

# The Bring Your Own Tampon Policy: Why Menstrual Hygiene Products Should Be Provided for Free in Restrooms

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*Like toilet paper, menstrual hygiene products,<sup>1</sup> such as tampons and pads, are necessities for managing natural and unavoidable bodily functions. However, menstrual hygiene products widely receive separate treatment in restrooms across the globe. While it would be absurd today to carry a roll of toilet paper at all times, it is considered necessary and common sense for all menstruators to carry menstrual hygiene products at all times, for approximately forty years, in case of an emergency. This is the “Bring Your Own*

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<sup>1</sup> In an effort to be more inclusive and cognizant of the fact that not all individuals who menstruate identify as “female,” I will use, where possible and accurate, gender neutral terms, such as “menstruators” and “menstrual hygiene,” rather than “women” and “feminine hygiene.” Furthermore, by referring to these products as exactly what they are, products to manage menstruation, instead of using euphemisms such as “feminine hygiene products” and that “time of the month,” I am seeking to encourage others to move past the “shame, embarrassment, [and] awkwardness” that people feel when discussing menstruation. Claire Coder, *Ditching Feminine Hygiene Products*, AUNT FLOW (Dec. 20, 2016), <https://www.auntflow.org/blogs/news/ditching-feminine-hygiene-products>.

*Tampon” (“BYOT”) policy and it is a violation of human rights and equal protection.*

*This Note seeks to answer four questions: (1) what is the history and impact of the BYOT policy?; (2) what progress has been made in ending the BYOT policy?; (3) what are the risks and benefits of ending the BYOT policy?; and (4) why are menstrual hygiene products, unlike toilets and toilet paper, considered luxuries instead of necessities? In addressing these questions, this Note analyzes two movements in the United States and their implications on human rights and equal protection: (1) the movement to end pay toilets and (2) the movement to end the BYOT policy. Based on this analysis, this Note posits that the BYOT policy is a violation of human rights and equal protection and needs to be flushed out across the globe.*

INTRODUCTION .....	372
I. THE HISTORY: A BRIEF LOOK INTO THE ORIGINS OF PAY TOILETS AND THE BYOT POLICY .....	374
A. <i>The Rise of Pay Toilets</i> .....	374
B. <i>The Rise of the BYOT Policy</i> .....	376
II. THE END: PAY TOILETS AS VIOLATIONS OF HUMAN RIGHTS AND EQUAL PROTECTION .....	379
A. <i>Pay Toilets Violated Human Rights and Equal Protection</i> .....	379
B. <i>The Movement to Eliminate Pay Toilets in the United States Succeeds</i> .....	383
III. THE BLOODY TRUTH: THE BYOT POLICY VIOLATES HUMAN RIGHTS AND EQUAL PROTECTION .....	384
A. <i>Human Rights to Education and Work</i> .....	385
B. <i>Human Rights to Health and Sanitation</i> .....	387
C. <i>Human Right to Equality and Equal Protection</i> .....	390
IV. THE PROGRESS: THE GRADUAL ELIMINATION OF THE BYOT POLICY .....	392
A. <i>The Movement to Eliminate the BYOT Policy in the United States</i> .....	393
B. <i>The Movement to Eliminate the BYOT Policy Outside the United States</i> .....	398
V. THE DOWNSIDE: WEIGHING THE COSTS AND BENEFITS .....	400
VI. THE SOLUTION: SOLVING THE MYSTERY BEHIND THE	

BYOT POLICY.....	404
A. <i>Menstruators Are Historically Underrepresented         in Legislatures</i> .....	405
B. <i>Menstruation Is Plagued With Debilitating Stigma</i> .....	407
CONCLUSION.....	410

## INTRODUCTION

Imagine this: you are finally on your way home after a long day at work, school, or running errands. As you are sitting in traffic, Mother Nature calls and she is not hanging up. You pull over at the nearest rest stop to answer her call but find that you must pay between \$0.74 and \$1.84<sup>2</sup> to do so. To your horror, you do not have any spare change. You start panicking, frantically searching for anyone who not only has the spare change, but who is also willing to give it to you. Just as you were about to resort to using the old newspaper from the stand outside, you finally find a knight in porcelain armor to give you the exact change you need. Though you are relieved, the stress and fear you felt cannot be eliminated.

While this seems like an exaggeration, “pay toilets” were standard devices in the United States throughout most of the twentieth century.<sup>3</sup> A “pay toilet” is a public toilet that requires payment to unlock the door and use the facility.<sup>4</sup> During their heyday, pay toilets constituted a \$30 million-a-year industry.<sup>5</sup> The supporters of pay toilets argued that the “entrance fees” would contribute to the costs of cleaning and supplying the bathrooms.<sup>6</sup> However, many opposition groups argued that pay toilets violated, among other things,

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<sup>2</sup> As of May 2018, this is the equivalent of between \$0.10 and \$0.25 in January 1968 after inflation. *CPI Inflation Calculator*, BUREAU OF LAB. STAT., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited June 24, 2018). This was the average price of using the pay toilet in 1968. See *infra* Section I.A.

<sup>3</sup> Eddie Deezen, *Many Public Toilets Used to Be Pay As You Go*, TODAY I FOUND OUT: FEED YOUR BRAIN (Aug. 23, 2012, 8:00 AM), <http://www.todayifoundout.com/index.php/2012/08/many-public-toilets-used-to-be-pay-as-you-use/>.

<sup>4</sup> Aaron Gordon, *Why Don't We Have Pay Toilets In America?*, PAC. STANDARD (Sept. 17, 2014), <https://psmag.com/economics/dont-pay-toilets-america-bathroom-restroom-free-market-90683>.

<sup>5</sup> *Group Seeks to End Pay Toilets: And It Has Had Some Success Already*, SARASOTA J., Jul. 25, 1973, § B, at 8 [hereinafter *Group Seeks to End*].

<sup>6</sup> *Id.*

basic human rights and equal protection.<sup>7</sup> As a result, pay toilets were essentially outlawed across the United States by 1980.<sup>8</sup>

In comparison, eighty-six percent (86%) of menstruators will unexpectedly start their period while in public without the necessary menstrual hygiene products.<sup>9</sup> Because menstrual hygiene products are not provided in restrooms, these individuals must frantically search for someone who not only has the products, but who is also willing to share the products. If they fail in this search, or are too humiliated to even try, these individuals must resort to unsanitary and dangerous alternative methods.<sup>10</sup> In other words, the hypothetical described above is not uncommon; in fact, for approximately 100 million people,<sup>11</sup> it is a consequence of the “Bring Your Own Tampon” (“BYOT”) policy that is a reality across the globe.<sup>12</sup>

The BYOT policy begs the following question: when pay toilets were outlawed in the United States, why were products such as toilet paper and soap made free while menstrual hygiene products were not? Like toilets and toilet paper, menstrual hygiene products are necessary to effectively and sanitarily manage natural and unavoidable bodily functions.<sup>13</sup> If pay toilets were found to be “discriminatory tax[es] on human biological functions[,]”<sup>14</sup> why were menstrual hygiene products forgotten?

Part I of this Note sets the stage with a brief discussion of the historical background of pay toilets and the BYOT policy. Part II

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<sup>7</sup> See Gordon, *supra* note 4.

<sup>8</sup> See *id.*

<sup>9</sup> FREE THE TAMPONS FOUND., THE MURPHY’S LAW OF MENSTRUATION (Harris Interactive, 2013), [http://www.freethetampons.org/uploads/4/6/0/3/46036337/ftt\\_infographic.pdf](http://www.freethetampons.org/uploads/4/6/0/3/46036337/ftt_infographic.pdf) [hereinafter MURPHY’S LAW].

<sup>10</sup> See *id.*

<sup>11</sup> Carrie Ghose, *Free the Tampons Campaign Backed by Digital Marketing Guru Nancy Kramer*, FREE TAMPONS (Oct. 16, 2013), <http://www.free-the-tampons.org/free-the-tampons-campaign-backed-by-digital-marketing-guru-nancy-kramer.html>.

<sup>12</sup> For a humorous and insightful discussion of this BYOT society, watch high school student Bridget McManamon’s TED Talk presentation in which she explores various reasons menstrual hygiene products must be more convenient and available for students. TEDx Talks, *The Bring Your Own Tampon Society | Bridget McManamon | TEDxFargo*, YOUTUBE (Sept. 12, 2017), <https://www.youtube.com/watch?v=tBpR5GiCA10>.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> Ralph Slovenko, *On Answering the Call of Nature*, 24 WAYNE L. REV. 1555, 1557 (1978).

details the end of pay toilets in the United States as protests against their violations of human rights and equal protection became widespread. Part III then compares the BYOT policy to pay toilets by analyzing the BYOT policy as a violation of several human rights, while Part IV details the current efforts and progress of ending the BYOT policy throughout the United States and across the globe. Part V discusses the consequences of ending pay toilets in the United States and the legitimate concerns involved with ending the BYOT policy. Finally, Part VI attempts to solve the mystery behind how the BYOT policy became the standard rule, despite menstrual hygiene products being as necessary and vital as toilet paper.

## I. THE HISTORY: A BRIEF LOOK INTO THE ORIGINS OF PAY TOILETS AND THE BYOT POLICY

### A. *The Rise of Pay Toilets*

The earliest record of pay toilets dates back to 74 A.D. during the rule of Titus Flavius Vespasian in Ancient Rome.<sup>15</sup> During this period, human urine was a valuable product used for a variety of activities, such as laundering, tanning leather, and teeth brushing.<sup>16</sup> Faced with repairing Rome after several civil wars left it financially unstable and physically crippled,<sup>17</sup> Emperor Vespasian saw a golden opportunity to capitalize on the high value of urine: he ordered the construction of public pay urinals, collected and sold the waste from each urinal, and imposed a Urine Tax on the waste collected and sold.<sup>18</sup> While Emperor Vespasian was widely criticized, he defended his most popular creation with the quote, “*pecunia non olet*,” which translates to “money does not smell.”<sup>19</sup>

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<sup>15</sup> Deezen, *supra* note 3; Scott Morris, *Today I Learned: Pay As You Go Toilets Used To Be A Thing*, PLUMBWORLD BLOG (May 23, 2014, 4:12 PM), <https://www.plumbworld.co.uk/blog/today-i-learned/pay-as-you-go-toilets-used-to-be-a-thing>.

<sup>16</sup> *First Pay Toilets Were Invented In Ancient Rome In 74 A.D.*, ANCIENT PAGES (Jan. 29, 2017), <http://www.ancientpages.com/2017/01/29/first-pay-toilets-were-invented-in-ancient-rome-in-74-a-d/> [hereinafter ANCIENT PAGES].

<sup>17</sup> Liz Tracey, *The Rise And Fall Of Pay Toilets*, JSTOR DAILY (Dec. 8, 2016), <https://daily.jstor.org/the-rise-and-fall-of-pay-toilets/>.

<sup>18</sup> See ANCIENT PAGES, *supra* note 16; see also Tracey, *supra* note 17.

<sup>19</sup> Deezen, *supra* note 3; Morris, *supra* note 15.

The earliest *modern* creation of public pay toilets is credited to English magician and inventor John Nevil Maskelyne.<sup>20</sup> In the late nineteenth century, Maskelyne invented a door lock that was put on public toilet stalls in London and required the insertion of a penny to unlock and use the facility.<sup>21</sup> Today, the euphemism “spend a penny” is still used throughout London when going to the “loo.”<sup>22</sup>

In the United States, the first unofficial “toilet for rent” was implemented at a Terre Haute, Indiana railroad station in 1910 and became a sort of “tourist spectacle.”<sup>23</sup> However, most credit Walt Disney as the man who installed the first official pay toilet in a commercial business in the United States when he installed a pay toilet in his popular Los Angeles café “Walt’s” in 1936.<sup>24</sup> Subsequently, pay toilets quickly spread to almost all major cities of the United States and were most commonly found in bus stations, train stations, airports, highway rest stops, gas stations, and restaurants.<sup>25</sup> By 1970, the United States had over 50,000 pay toilets.<sup>26</sup> The vast majority of these pay toilets used specialized locks that required exact change and were manufactured by companies such as Nik-O-Lok and American Coin Lock Co.<sup>27</sup>

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<sup>20</sup> *John Nevil Maskelyne: Biography, Career, Family, Death*, MAGICIANMAGAZINEONLINE (Mar. 19, 2017), <http://magiciansmag.com/magician/john-nevil-maskelyne-biography/>.

<sup>21</sup> *Pay Toilet*, MADE UP BRITAIN, [http://madeupinbritain.uk/Pay\\_Toilet](http://madeupinbritain.uk/Pay_Toilet) (last updated Oct. 5, 2016).

<sup>22</sup> Fraser McAlpine, *Fraser’s Phrases: ‘Spend A Penny,’* BBCAMERICA (2011), <http://www.bbcamerica.com/anglophenia/2011/09/frasers-phrases-spend-a-penny>.

