therefore, some argue that because only women menstruate, policies that burden people who menstruate have an unconstitutional, disparate impact on women.<sup>230</sup> Disparate impact in the prison context is particularly noteworthy because women constitute 100% of those burdened by restrictions on menstrual health products in prison despite the fact that women only constitute approximately 7% of the prison population.<sup>231</sup>

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<sup>224</sup> See, e.g., Crawford & Waldman, *supra* note 205, at 472 (arguing that *Obergefell* abrogates the reasoning in *Geduldig*); see also *Obergefell*, 576 U.S. at 675 (invalidating laws that prohibited same sex marriage as violative of the Fourteenth Amendment).

<sup>225</sup> *Obergefell*, 576 U.S. at 675. The plaintiffs in the 2015 Supreme Court case *Obergefell v. Hodges* challenged laws in several states that defined marriage as a union between one man and one woman. *Id.* at 653–54. The Court held that the laws violated the due process rights of the plaintiffs under the Fourteenth Amendment by abridging their fundamental right to marriage. *Id.* at 675. Although the Court did not decide the case under the Equal Protection Clause, the Court expressed equal protection concerns by noting that “the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.” *Id.*

<sup>226</sup> Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 68 *FORDHAM L. REV.* 1251, 1263 (2017).

<sup>227</sup> See, e.g., Crawford & Waldman, *supra* note 205, at 480–81 (discussing how the Supreme Court’s reasoning in *Obergefell* abrogates the reasoning in *Geduldig* because the Court in *Obergefell* was unconcerned with the fact that not all gay couples will become married, whereas the Court in *Geduldig* was concerned with the fact that not all women become pregnant).

<sup>228</sup> *Id.* at 476–77.

<sup>229</sup> *Casteneda v. Partida*, 430 U.S. 482, 493 (1977) (examining a claim of racial discrimination based on a neutral law that had a disparate impact); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (examining a claim of racial discrimination based on a neutral law that was enforced in a discriminatory way); see also *supra* note 82 and accompanying text (defining disparate impact).

<sup>230</sup> See, e.g., Crawford & Waldman, *supra* note 205, at 476–77.

<sup>231</sup> *Inmate Gender*, FED. BUREAU PRISONS (Jan. 25, 2020), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) [<https://perma.cc/BVY7-PDP5>]. In *Casteneda v. Partida*, the Supreme

Therefore, some have asserted that an equal protection claim could be based on a theory of disparate impact.<sup>232</sup>

Importantly, to succeed on disparate impact theory, advocates would need to demonstrate that prisons deny access to menstrual health products because of, and not merely in spite of, its negative effect on women.<sup>233</sup> When the disparate impact is severe enough, the extent of the disparate impact can be determinative of intent.<sup>234</sup> In 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court acknowledged that such cases are rare, but recognized at least two instances where the disparate impact was so severe that it determined intent.<sup>235</sup> In the first instance, the Alabama State Legislature redrew a voting district to exclude nearly all black voters, and in the second instance, a local government provided all white citizens, but no Chinese citizens, business permits.<sup>236</sup> In both of these cases, the Supreme Court found the disparate impact stark enough to support an inference of intent.<sup>237</sup> The current disparate impact on women in prison could be considered at least as striking as the disparate impact previously recognized by the Supreme Court and therefore support a finding of discriminatory intent.<sup>238</sup>

Alternatively, some scholars argue that discriminatory intent could be established based on the taboos surrounding menstruation that make menstrual health products generally disfavored in society.<sup>239</sup> Finally, discriminatory intent

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Court found the fact that Mexican-Americans only constituted 39% of grand jury summons, despite constituting 79.1% of the entire population, significant enough to support a disparate impact claim. 430 U.S. at 495; see also *supra* note 82 (discussing the Supreme Court's reasoning and holding in *Casteneda*).

<sup>232</sup> Crawford & Waldman, *supra* note 205, at 476–77.

<sup>233</sup> *Feeney*, 442 U.S. at 279.

<sup>234</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 256, 266 (1977).

<sup>235</sup> *Id.*

<sup>236</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo*, 118 U.S. at 374. In the 1886 Supreme Court case *Yick Wo v. Hopkins*, zero out of two hundred Chinese-Americans were provided laundering permits whereas eighty out of eighty white citizens were provided with permits. 118 U.S. at 374. In the Supreme Court's 1960 case *Gomillion v. Lightfoot*, Alabama changed a voting district in a way that excluded 396 out of 400 black voters from the city without excluding any white voters. 364 U.S. at 341. In both cases, the Supreme Court found the state acted with discriminatory intent. *Id.* at 347; *Yick Wo*, 118 U.S. at 374.

<sup>237</sup> *Arlington Heights*, 429 U.S. at 266 (noting that a disparate impact "as stark as that in *Gomillion* or *Yick Wo*" could be determinative of intent).

<sup>238</sup> See *supra* note 236 (describing the official acts in *Yick Wo* and *Gomillion* that the Supreme Court found had an unconstitutional, disparate impact on a distinct population). The disparate impact on women could be considered just as blatant as that in *Yick Wo* and *Gomillion* because only women are negatively affected by restrictions on menstrual health products, just as only Chinese people were affected by the enforcement in *Yick Wo* and only black people were affected by the redistricting in *Gomillion*. See *supra* note 231 and accompanying text (noting that women make up one hundred percent of the inmates affected by policies that restrict access to menstrual health products); see also *Gomillion*, 364 U.S. at 341; *Yick Wo*, 118 U.S. at 374.

<sup>239</sup> Crawford & Waldman, *supra* note 205, at 478–79. Taboos surrounding menstruation date as far back as ancient Greece, where it was thought that women's wombs traveled through their bodies

could also be inferred from the lack of compelling policy goals driving restrictions on menstrual health products; courts are generally more likely to find intent where there is not a larger policy goal driving the regulation.<sup>240</sup> These scholars contend that imposing policies against those who menstruate does not further any policy goals aside from saving money, which can be achieved through many alternative means.<sup>241</sup> Therefore, some argue that, despite the seemingly high bar, it is possible to prove that policies burdening access to menstrual health products show discriminatory intent.<sup>242</sup>

## 2. Intermediate Scrutiny Versus the *Turner* Standard

Although no court has decided what standard of review should be applied to the issue of access to menstrual health products in prison, several courts have considered the proper standard of review for other equal protection claims brought by inmates.<sup>243</sup> Lower courts are split on whether intermediate scrutiny or the *Turner* standard applies to sex-based equal protection claims within the prison context.<sup>244</sup> Courts that hold the *Turner* standard applies rely on the plain language of *Turner*, which states that “when a prison regulation impinges on an inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>245</sup> Conversely, courts that apply intermediate scrutiny maintain that the Supreme Court’s 2005 decision discussing a prisoner’s race-based equal protection claim, *Johnson v. Califor-*

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and caused disease. Ada McVean, *The History of Hysteria*, MCGILL U. OFF. FOR SCI. & SOC’Y (July 31, 2017), <https://www.mcgill.ca/oss/article/history-quackery/history-hysteria> [https://perma.cc/CZX4-BMF2]. Physicians at this time believed that menstrual blood caused “female problems,” including anxiety, depression, and other psychological disorders. *Id.* In the late nineteenth century, the theory was that women suffered from “hysteria,” a “medical explanation for everything that men found mysterious or unmanageable in women.” *Id.* Today, premenstrual syndrome is often viewed by men as a debilitating condition that renders women largely incompetent. Crawford, *supra* note 205, at 508. Ironically, tampons are currently taxed as “luxury items” rather than medical necessities despite the dominating view that menstruation is a debilitating condition. *Id.* at 504.

<sup>240</sup> Crawford & Waldman, *supra* note 205, at 480.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 476.

<sup>243</sup> See, e.g., May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000) (articulating the *Turner* standard as the appropriate test for equal protection claims in the prison context); Quinn v. Nix, 983 F.2d 115, 118 (8th Cir. 1993) (same); Benjamin v. Coughlin, 905 F.2d 571, 574 (2d Cir. 1990) (same); Pitts, 866 F.2d at 1455 (same); *Ashann-Ra*, 112 F. Supp. 2d at 570 (considering whether the *Turner* standard or intermediate scrutiny should apply to claims of sex discrimination in prison); *Klinger*, 824 F. Supp. at 1388 (same).

<sup>244</sup> See *supra* note 91 and accompanying text (illustrating how courts vary in their application to the *Turner* standard).

