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## U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda

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U.S. POLICYMAKING TO ADDRESS MENSTRUATION:  
ADVANCING AN EQUITY AGENDA

JENNIFER WEISS-WOLF\*

- I. ESTABLISHING AN EQUITY FRAME
- II. U.S. POLICY AGENDA 2015–2018
  - A. *The Tampon Tax and the Case for Equity*
    - 1. *Summary of Global Tampon Tax Campaigns*
      - a. *Kenya*
      - b. *Canada*
      - c. *England*
      - d. *France and Spain*
      - e. *India*
      - f. *Malaysia*
      - g. *Australia*
      - h. *South Africa*
    - 2. *Fighting the Tampon Tax in the United States*
      - a. *Legislators Responded*
      - b. *Non-traditional Voices*
  - B. *Menstrual Access and the Case for Equity*
- III. CORRESPONDING LEGAL AND PUBLIC STRATEGY
  - A. *Litigation*
    - 1. *Tampon Tax*
    - 2. *Menstrual Access*
    - 3. *Workplace Discrimination*
  - B. *Public Discourse*
- IV. NEW GENERATION OF MENSTRUAL EQUITY POLICY
  - A. *Public Benefits*
  - B. *Workplace*
  - C. *Criminal Justice*
  - D. *Education*
  - E. *Environmental Justice*
  - F. *#MeToo and the Equal Rights Amendment*

*[L]ately, women—and transgender and nonbinary people who menstruate—are talking about it in public more than ever before. . . . Globally, advocates are pushing for recognition of a woman’s right to manage her period with*

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*dignity. And in the United States, activists are bringing the concept of “menstrual equity” into the public debate.*

—*The New York Times* (July 2018)<sup>1</sup>

On any given day there are eight hundred million people on the planet who are menstruating, of whom at least five hundred million lack adequate resources—basic supplies, facilities, information, support—for managing their periods.<sup>2</sup>

In India, where the vast majority reportedly use materials like leaves or cloth scraps to absorb their menstrual flow,<sup>3</sup> *The New York Times* published a story of a young teen who was forced to undergo a hysterectomy after using a rag infested with lizard eggs.<sup>4</sup> In Nepal, deeply held taboos surrounding menstruation include the monthly expulsion of girls to remote huts—a ritual that persists despite legal prohibition and the claiming of three lives over the course of a year.<sup>5</sup>

In the United States, it is only recently that we have begun to publicly understand and acknowledge that marginalized populations also struggle with issues of access and stigma. For the nearly one in five American teenagers who live in poverty,<sup>6</sup> lack of menstrual products and support can lead to humiliation and lost educational opportunity. Those experiencing homelessness report infection caused by using tampons and pads for longer than recommended, or by improvising with items such as paper towels or newspapers.<sup>7</sup> Incarcerated

1. Karen Zraick, *It's Not Just the Tampon Tax: Why Periods Are Political*, N.Y. TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/health/tampon-tax-periods-menstruation-nyt.html> [<https://perma.cc/CTW8-D7KJ>].

2. UNICEF & WORLD HEALTH ORG., 25 YEARS: PROGRESS ON SANITATION AND DRINKING WATER: 2015 UPDATE AND MDG ASSESSMENT (2015), [http://files.unicef.org/publications/files/Progress\\_on\\_Sanitation\\_and\\_Drinking\\_Water\\_2015\\_Update\\_.pdf](http://files.unicef.org/publications/files/Progress_on_Sanitation_and_Drinking_Water_2015_Update_.pdf); Tanya Barron, *800 Million Women and Girls Are on Their Period Right Now—Let's Talk About It*, IBT (Oct. 11, 2017), <https://www.ibtimes.co.uk/800-million-women-girls-are-their-period-right-now-lets-talk-about-it-1642606> [<https://perma.cc/E3SV-ZHGD>].

3. See Kounteya Sinha, *70% Can't Afford Sanitary Napkins, Reveals Study*, TIMES INDIA (Jan. 23, 2011, 5:47 PM), <https://timesofindia.indiatimes.com/india/70-cant-afford-sanitary-napkins-reveals-study/articleshow/7344998.cms> [<https://perma.cc/WW56-K675>].

4. Rose George, *The Taboo of Menstruation*, N.Y. TIMES (Dec. 28, 2012), <https://www.nytimes.com/2012/12/29/opinion/the-taboo-of-menstruation.html> [<https://perma.cc/Y3BH-XMUY>].

5. Jeffrey Gettleman, *Where a Taboo Is Leading to the Deaths of Young Girls*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/world/asia/nepal-women-menstruation-period.html> [<https://perma.cc/T9MZ-UK2C>].

6. Heather Koball & Yang Jiang, *Basic Facts About Low-Income Children*, NAT'L CTR. FOR CHILD. POVERTY (Jan. 2018), [http://www.nccp.org/publications/pdf/text\\_1194.pdf](http://www.nccp.org/publications/pdf/text_1194.pdf).

7. See Janet Upadhye, *This Is How Homeless Women Cope with Their Periods*, BUSTLE (Oct. 18, 2016), <https://www.bustle.com/articles/190092-this-is-how-homeless-women-cope-with-their-periods> [<https://perma.cc/85DH-YCU6>].

individuals and those caught in the criminal justice system often beg or bargain with corrections staff for basic hygiene needs, part of a degrading and dehumanizing power imbalance.<sup>8</sup>

All of this has potentially devastating consequences. Entrenched stigma surrounding menstruation exacerbates the conditions of poverty, not only impacting the health of women and girls, but also curtailing their opportunities—educational, economic, civic, and social.

Globally, the field of Menstrual Hygiene Management, as it is formally designated in academia and philanthropy, has focused on water, sanitation, and hygiene protocols; product distribution coupled with public health and educational interventions; and, more recently, a linkage to principles of human rights.<sup>9</sup>

And, now a new social and policy movement has coalesced in the United States, centered on the concept of “menstrual equity”—a phrase first introduced in 2015 and further developed in the 2017 book *Periods Gone Public: Taking a Stand for Menstrual Equity*, which makes the case for an agenda that advances systemic solutions to address the societal and financial inequities caused by menstruation.<sup>10</sup> The menstrual equity frame is distinct in its direct association of periods with the values of democratic participation, citizen engagement, gender parity, and economic opportunity.

This Article will explore the political and legal tenets of menstrual equity. It will explain why this frame has proven particularly potent and detail recent, successful policy advocacy in which momentum has been both unusually bipartisan and swift. It will also shed light on the power of leveraging multiple tools for achieving societal change—law and litigation, coupled with extensive use of traditional and social media. It will preview emerging policy proposals for this burgeoning movement. In sum, it will show why making the case for menstrual equity is central to the greater quest for equal opportunity for all.

## I. ESTABLISHING AN EQUITY FRAME

We start with two basic assumptions. First, in the United States, the tradition of marginalizing menstruation is a long-standing one.

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8. Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, GUARDIAN (June 12, 2015, 7:30 PM), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights> [<https://perma.cc/M2TG-ENAL>].

9. See Amy Lieberman, *Menstrual Health, While Excluded from SDGs, Gains Spotlight at UN Political Forum*, DEVEX (July 23, 2018), <https://www.devex.com/news/menstrual-health-while-excluded-from-sdgs-gains-spotlight-at-un-political-forum-93137> [<https://perma.cc/295J-7MER>].

10. See generally JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY XVI (2017).

The experience for many individuals is deeply shrouded in shame and secrecy. At best, in the public sphere, periods are ignored or disregarded; at worst, they are mocked, belittled, and even maligned. The fact that menstruation itself—and the intersection of poverty and periods, in particular—has been wholly absent from public discourse, or even most private discussions, has meant that people are unlikely to raise the issue, especially those who need assistance.

Second, access to menstrual care is a real, ongoing need for half the population for a substantial portion of their lives. Without products that are safe and affordable—whether disposable or reusable, commercially produced or otherwise—and an open, productive dialogue and discourse, those who menstruate are prone to a state of compromised hygiene and mobility, as well as degradation or exclusion.

One result is that menstruation has been given little to no consideration in the policies and laws by which we live. This omission affects everyone, but hits hardest the populations for whom access and agency is most compromised. Some examples: tampons and pads have not been designated as allowable budgetary expenses for publicly funded shelters or crisis and emergency centers.<sup>11</sup> They are not provided in a consistent or fully accessible way in correctional and detention facilities.<sup>12</sup> Menstrual products are not covered by public health and nutritional benefits programs;<sup>13</sup> inconsistent tax classification status of menstrual products has prevented menstrual products from being included in Health Savings or Flexible Spending Account allowances;<sup>14</sup> they are not made uniformly available in schools or workplaces; and in forty states (as of January 2019), menstrual products are not sales tax exempt.<sup>15</sup>

Consider how three governmental agencies acknowledge and address menstrual products—not only with a disparate, inconsistent vocabulary and recognition of purpose, but always to the detriment of those who menstruate:

- The federal government bears responsibility for approving and disclosing the ingredients in menstrual products via the Food and Drug Administration (FDA). The FDA designates tampons a Class II “medical device,” in the company of contact lenses, condoms, and pregnancy test

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11. See Jennifer Weiss-Wolf, “The Year Period Policy Prevails”: A Look at Rising Momentum for Eliminating the Tampon Tax, BLOOMBERG BNA (Apr. 8, 2016), <https://www.bna.com/year-period-policy-n57982069614> [<https://perma.cc/JM8A-2V3K>].

12. See Bozelko, *supra* note 8.

13. See Weiss-Wolf, *supra* note 11.

14. See *id.*

15. See *id.*

kits.<sup>16</sup> The only affirmative obligations required of manufacturers are that they provide basic instructional labeling on packaging, and keep records of adverse events caused by their products.<sup>17</sup> Transparency in testing results is not required, nor is labeling or detailed disclosure about product ingredients on packaging.<sup>18</sup>

- From the Internal Revenue Service:

While the FDA classifies tampons as a medical product . . . the Internal Revenue Service (IRS) views tampons differently in determining whether they are deemed eligible for reimbursement. . . . Because these items do not play a role in alleviating or aiding in the treatment plan of a specific illness, they are not covered under any circumstance with consumer spending accounts.<sup>19</sup>

- At the U.S. Department of Labor, the Occupational Safety and Health Administration (OSHA) agency mandates that employers provide all workers with safe, sanitary toilet facilities as well as products required for washing and drying.<sup>20</sup> Menstrual products are conspicuously excluded from the list of hygiene necessities, though addressed in meticulous detail in disposal protocols for facilities.<sup>21</sup>

An equity-based argument yields a powerful narrative for countering these inconsistencies and oversights. Indeed, this is the heart of the formal definition of menstrual equity as set forth in *Periods Gone Public*:

In order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable . . . [for everyone who needs them]. The ability

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16. CONG. RESEARCH SERV., FDA REGULATION OF MEDICAL DEVICES 1, 36 (Sept. 14, 2016), [https://www.everycrsreport.com/files/20130212\\_R42130\\_22bf307ed41d32c6789d3b4bac91cbfdcfec98.pdf](https://www.everycrsreport.com/files/20130212_R42130_22bf307ed41d32c6789d3b4bac91cbfdcfec98.pdf).