<sup>23</sup> Peter Gruenstein, Opinion, *Pay Toilet Movement Attacks Capitalism*, BEAVER COUNTY TIMES, Sept. 4, 1975, § A at 7.

<sup>24</sup> See Deezen, *supra* note 3; Morris, *supra* note 15. While Mr. Disney originally installed pay toilets in Disneyland, after its opening received less than stellar reviews, Mr. Disney had a clear change of heart, stating it was “like inviting someone into your home and them having to pay to use the bathroom.” TODD JAMES PIERCE, *THREE YEARS IN WONDERLAND: THE DISNEY BROTHERS, C. V. WOOD, AND THE MAKING OF THE GREAT AMERICAN THEME PARK* 231 (2016). He demanded all the pay toilets be removed. *Id.*

<sup>25</sup> Deezen, *supra* note 3.

<sup>26</sup> Gordon, *supra* note 4; ANCIENT PAGES, *supra* note 16.

<sup>27</sup> Kenneth Franckling, *Ban On Pay Toilets Disputed*, DISPATCH (Lexington N.C.), Aug. 21, 1974, at 24; *see also* Gordon, *supra* note 4.

The rise of pay toilets in the United States was allegedly not a profit-earning strategy.<sup>28</sup> Rather, business owners believed that “freeloaders,” who used their restrooms to bathe, change, or find shelter,<sup>29</sup> increased instances of vandalism, sexual assaults, and exposure to dangerous materials.<sup>30</sup> Because pay toilets kept out “the trash”<sup>31</sup> by discouraging “drug addicts, homosexuals, muggers, and just plain hippies from haunting public bathrooms,”<sup>32</sup> business owners believed that requiring payment prevented unsavory individuals from using the restrooms, “encourage[d] people to take more care,” and resulted in cleaner, safer bathroom experiences.<sup>33</sup>

While installing pay toilets may not have started as a profit-making endeavor, business owners quickly realized their revenue potential.<sup>34</sup> Supporters believed that imposing a fee to use restrooms was part of the basic tenet of a free market economy: “a fee can be placed on anything for which there is a demand.”<sup>35</sup> The pay toilet industry grew to become a multi-million dollar a year industry,<sup>36</sup> with average locations earning up to \$50.00 a month and popular locations, such as high-traffic airports, earning up to \$200.00 a month.<sup>37</sup>

### B. *The Rise of the BYOT Policy*

Menstrual hygiene products have gone through centuries of development.<sup>38</sup> In 1888, Johnson & Johnson developed the first

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<sup>28</sup> Morris, *supra* note 15.

<sup>29</sup> Franckling, *supra* note 27; see Gordon, *supra* note 4.

<sup>30</sup> See Slovenko, *supra* note 14, at 1555.

<sup>31</sup> Ron Wiggins, *Comfort-For-Pay Being Flushed Out*, EVENING INDEP. (St. Petersburg, Fla.), Aug. 2, 1973, § B (Local Life), at 1.

<sup>32</sup> Gordon, *supra* note 4.

<sup>33</sup> Morris, *supra* note 15.

<sup>34</sup> A Nik-O-Lok pamphlet stated “[m]aintaining modern toilet rooms is an expense which Nik-O-Lok service can convert into a source of revenue.” Wiggins, *supra* note 31.

<sup>35</sup> Gruenstein, *supra* note 23; see Franckling, *supra* note 27.

<sup>36</sup> *Group Seeks to End*, *supra* note 5; Gruenstein, *supra* note 23.

<sup>37</sup> *Group Seeks to End*, *supra* note 5. After adjusting for inflation, these locations would now earn between \$280.00 and \$1,135.84.

<sup>38</sup> For a comprehensive history of feminine hygiene products, see, for example, Lecia Bushak, *A Brief History of the Menstrual Period: How Women Dealt with Their Cycles Throughout the Ages*, MED. DAILY (May 23, 2016, 9:00 AM), <http://www.medicaldaily.com/menstrual-period-time-month-history-387252>; Ashley Fetters, *The Tampon: A History*, ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/>

commercially available disposable pads, called Lister's Towels,<sup>39</sup> which were sold for \$0.25 each.<sup>40</sup> In 1920, nurses in World War One began using wood bandages as menstrual hygiene products, which were then put on the market as "Curads" by Kotex and worn with a reusable sanitary belt.<sup>41</sup> Curads cost \$0.05 each or \$0.60 for a pack of twelve.<sup>42</sup>

In 1929, Dr. Earle Haas developed the first commercially available tampon.<sup>43</sup> By 1933, Dr. Haas obtained a patent for his invention, combining the terms "tampon" and "vaginal packs" to name his creation Tampax.<sup>44</sup> Tampax cost \$0.25 for a pack of six tampons,<sup>45</sup> or between \$0.35 and \$0.45 for a box of ten.<sup>46</sup> Shortly after, Kotex put its Fibs tampons on the market for \$0.25 for a box of twelve.<sup>47</sup>

Now, menstrual hygiene products constitute a \$2 billion industry in the United States.<sup>48</sup> The average person menstruates for three to

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394334/; Carly Jacobs, *A Brief History of Feminine Hygiene Products*, SMAGGLE, <http://www.smaggle.com/history-of-feminine-hygiene-products/> (last visited Jan. 3, 2018).

<sup>39</sup> Bushak, *supra* note 38.

<sup>40</sup> *Id.*; *Lister's Towels Disposable Menstrual Napkins (Ads)*, MUSEUM OF MENSTRUATION & WOMAN'S HEALTH, <http://www.mum.org/listers.htm> (last visited Oct. 2, 2018) [hereinafter *Lister's Towels*].

<sup>41</sup> *Curads Kotex (Ads)*, MUSEUM OF MENSTRUATION & WOMEN'S HEALTH, <http://www.mum.org/CuradsKotexads.htm> (last visited Oct. 2, 2018); Jacobs, *supra* note 38.

<sup>42</sup> *See First Kotex Sanitary Napkin Ad in a Magazine (January 1921), and the First Kotex Ad Campaign*, MUSEUM OF MENSTRUATION & WOMEN'S HEALTH, <http://www.mum.org/kotexadwords.htm> (last visited Oct. 2, 2018).

<sup>43</sup> Bushak, *supra* note 38; Lilian Min, *How Much Have Tampon and Pad Prices Changed Through the Decades?*, HELLO GIGGLES (Feb. 24, 2016, 3:52 PM), <https://hellogiggles.com/lifestyle/tampon-pad-prices-decades-graphics/>.

<sup>44</sup> Fetters, *supra* note 38.

<sup>45</sup> *See Min, supra* note 43; *Is This the First Tampax Menstrual Tampon? Or the First Menstrual Tampon, Period?*, MUSEUM OF MENSTRUATION & WOMEN'S HEALTH, <http://www.mum.org/tampax34.htm> (last visited Oct. 2, 2018) [hereinafter *First Tampax Menstrual Tampon*].

<sup>46</sup> Fetters, *supra* note 38; *First Tampax Menstrual Tampon, supra* note 45.

<sup>47</sup> *See Two Ads for Fibs, 1935 and 1939, the First Successful Kotex Menstrual Tampon*, MUSEUM OF MENSTRUATION & WOMEN'S HEALTH, <http://www.mum.org/FibsAd.htm> (last visited Oct. 2, 2018).

<sup>48</sup> Jennifer Weiss-Wolf, *America's Very Real Menstrual Crisis*, TIME (Aug. 11, 2015), <http://time.com/3989966/america-menstrual-crisis/> [hereinafter *Real Menstrual Crisis*].



seven days each month<sup>49</sup> for approximately forty years.<sup>50</sup> In other words, the average menstruator will experience 480 periods, each lasting approximately one week. Therefore, the average menstruator will use approximately 16,800 tampons and pads during their lifetime.<sup>51</sup> With prices ranging between \$0.18 and \$0.30 per item,<sup>52</sup> one individual may spend between \$3,024.00 and \$5,040.00 on menstrual hygiene products during their lifetime, not including any sales tax.<sup>53</sup> However, the majority of states also charge a sales tax on menstrual hygiene products, commonly referred to as the “Tampon Tax.”<sup>54</sup> Although not all states tax menstrual hygiene products, in the thirty-six states that do,<sup>55</sup> these taxes add an additional financial

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<sup>49</sup> Jessica Kane, *Here's How Much a Woman's Period Will Cost Her over a Lifetime*, HUFFPOST, [https://www.huffingtonpost.com/2015/05/18/period-cost-lifetime\\_n\\_7258780.html](https://www.huffingtonpost.com/2015/05/18/period-cost-lifetime_n_7258780.html), (last updated Dec. 6, 2017).

<sup>50</sup> See Office on Women's Health, U.S. Dep't. Health & Human Servs., *What Happens During the Typical 28-day Menstrual Cycle?*, WOMENSHEALTH.GOV, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> (last visited Jan. 3, 2018).

<sup>51</sup> *Real Menstrual Crisis*, *supra* note 48.

<sup>52</sup> See Min, *supra* note 43.

<sup>53</sup> It should be noted that not all menstruators use both tampons and pads, and not all menstruators use tampons or pads at all. Additionally, some use a combination of both. Therefore, the total amount spent on menstrual hygiene products throughout a person's lifetime will vary depending on their chosen method.

<sup>54</sup> See *infra* notes 177–81 and accompanying text; see also Taryn Hillin, *These Are the U.S. States that Tax Women for Having Periods*, SPLINTERNEWS (Jun. 3, 2015, 12:33 PM), <https://splinternews.com/these-are-the-u-s-states-that-tax-women-for-having-per-1793848102>. To be clear, these sales taxes do not actually impose a special tax unique to menstrual hygiene products. See Patrick Gleason, Opinion, *The Phony Feminism of Tampon Tax Repeal*, USA TODAY (Aug. 31, 2017, 3:15 AM), <https://www.usatoday.com/story/opinion/2017/08/31/tampon-tax-repeal-movement-dishonest-political-gimmick-patrick-gleason-column/589595001/>. Rather, the name Tampon Tax refers to the fact that, while “non-luxury” and “necessity” items such as “groceries, food stamp purchases, medical purchases (prescriptions, prosthetics, some over-the-counter drugs), clothes (in some states), and agriculture supplies” are exempt from such taxes, menstrual hygiene products are not listed under such exemptions. Hillin, *supra*; see 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/?utm\\_term=.04bdca1dd63a](https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/?utm_term=.04bdca1dd63a); Emily Peck, *Free Tampons Should Be a Human Right*, HUFFPOST (Mar. 8, 2016, 1:17 PM), [https://www.huffingtonpost.com/entry/free-tampons-human-right\\_us\\_56deffbce4b03a40567a1e33](https://www.huffingtonpost.com/entry/free-tampons-human-right_us_56deffbce4b03a40567a1e33).

<sup>55</sup> See *infra* Section IV.A for a more in-depth discussion of the efforts to repeal the Tampon Tax.

burden on menstruators that ranges from 4.7%<sup>56</sup> to 10.25%.<sup>57</sup> In some locations, menstrual hygiene products bring in over \$20 million annually in taxes.<sup>58</sup>

## II. THE END: PAY TOILETS AS VIOLATIONS OF HUMAN RIGHTS AND EQUAL PROTECTION

Like a scene straight out of *Urinetown*,<sup>59</sup> people began protesting pay toilets as “a disgrace”<sup>60</sup> and an “unethical infringement on basic human rights”<sup>61</sup> in the late 1960s and throughout the 1970s. Pay toilets made “the satisfaction of [a] basic biological need contingent on the availability of small change, thus exploiting human discomfort for commercial purposes.”<sup>62</sup> Further, pay toilets made it almost impossible to find a place to go to the restroom in public without exact change, which resulted in not only pain and humiliation, but also in a public health risk from the increased occurrence of public defecation and urination.<sup>63</sup>

### A. Pay Toilets Violated Human Rights and Equal Protection

The opposition to pay toilets consisted of an unlikely group of leaders: four students from Dayton, Ohio who were fed up with the

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<sup>56</sup> *Utah Sales Tax Rate*, AVALARA TAX RATES, <http://www.taxrates.com/state-rates/utah> (last visited Oct. 2, 2018).

<sup>57</sup> *California Sales Tax Rate*, AVALARA TAX RATES, <https://www.taxrates.com/state-rates/california> (last visited Oct. 2, 2018).

<sup>58</sup> Nina Bahadur, *This Is How Much Your Period Costs*, SELF (Mar. 2, 2016), <https://www.self.com/story/this-is-how-much-your-period-costs>.

<sup>59</sup> *Urinetown*, which opened on Broadway on September 20, 2001 and won three Tony Awards, is a musical dramedy that takes place in a futuristic world where the government has enforced a ban on private toilets and all residents of Urinetown must pay for the privilege to use the restroom. *Urinetown: The Musical*, PLAYBILL, <http://www.playbill.com/production/urinetown-the-musical-henry-millers-theatre-vault-0000013327> (last visited Oct. 2, 2018).

<sup>60</sup> Wiggins, *supra* note 31.

<sup>61</sup> Gordon, *supra* note 4.

<sup>62</sup> Wiggins, *supra* note 31.