<sup>245</sup> *Turner*, 482 U.S. at 89; see *infra* notes 247–258 and accompanying text (explaining the reasoning of courts and scholars who argue that *Turner* should apply to equal protection claims based on sex within the prison context).

nia, limits *Turner* and thus leaves open the option of intermediate scrutiny for claims related to rights that do not conflict with incarceration.<sup>246</sup>

Most lower courts adopting the *Turner* standard have not explained their reasoning; rather, by simply citing the decision, these courts indicate that the plain language of *Turner* forecloses the application of intermediate scrutiny to prisoners' sex-based equal protection claims.<sup>247</sup> In defending this reading, scholars note that the policies that led the Court to formulate the *Turner* standard are still at play in sex-based equal protection claims: courts do not know how to run prisons and prisoners do not possess the full panoply of constitutional rights.<sup>248</sup> These scholars distinguish *Johnson* because sex, unlike race, is related to valid penological interests as evidenced by the fact that most prisons are segregated by sex.<sup>249</sup>

Further, some scholars note that the language of *Johnson* focuses narrowly on considerations unique to race.<sup>250</sup> For example, the Supreme Court was particularly wary of the relationship between race and the criminal justice system because of the system's fraught history of racial oppression, a historical concern not as present with sex.<sup>251</sup> Scholars also note that the Supreme Court takes seriously its role in eliminating racial discrimination and ensuring racial equality.<sup>252</sup> The Court historically has not taken the same view towards sex-

<sup>246</sup> See *infra* notes 259–266 and accompanying text (discussing the reasoning of those who assert that intermediate scrutiny applies to discrimination claims in prison). In its 2005 decision *Johnson v. California*, the Supreme Court held that the *Turner* standard should not be utilized for race-based equal protection claims. 543 U.S. 499, 510 (2005). Rather, the Supreme Court required that lower courts apply strict scrutiny to all claims of racial classification, including those that occurred in prison. *Id.* at 509.

<sup>247</sup> *May*, 226 F.3d at 882 (requiring equal treatment in prison unless there is a legitimate penal interest advanced by unequal treatment); *Quinn*, 983 F.2d at 118 (stating that *Turner* controls in determining whether a prison's infringement on individual rights is constitutional); *Benjamin*, 905 F.2d at 575 (articulating that the *Turner* standard is relevant to equal protection claims even though it originally answered a First Amendment issue).

<sup>248</sup> See Trevor N. McFadden, *When to Turn to Turner? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 178 (2006) (explaining when to apply the *Turner* standard in light of the Supreme Court's decision in *Johnson*).

<sup>249</sup> *Id.* at 177. Prisons are generally sex-segregated out of concern that sexual relationships could develop, which could result in safety concerns such as unwanted pregnancies, and security concerns such as fights over women. See MUSHLIN, *supra* note 95, § 5:19. Such segregation has been upheld as constitutional. See, e.g., *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (establishing that segregating prisons by sex does not violate the Equal Protection Clause).

<sup>250</sup> McFadden, *supra* note 248, at 173–74.

<sup>251</sup> *Id.* at 174.

<sup>252</sup> *Id.* at 173. There is no question that the Equal Protection Clause prohibits sex-based discrimination as well as race-based discrimination. *Reed v. Reed*, 404 U.S. 71, 76 (1971). But there is also no question that the Equal Protection Clause was enacted with the express purpose of eradicating the vestiges of slavery, and was thus formulated with race in mind. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 37 (1873) (“[T]he main purpose of [the Thirteenth, Fourteenth, and Fifteenth Amendments] was the freedom of the African race, the security and perpetuation of that freedom, and their protec-

based classification and thus may be less concerned with sex-based distinctions, as compared to those that are race-based.<sup>253</sup> These scholars thus argue that the Supreme Court could not have intended *Johnson* to extend to equal protection claims based on sex.<sup>254</sup>

Scholars also present significant pragmatic arguments against using intermediate scrutiny to evaluate sex-based classifications within the prison context.<sup>255</sup> For example, most prisons are segregated by sex, and men's and women's prisons often vary significantly in security, privileges, and conditions.<sup>256</sup> Although it is likely that many of these differences could be justified under intermediate scrutiny, intermediate scrutiny would hinder the government by forcing it to bear the burden of persuasion, an outcome courts may wish to avoid.<sup>257</sup> Therefore, these scholars conclude that the Supreme Court did not intend the holding of *Johnson* to extend to sex-based classification and, if posed with the question, the Court would likely apply the *Turner* standard to equal protection claims outside of race.<sup>258</sup>

Nevertheless, others argue that *Johnson* establishes that *Turner* is inapplicable to claims based on policies that do not implicate penological interests, including sex-based discrimination.<sup>259</sup> To support this position, scholars note that in *Turner*, the Court was reluctant to allow judges to substitute their own judgment for the expertise of prison authorities where interests unique to pris-

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tion from the oppressions of the white men who had formerly held them in slavery.") Indeed, courts did not begin using the Equal Protection Clause to subject sex-based discrimination to heightened scrutiny until 1971, more than 100 years after the amendment was ratified. *Reed*, 404 U.S. at 76.

<sup>253</sup> See McFadden, *supra* note 248, at 173 (noting that the Court's commitment to the Fourteenth Amendment's prohibition against racial classifications strongly influenced its decision in *Johnson*, and therefore may not translate to other rights).

<sup>254</sup> *Id.* at 177.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* See generally Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons*, 5 TEMP. POL. & C.R.L. REV. 1, 3–4 (1995) (discussing the differences in programming available at men's prisons and women's prisons). In most prisons, women have access to significantly fewer programs than men. Laddy, *supra*.

<sup>257</sup> McFadden, *supra* note 248, at 178.

<sup>258</sup> *Id.*

<sup>259</sup> Jennifer Arnett Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 271 (2000). In *Johnson*, the Supreme Court stated that the *Turner* standard only applies to rights that conflict with the goals of incarceration. 543 U.S. at 510. The Court found that "[t]he right not to be discriminated against . . . is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* Further, the Court noted that because "the government's power is at its apex" in the prison context, a more stringent standard than *Turner* was crucial to prevent racial discrimination. *Id.* at 511–12. In defending this decision, the Supreme Court noted that "[s]trict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety" such that a higher standard would not hamstring officials from carrying out effective prison administration. *Id.* at 514.

ons—security, rehabilitation, and deterrence—were at stake.<sup>260</sup> These scholars argue that treating men and women differently implicates only financial considerations, which can be appropriately analyzed by judges.<sup>261</sup>

Many lower courts have agreed with this analysis and elected to apply intermediate scrutiny to sex-based classifications in prisons.<sup>262</sup> Specifically, courts have noted that the driving motivation behind *Turner* was a desire to provide significant deference to prison officials in the realm of institutional operations and security.<sup>263</sup> Although personal rights, such as the right to free speech, may come into conflict with institutional operations and security, equal protection rights do not.<sup>264</sup> Thus, some courts maintain that equal protection rights are not susceptible to the logic of *Turner*.<sup>265</sup> These courts interpret *Johnson* as confirmation of this view and believe that it stands for the proposition that all equal protection claims should be evaluated under a higher level of scrutiny, regardless of whether the claims are based on race or sex.<sup>266</sup>

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<sup>260</sup> Lee, *supra* note 259, at 271.

<sup>261</sup> *Id.* at 274; *see Pitts*, 866 F.2d at 1453–54 (“*Turner* applies to cases involving regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners’ individual rights within prisons. This case [of sex-based discrimination], in stark contrast, challenges general budgetary and policy choices made over decades in the give and take of city politics.”). The Supreme Court has established that the financial burden of complying with the Equal Protection Clause cannot override the mandate of the Fourteenth Amendment. *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

<sup>262</sup> *See, e.g., Pitts*, 866 F.2d at 1455 (applying intermediate scrutiny to a sex-based equal protection claim in prison); *Ashann-Ra*, 112 F. Supp. 2d at 570 (same); *Klinger*, 824 F. Supp. at 1388 (same).

<sup>263</sup> *Pitts*, 866 F.2d at 1454. In the United States Court of Appeals for the District of Columbia Circuit’s 1989 case *Pitts v. Thornburg*, prisoner-plaintiffs sued the District of Columbia after it failed to build a women’s prison, which resulted in District of Columbia residents being incarcerated in West Virginia. *Id.* at 1451–52. The court noted that *Turner* was motivated by a desire to allow prison officials to “make the difficult judgments concerning institutional operations.” *Id.* at 1454 (quoting *Turner*, 482 U.S. at 89). The court concluded that the *Turner* standard would be inappropriate because sex-based classification did not implicate these difficult judgments. *Id.* Ultimately, the court held that the action did not violate the Equal Protection clause because it was not done with the intent of harming women. *Id.* at 1456.