17. *See id.*

18. *See id.*; Nadia Kounang, *What's in Your Pad or Tampon?*, CNN (Nov. 13, 2015, 11:19 AM), <https://www.cnn.com/2015/11/13/health/whats-in-your-pad-or-tampon/index.html> [<https://perma.cc/532B-G7Q5>].

19. *Tampons: FSA Eligibility*, FSASTORE, <https://fsastore.com/FSA-Eligibility-List/T/Tampons-E693.aspx> [<https://perma.cc/AW9B-2DAM>].

20. *See Restroom and Sanitation Requirements*, U.S. DEPT LAB., [https://www.osha.gov/SLTC/restrooms\\_sanitation](https://www.osha.gov/SLTC/restrooms_sanitation) [<https://perma.cc/UR35-HUVS>].

21. *See OSHA: Most Frequently Asked Questions Concerning the Bloodborne Pathogens Standard*, U.S. DEPT LAB. (Nov. 1, 2011), <https://www.osha.gov/laws-regs/standard-interpretations/1993-02-01-0> [<https://perma.cc/7DGY-NHNV>].

to access these items affects a person's freedom to work, . . . [study, stay healthy, and engage in the world] with basic dignity. And if [anyone's] access is compromised, whether by poverty or stigma or lack of education and resources, it is in . . . our [societal] interests to ensure those needs are met.<sup>22</sup>

Equity is a decidedly American perspective—one that harkens to the democratic creed and aspiration of civic, economic, and political participation. It is broader than a sanitation or public health frame, more tangible and applicable to U.S. policymaking than a human rights frame, and more precise than an equality frame (when it comes to periods, there's no equal opportunity).

It is a frame and argument that has massive potential as evidenced by the success of the inaugural political fights for menstrual equity in the United States, as described below.

## II. U.S. POLICY AGENDA 2015–2018

Forging meaningful change through policymaking has distinct advantages. To start, implementation of laws is an efficient way to benefit the widest swath of the population. Importantly, the laws we pass make an affirmative and deliberate statement about the values for which we stand—an especially critical ingredient in dismantling the stigma of menstruation.

Prior to initiation of the menstrual equity frame and advocacy campaign in 2015, menstruation was never at the heart of U.S. policy debate, or even at the fringes.<sup>23</sup> For a brief period of time in the 1990s, Congress was pressed to consider it, largely in response to a spate of deaths from toxic shock syndrome caused by high-absorbency tampons, followed by a later (unrelated) FDA report of toxicity in the synthetic fibers and chemicals used in regular tampons.<sup>24</sup> In 1997, U.S. Congresswoman Carolyn Maloney introduced federal legislation that would require funds for independent research into potentially hazardous ingredients in menstrual products, as well as to mandate transparency in sharing and publicizing testing results.<sup>25</sup> Her bill, the Tampon Safety and Research Act of 1997 (H.R. 2900), was unsuccessful.<sup>26</sup> Since then, she has reintroduced it eight times, most recently

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22. WEISS-WOLF, *supra* note 10, at XVI.

23. *See id.* at 65.

24. *See* Ashley Fetters, *The Tampon: A History*, ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/394334> [<https://perma.cc/GUA6-KAV3>].

25. *See* Tampon Safety and Research Act, H.R. 2900, 105th Cong. (1997).

26. *See* Fetters, *supra* note 24.

in 2017—renaming it in 1999 the Robin Danielson Act, in honor of a woman who died from toxic shock syndrome—but the proposal has never succeeded in garnering broad support.<sup>27</sup>

Fast forward to 2015. It was the “tampon tax”—shorthand for the fight to exempt menstrual product purchases from sales tax—that brought the language and position of menstrual equity to U.S. policymaking.<sup>28</sup> That campaign was soon joined by targeted municipal, state, and federal advocacy to ensure that products are freely accessible via public agencies that serve those who are young, low-income, homeless, or incarcerated.<sup>29</sup> These initiatives are described in detail below, with a focus on the variety of movement-building strategies and legal arguments that have been employed.

### A. *The Tampon Tax and the Case for Equity*

The tampon tax is regular sales tax or value-added tax applied to menstrual products, or, conversely, the failure of the state to otherwise exempt these products from sales tax by placing them in the category of necessity. Below is a comprehensive primer setting forth the basic mechanics of the U.S. tampon tax—excerpted from *Periods Gone Public* and updated accordingly—to provide necessary context for the advocacy agenda that has emerged.<sup>30</sup>

*Sales tax is primarily a state issue.*

Sales tax is legislated and levied state by state. Each state . . . [decides what] items to . . . exempt, at what rate items will be taxed, and if/how sub-bodies like counties or municipalities can do the same. Prior to 2015, there were five states . . . that had already . . . [exempted] menstrual products—Maryland, Massachusetts, Minnesota, New Jersey, and Pennsylvania [—though not as a result of a concerted campaign]. Another five [states]—Alaska, Delaware, Montana, New Hampshire, and Oregon—collect no sales tax at all, and therefore don’t tax these items. By 201[8], Connecticut, Florida, Illinois, [Nevada,] and New York [, as well as Washington, D.C. and the City of Chicago, have successfully eliminated the tampon tax. That leaves 35 states that continue to collect sales tax on menstrual products.]

*A “luxury” tax?*

[T]he tax itself is not a special or additive levy. Rather, it is regular sales tax applied to menstrual products . . . ranging from roughly 4 to 10 percent depending on the state tax code. Generally,

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27. *See id.*

28. *See* Weiss-Wolf, *supra* note 11.

29. *See* discussion *infra* Sections II.A, II.B.

30. WEISS-WOLF, *supra* note 10, at 124–27.



and as a matter of historical practice since sales taxes were first implemented in the United States in the 1930s, states exempt food and other items deemed necessities of life, such as medicine and prescription drugs, from sales tax.

Nor is it a “luxury” tax, a common misnomer. The term is a by-product of the vernacular of the European Union’s value-added tax (VAT), a consumption tax that[, at its highest rate categories,] . . . applies to “non-essential luxury items.”

*What is a necessity?*

Lack of consistent classification of “medical necessities” . . . has resulted in a complicated . . . [and often inconsistent array of recommendations] and outcomes. [Food generally is tax exempt.] Prescription drugs—ranging from the life-saving (insulin) to the life-enhancing (Rogaine and Viagra)[—also receive tax exemptions.] So too are incontinence pads, dandruff shampoo, and lip balm under this classification. Meanwhile, other items that seem comparable to menstrual supplies and that may also be deemed basic (if not medical) necessities, are often taxed—toilet paper, soap, and bandages among them.

. . . .

*The costs.*

A year’s supply of tampons and pads for [a] person costs in the [range] of \$70 to \$120, depending on where one lives, how heavy [one’s] flow [is], and the ability to take advantage of cost-cutting measures. (Reusable alternatives like menstrual cups, [absorbent underwear,] and cloth pads [often] have [high] upfront costs but are . . . more cost-effective over time.) All told, the expense can add up to more than \$[5],000 over a lifetime, [per person;] and sales tax adds . . . several hundred dollars to [this] total. The amount of annual tax revenue states collect on the sale of these products is based on the number of menstruating people in the state—ranging from \$1 million in Utah to \$20 million in California, for example.

It is worth noting . . . . [that periods are costlier for those who have the least means. They often pay] considerably more for the exact same items . . . because they’re subject to the inflated prices charged at convenience stores or they can’t afford [the cost benefit of buying in bulk. Sales taxes are also inherently regressive, causing a greater relative burden to low-income consumers.].

*Is the “tampon tax” the same as the “pink tax”?*

The phrase “pink tax” is a popular euphemism for the phenomenon where goods or services marketed for women often cost

more than the men’s [equivalent] for no . . . reason other than price gouging. [This is different from the tampon tax, but nonetheless a challenge posed by gender-based pricing.] A 2015 New York City Department of Consumer Affairs study, *From Cradle to Cane: The Cost of Being a Female Consumer*, [cited the following examples:] shampoo and conditioner in the women’s aisle cost an average of 48 percent more than that in the men’s; women’s jeans are 10 percent more expensive; dry cleaning bills for women’s shirts run an average of \$4.95 as compared to \$2.86 for men’s.<sup>31</sup> [These findings were bolstered by a 2018 report from the U.S. Government Accountability Office, “Gender-Related Price Differences for Goods and Services,” which found gender-based pricing discrepancies 50 percent of the time.]<sup>32</sup>

The arguments for taking on—and taking down—the tampon tax are fourfold: it would (1) lift a small financial burden; (2) challenge laws that are archaic, unfair, and discriminatory; (3) help inch toward a model of economic parity and gender equity; and (4) offer a gateway for enabling people to talk and think about the wider implications of menstruation—social, economic, and otherwise—in our policymaking.

Or, according to Professor Bridget Crawford at the Elisabeth Haub School of Law at Pace University, “[i]n a culture of silence about the gendered impact of tax laws, it will be impossible to achieve equality. The tampon tax has spurred citizens world-wide to advocate for fairer tax laws. . . . [and demand] that the tax law rid itself of this instance of blatant gender discrimination.”<sup>33</sup>

### 1. Summary of Global Tampon Tax Campaigns

Prior to 2015 and the emergence of the U.S. menstrual equity agenda, numerous campaigns to address the taxation of menstrual products were already underway around the world. Notable examples are summarized below.

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31. *Id.* (referencing in part Anna Bessendorf, *From Cradle to Cane: The Cost of Being a Female Consumer: A Study of Gender Pricing in New York City*, N.Y. CITY DEP’T CONSUMERAFF. 1, 11, 16, 28 (Dec. 2015), <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf> and Juliet Eilperin & Kate Zezima, *Women of America: President Obama Wants to Lower Your Dry Cleaning Bill*, WASH. POST (Apr. 8, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/04/08/women-of-america-president-obama-wants-to-lower-your-dry-cleaning-bill/?noredirect=on&utm\\_term=.c9fc4c9785be](https://www.washingtonpost.com/news/the-fix/wp/2014/04/08/women-of-america-president-obama-wants-to-lower-your-dry-cleaning-bill/?noredirect=on&utm_term=.c9fc4c9785be) [<https://perma.cc/X9TQ-8TJ9>]).

32. See U.S. GOV’T ACCOUNTABILITY OFF., GENDER-RELATED PRICE DIFFERENCES FOR GOODS AND SERVICES 9 (Aug. 2018), <https://www.gao.gov/assets/700/693841.pdf>.

33. Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 496 (2016).

*a. Kenya*

After eliminating the sales tax on menstrual products in 2004, Kenya also ended an import duty on pads in 2011, helping to further reduce costs.<sup>34</sup> In a country where over half the population survives on the equivalent of less than one dollar per day, the elimination of a twenty-cent tax on the \$1.20 charged for an eight-pack of pads is a considerable gain.<sup>35</sup> The Kenya Ministry of Health continues to take the fight even further, forging new ways to promote menstrual health as a human rights issue and to prioritize menstrual hygiene, access, disposal, and education solutions. By law, the government is now required to budget the equivalent of \$3 million per year for the provision of free pads in schools.<sup>36</sup>

*b. Canada*

In July 2015, Canada culminated a decades long fight to eliminate its national Goods and Services Tax on menstrual products.<sup>37</sup> Championed by Members of Parliament, Irene Mathyssen and Judy Wasylycia-Leis, and with the support of a well-organized grassroots mobilization led by activist Jill Piebiak, passage was unanimous with support of the three major political parties: Conservative, Liberal, and New Democratic.<sup>38</sup>

*c. England*

While the national tax on menstrual products had been reduced from 17.5% in 2000, a remaining 5% surcharge was mandated by the European Union's (EU) mandatory value-added tax (VAT).<sup>39</sup> The tampon tax became a highly publicized political cause in 2014, after

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34. See Vicky Hallett, *What Kenya Can Teach the U.S. About Menstrual Pads*, NPR (May 10, 2016, 10:00 AM), <https://www.npr.org/sections/goatsandsoda/2016/05/10/476741805/what-kenya-can-teach-the-u-s-about-menstrual-pads> [<https://perma.cc/WCP6-KLTC>]; Gina Reiss-Wilchins, *Kenya & Menstrual Equity: What You Didn't Know*, HUFFINGTON POST (Mar. 29, 2016, 3:04 PM), [https://www.huffingtonpost.com/gina-reisswilchins/kenya-menstrual-equity-wh\\_b\\_9557270.html](https://www.huffingtonpost.com/gina-reisswilchins/kenya-menstrual-equity-wh_b_9557270.html) [<https://perma.cc/6UNG-W8WB>].

35. See Hallett, *supra* note 34.

36. See *id.*

37. See Haydn Watters, *'Tampon Tax' Will End July 1*, CBC NEWS (May 28, 2015, 2:44 PM), <https://www.cbc.ca/news/politics/tampon-tax-will-end-july-1-1.3091533> [<https://perma.cc/YB7T-FHC6>].

38. See *id.*

39. Laura Coryton, *Stop Taxing Periods. Period. #EndTamponTax*, CHANGE.ORG, <https://www.change.org/p/george-osborne-stop-taxing-periods-period> [<https://perma.cc/MW6Z-3JSX>].

a student activist in London launched an online petition, “George Osborne: Stop Taxing Periods. Period. #EndTamponTax.”<sup>40</sup> It garnered hundreds of thousands of signatures (including spinoff petitions) and was championed by prominent Labour Party leaders, including Member of Parliament Paula Sherriff, Shadow Minister for Women and Equalities.<sup>41</sup> Eliminating the tax entailed persuading the EU to reduce the VAT to zero—a task which generated controversy after a far right-wing faction of Parliament took up the issue to bolster its campaign for Britain to exit the EU (a.k.a. Brexit), arguing that the tampon tax demonstrated EU overreach and Britain’s lack of agency.<sup>42</sup> In an attempt to keep the Brexit insurgency at bay, political leaders mobilized quickly to change the EU rule; they succeeded in 2017 (though it did not sway the eventual Brexit vote).<sup>43</sup> To date, Parliament has yet to affirmatively eliminate the VAT on menstrual products.<sup>44</sup> An initial proposal languished for several months.<sup>45</sup> The new target date is 2022, absent other Brexit complications.<sup>46</sup>

#### *d. France and Spain*

In 2015, members of French Parliament voted to reduce its national tax from 20% to 5.5% (a separate levy from the VAT surcharge).<sup>47</sup> Earlier that year, a vote rejecting that reduction had spurred citizen protests.<sup>48</sup> In Spain, where menstrual products are taxed nationally at a rate of 10%, activists are fighting to have them designated a “basic need product” to qualify for a further reduced rate of 4%.<sup>49</sup> In October 2018, the Minister of Finance, María Jesús Montero, made a public pledge to implement this reform.<sup>50</sup>

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40. *Id.*

41. *See id.*

42. Laura Argyropulo Coryton, *Why 2022 Is the Year Anticipated by Tampon Tax Campaigners*, HUFFPOST UK (July 23, 2018, 10:24 PM), [https://www.huffingtonpost.co.uk/entry/tampon-tax-update-from-brexit-to-the-importance-of\\_uk\\_5b45fe5be4b0c3d90ede0327?guccounter=1](https://www.huffingtonpost.co.uk/entry/tampon-tax-update-from-brexit-to-the-importance-of_uk_5b45fe5be4b0c3d90ede0327?guccounter=1) [<https://perma.cc/QFY5-HMQ9>].

43. *See id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Ana Garcia Valdivia, *Spanish Tampon Tax: Putting an End to Gender Discrimination*, FORBES (Nov. 14, 2018, 2:12 PM), <https://www.forbes.com/sites/anagarciavaldivia/2018/11/14/spanish-tampon-tax-putting-an-end-to-gender-discrimination/#359b7c6f969a> [<https://perma.cc/5UVP-6UFR>].

48. Jennifer Swann, *After Months of Protests, Tampons Will No Longer Be a ‘Luxury Good’ in France*, TAKEPART (Dec. 14, 2015), <http://www.takepart.com/article/2015/12/14/tampon-tax-france> [<https://perma.cc/F9UU-DHM8>].

49. *See* Valdivia, *supra* note 47.

50. *See id.*

*e. India*

Lawmakers and activists campaigned under the hashtag #lahuKaLagaan (“*tax on blood*”); a petition spearheaded by a female member of Parliament, Sushmita Dev, garnered more than 400,000 signatures.<sup>51</sup> In July 2018, the Indian government officially announced the end of its 12% tax on menstrual pads.<sup>52</sup> But, still, these products remain out of reach and too expensive for most according to India’s National Family Health Survey.<sup>53</sup>

*f. Malaysia*

In June 2018, the Royal Malaysian Customs Department announced that the classification of tampons, pads, and panty liners would be “miscellaneous manufactured articles,” thereby lifting the standard sales and service tax rate.<sup>54</sup> Previously, these products were classified as being for “beauty and health” use, thereby subjecting them to a goods and services tax rate of 6%.<sup>55</sup>

*g. Australia*

The government first introduced a federal goods and services tax in 2000, which included a 10% levy applied to tampons and pads.<sup>56</sup> At the time, condoms were exempt under the argument that they are preventive health care.<sup>57</sup> *The New York Times* reported that one legislator quipped, “I wasn’t aware that menstruation was an illness.”<sup>58</sup> A long-standing petition drive, initiated in 2015, lobbied conservative and progressive politicians.<sup>59</sup> The successful elimination of the tax was announced in October 2018.<sup>60</sup>

51. Rishi Iyengar, *India Scraps Controversial Tax on Sanitary Pads*, CNN (July 22, 2018, 6:24 AM), <https://www.cnn.com/2018/07/22/health/india-tampon-tax-intl/index.html> [<https://perma.cc/69WW-WM9R>].

52. *See id.*

53. *See id.*

54. *See* Leah Rodriguez, *Malaysia Finally Lifts ‘Tampon Tax’ on Menstrual Hygiene Products*, GLOBAL CITIZEN (Aug. 30, 2018, 6:24 AM), <https://www.globalcitizen.org/en/content/malaysia-lifts-tampon-tax-menstrual-hygiene> [<https://perma.cc/B3VE-2KKX>]; *see also* Arri Grewal, ‘*A Period Should End a Sentence. Not a Girl’s Education*,’ ARTEFACT, <http://www.artefactmagazine.com/2019/02/27/period-end-sentence-not-girls-education> [<https://perma.cc/PV35-DVTX>].

55. *See id.*

56. *See* Jamie Tarabay, *Australia Scraps Tax on Tampons, Once Considered a Luxury*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/world/australia/tampons-tax.html> [<https://perma.cc/54JJ-DSCA>].

57. *See id.*

58. *Id.*

59. ‘*Tampon Tax’ Scrapped in Australia After 18-Year Controversy*, BBC NEWS (Oct. 3, 2018), <https://www.bbc.com/news/world-australia-45727980> [<https://perma.cc/Z8Z2-FGYS>].

60. *See* Tarabay, *supra* note 56.

### *h. South Africa*

In October 2018, Minister of Finance, Tito Mboweni, declared that the government had committed to abolishing the tax on all menstrual products, as well as to ensuring that students have access to pads in schools.<sup>61</sup> It was formally noted that thousands of tweets were received in support.<sup>62</sup>

## *2. Fighting the Tampon Tax in the United States*

Amid this global backdrop, the tampon tax issue has offered a ripe forum for domestic policy advocacy and a chance to develop and test equity-based language for addressing the economics of menstruation.

Among its most distinct characteristics in the United States, the tampon tax argument has unusually strong trans-partisan appeal. There are persuasive perspectives from all sides—left, right, libertarian—focused on social justice and gender equity, or tax relief, or limiting the scope of government reach. There is one unique challenge in the U.S.: because there is no national sales tax in the U.S., but instead a multitude of municipal- and state-specific tax codes, there is not the simplicity of organizing one overarching nationwide campaign.

In October 2015, the inaugural campaign launched with the first national petition, cosponsored by *Cosmopolitan* magazine, “Stop Taxing Our Periods! End the #TamponTax.”<sup>63</sup> The primary goal for making the petition national in focus, rather than state-by-state, was to elevate the issue with a singular call for action, and then pressure lawmakers across the country to act simultaneously when the 2016 legislative session commenced.<sup>64</sup>

The petition sparked immediate and high-level attention by the media, policymakers, and other influential voices.<sup>65</sup> *The New York*

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61. Tito Mboweni, *Finance Minister Tito Mboweni's 2018 Medium-Term Budget Policy Statement* (Oct. 24, 2018, 3:30 PM), SUNDAY TIMES, <https://www.timeslive.co.za/sunday-times/business/2018-10-24-in-full-finance-minister-tito-mbowenis-2018-medium-term-budget-policy-statement> [<https://perma.cc/75K4-5EKC>].

62. *Id.*

63. *Stop Taxing Our Periods! End the #TamponTax*, CHANGE.ORG, <https://www.change.org/m/end-the-tax-on-feminine-hygiene-products-notaxontampons> [<https://perma.cc/S4ZW-2352>] (categorizing this page as a “Movement,” which is a group of similar petitions working towards a systemic change).