<sup>63</sup> See Deezen, *supra* note 3; see also Scott M. Solkoff, *If the Law Is a Jealous Mistress, What Ever Happened to Pay Toilets? A Digest of the Legally Profound*, 17 NOVA L. REV. 715, 720 (1993); Felicia R. Lee, *The Homeless Sue for Toilets in New York*, N.Y. TIMES (Nov. 1, 1990), <http://www.nytimes.com/1990/11/01/nyregion/the-homeless-sue-for-toilets-in-new-york.html>.

abundance of pay toilets used along the Pennsylvania Turnpike.<sup>64</sup> In 1968, brothers Ira and Michael Gessel, along with their friends, Steve Froikin and Natalie Precker, formed the Committee to End Pay Toilets in America (“CEPTIA”).<sup>65</sup> CEPTIA’s goal was to use legislation and public pressure to eliminate pay toilets across the United States.<sup>66</sup>

While CEPTIA had only forty-eight members and one chapter at the time of its first meeting in June 1970,<sup>67</sup> it quickly grew in popularity and, by 1973, had approximately 1,400 members and chapters in Philadelphia, Los Angeles, Chicago, Boston, and, of course, Dayton.<sup>68</sup> CEPTIA charged \$0.25 for lifetime membership, published a quarterly newspaper titled the “Free Toilet Paper,” and equipped its members with “effective weapons of guerrilla warfare in the form of . . . bumper stickers”<sup>69</sup> and “tee shirt[s] with the official CEPTIA insignia of a clenched fist arising out of a toilet bowl and grasping a shackled pullchain.”<sup>70</sup>

Another group called itself the Free Latrines Unlimited for Suffering Humanity (“F.L.U.S.H.”).<sup>71</sup> Sacramento Union columnist Tom Horton founded the group on the premise that “you don’t stop having to go just because you don’t have the correct change in your

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<sup>64</sup> Gordon, *supra* note 4.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See Group Seeks to End, supra* note 5.

<sup>69</sup> Gordon, *supra* note 4. CEPTIA taught four methods of tricking the pay toilet lock system:

the “American Crawl,” in which the urgent victim crawls under the stall door . . . ; the “Doorman,” where one individual sacrifices his or her dime and then holds the door open for others; “Stick It,” which involves placing a piece of invisible tape over the locking mechanism so it can’t engage; and “The Stuff,” where some unused toilet paper is lodged into the locking mechanism.

*Id.*

<sup>70</sup> Wiggins, *supra* note 31.

<sup>71</sup> Kelly Faircloth, *The 1970s Feminist Fight Against Pay Toilets*, JEZEBEL: PICTORIAL (Apr. 26, 2016, 2:35 PM), <https://pictorial.jezebel.com/the-1970s-feminist-fight-against-pay-toilets-1773143625>; *see also* Peter Fimrite, *Tom Horton -- Writer and Owner of Stinson Beach Grill*, SFGATE (Dec. 14, 2006, 4:00 AM), <http://www.sfgate.com/bayarea/article/Tom-Horton-writer-and-owner-of-Stinson-Beach-2465364.php>.

pocket.”<sup>72</sup> F.L.U.S.H. members sang “Buddy, can you spare a dime?” at protests and supported bills that called for the end of pay toilets.<sup>73</sup>

Although some locations saw positive results after installing pay toilets,<sup>74</sup> many pay toilets actually resulted in dirtier restrooms and more vandalism.<sup>75</sup> Patrons, angry about “having to pay for the basic necessities,”<sup>76</sup> trashed pay stalls and left them for the next unknowing patron to discover and use.<sup>77</sup> Even if patrons paid the necessary fee, they would often find the stall out of toilet paper or in an unsanitary and disgusting state.<sup>78</sup> Additionally, many pay stalls were broken into to avoid the payment<sup>79</sup> and thieves broke the lock boxes to steal the collected money.<sup>80</sup> Furthermore, people were often caught in an emergency situation without the necessary change and had to scramble to find the money or face the humiliation of doing their business in public.<sup>81</sup> In fact, many cities were riddled with the problem of people relieving themselves in public, usually on the city streets.<sup>82</sup> The problem was so bad in New York City that the city began to be referred to as the “city of fluids.”<sup>83</sup>

Manufacturers of pay toilets asserted that most popular locations had both pay toilets and free toilets, and therefore patrons had a choice of which to use.<sup>84</sup> In reality, however, even if there were free stalls available, the lines to use them were extremely long, the free stalls were in even *worse* condition than the already disgusting pay

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<sup>72</sup> Faircloth, *supra* note 71.

<sup>73</sup> *Id.*; *Pay Privy Smashed In Protest*, EUGENE REGISTER-GUARD, May 4, 1969, at 11E [hereinafter *Pay Privy Smashed*]. The group also used more subtle forms of protest: holding the stall door open for the next person or propping it open with a broom or other object, and getting airport bartenders and other workers to support the cause by withholding \$0.10 from their tip and telling them it was to use the bathroom. *Id.*

<sup>74</sup> See Franckling, *supra* note 27.

<sup>75</sup> See Morris, *supra* note 15.

<sup>76</sup> Franckling, *supra* note 27.

<sup>77</sup> See Morris, *supra* note 15.

<sup>78</sup> *Id.*; see Deezen, *supra* note 3.

<sup>79</sup> See Deezen, *supra* note 3.

<sup>80</sup> See Morris, *supra* note 15.

<sup>81</sup> See *Group Seeks to End*, *supra* note 5.

<sup>82</sup> Solkoff, *supra* note 63, at 720.

<sup>83</sup> *Id.*

<sup>84</sup> Franckling, *supra* note 27; see also *Group Seeks to End*, *supra* note 5.

stalls, and sometimes the free stalls were not equipped with a lock or a door at all.<sup>85</sup> Accordingly, the very existence of pay toilets acted as a kind of “psychological blackmail”: they sent the message that there was a good reason to use the pay toilet over the free toilet, and gave an individual the choice of either using the pay stall or dying of a “loathsome disease” from using the free toilet.<sup>86</sup>

The rebellion against pay toilets included another unlikely group of leaders: women.<sup>87</sup> Men often escaped the financial burden and social humiliation of having to pay to use the restroom, as urinals did not require a door, which were necessary to install the locks on all pay toilets.<sup>88</sup> In contrast, because of their need to always use closed stalls, women were always subjected to this heightened financial burden and social humiliation.<sup>89</sup> Accordingly, “pay toilets [were] directly discriminatory toward about one-half [of] the population – women.”<sup>90</sup>

Several women and women’s groups proposed legislation banning the use of pay toilets and filed lawsuits against municipalities that used pay toilets.<sup>91</sup> The Women’s Coalition to End Pay Toilets reported that “men ha[d] more than four times as many free toilet facilities at the airport as women.”<sup>92</sup> The National Organization of Women argued that the “unequal economic burden” violated several public accommodation laws and both state and federal Equal Protection amendments.<sup>93</sup>

On April 26, 1969, California assemblywoman March Fong Eu, surrounded by a group of women protesting the use of pay toilets in public buildings, smashed a porcelain toilet on the steps of the California capitol building.<sup>94</sup> While CEPTIA began its movement against pay toilets solely under the contention that they were violations of human and civil rights, by 1973, the group fully embraced

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<sup>85</sup> See *Group Seeks to End*, *supra* note 5.

<sup>86</sup> Wiggins, *supra* note 31.

<sup>87</sup> See Gordon, *supra* note 4; see also Faircloth, *supra* note 71.

<sup>88</sup> Faircloth, *supra* note 71.

<sup>89</sup> See Gordon, *supra* note 4; see also Solkoff, *supra* note 63, at 720; Faircloth, *supra* note 71.

<sup>90</sup> Wiggins, *supra* note 31.

<sup>91</sup> Deezen, *supra* note 3.

<sup>92</sup> Faircloth, *supra* note 71.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

and adopted the argument that pay toilets were sexually discriminatory.<sup>95</sup>

B. *The Movement to Eliminate Pay Toilets in the United States Succeeds*

While manufacturers and supporters of pay toilets believed “a toilet is not a right but a privilege offered by a locality,”<sup>96</sup> legislatures and judiciaries disagreed. After the founders of CEPTIA held a press conference in Chicago on January 11, 1973, in which they asserted that pay toilets were a discriminatory violation of human rights, Chicago Mayor Richard J. Daley announced that Chicago would be the first city to remove pay toilets from the city’s airports.<sup>97</sup> In March of 1973, Chicago banned pay toilets by passing its “free toilet law.”<sup>98</sup>

After campaigning on her longstanding crusade against pay toilets, Mrs. Fong Eu achieved one of the greatest political triumphs of 1974 when she was nominated for California Secretary of State,<sup>99</sup> and California subsequently passed its own legislation banning pay toilets in public buildings.<sup>100</sup> In 1975, the New York Assembly enacted a statute prohibiting the operation of “pay toilet facilities” on “any real property in the State.”<sup>101</sup> The New York statute’s legislative history contains the following passage: “[p]ay toilet facilities are essentially a tax on human biological functions. In addition, it is a discriminatory tax, in that women often have no choice but to use these pay facilities, while men frequently have access to free toilet facilities.”<sup>102</sup>

Pay toilet manufacturers immediately filed lawsuits in response to the movement, claiming that the free toilet laws violated equal protection in that they applied “only to pay toilets, not to toilets that

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<sup>95</sup> See Gordon, *supra* note 4; Wiggins, *supra* note 31.

<sup>96</sup> Franckling, *supra* note 27.

<sup>97</sup> Gordon, *supra* note 4.

<sup>98</sup> Franckling, *supra* note 27.

<sup>99</sup> Edward P. Butler, *This Is the Year For Women in Politics*, LODI NEWS-SENTINEL (Ca.), Aug. 29, 1974, at 6.

<sup>100</sup> Faircloth, *supra* note 71.

<sup>101</sup> William J. Curran, *The Constitutionality of Prohibiting the Operation of Pay Toilets*, 67 AM. J. PUB. HEALTH & L. 1205, 1205 (1977).

<sup>102</sup> *Nik-O-Lok Co. v. Carey*, 378 N.Y.S.2d 936, 938 (Sup. Ct.), *aff’d*, 384 N.Y.S.2d 211 (N.Y. App. Div. 1976), *aff’d*, 392 N.Y.S.2d 393 (1977).

were locked with a key.”<sup>103</sup> However, the courts upheld the statutes and stated “that the equal protection clause applies to people, not toilets.”<sup>104</sup> After Chicago became “the first American city to ban pay toilets altogether” in 1973,<sup>105</sup> Alaska, Wyoming, Florida, Iowa, Nevada, Ohio, Tennessee, Maryland, Michigan, New Mexico, and New Jersey enacted similar legislation throughout the decade,<sup>106</sup> and by 1980, almost every toilet in America was free.<sup>107</sup>

### III. THE BLOODY TRUTH: THE BYOT POLICY VIOLATES HUMAN RIGHTS AND EQUAL PROTECTION

Menstrual hygiene management<sup>108</sup> is vital for the health, well-being, education, and success of menstruators across the country.<sup>109</sup> Accordingly, like access to free and sanitary restrooms, menstrual hygiene is linked to several human rights.<sup>110</sup> However, menstrual hygiene products, unlike restrooms and toilet paper, are treated as

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<sup>103</sup> *Nik-O-Lok Co.*, 378 N.Y.S.2d at 938; Solkoff, *supra* note 63, at 720.

<sup>104</sup> *Nik-O-Lok Co.*, 378 N.Y.S.2d at 939; Solkoff, *supra* note 63, at 720.

<sup>105</sup> Gordon, *supra* note 4.

<sup>106</sup> *See id.*; *see also* Gruenstein, *supra* note 23; Slovenko, *supra* note 14, at 1557.

<sup>107</sup> Gordon, *supra* note 4; Deezen, *supra* note 3; Tracey, *supra* note 17.

<sup>108</sup> “Menstrual hygiene management” is a term used to refer to the best environmental factors and practices needed for safe, effective, and dignified menstrual hygiene. *See* Amanda Klasing, *Menstrual Hygiene Day Links Periods and Human Rights*, HUM. RTS. WATCH (May 28, 2014, 11:29 AM), <https://www.hrw.org/news/2014/05/28/menstrual-hygiene-day-links-periods-and-human-rights>; *Menstrual Hygiene Management*, WASH UNITED, <http://www.wash-united.org/our-work/issues/menstrual-hygiene-management/articles/our-work-issues-menstrual-hygiene-management> (last visited Jan. 3, 2018) [hereinafter *Menstrual Hygiene Management*].