<sup>264</sup> *Klinger*, 824 F. Supp. at 1387. In the United States District Court for the District of Nebraska’s 1993 case *Klinger v. Nebraska Department of Correctional Services*, prisoner-plaintiffs claimed that the prison violated their rights under the Fourteenth Amendment by providing fewer programming opportunities to women than to men. *Id.* at 1380–81. In determining that intermediate scrutiny was the correct standard, the court noted that the language of *Turner* indicates that it applies only to cases that implicate prison security or the minutiae of prison operations, which in turn are rarely implicated by equal protection claims. *Id.* at 1388. Further, the court noted that *Turner* made sense in the context of personal rights, which are necessarily limited by incarceration, but not in the context of equal protection because the right to be free from discrimination is not limited by incarceration. *Id.* After evaluating the plaintiffs’ claims under intermediate scrutiny, the court concluded that the prison’s practice violated the Equal Protection Clause. *Id.* at 1399.

<sup>265</sup> *See Pitts*, 866 F.2d at 1454 (reasoning that intermediate scrutiny, rather than the more lenient *Turner* standard, should apply to claims of sex discrimination in the prison context); *Ashann-Ra*, 112 F. Supp. 3d at 571 (same); *Klinger*, 824 F. Supp. at 1387 (same).

<sup>266</sup> *Ashann-Ra*, 112 F. Supp. 2d at 571. The United States District Court for the Western District of Virginia’s 2000 case *Ashaan-Ra v. Virginia* involved a challenge to the Virginia prison system’s

## B. Restricting Access to Menstrual Health Products in Prison Violates the Equal Protection Clause

Restricting access to menstrual health products in prison should be invalidated as a violation of the Equal Protection Clause.<sup>267</sup> Because menstruation is a sex-based characteristic, discrimination on the basis of menstruation is a facial classification.<sup>268</sup> Based on the precedent set by *Johnson v. California* and the values espoused by *Turner v. Safley*, sex-based discrimination should be evaluated under intermediate scrutiny rather than the *Turner* standard.<sup>269</sup> Regardless, the practice should fail under either intermediate scrutiny or the *Turner* standard because it has only a tenuous relationship to any important government or penological interests.<sup>270</sup>

### 1. Menstruation-Based Classification Is Sex-Based Classification

Although the disparate impact of menstruation-based classification is clear, a disparate impact theory would likely be unsuccessful.<sup>271</sup> It is beyond dispute that restricting access to menstrual health products in prison imposes a clear disparate impact on women.<sup>272</sup> Still, a disparate impact theory is unlikely

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grooming policy, which required men to maintain short hair while permitting women to wear longer hair. *Id.* at 567. It also prohibited certain hairstyles for men that were permitted for women. *Id.* The court reasoned that the Supreme Court could not have intended *Turner* to apply to sex-based classification claims because that would allow prisons to treat one sex more harshly than the other based on economic efficiency alone. *Id.* at 570. It therefore found that *Turner*, as clarified by *Johnson*, requires intermediate scrutiny for all equal protection claims. *Id.* at 571. After reviewing the claims under intermediate scrutiny, the court ultimately found that the policy survived intermediate scrutiny because the provisions that applied only to men related to valid penological objectives. *Id.* at 572.

<sup>267</sup> See *Turner*, 482 U.S. at 89 (holding that constitutional violations in prison will be overturned unless the violation is related to penological interests); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (determining that sex-based classifications violate the Equal Protection Clause unless they are substantially related to an important government interest); *Atkins*, 372 F. Supp. 2d at 406 (holding that a prison's failure to provide pads and other personal hygiene items constitutes an Eighth Amendment violation); *Dawson*, 527 F. Supp. at 1288–89 (finding that a prison's failure to provide pads, along with other unsanitary prison conditions, violated the Eighth Amendment).

<sup>268</sup> See Crawford & Waldman, *supra* note 205, at 472 (arguing that differential treatment based on menstruation is a form of facial classification on the basis of sex).

<sup>269</sup> See *Johnson*, 543 U.S. at 510–11 (holding that strict scrutiny, rather than the *Turner* standard, should be applied to claims of racial discrimination in prison); *Turner*, 482 U.S. at 81 (establishing that constitutional violations in prison are valid if they are reasonably related to valid penological interests).

<sup>270</sup> See *Turner*, 482 U.S. at 89 (holding that constitutional violations in prison will be overturned unless the violation is “reasonably related to legitimate penological interests”); *Virginia*, 518 U.S. at 531 (determining that sex-based classifications violate the Equal Protection Clause unless they are substantially related to an important government interest).

<sup>271</sup> See *infra* notes 272–277 and accompanying text.

<sup>272</sup> Crawford & Waldman, *supra* note 205, at 480–81 (arguing that differential treatment based on menstruation has a disparate impact on women because only people assigned female at birth are capable of menstruating); see also *Inmate Gender*, *supra* note 231 (noting that women constitute approximately 7% of the national prison population). In its 1997 opinion *Casteneda v. Partida*, the Supreme



to succeed because it would be very difficult—if not impossible—to prove that deciding to limit access to menstrual health products was because of, and not merely in spite of, its negative impact on women.<sup>273</sup> First, it is likely that prisons are reluctant to distribute free menstrual health items because of cost rather than an animus toward women.<sup>274</sup> Second, even if the decision was in part motivated by animus, the private nature of prison officials' decisions makes it nearly impossible to uncover the smoking gun evidence of intent that courts have found persuasive in the past.<sup>275</sup> In fact, many of the *Arlington Heights* factors discussed above are foreclosed by the fact that individual prison officials determine prison regulations without the benefit of a public hearing, open debates, or published justifications.<sup>276</sup> Third, even if a litigator were to uncover evidence of animus, the government could overcome the challenge by demonstrating that the same outcome would result from concern for budgetary constraints.<sup>277</sup> Therefore, unless the Supreme Court makes the unlikely

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Court found the fact that Mexican-Americans only constituted 39% of grand jury summons, despite constituting 79.1% of the entire population, significant enough to support a disparate impact claim. 430 U.S. at 495.

<sup>273</sup> *Feeney*, 442 U.S. at 279 (establishing that, in order to succeed on a disparate impact equal protection claim, plaintiffs must establish that the government acted because of invidious discrimination, rather than just in spite of the negative impact on a protected class).

<sup>274</sup> See Barchett, *supra* note 33 (discussing New York's concerns over the cost of providing free menstrual health products to inmates).

<sup>275</sup> Samantha Michaels, *Want to Know How Your Local Jail Operates? Sorry, That May Be a Trade Secret*, MOTHER JONES (2019), <https://www.motherjones.com/crime-justice/2019/03/want-to-know-how-your-local-jail-operates-sorry-that-may-be-a-trade-secret/> [<https://perma.cc/NWY3-QXTA>] (discussing roadblocks to accessing information on jail operations and procedures). Employing different procedures for different groups of people is one form of a smoking gun that can often lead courts to find discriminatory intent. See, e.g., *Arthur v. Nyquist*, 573 F.2d 134, 144 (2d Cir. 1978) (finding that a school intentionally discriminated on the basis of race when it employed different standards for evaluating a white student's request to transfer schools than a black student's request to transfer schools). Additionally, racist statements by legislatures or a history of racial disenfranchisement often lend strong support to an inference of discriminatory intent. See, e.g., *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 998, 1006–08 (11th Cir. 2018) (finding that a town intended to discriminate against black people based in part on racially charged statements by supporters of the law in question and the town's long history of racist laws). Given the secrecy within which prisons operate, a litigator would be unlikely to uncover evidence of departures from procedure or racist statements. See Michaels, *supra*.