64. *See id.*

65. *See infra* notes 66–70.

*Times* editorialized in favor of not only repealing sales tax on menstrual products, but also ensuring their affordability and accessibility.<sup>66</sup> Policy and fiscal analyses were published by *The Economist*<sup>67</sup> and the *Washington Post*.<sup>68</sup> The American Medical Association, the largest association of physicians in the United States, issued a position statement urging states to exempt menstrual products from sales tax as sound health and medical practice.<sup>69</sup> An op-ed by constitutional scholar and Dean at University of California at Irvine, Erwin Chemerinsky, put forth legal criteria for abolishing the tax, rooted in the argument that it would alleviate discriminatory impact.<sup>70</sup> Even President Obama weighed in, reflecting that the issue was indicative of our nation's less-than-fully representative leadership, stating, "I suspect it's because men were making the laws when those taxes were passed."<sup>71</sup>

#### *a. Legislators Responded*

Starting in January 2016, and through the present,

proposals to exempt menstrual products from sales tax have been introduced or debated in legislatures in Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Louisiana, Maine, Michigan, Mississippi, Missouri, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, [and] Wisconsin—as well as the District of Columbia, New York City, and Chicago.<sup>72</sup>

The city of Chicago was the first jurisdiction in 2016 to eliminate the tampon tax.<sup>73</sup> After conducting public testimony, the City Council

66. The Editorial Bd., *End the Tampon Tax*, N.Y. TIMES (Feb. 8, 2016), <https://www.nytimes.com/2016/02/08/opinion/end-the-tampon-tax.html> [https://perma.cc/8K2W-P958].

67. S.K., *Removing the Tampon Tax is Good Politics, but What About the Economics?*, ECONOMIST (Mar. 18, 2016), <https://www.economist.com/free-exchange/2016/03/18/removing-the-tampon-tax-is-good-politics-but-what-about-the-economics> [https://perma.cc/9B4R-2WC5].

68. Sarah Larimer, *The 'Tampon Tax,' Explained*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained> [https://perma.cc/89N8-Q3N7].

69. *AMA Adopts New Policies on Final Day of Annual Meeting*, AMA (June 15, 2016), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-final-day-annual-meeting> [https://perma.cc/F597-RMB4].

70. Erwin Chemerinsky, *In Tampon Tax, a Discriminatory California Policy Lives On*, LA DAILY NEWS (Sept. 21, 2016, 12:46 PM), <http://www.dailynews.com/opinion/2016/09/21/in-tampon-tax-a-discriminatory-california-policy-lives-on-erwin-chemerinsky> [https://perma.cc/HK77-7JPE].

71. Maya Rhodan, *President Obama Doesn't Understand the 'Tampon Tax' Either*, TIME (Jan. 15, 2016), <http://time.com/4183108/obama-tampon-tax-sanitary> [https://perma.cc/QYA4-K9FH].

72. WEISS-WOLF, *supra* note 10, at 137.

73. *See id.*

passed an ordinance eliminating the portion of sales tax, city residents were charged 1.25% on menstrual product purchases.<sup>74</sup>

New York and Illinois unanimously passed laws in 2016, signed by those states' respective governors—in New York, a Democrat, in Illinois, a Republican—demonstrating that there was bipartisan commitment to the issue.<sup>75</sup> In 2016, Connecticut became the next state to eliminate the tax by legislation.<sup>76</sup> In the 2017 legislative session, Florida successfully passed a tax exemption for menstrual products, also signed by a Republican governor.<sup>77</sup>

In the nation's capital, the Washington, D.C. Council exempted menstrual products from sales tax in 2016.<sup>78</sup> It took two years for the benefit to reach consumers, however, since Mayor Muriel Bowser failed to fund the provision in the budget effective immediately.<sup>79</sup> The exemption began in October 2018.<sup>80</sup>

On Election Day 2018, Nevada voters approved the first-ever ballot measure on the tampon tax.<sup>81</sup> Starting January 1, 2019, the state's 6.85% sales tax on menstrual products will be lifted.<sup>82</sup> The lawmakers who proposed the measure made clear their intention that the state should not be funding its needs “on the backs of women.”<sup>83</sup> Given the unnecessary hurdles that have emerged in several state legislatures, some detailed below, ballot measures are an important lever for making change, and a strategy to replicate going forward.

In states where bills failed, legislative rationale has varied. In California, a bill passed in 2016, only to be vetoed by the governor on grounds of fiscal restraint; it has been reintroduced every year since then, but unable to advance.<sup>84</sup> Utah's Hygiene Tax Act was killed in committee (by an all-male panel) in 2016 and 2017; among the reasons

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74. *Id.*

75. *See id.* at 138.

76. *See id.*

77. *See id.*

78. WEISS-WOLF, *supra* note 10, at 138.

79. Avery Anapol, *DC No Longer Charging Sales Tax on Feminine Hygiene Products*, HILL (Oct. 2, 2018, 5:16 PM), <https://thehill.com/homenews/state-watch/409548-dc-no-longer-charging-sales-tax-on-feminine-hygiene-products> [<https://perma.cc/8A66-QT9V>].

80. *Id.*

81. *See* Marguerite Ward, *Nevada, Ohio Voters Eliminate the ‘Tampon Tax,’* TODAY (Nov. 7, 2018, 4:19 PM), <https://www.today.com/health/nevada-voters-eliminate-tampon-tax-midterm-elections-t141544> [<https://perma.cc/XF38-NVDZ>].

82. *See id.*

83. Jana Kasperkevic, *Nevada’s ‘Tampon Tax’ Ballot Initiative Brings up Questions About Fairness and Gender Equality*, MARKETPLACE (Nov. 1, 2018, 8:58 AM), <https://www.marketplace.org/2018/11/01/elections/nevada-s-tampon-tax-ballot-initiative-brings-questions-about-fairness-and> [<https://perma.cc/PFZ7-MGCS>].

84. *See* Chemerinsky, *supra* note 70.



for rejecting the bill were fears of a too-subjective tax code and concerns about recouping \$1 million in lost revenue.<sup>85</sup>

On the fiscal argument, legislators did not raise the prospect of making up the difference in lost revenue by taxing alternative items that could be used or purchased equally by both men and women.<sup>86</sup> Nor did they demonstrate concern about non-necessity items already chosen for sales tax exemption; in Utah, for example, this includes arcade game tokens and potato chips purchased from a vending machine.<sup>87</sup> In fact, the variety of allowable exemptions from state to state are extraordinarily subjective—ranging from kettle corn in Iowa, to gun club memberships in Wisconsin, and from Mardi Gras beads in Louisiana, to seasoned croutons in Texas.<sup>88</sup>

### *b. Non-traditional Voices*

While support for these campaigns has been widespread, there are a few notable public critics. *Washington Post* opinion writer Catherine Rampell published a 2016 column, “The Tampon Tax Fraud,” in which she argued that, because revenues generated by sales tax support public services and programs utilized with greater frequency by low-income citizens, eliminating the tampon tax undermines that greater good.<sup>89</sup> Nicole Kaeding of The Tax Foundation argues similarly, and further posits that exempting any single item from the sales tax base drains states’ coffers, putting all other items at risk of a higher rate.<sup>90</sup> These arguments are well taken, but are too limited to be persuasive. State revenues generated via sales tax should not be unequally raised by the sale of products that are a gender-specific necessity.

85. Kerry Close, *An All-Male Committee in This State Just Voted to Keep on Taxing Tampons*, TIME (Feb. 11, 2016), <http://time.com/money/4217234/tampon-tax-utah> [<https://perma.cc/2P5F-QQLC>].

86. *See id.*

87. *See* Taryn Hillin, *Utah Is Cool Waiving Taxes on Arcade Games and Vending Machine Snacks—but Not Tampons*, FUSION (Feb. 13, 2016, 1:41 PM), [https://fusion.tv/story/268632/utah-tampon-tax-arcade-games/?utm\\_source=rss&utm\\_medium=feed&utm\\_campaign=/feed](https://fusion.tv/story/268632/utah-tampon-tax-arcade-games/?utm_source=rss&utm_medium=feed&utm_campaign=/feed) [<https://perma.cc/D3DQ-6GF5>].

88. *See* Jennifer Weiss-Wolf, *Menstrual Products Are Taxed in 40 States. Here’s What You Can Buy Tax-Free*, MS.BLOG (Feb. 19, 2016), <https://msmagazine.com/blog/2016/02/19/menstrual-products-are-taxed-in-40-states-heres-what-you-can-buy-tax-free> [<https://perma.cc/K3VD-Q6CS>] (last visited Apr. 5, 2019).

89. Catherine Rampell, *The ‘Tampon Tax’ Fraud*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/the-tampon-tax-fraud/2016/01/25/fb9c7e68-c3a8-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.8219bad6ea4c](https://www.washingtonpost.com/opinions/the-tampon-tax-fraud/2016/01/25/fb9c7e68-c3a8-11e5-8965-0607e0e265ce_story.html?utm_term=.8219bad6ea4c) [<https://perma.cc/XT84-SY2J>].

90. Nicole Kaeding, *Tampon Taxes: Do Feminine Hygiene Products Deserve a Sales Tax Exemption?*, TAX FOUND. (Apr. 26, 2017), <https://taxfoundation.org/tampon-taxes-sales-tax> [<https://perma.cc/47QT-ZPTB>].

Arguments to that effect have emerged as part of an exciting development for this work: new legal scholarship dedicated to the issue of menstruation and tax policy. Leading the way is Pace Law School's Bridget Crawford; her 2017 article, *Tampon Taxes, Discrimination and Human Rights*, quoted above, is now joined by a 2018 complement, *The Unconstitutional Tampon Tax*.<sup>91</sup> Crawford sets forth legal arguments using the Equal Protection Clause to counter the tax as sex-based discrimination, and demonstrates that it would not survive the requisite intermediate scrutiny test; she goes on to show that the tax would also fail a rational basis review.<sup>92</sup> She further argues gender disparity is deeply embedded in even neutral legal structures, such as the tax system, requiring intervention.<sup>93</sup> Other contributions that provide critical analyses and detailed summaries of the movement—and, importantly, further normalize the discussion of menstruation in the arena of legal scholarship—include the following: Jennifer Bennett, *The Tampon Tax: Sales Tax, Menstrual Hygiene Products, and Necessity Exemptions*, from the University of Missouri Law School;<sup>94</sup> Victoria Hartmann, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, from Northwestern Law School;<sup>95</sup> and Christopher Cotropia and Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, from the University of Richmond School of Law and University of Chicago Law School, respectively.<sup>96</sup>

### B. Menstrual Access and the Case for Equity

In terms of practical and meaningful intervention for those who are unable to afford the expense of menstrual products, legal arguments and policies that go further than sales tax reform are necessary. A simultaneous agenda has proceeded—one that makes the case for laws that ensure menstrual products are made freely available to certain target populations—and seen rapid progress. The case for these policies is at the heart of menstrual equity.