<sup>109</sup> *See* LAURA KEIHAS, UNICEF, *MENSTRUAL HYGIENE IN SCHOOLS IN 2 COUNTRIES OF FRANCOPHONE WEST AFRICA: BURKINA FASO AND NIGER CASE STUDIES IN 2013*, at 6, [https://www.unicef.org/wash/schools/files/MHM\\_study\\_report\\_Burkina\\_Faso\\_and\\_Niger\\_English\\_Final.pdf](https://www.unicef.org/wash/schools/files/MHM_study_report_Burkina_Faso_and_Niger_English_Final.pdf); Annamarya Scaccia, *The Price Young Girls Pay When Tampons Aren't Free*, BROADLY (Feb. 29, 2016, 12:15 PM), [https://broadly.vice.com/en\\_us/article/pg7n8m/the-price-young-girls-pay-when-tampons-arent-free](https://broadly.vice.com/en_us/article/pg7n8m/the-price-young-girls-pay-when-tampons-arent-free).

<sup>110</sup> *See* Human Rights Initiative, *Menstrual Hygiene Day*, CENT. EUR. U. (Oct. 27, 2015), <https://hrsi.ceu.edu/news/2015-10-27/menstrual-hygiene-day>; Abigail Jones, *The Fight to End Period Shaming Is Going Mainstream*, NEWSWEEK (Apr. 20, 2016, 6:01 AM), <http://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html>; Klasing, *supra* note 108.

“luxury goods” rather than necessities.<sup>111</sup> This disparate treatment arguably violates several human rights,<sup>112</sup> including, “most importantly the right to human dignity.”<sup>113</sup>

According to the Universal Declaration of Human Rights (“UDHR”),<sup>114</sup> “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>115</sup> As the Human Rights Initiative at the Central European University explains: “[a]ll human rights stem from the fundamental right to human dignity. When people who are bleeding every month are forced into seclusion, must use damp and soiled materials, are treated as second class citizens, dignity is difficult to maintain.”<sup>116</sup> Furthermore, the BYOT policy has significant negative implications on the human rights to education and work, health, sanitation, and equality.<sup>117</sup>

#### A. *Human Rights to Education and Work*

The UDHR states the following in regard to human rights bestowed upon all individuals: that “[e]veryone has the right to work . . . and [to have] just and favourable conditions of work”<sup>118</sup>; that “[e]veryone has the right to education”<sup>119</sup> and that “[e]ducation shall be directed to the full development of the human personality and to

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<sup>111</sup> Peck, *supra* note 54; see Kane, *supra* note 49 (defining the “pink tax” as “the price discrepancy that comes with purchasing female-branded products that are essentially identical to male products”); Min, *supra* note 43.

<sup>112</sup> See Bridget J. Crawford & Carla Spivack, *Human Rights and the Taxation of Menstrual Hygiene Products in an Unequal World*, in HUMAN RIGHTS AND TAX IN AN UNEQUAL WORLD (Philip G. Alston & Nikki Reisch eds.) (forthcoming 2018) (manuscript at III.A–E), available at <https://ssrn.com/abstract=30005700>; Office of the High Commissioner, U.N. Human Rights, Every Woman’s Right to Water, Sanitation and Hygiene, (Mar. 14, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrightto watersanitationandhygiene.aspx>.

<sup>113</sup> Office of the High Commissioner, *supra* note 112.

<sup>114</sup> The Universal Declaration of Human Rights is the foundational document that delineates the human rights that should be recognized by all member states. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

<sup>115</sup> *Id.* at Preamble.

<sup>116</sup> Human Rights Initiative, *supra* note 110.

<sup>117</sup> See Crawford & Spivack, *supra* note 112, at III.A–E.

<sup>118</sup> G.A. Res. 217 (III) A, *supra* note 114, at art. 23.1.

<sup>119</sup> *Id.* at art. 26.1.



the strengthening of respect for human rights and fundamental freedoms.”<sup>120</sup>

Studies show that inadequate access to menstrual hygiene products impacts the ability to go to school, work, and earn money.<sup>121</sup> Individuals who do not have access to menstrual hygiene products often miss work and school during menstruation,<sup>122</sup> either to recover from infections and diseases<sup>123</sup> or to hide away from the humiliation and stress of going to work or school without easy access to the necessary protection.<sup>124</sup> In fact, seventy-two percent (72%) of menstruators in emergency situations without the essential products leave work or school early out of stress, humiliation, panic, and the need to get the necessary protection.<sup>125</sup> In general, menstruating unexpectedly at work or school is a disruptive, stressful experience that

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<sup>120</sup> *Id.* at art. 26.2.

<sup>121</sup> See Eleanor Goldberg, *Why Many Native American Girls Skip School When They Have Their Periods*, HUFFPOST (Aug. 25, 2017, 9:34 AM), [https://www.huffingtonpost.com/entry/what-its-like-to-be-a-teen-in-the-us-who-cant-afford-tampons\\_us\\_597216dde4b09e5f6cceddff](https://www.huffingtonpost.com/entry/what-its-like-to-be-a-teen-in-the-us-who-cant-afford-tampons_us_597216dde4b09e5f6cceddff) (last updated Aug. 29, 2017) [hereinafter *Why Many Native American Girls*]; Klasing, *supra* note 108; see also Katherine Austin-Evelyn, *Blood, Sweat, and Tears: How Menstruation Holds Women and Girls Back*, INT’L WOMEN’S HEALTH COALITION (Mar. 3, 2016), <https://iwhc.org/2016/03/blood-sweat-and-tears-how-menstruation-holds-women-and-girls-back/>.

<sup>122</sup> See Scaccia, *supra* note 109; Sugata Roy, *Menstrual Hygiene Key to Keeping Girls in School*, UNICEF INDIA (Mar. 19, 2011), <http://unicef.in/Story/122/Menstrual-Hygiene-Key-to-Keeping-Girls-in-School>.

<sup>123</sup> ENDEVA INSIGHT & ASHLEY INSIGHT, WORLD BANK GRP., CHANGING THE LIVES OF WOMEN AND GIRLS THROUGH AFFORDABLE FEMININE HYGIENE PRODUCTS 1 (Elaine Tinsley & Natalia Agapitova eds., 2017).

<sup>124</sup> See *id.*; see also, e.g., Katie Mettler, ‘They’re as Necessary as Toilet Paper’: New York City Council Approves Free Tampon Program, WASH. POST (June 23, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/23/menstrual-equity-ny-city-council-approves-giving-away-tampons-to-women-in-schools-prisons-and-homeless-shelters/?utm\\_term=.157270884841](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/23/menstrual-equity-ny-city-council-approves-giving-away-tampons-to-women-in-schools-prisons-and-homeless-shelters/?utm_term=.157270884841); Jennifer Weiss-Wolf, *Blood In The Streets*, BEYOURSELF (Jan. 12, 2016), <https://byrslf.co/blood-in-the-streets-bf578a1b9634>; Jennifer Weiss-Wolf & Dasha Burns, *Why Feminine Hygiene Products Should Be Free In School*, NEWSWEEK (Apr. 20, 2016, 11:36 AM), <http://www.newsweek.com/let-girls-learn-michelle-obama-tampons-pads-education-450244>.

<sup>125</sup> AUNT FLOW, <https://www.goauntflow.com/> (last visited June 24, 2018); see MURPHY’S LAW, *supra* note 9 (finding that when menstruators “unexpectedly started their period,” “62% went to a store immediately to buy supplies” and “34% went home immediately to get feminine supplies”).

adversely affects productivity due to the anxiety encompassing the lack of necessary menstrual hygiene products.<sup>126</sup>

### B. *Human Rights to Health and Sanitation*

Additionally, it is “the right of everyone” to enjoy “the highest attainable standard of physical and mental health”<sup>127</sup> that is “conducive to living a life in dignity.”<sup>128</sup> This includes access to “facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health”<sup>129</sup> and “the underlying determinants of health, . . . such as access to . . . adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>130</sup>

Due to high costs, many individuals cannot afford menstrual hygiene products and are forced to use dirty and unsafe materials—such as rags, newspapers, and leaves—to manage their periods.<sup>131</sup> Additionally, because menstrual hygiene products are not readily available in restrooms, seventy-nine percent (79%) of those caught in an emergency situation without the essential products resort to creating their own makeshift products by using toilet paper, socks, paper towels, or napkins.<sup>132</sup> This poor and improper hygiene is linked to several health problems,<sup>133</sup> including high rates of cervical

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<sup>126</sup> See Elizabeth Segran, *Bleeding On The Job: A Menstruation Investigation*, FAST COMPANY (July 25, 2016), <https://www.fastcompany.com/3061417/bleeding-on-the-job-a-menstruation-investigation>; see also Emma Court, *If Paper Towels Are Free in Public Restrooms, Why Aren't Tampons?*, MARKETWATCH (Nov. 29, 2017, 10:43 AM), <https://www.marketwatch.com/story/if-paper-towels-are-free-in-public-restrooms-why-arent-tampons-2017-10-26>.

<sup>127</sup> G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 12 (Dec. 16, 1966).

<sup>128</sup> Gen. Comm. No. 14 on The Right to the Highest Attainable Standard of Health, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/4 (Aug. 11, 2000), at para. 1.

<sup>129</sup> *Id.* at para. 9.

<sup>130</sup> *Id.* at para. 4.

<sup>131</sup> See Yahoo Health, *Bathroom Inequality: TP Is Free but Tampons Aren't*, YAHOO LIFESTYLE (June 19, 2015), <https://www.yahoo.com/lifestyle/bathroom-inequality-tp-is-free-but-tampons-arent-121868517732.html>; see also Klasing, *supra* note 108; *Real Menstrual Crisis*, *supra* note 48; INSIGHT & INSIGHT, *supra* note 123.

<sup>132</sup> E.g., MURPHY'S LAW, *supra* note 9; Peck, *supra* note 54; Segran, *supra* note 126.

<sup>133</sup> See Crawford & Spivack, *supra* note 112, at III.B.

cancer, vaginal infections, toxic shock syndrome, and even infertility.<sup>134</sup>

Currently, an estimated 16 million menstruators are living in poverty in the United States.<sup>135</sup> Due to the high costs of menstruating, low-income individuals across the country have the added stress of figuring out where they are going to find, and how they are going to afford, menstrual hygiene products each month on a low budget.<sup>136</sup> Because food stamps do not cover menstrual hygiene products,<sup>137</sup> some low-income individuals resort to selling their food stamps in order to pay for these essentials.<sup>138</sup> What is more, individuals will often choose to forgo buying menstrual hygiene products and resort to unhygienic alternatives in order to spend the money they have on food for themselves and their families.<sup>139</sup>

Importantly, homeless individuals often do not have adequate access to menstrual hygiene products.<sup>140</sup> Menstrual hygiene

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<sup>134</sup> See, e.g., INSIGHT & INSIGHT, *supra* note 123; Klasing, *supra* note 108; Scaccia, *supra* note 109; *Real Menstrual Crisis*, *supra* note 48; Yahoo Health, *supra* note 131. Toxic Shock Syndrome is a potentially fatal disease characterized by vomiting, diarrhea, fever, and rashes. Toxic Shock Syndrome is caused by a bacterial toxin that has been associated with improper tampon use, such as prolonged usage. Susan Dudley et al., *Tampon Safety*, NAT'L CTR. FOR HEALTH RES., <http://www.center4research.org/tampon-safety/> (last visited Jan. 4, 2018). However, according to the government, Toxic Shock Syndrome is not an issue of the medical necessity of menstrual hygiene, but merely of the need for safe manufacturing of menstrual hygiene products. See Sharra L. Vostral, *Rely and Toxic Shock Syndrome: A Technological Health Crisis*, 84 YALE J. BIOLOGY & MED. 447, 455 (2011); Fetters, *supra* note 38.

<sup>135</sup> tabú, *Let's Talk About Periods—but Like Really*, TABÚTALK (Jan. 31, 2018) <https://talktabu.com/zine/periods-access-stigma>. The United States measures poverty rates using official poverty thresholds the Census Bureau issues annually. The poverty thresholds state the minimum yearly income required to support families of various sizes. *Poverty: How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html> (last visited Jan. 4, 2018).

<sup>136</sup> See Larimer, *supra* note 54.

<sup>137</sup> tabú, *supra* note 135.

<sup>138</sup> See *Real Menstrual Crisis*, *supra* note 48.

<sup>139</sup> Kirstie Brewer, *How Scotland Is Putting a Stop to Period Poverty*, GUARDIAN (Aug. 9, 2017, 2:30 PM), <https://www.theguardian.com/society/2017/aug/09/scotland-stop-period-poverty-food-banks>.