<sup>276</sup> See *Arlington Heights*, 429 U.S. at 264–65. In its 1977 opinion *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court instructed lower courts to look to the following five factors in evaluating whether discriminatory intent is present: (1) the historical background predating the decision; (2) the specific sequence of events leading up to the challenged classification; (3) departure from normal procedure; (4) the legislative history of the action, including statements made by decisionmakers; (5) and the extent of the disparate impact, including whether there exists a clear pattern that can only be explained by animus. *Id.*

<sup>277</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (establishing that state actors do not violate the constitution when their decision would have been reached regardless of the impermissible consideration).

decision to abandon the proof-of-intent requirement, a theory of disparate impact is unlikely to succeed.<sup>278</sup>

Yet there is a strong argument that restricting access to menstrual health products in prison facially classifies on the basis of sex, despite the difficult precedent set by *Geduldig*.<sup>279</sup> First, contrary to its infamous reputation, the language of *Geduldig* does not foreclose the possibility that pregnancy-related classifications could sometimes amount to sex-based classifications.<sup>280</sup> *Geduldig* simply stated that not “every legislative classification concerning pregnancy is a sex-based classification,” but never said that *no* legislative classification concerning pregnancy is a sex-based classification.<sup>281</sup> Given that *Geduldig* allowed for the possibility that at least some pregnancy-related classifications could be considered sex-based classifications, it does not foreclose the possibility that some menstruation-related classifications could be considered sex-based classifications as well.<sup>282</sup>

Further, the arguments that *Hibbs* and *Obergefell* mark a departure from the logic of *Geduldig* are convincing.<sup>283</sup> This distancing from the reasoning in *Geduldig* is not surprising given *Geduldig*’s widespread unpopularity.<sup>284</sup> Con-

<sup>278</sup> See *Arlington Heights*, 429 U.S. at 266 (establishing that a law that imposes a disparate impact on a protected class does not violate the Equal Protection Clause unless officials passed the law with the intent of harming a protected class).

<sup>279</sup> See *Geduldig*, 417 U.S. at 496 n.20 (holding that pregnancy discrimination is different from sex discrimination for the purposes of the Fourteenth Amendment); Crawford & Waldman, *supra* note 205, at 471–72 (arguing that differential treatment on the basis of menstruation is a form of facial classification, despite the Supreme Court’s holding in *Geduldig*).

<sup>280</sup> See *Geduldig*, 417 U.S. at 496 n.20.

<sup>281</sup> *Id.* (emphasis added).

<sup>282</sup> See *id.*

<sup>283</sup> See *Obergefell*, 576 U.S. at 675 (holding that laws prohibiting same-sex marriage violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment); *Hibbs*, 538 U.S. at 735 (holding that the FMLA was a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment); see also Crawford & Waldman, *supra* note 205, at 471–72 (arguing that the holdings in *Obergefell* and *Hibbs* abrogate the Court’s reasoning in *Geduldig*). By affirming Congress’s ability to combat pregnancy-related discrimination under Section 5 of the Fourteenth Amendment, *Hibbs* recognized that pregnancy-related discrimination posed a constitutional problem. Siegel & Siegel, *supra* note 205, at 1107; see *Hibbs*, 538 U.S. at 735. Furthermore, the Court in *Obergefell* appeared unconcerned by the fact that not every gay person would be affected by laws prohibiting marriage in finding that the law impermissibly burdened gay people. See *Obergefell*, 576 U.S. at 675; Crawford & Waldman, *supra* note 205, at 472.

<sup>284</sup> See Crawford & Waldman, *supra* note 205, at 471 (discussing the flawed logic of *Geduldig*, including the assertion that pregnancy discrimination is not sex-based discrimination because not all non-pregnant people are men); Siegel & Siegel, *supra* note 205, at 1112 (discussing Congress’s amendment to Title VII following the Court’s decision in *General Electric Co v. Gilbert*, 429 U.S. 125 (1976), which adopted the reasoning of the Court’s holding in *Geduldig* that discrimination on the basis of pregnancy is not sex-based discrimination). One constitutional law professor recounted that the decision “elicit[s] disbelieving and pained laughter from generations of [her] Constitutional Law students” attempting to understand the reasoning. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 782 (2011) (arguing that the Supreme Court’s equal protection jurisprudence has

gress rejected *Geduldig*'s reasoning by quickly amending Title VII and clarifying that discrimination based on pregnancy is a sex-based discrimination.<sup>285</sup> Therefore, based on the abrogation of the reasoning by subsequent Supreme Court decisions as well as the widespread unpopularity of the opinion, courts may be eager to distinguish future cases from *Geduldig*.<sup>286</sup>

Further, even if the reasoning in *Geduldig* stands, menstruation differs from pregnancy in several important ways.<sup>287</sup> First, pregnancy is usually the product of voluntary sexual activity whereas menstruation is completely involuntary.<sup>288</sup> Therefore, similar to sex, menstruation is an immutable characteristic whereas pregnancy is the result of active decisions.<sup>289</sup> Because there is not a layer of choice separating menstruation from sex, menstruation is more closely related to sex such that it could more appropriately be considered a proxy for sex.<sup>290</sup>

Second, virtually all women will menstruate at some point in their lives, whereas a significantly smaller percentage of women will become pregnant.<sup>291</sup> Approximately eighty-six percent of women will give birth by the age of forty-four.<sup>292</sup> Conversely, 99.999% of women experience menstruation at some point in their lives.<sup>293</sup> The Court in *Geduldig* referenced the fact that not all women

failed to advance the goals of the Fourteenth Amendment and the Court has compensated for this failure by expanding protections under the Due Process Clause.

<sup>285</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy . . .”). This amendment occurred following the Supreme Court’s decision in *Gilbert*, which extended the reasoning of *Geduldig* to Title VII. 429 U.S. at 133 (holding that discrimination on the basis of pregnancy is not sex-based discrimination and therefore does not violate Title VII).

<sup>286</sup> See *Geduldig*, 417 U.S. at 496 n.20; *supra* notes 283–285 and accompanying text (discussing the popular distaste for, and reaction to, the *Geduldig* reasoning and holding).

<sup>287</sup> See *Geduldig*, 417 U.S. at 496 n.20; *infra* notes 288–296 and accompanying text.

<sup>288</sup> See generally PETER MAYLE, WHERE DID I COME FROM? (2000) (discussing that babies are the result of sexual intercourse between a man and a woman). Of course, pregnancies that result from rape are not the product of voluntary choice. Without undermining the importance of this issue, it is safe to say that the vast majority of pregnancies are the result of consensual sexual encounters. Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 320 (1996) (finding that approximately 5% of rape victims become pregnant).

<sup>289</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>290</sup> See *id.* (noting that sex is a protected characteristic in part because it is an “immutable characteristic determined solely by the accident of birth”).

<sup>291</sup> Claire Cain Miller, *The U.S. Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html> [<https://perma.cc/BA5R-3HDY>] (explaining trends in pregnancy rates over the past two decades).

<sup>292</sup> *Id.* Statistics on pregnancy rates focus on how many women become pregnant before the age of forty-four because many women over forty-four are not capable of reproduction. *Id.*

<sup>293</sup> Kristi A. Tough DeSapri, *Amenorrhea*, MEDSCAPE (Oct. 14, 2019), <https://emedicine.medscape.com/article/252928-overview> [<https://web.archive.org/web/20200830192326/https://emedicine.medscape.com/article/252928-overview>]. Primary amenorrhea, or the absence of a period by age sixteen, affects approximately one out of every 4,500 women. *Id.* Many women with primary amenorrhea will

will be affected by pregnancy within their lifetime; alternatively, nearly all women will be affected by menstruation.<sup>294</sup> In this way, menstruation and sex are more closely connected than pregnancy and sex.<sup>295</sup> There is a strong argument that menstruation-based classifications are facial sex-based classifications.<sup>296</sup>

## 2. Adopting Intermediate Scrutiny to Evaluate Sex-Based Equal Protection Claims

Should a court find that restricting access to tampons in prison is a form of sex-based classification, the next question is determining the appropriate level of scrutiny.<sup>297</sup> Based on the language of *Turner* and the holding in *Johnson*, courts should apply intermediate scrutiny rather than the *Turner* standard.<sup>298</sup>

*Turner* formulated a test for constitutional constraints on *individual* rights, but the reasons for applying a lower standard of scrutiny to individual rights claims do not necessarily transfer to equal protection claims.<sup>299</sup> Equal protection claims do not frequently undermine the operation of prisons in the way that individual rights claims often do.<sup>300</sup> Similar to the right to be free from racial discrimination in *Johnson*, the right to be free from harsher treatment based on one's sex does hinder effective and appropriate incarceration.<sup>301</sup> In

eventually menstruate. Melissa Conrad Stöppler, *Amenorrhea*, MEDICINENET, [https://www.medicinenet.com/amenorrhea/article.htm#amenorrhea\\_facts](https://www.medicinenet.com/amenorrhea/article.htm#amenorrhea_facts) [<https://perma.cc/BWL3-9VSH>]. Therefore, even less than one out of every 4,500 women will truly never menstruate. *See id.*

<sup>294</sup> *See Geduldig*, 417 U.S. at 496, n.20 (noting that many non-pregnant people are women); DeSapri, *supra* note 293 (establishing that 4,499 out of every 4,500 women menstruate at some point in their lives).