In 2016, the New York City Council became the first U.S. jurisdiction to pass comprehensive legislation to ensure menstrual

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91. Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 439, 451 n.43 (2019).

92. *See id.*

93. *Id.* at 489.

94. Jennifer Bennett, *The Tampon Tax: Sales Tax, Menstrual Hygiene Products, and Necessity Exemptions*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 183 (2017).

95. Victoria Hartman, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U. L. REV. 313 (2017).

96. Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL STUD. 620 (2018).

access.<sup>97</sup> The laws require the city to provide tampons and pads via dispensers in bathrooms at public middle and high schools reaching 300,000 students; to provide a budget for menstrual products at all shelters overseen by the Department of Homeless Services and the Department of Health and Mental Hygiene (covering an estimated 2 million tampons and 3.5 million pads to 23,000 residents annually); and to eliminate the cap on the number of pads received by those in custody of the Department of Corrections (which had previously amounted to 11 low-quality pads per month).<sup>98</sup> (Worth noting: The formula the city used prior was that every unit of 50 was to divide 144 pads among themselves per week; this was the first time the agency was called out for its deficient formula—e.g., that 144 is not evenly divisible by 50—and admonished that the resulting number of pads would not otherwise cover an average menstrual cycle).<sup>99</sup>

New York City's was a swift, highly public, and extraordinarily effective campaign. It elevated the profile of and arguments for menstrual equity, regionally, nationally, and globally. The media that resulted was both high-quality and high-quantity, featuring personal stories from affected populations as well as the commitment of lawmakers and activists.<sup>100</sup> The publicity led to widespread support for these policies, which in turn helped to spur other cities and local jurisdictions to take similar action. Among these: The Columbus, Ohio City Council initiated a 2016 pilot program, which expanded in 2017 and 2018, to provide free menstrual products in public recreation facilities.<sup>101</sup> Los Angeles County passed an ordinance to supplement its provision of pads with tampons for those in the

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97. *Mayor de Blasio Signs Legislation Increasing Access to Feminine Hygiene Products for Students, Shelter Residents and Inmates*, NYC (July 13, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/611-16/mayor-de-blasio-signs-legislation-increasing-access-feminine-hygiene-products-students-> [<https://perma.cc/4QKE-TGZ6>] [hereinafter *Mayor de Blasio*].

98. *See id.*; see also Emily McCarty, *Let It Flow! NYC Funds Free Pads and Tampons for All Schools, Jails, and Shelters*, BITCHMEDIA (June 29, 2016, 11:27 AM), <https://www.bitchmedia.org/article/let-it-flow-nyc-funds-free-pads-and-tampons-all-schools-jails-and-shelters> [<https://perma.cc/AC2A-SV4K>]; Jennifer Peltz, *How New York Plans to Reduce Financial Barriers in Women's Hygiene*, CHRISTIAN SCI. MONITOR (June 21, 2016), <https://www.csmonitor.com/USA/USA-Update/2016/0621/How-New-York-plans-to-reduce-financial-barriers-in-women-s-hygiene> [<https://perma.cc/F24M-QG59>].

99. *See* Melissa Jeltsen, *Providing Free Pads and Tampons to Incarcerated Women Is About More than Hygiene*, HUFFINGTON POST (June 23, 2016, 3:00 PM), [https://www.huffingtonpost.com/entry/new-york-prisons-periods\\_us\\_576bfcade4b0b489bb0c901b](https://www.huffingtonpost.com/entry/new-york-prisons-periods_us_576bfcade4b0b489bb0c901b) [<https://perma.cc/8CNE-HRKE>].

100. *See, e.g.*, Chemerinsky, *supra* note 70.

101. Rick Rouan, *Columbus Recreation Centers Providing Free Tampons and Pads*, COLUMBUS DISPATCH (Jan. 17, 2017, 10:42 AM), <http://www.dispatch.com/news/20170117/columbus-recreation-centers-providing-free-tampons-and-pads> [<https://perma.cc/3GZJ-935P>].

juvenile detention system.<sup>102</sup> The San Luis Obispo County Sheriff's Office issued a policy that does the same for women at its County Jail.<sup>103</sup>

A state-by-state and federal agenda has seen similar popular support and more bipartisan buy-in throughout 2017–18:

- On January 1, 2018, new laws went into effect in California and Illinois making menstrual products freely available in public schools.<sup>104</sup> In the “Women’s Opportunity Agenda for New York” issued by Governor Cuomo in January 2018, a provision to require free menstrual products in public schools for students in grades 6–12 became law.<sup>105</sup> Another nine states, plus D.C., proposed similar legislation: Connecticut, Maryland, Michigan, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wisconsin.<sup>106</sup>
- Three of these states—Connecticut, Maryland, and New York—as well as D.C. have also put forth proposals that mandate budgets for the provision of menstrual products in shelters.<sup>107</sup> In 2017, the Maryland bill was enacted into law, requiring the state Department of Human Resources to provide certain homeless service providers and their local administering agencies with a “sufficient” supply of tampons and pads; the law links to the county board of education to ensure the needs of students are aligned and met.<sup>108</sup>
- Numerous states have taken up the cause for those who are incarcerated.<sup>109</sup> Colorado mandated funding in its budget for tampons in state prisons starting in

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102. See Tim Loc, *County Supervisors Vote to Ensure Tampon Access for Juvenile Detainees*, LAIST (Jan. 25, 2017, 12:00 AM), [http://www.laist.com/2017/01/25/supervisors\\_vote\\_for\\_tampons.php](http://www.laist.com/2017/01/25/supervisors_vote_for_tampons.php) [<https://perma.cc/2D2M-G5UW>].

103. The Tribune Editorial Bd., *Tampons Should Be Free in All County Jails—and in All Public Schools, Too*, TRIBUNE (July 25, 2018, 3:38 PM), <https://www.sanluisobispo.com/opinion/editorials/article215503790.html> [<https://perma.cc/78CH-4VNY>].

104. See Valerie Strauss, *California and Illinois Must Provide Students Free Feminine Hygiene Products*, LILY (Jan. 8, 2018), <https://www.thelily.com/california-and-illinois-must-provide-students-free-feminine-hygiene-products> [<https://perma.cc/AX6Z-UY3U>].

105. *2018 Women’s Opportunity Agenda for New York*, N.Y. STATE, <https://www.ny.gov/programs/2018-womens-opportunity-agenda-new-york> [<https://perma.cc/K2P2-4XXF>].

106. See UDC/DCSL LEGISLATION CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 1, 11 (May 2018), [https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018\\_periods\\_policy\\_report.pdf](https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf) [hereinafter UDC/DCSL].

107. See *id.* at 16.

108. *Id.*

109. See *infra* notes 110–13.

2017.<sup>110</sup> Several states—Connecticut, Kentucky, Maryland, New York, Virginia—passed laws mandating that prisons and local jails provide free menstrual products.<sup>111</sup> Arizona did so by a Department of Correction rule after legislation stalled.<sup>112</sup> 2018 polling research by the Justice Action Network shows that 90% of voters are in favor of providing free menstrual products in prisons, with robust support among Republicans (85%), Independents (91%) and Democrats (94%) alike.<sup>113</sup>

Even Capitol Hill is taking a stand. First, after the Dignity for Incarcerated Women Act (S. 1524) was introduced in July 2017 by U.S. Senators Cory Booker (D-NY), Richard Durbin (D-IL), Kamala Harris (D-CA), and Elizabeth Warren (D-MA), which included a prominent menstrual access provision,<sup>114</sup> the Department of Justice issued a guidance that tampons and pads be freely provided in all federal correctional facilities.<sup>115</sup> Now, new federal legislation is poised to be close to passage. In May 2018, the House passed bipartisan prison reform legislation, the FIRST STEP Act (H.R. 5682), introduced by U.S. Congressman Doug Collins (R-GA), with a wide array of sponsors (ten Republicans and nine Democrats), which specifically includes the provision of menstrual products at federal facilities.<sup>116</sup> President Trump has signed the bill.<sup>117</sup>

Menstrual equity has perhaps its fiercest federal champion in U.S. Congresswoman Grace Meng (D-NY), who has developed creative

110. See Jesse Paul, *Women in Colorado Prisons Will Get Free Tampons Under Amendment that Offers “a Small Piece of Dignity,”* DENVER POST (May 3, 2017, 2:29 PM), <https://www.denverpost.com/2017/05/03/colorado-prisons-free-tampon-amendment> [<https://perma.cc/W53D-4ASW>].

111. See UDC/DCSL, *supra* note 106, at 22.

112. See Amy Held, *Arizona Department of Corrections Changes Sanitary Pad Policy Following Backlash*, NPR (Feb. 15, 2018, 9:26 PM), <https://www.npr.org/sections/thetwo-way/2018/02/15/586134335/arizona-department-of-corrections-changes-sanitary-pad-policy-following-backlash> [<https://perma.cc/2XLS-2X8U>].

113. Grace Meng, Julissa Ferreras-Copeland & Jennifer Weiss-Wolf, *Women Are Finally Winning the Period Rights Fight*, NEWSWEEK (Jan. 25, 2018, 12:02 PM), <https://www.newsweek.com/women-finally-winning-period-rights-fight-790990> [<https://perma.cc/3WJY-QJMM>].

114. Dignity for Incarcerated Women Act, S. 1524, 115th Cong. (2018).

115. See Michael Alison Chandler, *Federal Prisons Must Now Provide Free Tampons and Pads to Incarcerated Women*, WASH. POST (Aug. 24, 2017), [https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated-women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee\\_story.html?utm\\_term=.2360652c6af1](https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated-women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee_story.html?utm_term=.2360652c6af1) [<https://perma.cc/W4DH-RFGX>].

116. First Step Act, H.R. 5682, 115th Cong. (2018).

117. Jamiles Lartey, *Trump Signs Bipartisan Criminal Justice Overhaul First Step Act into Law*, GUARDIAN (Dec. 21, 2018, 2:12 PM), <https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law> [<https://perma.cc/5Y8Z-R4JL>].

interventions that would ease the financial burdens of menstruation.<sup>118</sup> In 2016, she advanced a simple but meaningful policy administered by the Federal Emergency Management Agency (FEMA)—and approved by the Department of Homeland Security—allowing shelters and crisis centers to purchase menstrual products with FEMA grant funds.<sup>119</sup> These were added to the list of already approved “personal necessities” that already included toilet paper, soap, toothpaste, underwear, and diapers.<sup>120</sup> Those covered by this rule include people who are impacted or displaced by natural disasters.<sup>121</sup> However, it remains subject to local board approval from shelter to shelter; and such a rule change is not permanent, but rather subject to further updates of the manual and approvals within the Department and its leadership.