<sup>140</sup> Eleanor Goldberg, *For Homeless Women, Getting Their Period Is One of the Most Difficult Challenges*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/2015/01/14/homeless-women-tampons\\_n\\_6465230.html](https://www.huffpost.com/2015/01/14/homeless-women-tampons_n_6465230.html)

products are frequently the most requested donation items at homeless shelters due to their high prices.<sup>141</sup> The BYOT policy forces homeless individuals to make the impossible and undignified choice between spending what little money they have either on food or managing menstruation.<sup>142</sup> Significantly, because homeless shelters frequently lack sanitary showers and clothing options, menstruators in these facilities face heightened risks of infections and diseases.<sup>143</sup>

The United States government purports to provide menstrual hygiene products in prisons and jails across the country.<sup>144</sup> However, horror stories arising from the lack of menstrual hygiene products in correctional facilities are all too frequent for incarcerated individuals, including immigrants in detention centers awaiting deportation.<sup>145</sup> Because prison officials operate on very broad and vague administrative policies,<sup>146</sup> these officials have overwhelming control and power over the distribution of menstrual hygiene

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[hereinafter *For Homeless Women*]; see also Sue Kerr, *If You Can't Afford Tampons, What Do You Do?*, HUFFPOST, [https://www.huffingtonpost.com/sue-kerr/if-you-cant-afford-tampons-what-do-you-do\\_b\\_5352396.html](https://www.huffingtonpost.com/sue-kerr/if-you-cant-afford-tampons-what-do-you-do_b_5352396.html) (last updated Dec. 6, 2017); Kylyssa Shay, *Homeless Periods: A Problem of Poverty, Dignity, and Feminine Hygiene*, SOAPBOXIE (Dec. 29, 2017), <https://soapboxie.com/social-issues/Homeless-Periods-Suck>.

<sup>141</sup> *For Homeless Women*, *supra* note 140.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; Pallavi Manoj, *6 Health Risks of Poor Menstrual Hygiene*, NUA WOMAN (Oct. 31, 2017), <https://nuawoman.com/blog/6-health-risks-poor-menstrual-hygiene/> (discussing various risks of diseases and infections that an individual can contract due to poor menstrual hygiene, such as fungal infections, reproductive tract infections, urinary infections, yeast infections, rashes, and even an increased vulnerability to infertility).

<sup>144</sup> See *infra* notes 190–95 and accompanying text.

<sup>145</sup> See Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPER'S BAZAAR (Oct. 9, 2017), <http://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/> (citing to several highly-publicized incidents, including a viral video of a Kentucky judge scolding prison staff after a defendant appeared in his courtroom without pants because she was denied menstrual products for the three days she was in custody).

<sup>146</sup> 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=.4f27afed9bd1](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=.4f27afed9bd1) [hereinafter *Federal Prisons Must Now*].

products.<sup>147</sup> This power imbalance forces incarcerated individuals to use a very small supply of substandard products<sup>148</sup> and wear soiled, bloodstained clothing until the prison officials decide the prisoners have earned the right to receive more products.<sup>149</sup>

Additionally, if an individual runs out of menstrual hygiene products before the menstruation cycle is over, the only way to receive more products is by purchasing them from the commissary.<sup>150</sup> While it depends on the facility, prices for menstrual hygiene products in prison generally range between \$2.00 and \$5.00.<sup>151</sup> Because incarcerated individuals earn only \$0.75 per day and must spend money on other products—such as deodorant and toothpaste—it is almost impossible for such individuals to afford “extra” menstrual hygiene products.<sup>152</sup>

### C. *Human Right to Equality and Equal Protection*

Lastly, both United States and international law provide that all individuals are equal and entitled to equal protection under the law.<sup>153</sup> The United States Constitution prohibits any state from denying any person within its jurisdiction “the equal protection of

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<sup>147</sup> See Kosin, *supra* note 145.

<sup>148</sup> See Alex Ronan, *Menstruation Can Become Humiliation in Prisons*, CUT (June 16, 2015, 5:00 PM), <https://www.thecut.com/2015/06/menstruation-can-become-humiliation-in-prisons.html>.

<sup>149</sup> See Kosin, *supra* note 145. During a visit to an Immigration and Customs Enforcement detention center, the University of Miami Law School Immigration Clinic interviewed a detainee who told the story of how she was not given any menstrual hygiene products before she was transported to her hearing in immigration court, and therefore had to stand in front of an immigration judge in her blood-stained clothes. Letter from Jessica Zagier Wallace & Romy Lerner, Southern Poverty Law Center & University of Miami Immigration Law Clinic, to Major Keith Henson & Supervisory Detention and Deportation Officer David Waite, United States Immigration and Customs Enforcement (Jan. 19, 2016) (on file with the University of Miami School of Law Immigration Clinic).

<sup>150</sup> See Kerr, *supra* note 140; see also Olivia Alperstein, Opinion, *Millions of Women in the US Lack Proper Access to Menstrual Supplies*, TRUTHOUT (Jan. 2, 2017), <http://www.truth-out.org/opinion/item/38940-millions-of-women-in-the-us-lack-proper-access-to-menstrual-supplies>.

<sup>151</sup> See Alperstein, *supra* note 150; Kerr, *supra* note 140.

<sup>152</sup> Alperstein, *supra* note 150; Ronan, *supra* note 148; see Kerr, *supra* note 140.

<sup>153</sup> U.S. CONST. amend. XIV, § 1; G.A. Res. 217 (III) A, *supra* note 114, at art. 7.

the laws.”<sup>154</sup> The Supreme Court of the United States established that any regulation or law that discriminates on the basis of sex or gender must be substantially related to an important government interest and cannot be based on “archaic and overbroad generalizations.”<sup>155</sup> Internationally, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>156</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) states that all parties must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>157</sup>

Public restrooms are required to provide all the necessities non-menstruating individuals need to safely and effectively use the restroom and manage their normal and unavoidable bodily functions: toilet paper, soap, hand dryers, and even seat covers.<sup>158</sup> Like toilet paper, menstrual hygiene products are also necessary for menstruating individuals to safely and effectively use the restroom and manage normal and unavoidable bodily functions.<sup>159</sup> Accordingly, failing to provide menstrual hygiene products in restrooms while providing all of the necessities non-menstruating individuals require amounts to sexual discrimination.<sup>160</sup>

Interestingly, some critics argue that menstruating individuals can save money by refraining from doing other non-essential

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<sup>154</sup> U.S. CONST. amend. XIV, § 1.

<sup>155</sup> *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

<sup>156</sup> G.A. Res. 217 (III) A, *supra* note 114, at art. 7.

<sup>157</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 2(f), Dec. 18, 1979, No. 20378, 1249 U.N.T.S. 13. President Carter signed and sent the CEDAW to the Senate on July 17, 1980. However, the Senate Committee on Foreign Relations has never brought the treaty to a floor vote. United Nations Treaty Collection, *Convention on the Elimination of All Forms of Discrimination Against Women*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Jan. 3, 2018).

<sup>158</sup> See Maytinee Kramer, *Feminine Products Not a Luxury*, PANTHERNOW (Mar. 22, 2016), <http://panthernow.com/2016/03/22/feminine-products-not-a-luxury-item/>. The Occupational Safety and Health Administration (“OSHA”) requires that all lavatories be provided with “[h]and soap or similar cleansing agents[,]” and “[i]ndividual hand towels or sections thereof, of cloth or paper, air blowers or clean individual sections of continuous cloth toweling[.]” 29 C.F.R. § 1910.141(d)(2) (2018).

<sup>159</sup> See Scaccia, *supra* note 109.

<sup>160</sup> See Crawford & Spivack, *supra* note 112, at III.A.

activities and that the biological differences in human bodies are legitimate and warrant such disparate treatment.<sup>161</sup> It is true that refraining from activities, such as going to bars, the movies, or the mall, will logically allow menstruators to use the money saved to buy essential menstrual hygiene products. However, the fact that the non-menstruating half of the population does not have to make the same sacrifices because laws and regulations ensure they are provided with all of their restroom necessities is a discriminatory violation in and of itself.<sup>162</sup> Subjecting menstruating individuals to increased financial and social burdens based solely on the sex organs they had no choice to be born with sends a message that menstruating is inherently wrong, inferior, and that the individuals who do so should be punished.<sup>163</sup>

#### IV. THE PROGRESS: THE GRADUAL ELIMINATION OF THE BYOT POLICY

Pay toilets enjoyed much popularity throughout the twentieth century.<sup>164</sup> However, through legislation, protests, press conferences, and lawsuits claiming pay toilets were violations of human rights and equal protection, almost all toilets in the United States became free by 1980.<sup>165</sup> In contrast, the BYOT policy has been popular since the beginning of commercially available menstrual hygiene products and, while there is an increasingly popular movement to achieve “menstrual equity,” the BYOT policy still persists today.<sup>166</sup>

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<sup>161</sup> E.g., John Hyendius, *Feminists Demand Free Menstruation Products so They Don't Have to "Pay to Be Women,"* RETURN KINGS (Mar. 13, 2016), <http://www.returnofkings.com/82659/feminists-demand-free-menstruation-products-so-they-dont-have-to-pay-to-be-women>.

<sup>162</sup> See *supra* Section III.C. Both United States and international law state that all individuals are equal under the law and are entitled to equal protection under the law. U.S. CONST. amend. XIV, § 1; *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973); G.A. Res. 217 (III) A, *supra* note 114, at art. 7.

<sup>163</sup> See *Why Many Native American Girls*, *supra* note 121 (“They shouldn’t feel like they’re being punished for being a girl.”).

<sup>164</sup> See Gordon, *supra* note 4; see also ANCIENT PAGES, *supra* note 16.

<sup>165</sup> See Gordon, *supra* note 4.

<sup>166</sup> 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->

A. *The Movement to Eliminate the BYOT Policy  
in the United States*

Similar to the end of pay toilets, women and students have led the fight to end the BYOT policy in the United States.<sup>167</sup> Marketing and technology entrepreneur Nancy Kramer founded the Free the Tampons Foundation (“FTT”) in 2013, which operates under the belief that “every bathroom outside the home should provide freely accessible items that people who menstruate need for their periods.”<sup>168</sup> FTT works with both private businesses and the public sector to provide “education and resources that empower advocates to create change for [people who menstruate] nationwide” and to “overcome barriers, such as the concern that products would be excessively costly due to theft.”<sup>169</sup>

College student Claire Coder founded Aunt Flow LLC<sup>170</sup> after she found herself without a tampon at a networking event and was forced to go home and miss important, career-advancing opportunities.<sup>171</sup> Aunt Flow takes a more hands-on approach to providing free menstrual hygiene products across the United States: for each thirty-two pack of non-applicator, 100% organic cotton tampons it sells at \$12.10 per pack, the organization donates an identical pack to businesses and organizations in the United States that have agreed to provide free menstrual products in its restrooms.<sup>172</sup> Aunt Flow also

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of-womens-menstruation-now-has-political-cachet/2017/08/07/cdeae46e-68a2-11e7-8eb5-cbccc2e7bfbf\_story.html?utm\_term=.28f1fede7382 [hereinafter *The Once-Whispered Topic*].

<sup>167</sup> See, e.g., Rachel Falek, *College Students Are Demanding Free Tampons on Campus*, USA TODAY (Jan. 4, 2017, 2:36 PM), <http://college.usatoday.com/2017/01/04/college-students-are-demanding-free-tampons-on-campus/>; *The Once-Whispered Topic*, *supra* note 166.

<sup>168</sup> FREE TAMPONS, <http://www.freethetampons.org/about.html> (last visited Jan. 4, 2018).

<sup>169</sup> *Id.*

<sup>170</sup> AUNT FLOW, *supra* note 125.

<sup>171</sup> *Who We Are*, AUNT FLOW, <https://www.auntflow.org/pages/about> (last visited June 24, 2018).

<sup>172</sup> *30 Non-applicator, 100% Organic Cotton Tampons*, AUNT FLOW, <https://www.auntflow.org/collections/tampons/products/tampons> (last visited June 24, 2018).



has a mobile app that displays a map of businesses nearby that provide free menstrual hygiene products to employees and guests.<sup>173</sup>

Other college students across the United States are leading initiatives for their schools to provide free menstrual hygiene products in restrooms.<sup>174</sup> Viet Nguyen, president of the Undergraduate Council of Students at Brown University, led one of the most successful of these initiatives, which has resulted in free “tampons and sanitary napkins in non-residential women’s, men’s, and gender-inclusive bathrooms across” the school’s campus.<sup>175</sup> As Nguyen hoped, the success of this initiative seems to have led other universities to make the same changes.<sup>176</sup>

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<sup>173</sup> AUNT FLOW, *supra* note 125. For a more complete list of organizations that provide free menstrual hygiene products, see Mia Mercado, *10 Organizations That Provide Menstrual Hygiene Products for People Who Need Them & How You Can Help*, BUSTLE (Mar. 17, 2017), <https://www.bustle.com/p/10-organizations-that-provide-menstrual-products-for-people-who-need-them-how-you-can-help-45116>.

<sup>174</sup> See Falek, *supra* 167.

<sup>175</sup> Press Release, The Brown Univ. Undergraduate Council (Sept. 6, 2016), [https://docs.google.com/document/d/1ox78v9BCL870E0P\\_HtwRzhGI-mVVjcs-goCCBgCMSAU0/edit](https://docs.google.com/document/d/1ox78v9BCL870E0P_HtwRzhGI-mVVjcs-goCCBgCMSAU0/edit) [hereinafter Press Release, Brown Univ.]; see also Associated Press, *Free Tampons and Pads Added to Brown University Campus Bathrooms*, GUARDIAN (Sept. 6, 2016, 2:18 PM), <https://www.theguardian.com/us-news/2016/sep/06/brown-university-free-tampons-pads>; Ryan Lasker, *At Brown, It’s Free Tampons and Pads for All*, USA TODAY (Sept. 8, 2016, 1:30 PM), <http://college.usatoday.com/2016/09/08/brown-u-student-government-is-providing-free-tampons-and-pads-in-all-bathrooms/>.