<sup>295</sup> *See supra* notes 291–294 and accompanying text (noting that virtually all women menstruate, but not all women experience pregnancy).

<sup>296</sup> Crawford & Waldman, *supra* note 205, at 471–72 (arguing that differential treatment on the basis of menstruation is a form of facial classification, despite the Supreme Court's holding in *Geduldig*).

<sup>297</sup> Friedmann, *supra* note 73, at 2550–51 n.27.

<sup>298</sup> *See Johnson*, 543 U.S. at 510 (holding that the *Turner* standard does not apply to claims of racial discrimination in prison); *Turner*, 482 U.S. at 89 (holding that prisons may impinge on inmates' constitutional rights so long as the restrictions relate to valid penological interests).

<sup>299</sup> *Asham-Ra*, 112 F. Supp. 2d at 570 (noting that *Turner* did not hold that its rational basis standard should be applied to equal protection claims).

<sup>300</sup> *Klinger*, 824 F. Supp. at 1388.

<sup>301</sup> *Id.* The only way in which sex-based discrimination could be considered a legitimate penological interest is in the segregation of prisons, which has been upheld as constitutional. MUSHLIN, *supra* note 95, § 5:19. Segregation based on sex is not the sort of sex-based discrimination that historically concerns courts so long as both sexes receive roughly equal treatment. *See, e.g., Virginia*, 518 U.S. at 534 (inferring that creating a separate school for women could remedy unconstitutional sex discrimination if the educational quality and value of the schools were equal); *see also* J. Shaw Vanze, *The Constitutionality of Single-Sex Public Education in Pennsylvania Elementary and Secondary Schools*, 12 U. PA. J. CONST. L. 1479, 1489 (2010) (describing cases upholding single-sex education so long as

fact, much like race, treating a person less favorably based on sex is likely to undermine the goals of incarceration by instigating anger and disaffection and simultaneously threatening the legitimacy of the prison system.<sup>302</sup> Finally, a court should find that an intermediate scrutiny standard is flexible enough to accommodate prison officials' discretion while still protecting the rights of individuals.<sup>303</sup> Because the Supreme Court found in *Johnson* that strict scrutiny was a sufficiently flexible standard, a court should similarly find that intermediate scrutiny, a comparatively lower standard, is also sufficiently flexible.<sup>304</sup>

### 3. Regulations Limiting Access to Menstrual Health Products Would Be Overturned Under an Intermediate Scrutiny Standard

The current practice of limiting access to menstrual health products in prison is unlikely to survive an intermediate scrutiny inquiry because it is not substantially related to an important government interest.<sup>305</sup> There does not appear to be any contention that limiting access to menstrual health products serves any sort of safety or security purpose.<sup>306</sup> The only interest articulated by prisons, outside of concerns regarding cost and distribution logistics, is that if women did not need to worry about the supply of menstrual health products, they may repurpose them for off-label uses, such as using the cotton inside the

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the quality of education is roughly equal). Therefore, it seems likely that a court could subject harsh treatment based on sex to a heightened level of scrutiny without disturbing the practice of segregating prisoners by sex. *See id.*

<sup>302</sup> *See Johnson*, 543 U.S. at 510–11 (discussing how abstaining from racial discrimination furthers important penological interests).

<sup>303</sup> *See id.* at 514 (“Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety.”).

<sup>304</sup> *See, e.g., Pitts*, 866 F.2d at 1455 (applying intermediate scrutiny to a sex-based equal protection claim in prison); *Ashann-Ra*, 112 F. Supp. 2d at 570 (“[N]either *Turner* nor *Washington* held that this rational basis test would apply to a prison regulation that differentiated between classes of inmates on the basis of race, national origin, or gender.”); *Klinger*, 824 F. Supp. at 1388 (finding that intermediate scrutiny, rather than the *Turner* test, is the proper test for equal protection claims based on sex in the prison context).

<sup>305</sup> *See Virginia*, 518 U.S. at 531 (establishing that sex-based discrimination can only stand if it substantially relates to an important government interest).

<sup>306</sup> *See Eric Katz, Federal Law Enforcement Not Happy with Trump-Backed Criminal Justice Reform*, GOV'T EXECUTIVE (Nov. 27, 2018), <https://www.govexec.com/management/2018/11/federal-law-enforcement-not-happy-trump-backed-criminal-justice-reform/153086/> [<https://perma.cc/YX5H-J2VN>] (outlining correctional officers' concerns with the First Step Act, without mentioning that the provision calling for unrestricted access to menstrual health products implicates safety or security concerns). Prior to the First Step Act, the Bureau of Prisons issued a memo calling for unrestricted access to menstrual health products. Samantha Laufer, *Reproductive Healthcare for Incarcerated Women: From “Rights” to “Dignity,”* 56 AM. CRIM. L. REV. 1785, 1802 (2019). Given correctional officers' failure to express any safety or security concerns regarding unrestricted access to menstrual health products, it seems likely that no such concerns exist. *See Katz, supra*.

product to make earplugs or using pads to clean their cells.<sup>307</sup> Nonetheless, this concern does not implicate safety or security, as there appears to be no risk that menstrual health products could be repurposed to harm others or interfere with prison security.<sup>308</sup> Thus, this interest—preventing a scenario where the prison will need to purchase and distribute more menstrual health products than is necessary—boils down to an interest in administrative convenience and cost reduction, neither of which serve sufficiently important interests.<sup>309</sup> Consequently, the government would likely fail to meet its burden.<sup>310</sup>

But even if preventing off-label uses was adjudicated to be an important government interest, it is still unlikely that a court would find that the regulation substantially relates to such interest.<sup>311</sup> First, the practice is overinclusive because there are other viable alternatives, as evidenced by the fact that federal prisons and prisons in fourteen states currently provide unrestricted access to menstrual health products.<sup>312</sup> Further, the practice is underinclusive insofar as

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<sup>307</sup> Chandra Bozelko, *Prisons That Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, THE GUARDIAN (June 12, 2015), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights> [<https://perma.cc/9W4K-FXG2>]. Bozelko was a former inmate at York Correctional Institution in Niantic, Connecticut, where she served a six-year sentence. *Id.* She notes that, although pads and tampons are “precious resources” in prison, women will occasionally utilize them for reasons other than menstrual health care. *Id.* She asserts that such uses should not be utilized as a reason to prevent access to menstrual health products, as “these alternative uses fill other unfilled needs for a woman to maintain her physical and mental health.” *Id.* Bozelko notes that “[i]f [prisoners] had adequate cleaning supplies, proper noise control, band-aids for [their] blisters or stable beds,” they would use menstrual health products for their intended purpose. *Id.*

<sup>308</sup> See *Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 3–6 (2019) (statement of Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons) [hereinafter *Sawyer Statement*] (reporting on the progress of the Bureau of Prison’s implementation of the First Step Act, which required providing access to free menstrual health products, without articulating any security or safety concerns).

<sup>309</sup> See Laufer, *supra* note 306 (explaining concerns over the cost of providing menstrual health products and the method of distributing products).

<sup>310</sup> *Frontiero*, 411 U.S. at 690 (establishing that administrative efficiency and convenience cannot constitute an important government interest).

<sup>311</sup> See *Virginia*, 518 U.S. at 531 (establishing that differential treatment on the basis of sex is unconstitutional unless it is substantially related to an important government interest).