The Congresswoman introduced the first-ever federal menstrual equity legislation, the Menstrual Equity for All Act of 2017 (H.R. 972).<sup>122</sup> It would provide a refundable tax credit to low-income individuals who purchase menstrual products; require state prisons to provide menstrual products as a condition of receiving federal funding (via the Edward Byrne Memorial Justice Assistance Grant Program); and require employers with 100+ employees to provide menstrual products in workplace restrooms.<sup>123</sup>

Most recently, she advanced the Restoring Access to Medication and Modernizing Health Savings Accounts Act of 2018 (H.R. 6199).<sup>124</sup> Sponsored by Congresswoman Lynn Jenkins (R-KS), menstrual products would be covered as a qualified expense by Flexible Spending and Health Savings accounts, repealing the limitation otherwise posed by the IRS classification (described in the opening of this Article).<sup>125</sup> On July 27, 2018 the bill passed in the House.<sup>126</sup> In addition to the

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118. Press Release, Meng: FEMA to Permit Homeless Assistance Providers to Purchase Feminine Hygiene Products—Such as Tampons and Pads—with Federal Grant Funds (Mar. 1, 2016), <https://meng.house.gov/media-center/press-releases/meng-fema-to-permit-homeless-assistance-providers-to-purchase-feminine> [<https://perma.cc/6QWG-8S4Y>].

119. *See id.*

120. *Id.*

121. *About the Agency*, FEMA, <https://www.fema.gov/about-agency> [<https://perma.cc/U7NG-LBHN>].

122. Menstrual Equity for All Act, H.R. 972, 115th Cong. § 36C (2017).

123. *See generally id.*

124. Press Release, Congresswoman Grace Meng, House Passes Meng Legislation Permitting Menstrual Hygiene Products to be Purchased with Health Flexible Spending Accounts (July 27, 2018), <https://meng.house.gov/media-center/press-releases/house-passes-meng-legislation-permitting-menstrual-hygiene-products-to> [<https://perma.cc/T4X5-UH5G>].

125. *See Restoring Access to Medication and Modernizing Health Savings Accounts Act*, H.R. 6199, 115th Cong. § 7 (2018).

126. *See Morgan Gstalter, House Passes ‘Menstrual Equality’ Measure to Allow Tampon, Pad Purchases with Health Spending Accounts*, HILL (July 28, 2018, 5:23 PM), <http://the>

financial benefit reaped by employees who purchase menstrual products with pre-tax dollars, employers similarly stand to gain since they owe no Social Security tax on employee contributions to FSAs.<sup>127</sup> It is worth noting, however, that those who earn so little cannot afford to divert part or any of their salary to an FSA, and those who are unemployed are shut out of this relief.

Collectively, these legislative provisions would help make menstruation more affordable for millions. And federal activity stands to vastly elevate the politics of periods on the national stage. As a practical matter, whether leaders in Congress have the will or ability to advance the issue is quite another story, given how polarized the political landscape is in Washington. But, with vast defensive fights on deck on myriad issues related to women's bodily autonomy and reproductive health, it may also well be that menstrual policy remains a uniquely viable opportunity to make affirmative and bipartisan progress.

### III. CORRESPONDING LEGAL AND PUBLIC STRATEGY

#### A. *Litigation*

While policy advocacy has been a demonstrably productive path to achieving legal change, the courts have posed some potential—though, to date, non-definitive—alternatives. Among the various claims and legal arguments:

##### 1. *Tampon Tax*

The first litigation that was undertaken as a method for seeking tax relief was in 1989.<sup>128</sup> A group of Chicago women brought a lawsuit, *Geary v. Dominick's Finer Foods*, against a retailer as well as the City of Chicago and the city, county, and state tax authorities.<sup>129</sup> The plaintiffs successfully argued that the city should follow the state-wide classification of tampons and pads as “medical appliances.”<sup>130</sup> But in 2009, the Illinois legislature reclassified tampons as “grooming and hygiene products,” effectively reversing the outcome.<sup>131</sup> Now,

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hill.com/homenews/house/399360-house-passes-menstrual-equality-measure-for-tampon-pad-purchases-with-health [https://perma.cc/CBC2-4H3U].

127. Restoring Access to Medication and Modernizing Health Savings Accounts Act, H.R. 6199, 115th Cong. § 7 (2018).

128. See *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344, 345 (Ill. 1989).

129. See *id.*

130. *Id.* at 355.

131. Weiss-Wolf, *supra* note 11.

of course, the Chicago City Council has passed its own ordinance exempting menstrual products from the city's sales tax, as has the state of Illinois.<sup>132</sup> But the lawsuit demonstrated that the courts can potentially be part of the arsenal for the argument to advance menstrual equity.

The next attempt at litigation was initiated nearly twenty years later as a deliberate strategic intervention in the coordinated menstrual equity campaign of 2015.<sup>133</sup> In March 2016, a class-action lawsuit was filed in New York State, *Seibert v. New York State Department of Taxation & Finance*, charging that the tampon tax violates New York State Tax Law, the U.S. Constitution's Fourteenth Amendment, and the New York Constitution's Equal Protection Clause.<sup>134</sup>

The primary impetus for the lawsuit was to pressure the governor to assert that he would act once the legislature passed a law for him to sign—which it did, just one week later.<sup>135</sup> Once he signed the bill into law later in the summer of 2016, the suit went on to be settled.<sup>136</sup> The legislative win was ideal, but given the saliency of the legal arguments, it is unfortunate, the suit was mooted out before a formal judgment could be rendered. Given that New York had levied this tax for decades—millions of dollars collected over nearly eighty years—the potential for a statewide cash refund would have been an appropriate remedy (especially if it had been distributed to charitable organizations providing menstrual products, as was the intention from the start).<sup>137</sup>

Similar lawsuits have been filed making comparable (and additional) legal claims in California,<sup>138</sup> Florida,<sup>139</sup> and Ohio.<sup>140</sup> Like New York, the Florida case was voluntarily withdrawn when legislation

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132. *See id.*

133. *See* Verified Class Action Complaint, *Seibert v. N.Y. State Dep't of Taxation & Fin.* (N.Y. Sup. Ct. 2016) (No. 1).

134. *Id.*

135. *See* Audrey Huang, *Major NYC Legislations from 2016–2018 for Menstrual Equity*, MEDIUM (June 28, 2018), <https://medium.com/periodmovement/major-nyc-legislations-from-2016-2018-for-menstrual-equity-b9102619124f> [<https://perma.cc/7UFH-8HEU>].

136. *See Mayor de Blasio, supra* note 97.

137. Handel Destinvil, *New York Residents File Suit to Eliminate the “Tampon Tax,”* ABA (Mar. 29, 2016), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/ny-residents-file-suit-eliminate-tampon-tax> [<https://perma.cc/68TU-6KJH>].

138. Class Action Compl. ¶ 4, *DiSimone v. Cal.* (Cal. Super. Ct. 2016) (No. 16CV293099).

139. Class Action Compl. ¶ 1, *Wendell v. Fla. Dep't of Revenue* (Fla. Cir. Ct. 2016) (No. 43590417).

140. Class Action Compl. ¶ 1, *Rowitz v. Ohio Dep't of Taxation* (Ohio Ct. of Claims 2016) (No. 2016-00197) (dismissed without prejudice). Refiled as class action: *Rowitz v. Ohio* (Franklin City., Ohio Ct. Common Pleas 2016).



passed. The California case was dismissed on procedural grounds pertaining to the standing of the plaintiff; with the dismissal, the court also went on to state that it found no evidence of disparate impact or discriminatory intent.<sup>141</sup> The only current live case is that in Ohio, which argues on Equal Protection grounds, as well as that menstrual products should be classified as medical devices (under federal law, as per the FDA) or “durable medical equipment” (under state law), and therefore tax exempt; that case is pending appeal.<sup>142</sup> These cases are described in considerable detail in the various law review articles and notes referenced above.

## 2. *Menstrual Access*

The American Civil Liberties Union of Michigan filed a federal class action lawsuit in 2014 on behalf of eight incarcerated women against Muskegon County’s jail for inhumane and degrading policies.<sup>143</sup> Among the claims—from unsafe physical conditions to abusive protocols carried out by male guards—was refusal to provide a timely and adequate supply of menstrual products.<sup>144</sup> When a new jail opened a year after the case was filed, addressing related claims about the condition of the facilities themselves, the case was dismissed.<sup>145</sup> On the specific question regarding access to menstrual products, the court found that only deprivation, not a delay, in receiving menstrual products, would amount to a legal violation of rights under the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>146</sup>

## 3. *Workplace Discrimination*

In 2017, a Georgia woman was fired from her job at a 911 call center after leaking menstrual blood on an office chair.<sup>147</sup> The federal district court dismissed her claim, finding that she had not

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141. J. After Granting Mot. for Summ. J., *DiSimone v. Cal. Dep’t of Tax & Fee Admin.*, 2018 Cal. Super. LEXIS 1814 (Cal. Super. Ct. Jan. 29, 2018).

142. Compl., *Rowitz* (No. 2016-00197), ¶¶ 17, 21.

143. Class Action Compl., *Semelbauer et al. v. Muskegon Cty.* (W.D. Mich., S. Div. Sept. 11, 2015) (No. 14-cv-01245-JTN).

144. *Id.* ¶¶ 3–5, 7–8.

145. Order of Stipulation and Dismissal, *Semelbauer et al. v. Muskegon County* (W.D. Mich. 2015) (No. 14-cv-1245).

146. *Semelbauer et al.*, ¶ at 18 (W.D. Mich., S. Div. Sept. 11, 2015).

147. See *ACLU Settles Case on Behalf of Woman Alleging She Was Fired for Getting Her Period at Work*, ACLU GA. (Nov. 9, 2017), <https://www.acluga.org/en/news/aclu-settles-case-behalf-woman-alleging-she-was-fired-getting-her-period-work> [<https://perma.cc/AW2T-4ZDQ>].

adequately alleged discrimination on the basis of sex.<sup>148</sup> The ACLU of Georgia then filed in the Eleventh Circuit Court of Appeals, arguing that menstruation and menopause should be included under Title VII of the Civil Rights Act's prohibition of workplace discrimination on the basis of sex—in particular, under “pregnancy, childbirth, and related medical conditions.”<sup>149</sup> Ultimately the case was settled, so the potency of that argument and the use of pregnancy discrimination law as a tool for advancing menstrual equity remains untested.<sup>150</sup>

### *B. Public Discourse*

If it is true that lasting social change comes from smart policy innovation driven by an informed and motivated public, it is exponentially so for an issue so shrouded in shame and secrecy as menstruation. To counter centuries of silence, it is as essential to normalize and neutralize public dialogue as it is to win in the legislatures and the courts. This has meant ensuring that mainstream media outlets—beyond traditional mediums for women's audiences—cover the issue with a combination of quality, quantity, and clarity. Why? Eradicating stigma is one goal; educating the broader public about the plight of those who lack access is another. A third critical driver: motivating legislators to act, and assuring them that the public's will is on the side of these laws.