<sup>176</sup> See Press Release, Brown Univ., *supra* note 175 (“We want to stress that this has been long overdue and encourage other student governments to make this issue a priority going into this school year.”). Proudly, the University of Miami recently implemented a six-week trial in which it provided free, although limited, menstrual hygiene products in restrooms across campus. Amanda Herrera, *No More Rolled Up Toilet Paper: SG Trial Initiative Places Free Pads, Tampons in Campus Bathrooms*, MIAMI HURRICANE (Aug. 30, 2018), <https://www.themiami-hurricane.com/2018/03/28/no-more-rolled-up-toilet-paper-sg-trial-initiative-places-free-pads-tampons-in-campus-bathrooms/>. “As of April 2, 2018, 99.5 percent of students have indicated the university should provide free feminine hygiene products in the future.” *Id.* Students at schools like Emory, Columbia University, Reed College, the University of Arizona, the University of Minnesota, and the University of Wisconsin have led similar initiatives, though the results have varied. See Falek, *supra* note 167; Nathan Hansen, *UW-L Initiative Adds No-cost Feminine Hygiene Products to all Bathrooms on Campus*, LA CROSSE TRI. (Oct. 8, 2017), [http://lacrossetribune.com/news/local/uw-l-initiative-adds-no-cost-feminine-hygiene-products-to/article\\_ca3eb859-1507-536b-963c-](http://lacrossetribune.com/news/local/uw-l-initiative-adds-no-cost-feminine-hygiene-products-to/article_ca3eb859-1507-536b-963c-)

While grassroots movements are developing rapidly, legislation for providing free menstrual products has been slower to take hold; nevertheless, such legislation does exist.<sup>177</sup> Legislation regarding “menstrual equity” largely focuses on repealing the Tampon Tax.<sup>178</sup> In 2015, only five states explicitly exempted menstrual hygiene products from the state sales tax: Maryland, Massachusetts, Pennsylvania, Minnesota, and New Jersey.<sup>179</sup> As the movement for menstrual equity gained more traction in 2016, twenty-four states introduced legislation to exempt menstrual hygiene products from the state’s sales tax.<sup>180</sup> As of early 2018, the number of states that explicitly exempt menstrual hygiene products from their state sales tax increased to nine with the additions of the following states: Connecticut, Florida, Illinois, and New York.<sup>181</sup>

The majority of successful legislation regarding menstrual hygiene products focuses on providing these products for free in public school restrooms and prisons. In 2016, the New York City Council passed legislation requiring menstrual products to be available for free in public schools, shelters, and jails, benefiting approximately

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05eb5fcf27e4.html; Jake New, *If Condoms Are Free, Why Aren’t Tampons?*, INSIDE HIGHER ED. (Mar. 11, 2016), <https://www.insidehighered.com/news/2016/03/11/students-demand-free-tampons-campus>.

<sup>177</sup> *The Once-Whispered Topic*, *supra* note 166.

<sup>178</sup> *Id.*; see *supra* notes 54–58 and accompanying text.

<sup>179</sup> Hillin, *supra* note 54. Alaska, Delaware, Montana, New Hampshire, and Oregon do not have a state sales tax. *Id.*

<sup>180</sup> *The Once-Whispered Topic*, *supra* note 166.

<sup>181</sup> Ema Sagner, *More States Move to End ‘Tampon Tax’ That’s Seen as Discriminating Against Women*, NPR (Mar. 25, 2018, 8:01 AM), <https://www.npr.org/2018/03/25/564580736/more-states-move-to-end-tampon-tax-that-s-seen-as-discriminating-against-women>. Seven other states have introduced legislation aimed at eliminating the Tampon Tax, including Virginia, Nebraska, and Arizona. *Id.* See also *Why is the US ‘Tampon Tax’ so Hated?*, BBCNEWS (Sept. 14, 2016), <http://www.bbc.com/news/world-us-canada-37365286> [hereinafter *Why is the US*]; e.g., Catherine Pearson, *Florida Just Became the Latest State to Abolish the ‘Tampon Tax,’* HUFFPOST (May 26, 2017, 11:14 AM), [https://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax\\_us\\_59282d4de4b0df34c35b77cf](https://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax_us_59282d4de4b0df34c35b77cf). The District of Columbia has also exempted menstrual hygiene products from its sales tax. See Fenit Nirappil, *D.C. to Lift Sales Tax on Diapers, Tampons*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd\\_story.html?utm\\_term=.234bbf28756d](https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd_story.html?utm_term=.234bbf28756d).

323,000 people.<sup>182</sup> Councilwoman Julissa Ferreras-Copeland sponsored the legislation to allow menstruating individuals to “have their essential needs met in order to do well in school [by] having unfettered access to menstrual hygiene products.”<sup>183</sup> After the initial trial program resulted in a significant increase in school attendance,<sup>184</sup> New York City Mayor Bill de Blasio signed the bill into law and stated that “[t]hese laws recognize that menstrual hygiene products are a necessity—not a luxury.”<sup>185</sup>

In 2017, both California and Illinois passed legislation requiring menstrual hygiene products to be free in public schools. Illinois Governor, Bruce Rauner, signed a bill on August 18, 2017 that requires all Illinois public schools serving grades six through twelve to provide free menstrual hygiene products in all restrooms.<sup>186</sup> California Governor Jerry Brown signed a less expansive bill on October 12, 2017.<sup>187</sup> The bill requires California public schools that serve grades six through twelve where at least forty percent (40%) of the students meet the federal poverty threshold to stock at least fifty percent (50%) of their school restrooms with free menstrual hygiene

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<sup>182</sup> Sarah Ruiz-Grossman, *NYC Mayor Signs Free Tampons for Schools, Jails, Shelters into Law*, HUFFPOST (July 14, 2016, 3:29 PM), [https://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law\\_us\\_5787bc57e4b08608d3336b27](https://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law_us_5787bc57e4b08608d3336b27) [hereinafter *NYC Mayor Signs*]. The cost of implementing the legislation was approximately \$4.2 million but will cost an estimated \$1.9 million after the first year. Sarah Ruiz-Grossman, *Unanimous Vote Brings Free Tampons to NYC’s Schools, Prisons, Shelters*, HUFFPOST (June 21, 2016, 5:48 PM), [https://www.huffingtonpost.com/entry/free-tampons-law-new-york-schools-prisons-shelters\\_us\\_57697b43e4b0a75709b7ea1a](https://www.huffingtonpost.com/entry/free-tampons-law-new-york-schools-prisons-shelters_us_57697b43e4b0a75709b7ea1a) [hereinafter *Unanimous Vote Brings*].

<sup>183</sup> *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->

<sup>184</sup> Miquel-Caitlyn Gabbidon, *NYC Schools Are Now Offering Free Feminine Hygiene Products for School Firls*, GLOBAL CITIZEN (Mar. 15, 2016), <https://www.globalcitizen.org/en/content/nyc-schools-are-now-offering-free-feminine-hygiene/>.

<sup>185</sup> *NYC Mayor Signs*, *supra* note 182.

<sup>186</sup> H.B. 3125, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

<sup>187</sup> A.B. 10, Gen. Assemb., Reg. Sess. (Cal. 2017).

products.<sup>188</sup> Both bills were created with the goals of improving attendance and minimizing school-day interruptions.<sup>189</sup>

On August 1, 2017, the Federal Bureau of Prisons issued a memorandum guidance stating all federal prisons must provide “at least one type of tampon, maxi pad, and panty liner” at no cost to inmates.<sup>190</sup> The Bureau’s previous policy made the broad and unclear requirement that “[p]roducts for female hygiene needs shall be available.”<sup>191</sup> The new guidance aims to correct the Bureau’s overwhelming failure to adequately provide essential products to these individuals<sup>192</sup> by detailing the types and sizes of the products that must be made freely available.<sup>193</sup> While concern regarding enforcement remains,<sup>194</sup> it is a step in the right direction to improve the basic rights of “the women who comprise the fastest growing segment of the U.S. prison population.”<sup>195</sup>

Nevertheless, legislation aimed at providing free menstrual hygiene products in more general and widespread terms has not seen similar success. United States Representative Grace Meng introduced the Menstrual Equity for All Act of 2017 on February 7, 2017.<sup>196</sup> In the five provisions aimed “to increase the availability

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<sup>188</sup> *Id.* The bill will affect approximately 4,000 schools, cost between \$2 and \$3 million to implement, and cost an estimated \$1.8 million annually after implementation. Sammy Caiola, *Free Tampons, Pads to Become Available in California Schools*, CAP. PUB. RADIO (Dec. 18, 2017), <http://www.capradio.org/articles/2017/12/18/free-tampons-pads-to-become-available-in-california-schools/>.

<sup>189</sup> Joseph Bustos, *Illinois Schools Must Now Provide Free Feminine Hygiene Products in Bathrooms*, BELLEVILLE NEWS-DEMOCRAT (Sept. 14, 2017, 7:40 PM), <http://www.bnd.com/news/local/article173374866.html>; *see also* Caiola, *supra* note 188.

<sup>190</sup> FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, RSD/FOB No. 001-2017, OPERATIONS MEMORANDUM: PROVISION OF FEMININE HYGIENE PRODUCTS (Aug. 1, 2017).

<sup>191</sup> *Federal Prisons Must Now*, *supra* note 146.

<sup>192</sup> *See id.*; *see also* *The Once-Whispered Topic*, *supra* note 166 (referencing a 2015 report from the Correctional Association of New York that found 54% of women surveyed in state prisons said they did not get enough sanitary pads each month); Kosin, *supra* note 145; *supra* Section III.B.

<sup>193</sup> *See Federal Prisons Must Now*, *supra* note 146.

<sup>194</sup> *See id.* (describing concerns due to the continuing vagueness and non-binding nature of the guidance).

<sup>195</sup> *See id.*

<sup>196</sup> H.R. 972, 155th Cong. (2017); Press Release, U.S. Rep. Grace Meng, Meng Renews Effort to Make Menstrual Hygiene Products More Accessible and

and affordability of menstrual hygiene products”<sup>197</sup> to low-income individuals, the proposed Act directs the Department of Labor “to require employers with 100 or more employees to provide menstrual hygiene products to their employees free of charge.”<sup>198</sup> Unfortunately, the bill was last referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on March 2, 2017<sup>199</sup> and has a mere three percent (3%) chance of being enacted.<sup>200</sup>

### B. *The Movement to Eliminate the BYOT Policy Outside the United States*

The painful impacts of the BYOT policy are not limited to the United States as menstruators across the globe pay ridiculously high costs, both literally and figuratively, for menstrual hygiene products. For example, young girls in sub-Saharan Africa engage in transactional sex in order to buy the sanitary pads necessary to comfortably attend school while menstruating.<sup>201</sup> Additionally, in 2014, Canadians spent approximately \$519,976,963 on menstrual hygiene products and an additional \$36 million in taxes on such products after adding the mandatory five percent (5%) federal “Goods and Services” tax (“GST”).<sup>202</sup>

However, like in the United States, there are efforts to eliminate the BYOT policy and improve menstrual hygiene management around the world.<sup>203</sup> Similar to the current battle in the United

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Affordable to Women (Feb. 13, 2017), <https://meng.house.gov/media-center/press-releases/meng-renews-effort-to-make-menstrual-hygiene-products-more-accessible> [hereinafter Meng Press Release].

<sup>197</sup> H.R. 972.

<sup>198</sup> Meng Press Release, *supra* note 196.

<sup>199</sup> *All Actions H.R. 972*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/972/all-actions> (last visited Oct. 25, 2018).

<sup>200</sup> *H.R. 972: Menstrual Equity For All Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr972> (last visited June 24, 2018).

<sup>201</sup> UNESCO, *Puberty Education & Menstrual Hygiene Management*, 9 GOOD POL’Y & PRAC. HEALTH EDUC. 16 (2014).

<sup>202</sup> Courtney Dickson, *How Canada Finally Axed Its Federal Tampon Tax*, MS. BLOG (Apr. 14, 2016), <http://msmagazine.com/blog/2016/04/14/how-canada-finally-axed-its-federal-tampon-tax/>; Haydn Watters, *‘Tampon Tax’ Will End July 1*, CBCNEWS (May 28, 2015, 7:01 PM), <http://www.cbc.ca/news/politics/tampon-tax-will-end-july-1-1.3091533>.

<sup>203</sup> *See Menstrual Hygiene Management*, *supra* note 108; *We Exist to Empower Women*, CORA, <https://cora.life/pages/our-cause> (last visited Feb. 3, 2018).