<sup>312</sup> See *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); see also First Step Act of 2018, Pub. L. No. 115-391 § 611, 132 Stat. 5194, 5274 (requiring federal prisons to provide menstrual health products to female inmates); Lydia O’Connor, *Federal Prisons Made Menstrual Products Free. Now Some States May Follow Suit.*, HUFFINGTON POST (Feb. 7, 2018), [https://www.huffpost.com/entry/state-prison-free-pads-tampons\\_n\\_5a7b427be4b08dfc92ff5231](https://www.huffpost.com/entry/state-prison-free-pads-tampons_n_5a7b427be4b08dfc92ff5231) [<https://perma.cc/L3PL-XB2E>] (discussing state laws requiring prisons to provide menstrual health products to female inmates); Walker, *supra* note 11 (explaining that thirty-six states have laws requiring access to menstrual health products in prison). A practice is considered overinclusive if the government’s interest could be achieved in a less restrictive manner. *Ashcroft*, 542 U.S. at 666; see also *supra* note 108 and accompanying text (explaining the doctrine of over-inclusivity). Therefore, if courts can identify a reasonable and viable alternative for achieving the government’s interest in a way that does not infringe on an individual’s constitutional rights, courts are likely to find that the practice is overinclusive. *Ashcroft*, 542 U.S. at 666 (finding a

women already receive some menstrual health products, therefore negating any claim that access to menstrual health products is a safety concern.<sup>313</sup>

#### 4. Regulations Limiting Access to Menstrual Health Products Would Also Be Overturned Under the Lower *Turner* Standard

Even if a court were to apply the *Turner* standard instead of intermediate scrutiny, a regulation limiting access to menstrual health products likely could not stand.<sup>314</sup> First, although there is a valid penological interest in conserving resources, the restriction is not reasonably related to such a purpose because it does not conserve a significant amount of resources.<sup>315</sup> The State of New York estimates that it would cost approximately thirteen thousand dollars per year to provide unlimited menstrual health products to its four thousand prisoners, which averages out to approximately \$3.25 per prisoner per year.<sup>316</sup> Assuming this rate would be consistent across the United States, it would cost taxpayers a total of \$750,750.00 per year to provide unrestricted access to menstrual health products for all 231,000 female prisoners in the United States.<sup>317</sup> Given that the prison industry's total operating budget is approximately eighty billion dollars per year, this would only increase the budget by approximately 0.0000093%.<sup>318</sup> This negligible increase cannot be viewed as reasonably related to the goal of conserving resources.<sup>319</sup> Based on the trend of lower courts finding in favor of plaintiff-prisoners who satisfy the first prong of *Turner*, courts may find this

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law restricting internet speech overinclusive because the government's interest could be achieved by imposing less of a burden on individual rights, such as software that blocked or filtered inappropriate content).

<sup>313</sup> See *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). A practice is considered underinclusive if the law fails to regulate individuals or activities that pose the same fundamental threat to the government's interest as the person or activity restricted by the law. See *id.* Therefore, if courts can identify that the threat is left unregulated in other areas, courts are likely to find that the practice is underinclusive. See *id.* (finding a law prohibiting certain residential signs underinclusive because the law failed to regulate activities that posed the same fundamental threat).

<sup>314</sup> See *Turner*, 482 U.S. at 89 (articulating a lower standard for evaluating infringements on constitutional rights in the prison context).

<sup>315</sup> See Barchett, *supra* note 33 (noting that providing unlimited menstrual health products would cost approximately \$3.25 per prisoner per year).

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> See Melissa S. Kearney et al., *Ten Economic Facts About Crime and Incarceration in the United States*, HAMILTON PROJECT (May 1, 2014), [https://www.hamiltonproject.org/papers/ten\\_economic\\_facts\\_about\\_crime\\_and\\_incarceration\\_in\\_the\\_united\\_states](https://www.hamiltonproject.org/papers/ten_economic_facts_about_crime_and_incarceration_in_the_united_states) [<https://perma.cc/9XT4-YZA3>] (explaining the economic impact of mass incarceration on taxpayers). The prison industry's total operating budget includes federal, state, and local spending. *Id.*

<sup>319</sup> See *id.*

fact sufficient to overturn the policy of restricting access to menstrual health products.<sup>320</sup>

Even if the court were to look beyond the first prong, two of the three remaining prongs also favor requiring prisons to provide adequate access to menstrual health products.<sup>321</sup> The third prong of the test is satisfied because the cost of the accommodation is relatively slight.<sup>322</sup> Even beyond the financial cost, there is no negative ripple effect stemming from providing unlimited access to menstrual health products; prisons that currently engage in this practice serve as proof that there are no negative side effects.<sup>323</sup> If anything, there could be a positive ripple effect by putting all prisoners on equal footing, regardless of whether they have the resources to afford extra menstrual health products.<sup>324</sup> Finally, given the low financial cost and the low burden to staff, who are already charged with distributing products, providing free unlimited menstrual health products in prison is an “obvious, easy alternative” and thus satisfies the fourth prong of *Turner*.<sup>325</sup> The federal government and fourteen states that already provide unlimited access to these products prove it is, in fact, an “obvious, easy alternative.”<sup>326</sup>

The only *Turner* prong which may not point in favor of providing unlimited access to menstrual health products is the second prong, which considers whether prisoners are provided alternative means to exercise their rights.<sup>327</sup> The government could argue that women in prison are provided alternatives, such as buying tampons from the commissary or obtaining a doctor’s note authorizing receipt of additional tampons.<sup>328</sup> The relatively high cost of these

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<sup>320</sup> See MUSHLIN, *supra* note 95, § 2:9 (“The primary recommendation is that the first factor ought to be determinative if it favors the prisoner’s claim.”).

<sup>321</sup> *See id.* § 2:4 (noting that the third prong of *Turner* asks whether accommodating the prisoner’s right would have a negative ripple effect throughout the prison and the fourth prong of *Turner* asks whether there are “obvious, easy” alternatives for the prison to meet its goals without burdening constitutional rights).

<sup>322</sup> *See id.* § 2:7.

<sup>323</sup> *See Sawyer Statement, supra* note 308, at 6 (listing the provision of free menstrual health products as one of the Bureau of Prison’s “accomplishments,” without noting any challenges stemming from providing free menstrual health products).

<sup>324</sup> *See MUSHLIN, supra* note 95, § 2:7 (discussing the impact of ripple effects on courts’ *Turner* analyses); Greenberg, *supra* note 6 (discussing how menstrual health products become items of competition in prisons where those items are restricted); *see also supra* note 125 (explaining how courts often consider jealousy as one of the ripple effects of accommodating individual rights).

<sup>325</sup> *See Turner*, 482 U.S. at 90–91.

<sup>326</sup> *See First Step Act of 2018* § 611 (requiring federal prisons to provide free pads and tampons to female inmates); Walker, *supra* note 11 (explaining that thirty-six states have laws requiring access to menstrual health products in prison).

<sup>327</sup> *See Turner*, 482 U.S. at 90 (discussing the factors that should be considered in determining whether an infringement on a constitutional right is reasonably related to a valid penological interest).

<sup>328</sup> Michaels, *supra* note 12.



items, however, precludes this option for many indigent prisoners.<sup>329</sup> Nonetheless, even if a court were to find that the second prong favored the government, that prong is not outcome determinative.<sup>330</sup> Generally, the first and fourth prongs are given greater consideration.<sup>331</sup> Because these two prongs favor requiring unlimited access to menstrual health products, the prisoner-plaintiffs would still likely succeed in bringing an equal protection claim under either intermediate scrutiny or the *Turner* standard.<sup>332</sup>

#### IV. DENIAL OF MENSTRUAL HEALTH PRODUCTS AS AN EIGHTH AMENDMENT VIOLATION

Very few lower courts have considered whether a prison's practice of restricting access to menstrual health products violates the Eighth Amendment.<sup>333</sup> The courts that have considered the practice typically view it as part of a larger constellation of conditions and therefore have not considered whether the restriction on its own constitutes an Eighth Amendment violation.<sup>334</sup> Nonetheless, the few scholars who have considered the issue in isola-

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<sup>329</sup> See Sawyer, *supra* note 39. The average minimum wage in prisons is \$0.14 per hour. *Id.* Therefore, a prisoner making minimum wage would have to work more than twenty-five hours to afford a copy to see a doctor. *Id.* The average commissary charges \$0.56 per tampon. Michaels, *supra* note 12. Consequently, a prisoner making minimum wage would have to work approximately sixty-four hours in order to afford a sixteen-count box of tampons. See Sawyer, *supra* note 39. Because women are advised to change their tampons every four hours, a sixteen-count box of tampons would not last many women through one cycle. See *id.*

<sup>330</sup> MUSHLIN, *supra* note 95, § 2:9.

<sup>331</sup> *Id.* (noting that the first and fourth prong are the most important because they address the reasonableness of the restriction, which is the core inquiry in *Turner*).

<sup>332</sup> See *Virginia*, 518 U.S. at 531 (determining that sex-based classifications violate the Equal Protection Clause unless they are substantially related to an important government interest); *Turner*, 482 U.S. at 93 (holding that regulations that infringe on prisoners' constitutional rights will be overturned unless the regulation is "reasonably related to valid corrections goals").

<sup>333</sup> *Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245, 2015 WL 9906265, at \*9 (W.D. Mich. 2015) (considering an inmate's claim that the prison violated her Eighth Amendment rights by delaying access to menstrual health products); *Atkins v. Cty. of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005) (considering whether withholding personal hygiene items, including menstrual health products, violated the Eighth Amendment); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1288–89 (S.D. Va. 1981) (considering whether a prison's aggregated conditions, including its denial of menstrual health products, violated the Eighth Amendment).