At the close of 2015, NPR coined the phrase, “The Year of the Period,” noting that the number of times the word menstruation was mentioned by national news outlets more than tripled from 2010 to 2015.<sup>151</sup> In April 2016, for the first time ever, *Newsweek* featured period activism as a cover story.<sup>152</sup> *Cosmopolitan* magazine designated 2015 “The Year the Period Went Public.”<sup>153</sup> Major newspapers

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148. *See id.*

149. *Id.*

150. *See id.*

151. Malaka Gharib, *Why 2015 Was the Year of the Period, and We Don't Mean Punctuation*, NPR (Dec. 31, 2015, 1:30 PM), <https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and-we-don-t-mean-punctuation> [<https://perma.cc/U47U-UBB6>].

152. Abigail Jones, *The Fight to End Period Shaming Is Going Mainstream*, NEWSWEEK (Apr. 20, 2016, 6:01 AM), <https://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html> [<https://perma.cc/PEH9-ZVNJ>].

153. *See* Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN (Oct. 13, 2015), <https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public> [<https://perma.cc/KHR3-NPJH>]; *see also* Sara Austin, *How These 3 Women Are Working to Make “Menstrual Equity” a Reality*, COSMOPOLITAN (Nov. 17, 2016), <https://www.cosmopolitan.com/sex-love/a8287266/periods-menstrual-equity-tampon-tax> [<https://perma.cc/MK7R-YTV3>].

including *The New York Times*<sup>154</sup> and *Washington Post*<sup>155</sup> published feature stories and front-page news articles on the topic in 2017 and 2018.<sup>156</sup> Social media has also been a magnet for period discourse, whether in response to Donald Trump, then on the campaign trail, accusing a debate moderator of having “blood coming out of her wherever” (causing #PeriodsAreNotAnInsult to trend on Twitter),<sup>157</sup> or to pop culture influencers weighing in on period policy ranging from comedienne Amy Schumer<sup>158</sup> to actress Janelle Monáe,<sup>159</sup> to the newly married Duchess of Sussex, Meghan Markle.<sup>160</sup>

These are among the many hundreds of high-profile headlines and hits over the past two years that have helped to normalize the discussion and add fuel and legitimacy to the menstrual equity agenda.

#### IV. NEW GENERATION OF MENSTRUAL EQUITY POLICY

The next phase for this movement promises to be even more productive, with an already-established track record, a well of strong bipartisan support—and, in new ways, alignment with the intense momentum around #MeToo, #TimesUp, and all that it means when women’s stories and experiences, for so long unacknowledged or disregarded, have become (finally) drivers of social and political change.

The need for such perspective is increasingly urgent given the likelihood of the current Congress and U.S. Supreme Court to continue to roll back hard-won protections for civil rights and reproductive justice in the coming years. Many statehouses are also emboldened to advance laws that profoundly compromise bodily autonomy and health.

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154. See, e.g., Zraick, *supra* note 1.

155. See, e.g., Michael Alison Chandler, *The Once-Whispered Topic of Women’s Menstruation Now Has Political Cachet*, WASH. POST (Aug. 7, 2017), [https://www.washingtonpost.com/local/social-issues/the-once-whispered-topic-of-womens-menstruation-now-has-political-cachet/2017/08/07/cdeae46e-68a2-11e7-8eb5-cbcc2e7bfbf\\_story.html?utm\\_term=.0fdecc38963d](https://www.washingtonpost.com/local/social-issues/the-once-whispered-topic-of-womens-menstruation-now-has-political-cachet/2017/08/07/cdeae46e-68a2-11e7-8eb5-cbcc2e7bfbf_story.html?utm_term=.0fdecc38963d) [<https://perma.cc/7LWA-TSJK>].

156. See, e.g., *id.*; Zraick, *supra* note 1.

157. Erica Schwiegershausen, *Women Are Live-Tweeting Their Periods at Donald Trump*, CUT (Aug. 11, 2015), <https://www.thecut.com/2015/08/why-not-live-tweet-your-period-at-donald-trump.html> [<https://perma.cc/9WZ4-ELL2>].

158. See Elizabeth Yuko, *What Amy Schumer Got Right (and Wrong) About Periods on SNL*, STYLECASTER (May 2018), <https://stylecaster.com/beauty/amy-schumer-periods-on-snl> [<https://perma.cc/AL2L-CYRR>].

159. See Zoe Weiner, *Janelle Monáe Perfectly Shuts Down Period Shamers*, SELF (Mar. 6, 2017), <https://www.self.com/story/janelle-monae-shuts-down-period-shamers> [<https://perma.cc/TT2U-8GB5>].

160. See Chloe Lambert, *How Meghan Markle Got the World Talking About Periods*, TELEGRAPH (May 24, 2018, 12:32 PM), <https://www.telegraph.co.uk/news/0/meghan-markle-got-world-talking-periods> [<https://perma.cc/Q3KL-269L>].

An affirmative menstrual equity agenda undergirds and fuels far-reaching goals. When we elevate menstruation as a catalyst, a core focal point, for how we consider *all* of the laws and rules by which we live, we can better evaluate whether those laws are just, practical, and equitable—and whether they enable full and fair societal participation.

The next Section will begin to envision new policy arguments and the requisite framing of solutions. Among the questions new policies might aim to address are: How might public benefits be calculated or distributed more rationally? Could workplace rules be more accommodating of menstruation, and if so, what advantage might that yield for employees and employers, alike? Might politicians view criminal justice policy and its impact on women differently if they were prone to better understand or empathize with menstruation? Can we reimagine the provision of educational curricula to be an avenue for shedding menstrual stigma? How can environmental policy impact menstrual equity? Should new campaigns to combat sex discrimination embrace menstruation?

Following is a brief overview of potential policy interventions for consideration by advocates and the legal academy. Surely, there are countless more worth exploring. In the end, the ideal is to identify how seemingly neutral policies can be adapted to acknowledge and account for, and even appreciate, how menstruating bodies function.

### *A. Public Benefits*

Income inequality overwhelmingly affects women in the United States, where nearly fourteen percent of girls and women live below the poverty line (compared to eleven percent of boys and men).<sup>161</sup> This disparity is heightened during the time span of menstruation: “Twelve million U.S. women and girls [between the ages of] 12 to 52 live below the poverty line.”<sup>162</sup>

Key programs designed to help low-income families, including SNAP (Supplemental Nutrition Assistance Program, i.e., food stamps) and WIC (Special Supplemental Nutrition Program for Women, Infants, and Children), provide monthly subsidies to purchase specific food and nutritional products.<sup>163</sup> Neither program includes menstrual

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161. See Kayla Fontenot, Jessica Semega & Melissa Kollar, *Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU (Sept. 12, 2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html> [<https://perma.cc/XG69-J9YB>].

162. Hannah Recht, *What Life Would Look Like Without the ‘Tampon Tax,’* BLOOMBERG (Oct. 30, 2018), <https://www.bloomberg.com/graphics/2018-tampon-cost> [<https://perma.cc/PP6W-3PX9>].

163. *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP’T AGRIC. (Apr. 25,

products as an allowable expense.<sup>164</sup> SNAP's classification of pads and tampons places them alongside pet food, cigarettes, and alcohol.<sup>165</sup>

The ensuing financial burden has been conspicuously absent from public debate over the scope of these programs. There are opportunities to change that. First, the SNAP program is reauthorized by Congress every five years as part of the Farm Bill—happening currently and through 2019.<sup>166</sup> Arguing for larger allowances that include menstrual products is a worthwhile messaging campaign, though one that will not likely yield immediate success. WIC is regulated by the Department of Agriculture's child nutrition legislation and this is not a time-sensitive case.<sup>167</sup> Members of Congress would benefit, though, to hear firsthand testimony of new mothers, who especially need postpartum pads as a matter of health and wellness.

An incidental benefit is that all purchases made with food stamps and WIC are already exempt by law from state sales tax.<sup>168</sup> This would mean effectively eliminating the tampon tax for the poorest women.

### *B. Workplace*

Overall, women earn eighty cents on average for every dollar a white man makes; the gap is even greater for women of color, with black women at sixty-one cents and Latinas, fifty-three cents for every dollar earned by a white man.<sup>169</sup> Managing menstruation is but one facet of the vast economic disadvantages working women face.

Potential interventions include ensuring access to menstrual products in places of employment under the argument that it would maximize employee output, attendance, and productivity. In the case of the nation's low-wage workers—who are most likely to be women, and who are least likely to be able to afford menstrual products—this reform is worthy of a thorough cost-benefit analysis.

2018), <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> [<https://perma.cc/C5VT-G54G>]; *Women, Infants, and Children (WIC)*, U.S. DEPT AGRIC. (Oct. 17, 2018), <https://www.fns.usda.gov/wic/women-infants-and-children-wic> [<https://perma.cc/5J6S-VYKX>].

164. See *The Facts. Period.*, GIRLS HELPING GIRLS PERIOD, <https://www.girlshelpinggirlsperiod.org/the-facts--period-> [<https://perma.cc/3HS2-ARAH>].

165. Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPERSBAZAAR (Oct. 9, 2017), <https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states> [<https://perma.cc/8CVH-RCF4>].

166. See Katie Costello, *Why SNAP Matters in the Farm Bill*, MINNPOST (June 7, 2018), <https://www.minnpost.com/community-voices/2018/06/why-snap-matters-farm-bill> [<https://perma.cc/76DM-XTTH>].

167. See Child Nutrition Act of 1966, 42 U.S.C. § 1786(a) (2010).

168. RETAILER SALES TAX NOTICE, U.S. DEPT AGRIC. (Aug. 23, 2017), <https://fns-prod.azureedge.net/sites/default/files/snap/Retailer-Sales-Tax-Notice.pdf>.

169. AMERICA'S WOMEN AND THE WAGE GAP, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Sept. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>.

In addition to direct corporate activism and intervention, we should call upon the federal Occupational Safety and Health Administration, which oversees and regulates certain workplace hygiene protocol and facilities, to mandate the provision of menstrual products in restrooms.<sup>170</sup> Just as it requires hand soap and dryers,<sup>171</sup> tampons and pads serve similar needs as a matter of both personal hygiene and public health.