States, opponents of the Canadian Tampon Tax argued that it was offensive to label menstrual hygiene products as “nonessential” or “luxury” items when other products—such as, cake decorations, contact lenses, and cocktail cherries—were exempt from the country’s GST.<sup>204</sup> After close to 75,000 people signed a petition demanding the repeal of its Tampon Tax, the Canadian government added menstrual hygiene products—pads, tampons, sanitary belts, and menstrual cups—to the list of products exempt from the country’s GST on July 1, 2015.<sup>205</sup>

In 2017, after evidence showed that low-income menstruators across the country substitute expensive menstrual hygiene products with socks, toilet paper, and even newspapers,<sup>206</sup> Scotland implemented the first governmentally funded initiative to tackle “period poverty.”<sup>207</sup> The Scottish government gave the Community Food Initiatives North East (“CFINE”) £42,500 to create this six-month initiative to “explore how to make [these] products freely available to low-income groups.”<sup>208</sup> The initiative would provide free menstrual hygiene products in seven low-income parts of Aberdeen, Scotland,

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In 2015, for example, the government of India launched “National Guidelines on Menstrual Hygiene Management” to respond to the fact that nearly 113 million girls are at risk of dropping out of school when they start menstruating. Oni Lusk-Stover et al., *Globally, Periods Are Causing Girls to Be Absent from School*, WORLD BANK: EDUC. FOR GLOBAL DEV. BLOG (June 27, 2016), <http://blogs.worldbank.org/education/globally-periods-are-causing-girls-be-absent-school>.

<sup>204</sup> Dickson, *supra* note 202; Tara Culp-Ressler, *After Years of Backlash, Canada Ditches the ‘Tampon Tax,’* THINKPROGRESS (May 29, 2015, 3:50 PM), <https://thinkprogress.org/after-years-of-backlash-canada-ditches-the-tampon-tax-ed5cd867fbf4/>.

<sup>205</sup> Culp-Ressler, *supra* note 204; Watters, *supra* note 202.

<sup>206</sup> *Free Tampons and Towels in Pilot Tackling ‘Period Poverty,’* BBCNEWS (July 11, 2017), <http://www.bbc.com/news/uk-scotland-40566524>.

<sup>207</sup> Shan Ross, *Scotland to Provide Free Sanitary Towels to Low-Income Women*, SCOTSMAN (July 11, 2017, 6:00 AM), <https://www.scotsman.com/news/scotland-to-provide-free-sanitary-towels-to-low-income-women-1-4500210>.

<sup>208</sup> Catriona Webster, *Scotland May Be the First Country to Offer Free Sanitary Products to Poor Women*, BUS. INSIDER (July 12, 2017, 6:21 AM), <http://www.businessinsider.com/scotland-first-country-to-offer-free-sanitary-products-to-poor-women-2017-7>. This amount is the equivalent of approximately \$56,359.93. XE: *Convert GBP/USD*, XE CURRENCY CONVERTER, <http://www.xe.com/currencyconverter/convert/?Amount=42%2C500&From=GBP&To=USD> (last visited June 24, 2018).

and benefit at least 1,000 individuals.<sup>209</sup> While this initiative is certainly a step in the right direction, several individuals believe the Scottish government can and should go further<sup>210</sup>: Monica Lennon has introduced a Member's Bill, which would give all menstruators in Scotland the right to access menstrual hygiene products for free regardless of their income.<sup>211</sup>

#### V. THE DOWNSIDE: WEIGHING THE COSTS AND BENEFITS

Although it may be beneficial to provide free menstrual hygiene products in restrooms, doing so brings about several practical risks and concerns. Of course, requiring free menstrual hygiene products in restrooms poses a risk of negative economic and financial effects.<sup>212</sup> In 2017, United States individuals spent \$2.6 billion on menstrual hygiene products and this number is projected to grow to \$2.9 billion by 2020.<sup>213</sup> Therefore, it is logical to be concerned that requiring free menstrual hygiene products in restrooms may greatly reduce the industry's worth.<sup>214</sup>

However, this concern is significantly diminished upon analyzing the comparable toilet paper industry. In 2018, it is projected that the toilet paper industry in the United States will be worth almost \$10.9 billion, with the average person spending \$33.15 annually on toilet paper with a projected increase of 2.2% by the year 2021.<sup>215</sup> This is an increase from 2009 where the toilet paper industry was

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<sup>209</sup> Ross, *supra* note 207; Webster, *supra* note 208.

<sup>210</sup> 'Time is Right' to End Period Poverty in Scotland, BBC NEWS (Mar. 8, 2018) <https://www.bbc.com/news/uk-scotland-scotland-politics-43331599>.

<sup>211</sup> See Webster, *supra* note 208.

<sup>212</sup> See Scaccia, *supra* note 109; *Why is the US*, *supra* note 181. California Governor Jerry Brown vetoed several bills to end sales tax on menstrual hygiene products because it would decrease the state's revenue by close to \$300 million. *Id.*

<sup>213</sup> *Feminine Hygiene: United States*, STATISTA, <https://www.statista.com/outlook/80040000/109/feminine-hygiene/united-states#> (last visited June 24, 2018).

<sup>214</sup> See *Why is the US*, *supra* note 181; see also 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/>.

<sup>215</sup> *Toilet Paper: United States*, STATISTA, <https://www.statista.com/outlook/80010000/109/toilet-paper/united-states#> (last visited June 24, 2018).

worth a mere \$6 billion.<sup>216</sup> Furthermore, in 2014 the toilet paper industry was made up of \$1.4 billion in sales of “luxury” toilet paper— toilet paper that is “quilted, lotioned, perfumed, or ultra-soft.”<sup>217</sup> In fact, the industry for luxury toilet paper is also projected to increase.<sup>218</sup> Therefore, requiring toilet paper in every restroom does not seem to cause a decrease in toilet paper sales; rather, the requirement merely shifts a portion of the expense onto businesses and the government to provide the toilet paper in restrooms outside of the home.

Comparably, the average person spends between \$60.00 and \$120.00 a year on menstrual hygiene products.<sup>219</sup> Additionally, it would cost an estimated “\$4.76 per . . . student or employee to provide free sanitary products annually.”<sup>220</sup> Therefore, similar to the toilet paper industry, requiring menstrual hygiene products in restrooms will not result in a drop in sales of menstrual hygiene products; rather, the requirement will merely result in an economical shift of a portion of the expense.

Furthermore, while critics argue the government cannot afford to supply menstrual hygiene products with taxpayer money,<sup>221</sup> the total cost to provide free menstrual hygiene products would be relatively small.<sup>222</sup> In New York City, for example, it costs approximately \$1.9 million, or \$5.88 per person, to provide free menstrual hygiene products to 323,000 individuals annually.<sup>223</sup> This is much

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<sup>216</sup> Linda Rodriguez, *Why Toilet Paper Belongs to America*, CNN (July 8, 2009, 11:10 AM), <http://www.cnn.com/2009/LIVING/wayoflife/07/07/mf.toilet.paper.history/index.html>.

<sup>217</sup> Drew Harwell, *The Rise of Luxury Toilet Paper*, WASH. POST (Mar. 13, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/03/13/what-the-rise-of-luxury-toilet-paper-says-about-the-economy/?utm\\_term=.9dca6e518fa7](https://www.washingtonpost.com/news/wonk/wp/2015/03/13/what-the-rise-of-luxury-toilet-paper-says-about-the-economy/?utm_term=.9dca6e518fa7).

<sup>218</sup> *Id.*

<sup>219</sup> This calculation is based on the average costs of pads and tampons collected from various sources, ranging between \$7.00 and \$10.00 a box and the average requirement of between 1 box per cycle. *E.g.*, Falek, *supra* note 167; Kane, *supra* note 49; Larimer, *supra* note 54; Scaccia, *supra* note 109; *Why is the US*, *supra* note 181.

<sup>220</sup> Peck, *supra* note 54.

<sup>221</sup> See Amanda Prestigiacomo, *Entitled Feminists Now Pushing for ‘Menstrual Equity,’* DAILY WIRE (May 9, 2017), <https://www.dailywire.com/news/16240/entitled-feminists-now-pushing-menstrual-equality-amanda-prestigiacomo#exit-modal>.

<sup>222</sup> See Scaccia, *supra* note 109.

<sup>223</sup> See *Unanimous Vote Brings*, *supra* note 182.



less than the \$2 million, or \$86.96 per person, the federal government spent annually on toilet paper products for its 23,000 workers in the Pentagon between 2010 and 2012.<sup>224</sup>

Nevertheless, the dearth of public restrooms in the United States is becoming an increasingly concerning problem.<sup>225</sup> Thus, perhaps the most significant concern involved with providing free menstrual hygiene products in all restrooms is the risk that the associated increase in costs, however small, may lead business owners to eliminate or severely restrict access to their restrooms altogether.

At the height of the movement to end pay toilets, for instance, many critics were concerned that outlawing pay toilets would result in the elimination of public toilets altogether, due to increased insurance costs and fear of litigation.<sup>226</sup> Although pay toilets were clearly a “crime against nature,” these critics believed having pay toilets was better than having no public toilets at all, which would be an even greater violation of human rights.<sup>227</sup> While restrooms outside the home still exist, this concern has materialized in several cities where the number of available public restrooms has decreased, time restrictions on when such restrooms can be accessed have been imposed, and unequal access to restrooms is still an issue.<sup>228</sup>

Since the height of the movement to end pay toilets, however, state and local ordinances and regulations requiring businesses to provide public access to their restrooms have continued to gain

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<sup>224</sup> Scaccia, *supra* note 109.

<sup>225</sup> See ROBERT BRUBAKER & CAROL MCCREARY, AM. RESTROOM ASS'N, US PUBLIC HEALTH MANDATES AND THE RESTROOM PROBLEM IN AMERICA: A CALL TO ACTION 1 (2007) (study used for presentation at the World Toilet Summit in Dehli, India), <http://www.phlush.org/federal-public-restroom-requirements-initiative/>; see also Stacey McKenna, *No Toilets for the Homeless*, BRIGHT MAG. (Jan. 20, 2016), <https://brightthemag.com/no-toilets-for-the-homeless-55b3b073e919>. In 1990, several homeless rights activists filed a class action on behalf of the homeless people of New York, claiming that the city's failure to provide adequate public toilets constitutes a public nuisance. See Lee, *supra* note 63.

<sup>226</sup> Slovenko, *supra* note 14, at 1557–58.

<sup>227</sup> *Id.* at 1557.

<sup>228</sup> See McKenna, *supra* note 225; see also Irus Braverman, *Loo Law: The Public Restroom as a Hyper-Regulated Place*, 20 HASTINGS WOMEN'S L.J. 45, 54 (2009) (“It is common knowledge, in the United States at least, that commercial washrooms in cafés and malls are not equally accessible to all people. Much, it seems, depends on the mood of the manager at the time and, moreover, on the particular features of the person asking to use the washroom.”).

support.<sup>229</sup> Such regulations generally rely on the size, location, customer capacity, and nature of the business.<sup>230</sup> There are several restroom accessibility regulations in Florida; for example, at least one restroom must be accessible to the public in all businesses serving food and all public-lodging establishments.<sup>231</sup> Accordingly, because the accessibility of public restrooms has become a more regulated area, it is less likely that the slight increase in maintenance costs involved with providing free menstrual hygiene products will greatly reduce the availability of restrooms outside the home.

Additionally, even in states that do not require businesses to provide public access to its restrooms, it is in the organization's best interests to voluntarily open its restrooms to the public.<sup>232</sup> For example, opening restrooms to the public generally benefits a business's reputation and has been proven to "increase retail turnover, tourist numbers, and economic growth."<sup>233</sup> In other words, because the benefits of providing public access to restrooms outweigh the costs, businesses are much less likely to eliminate restrooms or restrict their access as a result of the slight increase in maintenance costs involved with providing free menstrual hygiene products.

Furthermore, the benefits of providing free menstrual hygiene products in restrooms greatly outweigh the risks and make the

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<sup>229</sup> The International Plumbing Code ("IPC") requires a certain number of toilet facilities in places including but not limited to: places of public assembly, restaurants, nightclubs, and mercantile occupancies. See INT'L PLUMB. CODE. § 403 (2015). As of January 2018, at least 37 states have adopted the IPC. *Int'l Codes-Adoption by State*, ICC (Jan. 2018), <https://cdn-web.iccsafe.org/wp-content/uploads/Master-I-Code-Adoption-Chart-JAN-2018-Update.pdf>.

<sup>230</sup> See Melissa Bajorek, *Are Stores Required to Have Public Restrooms*, LEGALBEAGLE (June 12, 2017), <https://legalbeagle.com/7250040-stores-required-public-restrooms.html>; George Khoury, *Do You Have to Provide Customers With a Bathroom*, FINDLAW (Feb 13, 2017, 3:06 PM), [http://blogs.findlaw.com/free\\_enterprise/2017/02/do-you-have-to-provide-customers-with-a-bathroom.html](http://blogs.findlaw.com/free_enterprise/2017/02/do-you-have-to-provide-customers-with-a-bathroom.html). E.g., FLA. BUILD. CODE § 403 (2010); OR. STRUCT. SPEC. CODE. § 2902 (2004).