<sup>334</sup> *Semelbauer*, 2015 WL 9906265, at \*9 (finding that temporary and infrequent delays in providing menstrual health products did not violate the Eighth Amendment); *Atkins*, 372 F. Supp. 2d at 406 (holding that a prison's failure to provide pads and other personal hygiene items constituted an Eighth Amendment violation); *Dawson*, 527 F. Supp. at 1288–89 (finding that a prison's failure to provide pads, along with other unsanitary prison conditions, violated the Eighth Amendment). None of the plaintiffs claimed that the practice of restricting access to menstrual health products on its own constituted a violation of the Eighth Amendment, but rather claimed that the practice in conjunction with other deprivations was a violation. *Semelbauer*, 2015 WL 9906265, at \*9 (noting that plaintiffs argued that the combination of the prison's failure to provide menstrual health products and the plaintiff's inability to receive clean laundry together violated the Eighth Amendment); *Atkins*, 372 F. Supp. 2d at 406 (noting that the plaintiff claimed she was "denied basic hygiene products such as toilet paper,

tion have concluded that restricting access to menstrual health products could violate the Eighth Amendment.<sup>335</sup> Section A of this Part reviews prior court decisions and scholarly articles considering the constitutionality of restricting access to menstrual health products under the Eighth Amendment.<sup>336</sup> Section B then argues that this practice could violate the Eighth Amendment so long as the plaintiff establishes enough facts to constitute deliberate indifference.<sup>337</sup>

### A. The Eighth Amendment and Menstrual Health in Prison

The few lower courts that have considered whether a prison restricting access to menstrual health products violates the Eighth Amendment have reached different conclusions.<sup>338</sup> In 1981 in *Dawson v. Kendrick*, the United States District Court for the Southern District of West Virginia found that the prison's failure to provide clean bedding, towels, clothing, sanitary mattresses, and toilet articles, including sanitary napkins, violated the Eighth Amendment.<sup>339</sup> The court noted that the culmination of these deprivations often resulted in parasitic skin conditions and served no legitimate penological purpose.<sup>340</sup> Because the court looked at the prison conditions as a whole rather than individually, it is impossible to know how much the court considered the lack of access to menstrual health products in particular.<sup>341</sup> Citing *Dawson*, the United States District Court for the Southern District of New York similarly found in 2005 in *Atkins v. County of Orange* that a correctional officer's failure to provide pads to an inmate could constitute an Eighth Amendment violation.<sup>342</sup>

Conversely, in 2015 in *Semelbauer v. Muskegon County*, the United States District Court for the Western District of Michigan found that temporary and infrequent delays in access to menstrual health products, toilet paper, and un-

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toothbrush and sanitary napkins"); *Dawson*, 527 F. Supp. at 1288–89 (noting that plaintiffs claimed the prison violated their Eighth Amendment rights because the prison failed to provide bedding, towels, clothing, mattresses, and various toilet articles, including pads).

<sup>335</sup> Shaw, *supra* note 31, at 491 (arguing that the practice of restricting access to menstrual health products could violate the Eighth Amendment); Walsh, *supra* note 196, at 66 (same).

<sup>336</sup> See *infra* notes 338–351 and accompanying text.

<sup>337</sup> See *infra* notes 352–371 and accompanying text.

<sup>338</sup> *Semelbauer*, 2015 WL 9906265, at \*9 (finding that a prison's failure to promptly provide menstrual health products did not violate the Eighth Amendment); *Atkins*, 372 F. Supp. 2d at 406 (holding that failure to provide personal hygiene items, including pads, violated the Eighth Amendment); *Dawson*, 527 F. Supp. at 1288–89 (finding that a prison's unsanitary conditions and failure to provide menstrual health products violated the Eighth Amendment).

<sup>339</sup> 527 F. Supp. at 1288–89.

<sup>340</sup> *Id.* at 1289.

<sup>341</sup> *Id.* at 1288–89.

<sup>342</sup> 372 F. Supp. 2d at 406. In ruling on defendant's motion for summary judgment, the court found that a genuine issue of material fact existed regarding whether the plaintiff was denied access to pads. *Id.* If proven, this conduct could have constituted an Eighth Amendment violation. *Id.* There is no subsequent case history following the court's ruling on summary judgment.

derwear did not constitute an Eighth Amendment violation.<sup>343</sup> In reaching its decision, the court seemed to acknowledge that the prison's failure to provide adequate hygiene items could constitute an Eighth Amendment violation if the deprivation was ongoing or long-lasting.<sup>344</sup> But the court concluded that, because the plaintiffs in this case alleged only a single delay of two days or less before ultimately receiving the items, the deprivation was de minimis and could not amount to an Eighth Amendment violation.<sup>345</sup>

A number of scholars have argued that restricting access to menstrual health products could violate the Eighth Amendment.<sup>346</sup> These scholars recognize that plaintiffs who have been consistently denied access to menstrual health products, particularly those who suffered adverse health consequences as a result, could bring a colorable Eighth Amendment claim.<sup>347</sup> Although *Semelbauer* sets a bleak precedent, the Eighth Amendment analysis is extremely fact-specific and a different scenario could lead to a successful claim.<sup>348</sup> For example, deliberate indifference could be well-established in prisons where women frequently bleed through their uniforms.<sup>349</sup> Further, women who have not been provided an adequate amount of menstrual health products could have

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<sup>343</sup> 2015 WL 9906265, at \*9. The prisoner-plaintiffs in *Semelbauer v. Muskegon County* alleged that female inmates were not provided with pads at an appropriate frequency. *Id.* at \*8. They also claimed that the prison sometimes did not provide any pads. *Id.* But in making their complaint, plaintiffs only identified a delay in receiving menstrual health products ranging from several hours to two days. *Id.* at \*9.

<sup>344</sup> *See id.* at \*9 (“While ‘hygiene’ has also been generally identified as a basic need deserving of Eighth Amendment protection, the Court determines that the nature and duration of the alleged deprivations in this case similarly lead to the conclusion that Plaintiffs have not stated a plausible Eighth Amendment violation.” (citations omitted) (quoting *Argue v. Hofmeyer*, 80 Fed. App’x 427, 430 (6th Cir. 2003)) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976))).

<sup>345</sup> *Id.* at \*9–10. A deprivation is considered de minimis if it is trifling or negligible such that it is easy for the court to overlook it. *De Minimis*, BLACK’S LAW DICTIONARY, *supra* note 146.

<sup>346</sup> *Shaw, supra* note 31, at 491 (arguing that the practice of restricting access to menstrual health products could violate the Eighth Amendment); *Walsh, supra* note 196, at 66 (same).

<sup>347</sup> *Shaw, supra* note 31, at 491–92.

<sup>348</sup> *See Semelbauer*, 2015 WL 9906265, at \*9; *Walsh, supra* note 196, at 66 (arguing that, with a proper set of facts, prisoners could establish that restricting access to menstrual health products violates the Eighth Amendment).

<sup>349</sup> *See Walsh, supra* note 196, at 67 (noting that, despite the holding in *Semelbauer*, women in other jurisdictions may be able to establish that failure to provide adequate menstrual health products violates the Eighth Amendment). Recall that deliberate indifference requires that a prison official be actually aware there is a risk of harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (noting that, to establish deliberate indifference, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”). *Kate Walsh* notes that the court in *Semelbauer* “fails to address that ‘incidents where Defendants ignored or mocked Plaintiffs’ pleas for sanitary supplies’ . . . may provide plaintiffs with more persuasive arguments.” *Walsh, supra* note 196, at 67 (quoting Plaintiffs’ Brief in Opposition to Defendants’ Motion for Partial Judgment on the Pleadings at 16, *Semelbauer*, No. 1:14-CV-1245). According to *Walsh*, such instances could exhibit the level of deliberate indifference that was missing from *Semelbauer. Id.*

a stronger case than those whose access was simply delayed.<sup>350</sup> Therefore, although courts have yet to recognize that restricting access to menstrual health products in prison is an Eighth Amendment violation on its own, there are strong arguments in favor of this position.<sup>351</sup>

### *B. Restricting Access to Menstrual Health Products in Prison Could Violate the Eighth Amendment in Some Jurisdictions*

Restricting access to menstrual health products should be invalidated under the Eighth Amendment in situations where deliberate indifference can be established.<sup>352</sup> Recent activism surrounding the treatment of women in prison, coupled with the growing media coverage of the health risks associated with depriving women's access to menstrual health products in prison, would likely allow prisoners to establish deliberate indifference by correctional officials.<sup>353</sup> Further, the risk of future harm to women's health caused by poor menstrual hygiene over a prolonged period of time is sufficiently serious and therefore constitutes an Eighth Amendment violation.<sup>354</sup>

#### 1. Establishing Deliberate Indifference with the Right Facts

It is notoriously difficult to demonstrate deliberate indifference.<sup>355</sup> Still, it may be possible to demonstrate that prison officials exhibited deliberate indif-

<sup>350</sup> Walsh, *supra* note 196, at 68. Walsh notes that courts are more likely to view "continuous, systematic deprivations" as Eighth Amendment violations as opposed to "single, short incidents." *Id.* Walsh underscores that, in *Todaro v. Ward*, the United States Court of Appeals for the Second Circuit noted that, "while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures." *Id.* at 68 n.125 (quoting 565 F.2d 48, 52 (2d Cir. 1977)). Thus, both because of the severity of the deprivation and its "continuous, systematic nature," courts may be more likely to distinguish cases where plaintiffs are regularly denied adequate access to menstrual health products from the logic in *Semelbauer*. *Id.* at 67–69.