Menstrual leave is another policy intervention that has seen growing interest. Japan began its national policy of paid days off for menstruation under its 1947 Labor Standards Law; other nations followed over the past decade, including South Korea, Indonesia, Taiwan, and parts of China (the Anhui, Shanxi, and Hebei provinces).<sup>172</sup> In 2017, Zambia passed a law requiring a day of menstrual leave per month.<sup>173</sup> A bill was introduced in the Italian Parliament in 2017 to mandate that companies grant up to three days of menstrual leave each month.<sup>174</sup>

The issue stirs fierce debate. Does a formal leave policy improve women's opportunities to compete professionally and provide job security? Or does it imply impairment and, in turn, justify discrimination? In practice, the success of these laws varies. Some have unwieldy, even humiliating medical requirements. Most tend to be under-utilized for fear of backlash.<sup>175</sup>

There are other options ripe for further exploration to address the issue in the United States, such as : including menstrual health in advocacy around paid sick leave, as well as under the federal Family and Medical Leave Act and Americans with Disabilities Act.

### *C. Criminal Justice*

Today there are more than 200,000 women incarcerated in America, and another million otherwise in contact with the criminal justice system.<sup>176</sup> In part because the system was never intended to

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170. See *OSHA: Restrooms and Sanitation Requirements*, U.S. DEPT LAB., [https://www.osha.gov/SLTC/restrooms\\_sanitation](https://www.osha.gov/SLTC/restrooms_sanitation) [<https://perma.cc/Z3QB-U5J6>].

171. See *id.*

172. See Aneri Pattani, *In Some Countries, Women Get Days Off for Period Pain*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/health/period-pain-paid-time-off-policy.html> [<https://perma.cc/YY29-D25L>].

173. See Lynsey Chutel, *Women in Zambia Are Getting an Extra Day Off per Month for Period Pain*, QUARTZ AFRICA (Feb. 4, 2017), <https://qz.com/africa/902561/zambia-has-done-for-women-what-everyone-is-still-just-talking-about> [<https://perma.cc/J5WK-28E7>].

174. See Pattani, *supra* note 172.

175. See *id.*

176. *Women in Prison*, ACLU, <https://www.aclu.org/issues/prisoners-rights/women-prison> [<https://perma.cc/YT73-SSK5>].

engage with so many women, the needs and well-being of inmates who menstruate have been inadequately addressed, as evidenced by an inconsistent patchwork of policies and protocols across the nation's vast array of correction facilities.

Worse, there is evidence of intentional degradation and punishment.<sup>177</sup> According to two recent reports—*Reproductive Health Behind Bars in California*<sup>178</sup> and *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*<sup>179</sup>—examples range from punishment for hoarding products, to a requirement that menstruating prisoners present their used pads as proof of needing extra.<sup>180</sup>

This is a failure of the state. For those who are in the government's direct custody, basic hygiene is fully the responsibility of the public sector.

State and federal legislation to address this crisis is increasingly prevalent, as referenced above. But to be fully effective, proposals regarding menstruation must address the reality that the availability of products is not simply a matter of budgeting. Rather, it directly implicates a power imbalance experienced by women who lack agency and are extremely vulnerable.

Laws should offer clear-cut guidance that leave as little room as possible for subjectivity and discretion as to the manner in which products are distributed. At New York City Council hearings in 2016, testimony was presented urging that pads be centrally placed near toilets or in a common location to avoid the need to seek permission or intervention.<sup>181</sup> Such minor accommodation to access legislation already in place could yield tremendous benefit.

#### D. Education

While there is a growing trove of research on the impact of menstruation on students in the Global South and Africa, there is little

177. See *infra* notes 178–79.

178. See MELISSA GOODMAN, RUTH DAWSON & PHYLLIDA BURLINGAME, *REPRODUCTIVE HEALTH BEHIND BARS IN CALIFORNIA*, ACLU CAL. (Jan. 2016), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2016/01/Reproductive-Health-Behind-Bars-in-California.pdf>.

179. See TAMAR KRAFT-STOLAR, *REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS*, WOMEN PRISON PROJECT CORRECTIONAL ASS'N N.Y. 1, 67 (Jan. 2015) (on file with author).

180. See GOODMAN, DAWSON & BURLINGAME, *supra* note 178; KRAFT-STOLAR, *supra* note 179.

181. See *SGPIA Students Testify to NY City Council About Importance of Access to Menstrual Hygiene Products*, NEW SCH. INT'L AFF. (June 10, 2016), <https://newschoolinternationalaffairs.org/2016/06/10/sgpia-students-testify-to-ny-city-council-about-importance-of-access-to-menstrual-hygiene-products> [<https://perma.cc/BBQ7-MAN6>].

documentation about the experience for those in the U.S. and other Western nations. Most recently, a 2018 study from the London-based Plan International UK offers long sought empirical data.<sup>182</sup> Notable findings included nearly half the female students experiencing embarrassment during their period (the figure rose to fifty-six percent of young teens) and twelve percent resorting to makeshift supplies when they could not afford or access commercial products.<sup>183</sup> Forty-nine percent admitted that they had missed at least one day of school due to their period, and many reported that menstruation distracted them during school or work.<sup>184</sup>

Availability of menstrual products for students is a necessity. Domestically, local and state laws are one avenue for ensuring access. Federal opportunities may also exist through Title IV of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7112), which accounts for financial aid distributed to states.<sup>185</sup> New legislation was proposed in October 2018—the Giving Increased Resources to Learning Students (GIRLS) Act (H.R. 6953)—that would extend the use of funding for menstrual supplies.<sup>186</sup>

An essential caveat for the provision of free products in schools is that dispensers must be marked with vital information about safe usage, such as how often tampons and pads must be changed, the dangers of not changing them frequently enough, and proper disposal. This should be supplemented in any health-related class or curricula.

A related and critical intervention is enabling open conversations about menstruation in addition to other hygiene basics and health education. Freely discussing the natural biological function in a respectful and positive way, and incorporating menstruation into the curriculum (history, literature, science), will help reduce the stigma and create an equitable learning environment.

Finally, schools that do provide support should be encouraged to collect as much feedback and data as possible—are the products helping with attendance rates? Improving classroom productivity?—to help fuel new research to better understand how supporting students during their periods enhances their ability to learn. As this is becoming better understood globally, Americans' investment in comparable research can help ensure the best outcomes for students.

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182. See Chloe Tingle & Shailini Vora, *Break the Barriers: Girls' Experiences of Menstruation in the UK*, PLAN INT'L UK 1, 8 (Jan. 2018), <https://plan-uk.org/file/plan-uk-break-the-barriers-report-032018pdf/download?token=Fs-HYP3v> [<https://perma.cc/6X7D-C8BF>].

183. See *id.* at 11, 43.

184. See *Plan International UK's Research on Period Poverty and Stigma*, PLAN INT'L UK (Dec. 20, 2017), <https://plan-uk.org/media-centre/plan-international-uks-research-on-period-poverty-and-stigma> [<https://perma.cc/AC8G-5XE2>].

185. 20 U.S.C. § 7112 (1965).

186. GIRLS Act, H.R. 6953, 115th Cong. (2018).



### *E. Environmental Justice*

Menstrual equity requires that we consider the impact of menstruation not only on our ability to engage in society—but on the safety to our bodies and the environment as a whole.

Because the FDA has oversight of the menstrual product industry, federal advocacy is the main avenue for systemic change, though similar bills have been introduced in states, including New York in 2018.<sup>187</sup> First, the above-referenced Robin Danielson Act's principal requirements are that the National Institutes of Health allocate resources for independent research into the potential hazards posed by the ingredients and/or chemical processes used in menstrual products; and that research confirm any data submitted to the FDA by manufacturers.<sup>188</sup> There is a transparency mandate as well, requiring that the results of all future independent studies submitted to the FDA be shared with Congress, the Environmental Protection Agency, and the Consumer Product Safety Commission, as well as made available to the public.<sup>189</sup>

A new companion bill was introduced in Congress in 2016, The Accurate Labeling of Menstrual Products Act (H.R. 5916), cosponsored by Congresswomen Maloney and Meng; this bill is a limited attempt to simply require the listing of ingredients on packaging.<sup>190</sup> In the immediate term, it may be a more practical, winnable step, and a way to lay the groundwork for the more sweeping Robin Danielson Act.

In the fight for transparency, we must be sure low-income populations are not overlooked in arguments or recommendations made in favor of eco-friendlier options. Products like menstrual cups or cloth pads are often not feasible for those without access to hot water, soap, and privacy; tampons and pads made with organic or all-natural ingredients tend to be more expensive.

### *F. #MeToo and the Equal Rights Amendment*

U.S. Congresswoman Carolyn Maloney released a report in August 2018, *Earn Less, Pay More: The State of the Gender Pay Gap and 'Pink Tax' in 2018*,<sup>191</sup> calling out gender-based pricing disparities

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187. *Assembly Bill A10270*, NY. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2017/a10270?intent=suppport> [<https://perma.cc/2HAB-BT99>].

188. Robin Danielson Feminine Hygiene Product Safety Act, H.R. 2379, 115th Cong. (2017).

189. *See id.*

190. Accurate Labeling of Menstrual Products Act, H.R. 5916, 114th Cong. (2016).

191. U.S. CONGRESSWOMAN CAROLYN MALONEY, "EARN LESS, PAY MORE: THE STATE OF THE GENDER PAY GAP AND 'PINK TAX' IN 2018" (Aug. 2018), <https://maloney.house.gov/sites/maloney.house.gov/files/Pink%20Tax%20report%20FINAL.pdf>

that remain prevalent in America (and are discussed above in the excerpt on the Pink Tax).<sup>192</sup> She includes the tampon tax in her call for uniform national policies to address this issue—including, and especially, a national Equal Rights Amendment.<sup>193</sup>

States Maloney: “The ERA would mean that women would no longer have to fight the pink tax product by product, or fight the gender pay gap job by job or employer by employer, and it would solve intractable problems that a piecemeal approach cannot.”<sup>194</sup>

The fight for menstrual equity falls squarely in this category. Simply stated: We cannot achieve gender equity without menstrual equity—which encompasses calls for advancing economic equity, accelerating the push for women’s agency, and ensuring educational and employment opportunities. Linking it to the renewed movement to resurrect the fight for the ERA would ensure that menstrual access falls under the sweeping umbrella of protection that the Amendment would provide. Conversely, it offers a politically salient benefit to proponents of the ERA, due to the popular and bipartisan nature of this advocacy—it is a winning partnership.

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Reframing and reforming laws to account for menstruation is a critical component to advancing gender and economic parity. At a minimum, that includes championing policies that prioritize the immediate needs of those who menstruate: access, affordability, safety, dignity—all of which translate to the ability to participate fully and equitably in society. Such arguments also offer a further catalyst for ensuring that the experiences of women and girls are better reflected in our lawmaking, and championed by our leadership.

Periods, quite amazingly, have proven to be a potent rallying force. We will be well served to continue to leverage the opportunities and success of the menstrual equity movement.

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192. *Id.*

193. *See id.*

194. *Id.*