<sup>351</sup> Shaw, *supra* note 31, at 491 (arguing that inadequate access to menstrual health products in prison violates the Eighth Amendment because it puts women at an unreasonable risk of future harm); Walsh, *supra* note 196, at 66 (same).

<sup>352</sup> See *infra* notes 355–371 and accompanying text (arguing that a failure to provide access to menstrual health products in prison places women at an unreasonable risk of future harm and articulating circumstances where it may be possible to establish deliberate indifference).

<sup>353</sup> See *Farmer*, 511 U.S. at 834 (establishing that deliberate indifference towards a prisoner's serious medical needs violates the Eighth Amendment).

<sup>354</sup> *Estelle*, 429 U.S. at 106 ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.").

<sup>355</sup> Jeffrey M. Lipman, *Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook*, 31 CREIGHTON L. REV. 435, 446 (1998) (noting that the deliberate indifference "standard is very difficult and impractical, placing an incredible burden on the inmate").

ference by failing to provide adequate access to menstrual health products given the recent publicity that the problem has received.<sup>356</sup>

Some lay people may not realize the dangers that stem from only providing ten thin pads per month, undermining the obviousness of the risk.<sup>357</sup> Therefore, to establish deliberate indifference, a plaintiff would need to demonstrate that the prison officials were aware of the risk and declined to take action.<sup>358</sup> This could best be established in one of the counties where activists have lobbied for adequate access to menstrual health products.<sup>359</sup> If activists provided these prisons with clear information about the health risks that stem from poor menstrual hygiene, the plaintiffs could potentially build a strong claim.<sup>360</sup>

Likewise, deliberate indifference could be established in a prison where an inmate contracted a serious illness as a result of inadequate menstrual health and notified prison officials of the ailment.<sup>361</sup> Because the deliberate indifference inquiry is highly fact specific, it can be difficult to predict its success.<sup>362</sup> Yet the prevalence of activism surrounding prisoners' menstrual health and the subsequent media attention is helpful in demonstrating deliberate indifference.<sup>363</sup> In this way, grassroots activism can serve an important role in supporting successful litigation.<sup>364</sup>

## 2. Denying Adequate Access to Menstrual Health Products Constitutes a Serious Medical Need

If a plaintiff were to succeed in demonstrating that prison officials exhibited deliberate indifference, the argument that restricting access to menstrual health products poses a serious medical need would be relatively straightfor-

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<sup>356</sup> See Witte, *supra* note 4 (discussing the #MeToo movement's effort to publicize the current state of access to menstrual health products in prison).

<sup>357</sup> See *Farmer*, 511 U.S. at 843 n.8 (noting that, although not conclusive, the obviousness of a risk can be persuasive evidence in establishing deliberate indifference).

<sup>358</sup> Lipman, *supra* note 355, at 442 (illustrating how plaintiffs may establish deliberate indifference).

<sup>359</sup> Marimow, *supra* note 1 (discussing advocacy for increased access to menstrual health products in prison).

<sup>360</sup> See, e.g., Witte, *supra* note 4 (noting advocacy by former prisoners to educate legislators and prison officials about the lack of access to menstrual health products and the resulting health risks).

<sup>361</sup> See *id.* (providing testimony by a former prisoner who suffered medical complications due to poor menstrual hygiene during her time in prison).

<sup>362</sup> See Lipman, *supra* note 355, at 439 (noting the difficulty of establishing deliberate indifference and the need for highly persuasive facts).

<sup>363</sup> See Witte, *supra* note 4 (discussing the recent surge in activism around access to menstrual health products in prison).

<sup>364</sup> See *id.* (discussing grassroots efforts to call attention to the current state of access to menstrual health products in prison).

ward.<sup>365</sup> The seriousness of toxic shock syndrome and bacterial infections is beyond dispute, and neither serve any legitimate penological purpose.<sup>366</sup> Although it is true that restricting access to menstrual health products does not generally cause significant pain or inhibit daily acts in the immediacy, the significant threat of developing toxic shock syndrome or a bacterial infection, combined with the related and long-term complications, demonstrates a serious risk of future harm.<sup>367</sup>

Thus, each of the factors that courts generally consider persuasive in assessing whether the serious medical need element is satisfied are met with regards to restricting access to menstrual health products in prison.<sup>368</sup> By focusing on the risk of future harm—rather than just the discomfort and embarrassment of bleeding through one’s uniform—litigators could establish that the repeated and prolonged denial of basic menstrual health products constitutes a serious medical need.<sup>369</sup> Perhaps the strongest case would be in a prison where women are only provided ten pads per month because it is a regular and prolonged practice and poses a significant risk of future harm.<sup>370</sup> Therefore, as long as the particular facts lend themselves to a showing of deliberate indifference, an Eighth Amendment claim would likely succeed.<sup>371</sup>

## CONCLUSION

Although prison officials are provided significant deference in how they manage the day-to-day operations of prisons, the Constitution cabins their dis-

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<sup>365</sup> See *infra* notes 366–368 and accompanying text (explaining why the health risks inherent in denying women the means to practice proper menstrual hygiene constitutes a serious medical need under the Eighth Amendment).

<sup>366</sup> See 21 C.F.R. § 801.430 (2019) (requiring warnings about toxic shock syndrome to be posted on boxes of tampons). The risk has been adequately recognized by medical experts, who express clear consensus that women should change their pads or tampons every four to eight hours while they are menstruating. Shaw, *supra* note 31, at 484. Furthermore, although not every lay person may know the exact health risks that accompany poor menstrual hygiene, the importance of menstrual hygiene and warnings about toxic shock syndrome are taught in many health classes and posted on tampon boxes such that the lay person likely has some awareness of the importance of menstrual hygiene. See 21 C.F.R. § 801.430.

<sup>367</sup> See *supra* notes 56–65 and accompanying text (discussing the health risks of poor menstrual health in prison). Poor menstrual health threatens permanent loss due to the increased risk of corrective hysterectomies or cervical cancer. Weiss-Wolf, *supra* note 65.

<sup>368</sup> See *supra* notes 366–367 and accompanying text.

<sup>369</sup> *Helling v. McKinney*, 509 U.S. 25, 34 (1993) (establishing that the Eighth Amendment prohibits prison officials from exposing inmates to an unreasonable risk of future harm).

<sup>370</sup> See *Semelbauer*, 2015 WL 9906265, at \*10 (dismissing a plaintiff’s complaint that a correctional officer’s refusal to provide her with pads constituted an Eighth Amendment violation because the deprivation occurred only one time for a maximum of two days and therefore constituted a de minimis deprivation); Barchett, *supra* note 33 (noting that, on average, prisons provide only ten free pads per month).

<sup>371</sup> See *supra* notes 353–370 and accompany text (arguing that the current practice of restricting access to menstrual health products violates the Eighth Amendment).

cretion. Despite the high standards required to prove an Equal Protection Clause and Eighth Amendment violation, prisoners who have been denied adequate access to menstrual health products and forced to maintain poor menstrual health during their prison sentences may be able to bring a successful constitutional challenge. Denying access to menstrual health products is a form of sex-based classification that is neither substantially related to a compelling government interest nor reasonably related to a valid penological interest. Furthermore, the risk of future harm inherent in prolonged poor menstrual hygiene constitutes a violation of the Eighth Amendment if the facts establish the prison official's subjective awareness of the harm. Although legislative reforms have been successful in many parts of the country, judicial action is necessary to ensure that the health of female inmates is guaranteed rather than subject to the will of the majority.

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