<sup>231</sup> FLA. STAT. § 509.221(2)(a) (2017); Myriam Beltran, *Bathroom Requirements for Businesses in Florida*, BIZFLUENT (Sept. 26, 2017), <https://bizfluent.com/list-6771018-bathroom-requirements-businesses-florida.html>.

<sup>232</sup> See 12 HOUSE OF COMMONS, THE PROVISION OF PUBLIC TOILETS 5–7 (2007); see also Erik Johnson, *Rules & Regulations for Business Public Restrooms*, CHRON, <http://smallbusiness.chron.com/rules-regulations-business-public-restrooms-68740.html> (last updated Mar. 4, 2018).

<sup>233</sup> HOUSE OF COMMONS, *supra* note 232, at 7.

minimal increase in costs a worthwhile investment.<sup>234</sup> Providing free menstrual hygiene products increases attendance and productivity at work and school.<sup>235</sup> In New York City, for example, attendance in school increased by 2.4% after its implementation of legislation requiring all public schools to provide menstrual hygiene products in every school restroom.<sup>236</sup> Additionally, providing free menstrual hygiene products in restrooms decreases the risk of disease and infections and improves societal norms and stigma.<sup>237</sup> Accordingly, not only is providing free menstrual hygiene products beneficial to businesses and governments, it is also beneficial to the health, well-being, and quality of life of menstruating individuals.

#### VI. THE SOLUTION: SOLVING THE MYSTERY BEHIND THE BYOT POLICY

Since the widespread elimination of pay toilets in the United States,<sup>238</sup> restrooms have become a highly regulated area of society.<sup>239</sup> Regulations control the number, type, and design of restrooms in certain places, require toilet paper, soap, and drying materials in restrooms,<sup>240</sup> and require certain accommodations for disabilities.<sup>241</sup> Today, there would be outrage if people were required to pay to use restrooms or carry around toilet paper in case they need to go to the bathroom in public.<sup>242</sup> In contrast, while there are many regulations governing the technical manufacturing, labeling, and categorization of menstrual hygiene products,<sup>243</sup> no regulations

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<sup>234</sup> See Lindsey McEntee, *Does Your Office Have Free Tampons in the Bathrooms? Here's Why It Should*, FAIRY GOD BOSS, (Mar. 13, 2018) <https://fairygodboss.com/articles/why-should-free-tampons-be-offered-in-the-workplace>; see also AUNT FLOW, *supra* note 125; Falek, *supra* note 167.

<sup>235</sup> See AUNT FLOW, *supra* note 125; see also Gabbidon, *supra* note 184.

<sup>236</sup> Gabbidon, *supra* note 184.

<sup>237</sup> See Scaccia, *supra* note 109; *supra* Part III.

<sup>238</sup> See *supra* Part II.

<sup>239</sup> See generally Braverman, *supra* note 228.

<sup>240</sup> E.g., 29 C.F.R. §§ 1910.141, 1926.51, 1928.110 (2011).

<sup>241</sup> *The ADA-Compliant Restroom*, BUILDINGS, <https://www.buildings.com/article-details/articleid/9242/title/the-ada-compliant-restroom> (last updated May 30, 2018).

<sup>242</sup> See Scaccia, *supra* note 109.

<sup>243</sup> See generally Jamie Kohen, *The History of the Regulation of Menstrual Tampons* (2001) (unpublished student paper, Harvard Law School) (on file with

require restrooms to provide these products. In fact, even if a restroom has a tampon or pad dispenser, these dispensers are rarely free or adequately stocked.<sup>244</sup>

Why is this? If pay toilets were “a tax on human biological functions” and “a discriminatory tax” on half of the population,<sup>245</sup> why were menstrual hygiene products, which are necessary for the human biological functions of half the population, overlooked when regulations were created to remedy the negative effects of pay toilets?

#### A. *Menstruators Are Historically Underrepresented in Legislatures*

This Note is not meant to be an attack on those who do not menstruate. Nevertheless, evidence strongly suggests this oversight is largely the product of a severe lack of representation for menstruating individuals in legislatures throughout history.<sup>246</sup> Menstruating has been a natural part of life for as long as humans have been a species; however, there is very little, if any, documentation of the scientific process of menstruation among ancient and medieval people.<sup>247</sup> This is likely because most historical scribes were men, or non-menstruating individuals.<sup>248</sup>

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the Digital Access to Scholarship at Harvard), <https://dash.harvard.edu/handle/1/8852185>.

<sup>244</sup> See MURPHY’S LAW, *supra* note 9; see also Segran, *supra* note 126.

<sup>245</sup> Nik-O-Lok Co. v. Carey, 378 N.Y.S.2d 936, 938 (Sup. Ct.), *aff’d*, 384 N.Y.S.2d 211 (N.Y. App. Div. 1976), *aff’d*, 392 N.Y.S.2d 393 (1977).

<sup>246</sup> See Peck, *supra* note 54; Scaccia, *supra* note 109. In 2017, only six state legislatures had between thirty-five percent (35%) and forty-six percent (46%) women in their legislatures, the highest of which being in Arizona at forty percent (40%). The majority of state legislatures had between fifteen percent (15%) and thirty-four percent (34%) women in their legislatures. *Women in State Legislatures for 2017*, NAT’L CONF. ST. LEGISLATURES (Nov. 7, 2017), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2017.aspx>. As for Congress, 104 women are part of the 115th Congress, which accounts for only nineteen percent (19%) of lawmakers in Congress. Gabrielle Levy, *The 115th Congress by Party, Race, Gender and Religion*, U.S. NEWS & WORLD REPORT (Jan. 5, 2017, 2:21 PM), <https://www.usnews.com/news/politics/slideshows/the-115th-congress-by-party-race-gender-and-religion?slide=4>.

<sup>247</sup> Bushak, *supra* note 38.

<sup>248</sup> *Id.*

In 1986, Gloria Steinem wrote that “if suddenly, magically, men could menstruate and women could not[,] . . . menstruation would become an enviable, worthy, masculine event” and “[s]anitary supplies would be federally funded and free.”<sup>249</sup> In 2016, for the first time in history, the President of the United States publicly addressed menstrual hygiene when former President Obama expressed his confusion over “why states would tax [menstrual hygiene products] as luxury items.”<sup>250</sup> He posited that this is probably “because men were making the laws when those taxes were passed.”<sup>251</sup>

While lawmakers labeled products such as Rogaine, Viagra, and condoms as “necessities” that are exempt from most sales taxes, the same lawmakers labeled menstrual hygiene products not as “necessities,” but as “luxury items.”<sup>252</sup> As justification, a representative for the Idaho State Tax Commissions stated that “[t]ampons and pads are used for [menstrual] hygiene and not for use in the diagnosis, cure, mitigation, treatment or prevention of [menstrual] diseases.”<sup>253</sup> Although menstruation is definitely not a disease, it is clear that menstrual hygiene itself is necessary to prevent and even treat diseases based on overwhelming research and evidence.<sup>254</sup> Additionally, any menstruating individual will agree that menstrual hygiene products *are* necessities, unless they choose to bleed everywhere,

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<sup>249</sup> Gloria Steinem, *If Men Could Menstruate*, MS. MAG. (Oct. 1978), [http://www.mylittleredbook.net/imcm\\_orig.pdf](http://www.mylittleredbook.net/imcm_orig.pdf).

<sup>250</sup> Reflect, *Ingrid Nilsen Interviews Obama*, YOUTUBE (Jan. 16, 2016), <https://youtu.be/K2OaaWjB6S8?t=3m> (relevant discussion begins at the 3:00 mark).

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

<sup>252</sup> See Peck, *supra* note 54; see also Christina Cauterucci, *Tampons Shouldn't Be Tax Free. They Should Be Covered by Food Stamps and Medicaid*, SLATE (Mar. 17, 2016, 2:46 PM), [http://www.slate.com/blogs/xx\\_factor/2016/03/17/tampons\\_shouldn\\_t\\_be\\_tax\\_free\\_they\\_should\\_be\\_covered\\_by\\_food\\_stamps\\_and.html](http://www.slate.com/blogs/xx_factor/2016/03/17/tampons_shouldn_t_be_tax_free_they_should_be_covered_by_food_stamps_and.html). It is important to note that toilet paper is also, in most states, not exempt from sales tax. See Samantha Allen, *The 'Tampon Tax' Outrage Is Overblown*, DAILY BEAST (Oct. 22, 2015, 1:00 AM), <https://www.thedailybeast.com/the-tampon-tax-outrage-is-overblown>. However, these facts are used only to demonstrate what lawmakers consider “necessities”—Viagra and Rogaine, but not menstrual hygiene products. Whether toilet paper should also be exempt from sales tax is an entirely different argument that this Note does not venture to flush itself in.

<sup>253</sup> Hillin, *supra* note 54.

<sup>254</sup> See *supra* Section I.B.2. Menstrual hygiene products, specifically pads, are also used to manage diseases such as polycystic ovary syndrome and endometriosis. See Court, *supra* note 126.

stay home for an entire week, or use dangerous “creative” alternatives.<sup>255</sup>

Lastly, some non-menstruating individuals use baseless comparisons to justify the high cost of menstrual hygiene and the BYOT policy. For example, one individual compares the social construct that “men are expected to pay for the woman on dates” to the involuntary and uncontrollable bodily function of menstruation as evidence of legitimate differences warranting disparate treatment.<sup>256</sup> This is like comparing apples and apple pie: one is a natural and healthy product of Mother Nature; the other is an unnatural and unhealthy, though—depending on who is asked—wonderful, human creation. This comparison, and others like it, depicts how underrepresented, misrepresented, and misunderstood menstruation is throughout society and legislatures.<sup>257</sup>

### B. *Menstruation Is Plagued with Debilitating Stigma*

Menstruation is a process, as natural as sleeping and breathing, that affects approximately half of the world’s population.<sup>258</sup> However, because “our [n]ation has had a long and unfortunate history of sex discrimination[,]”<sup>259</sup> “we shroud this natural phenomenon which is responsible for the birth and regeneration of humanity in shame, silence and indignity.”<sup>260</sup> In other words, because

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<sup>255</sup> See *supra* Section III.B.

<sup>256</sup> Hyendius, *supra* note 161.

<sup>257</sup> For a humorous, albeit depressing, look at what men know about menstruation, see Emma Cueto, *BuzzFeed’s “Men Explain Periods” Video Hilariously Shows that Most of Them Actually Can’t*, BUSTLE (Apr. 2, 2015), <https://www.bustle.com/articles/73759-buzzfeeds-men-explain-periods-video-hilariously-shows-that-most-of-them-actually-cant>.

<sup>258</sup> *Talking About Periods – An International Investigation*, CLUE, <https://www.helloclue.com/survey.html> (last visited June 24, 2018) [hereinafter *Talking About Periods*]. See Jones, *supra* note 110.

<sup>259</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

<sup>260</sup> Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 3 (2014) (quoting Archana Patkar, *quoted in* ROSE GEORGE, WATER SUPPLY AND SANITATION COLLABORATIVE COUNCIL, *CELEBRATING WOMANHOOD: BREAK THE SILENCE!* 20 (2013), <https://www.wsscc.org/wp-content/uploads/2016/05/Celebrating-Womanhood-How-better-menstrual-hygiene-management-is-the-path-to-better-health-dignity-and-business-%E2%80%93-WSSCC-2013.pdf>).

menstruation is not viewed as stereotypically “feminine” by being “bloody, smelly, and natural,”<sup>261</sup> the public has been historically silent and degrading in regards to menstruation.<sup>262</sup>

In ancient times, menstruation was “strongly associated with mystery, magic, and even sorcery.”<sup>263</sup> In biblical times, ancient Hebrews put menstruating women in seclusion where they were “separated from the rest of society for seven ‘clean’ days.”<sup>264</sup> In the United States, commercially available menstrual hygiene products did not become successful until there were discreet means of obtaining such “unmentionables.”<sup>265</sup> For example, to buy Curads in 1920, storeowners placed a moneybox next to the display so people did not have to show the cashier what they were buying.<sup>266</sup> Additionally, to buy Tampax in 1929, the packages were often delivered in non-descriptive, plain boxes in the mail.<sup>267</sup>

While this “attitude of romantic paternalism” was likely meant to encourage and protect morals and virtue, “in practical effect, [it] put women not on a pedestal, but in a cage”<sup>268</sup> filled with shame and anxiety.<sup>269</sup> Now, seventy-eight percent (78%) of the world’s population uses over 5,000 slang terms for menstruation, most of which are negative and embarrassing in nature: “Shark week,” “Code red,” “Bloody [M]ary,” “Crimson wave,” and “On the rag” just to name a few.<sup>270</sup> Additionally, even if an individual does have the necessary

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<sup>261</sup> Winkler & Roaf, *supra* note 260, at 3.

<sup>262</sup> See *Talking About Periods*, *supra* note 258.

<sup>263</sup> Bushak, *supra* note 38.

<sup>264</sup> *Id.*

<sup>265</sup> The first commercially available disposable pad in the United States, Lister’s Towels, did not achieve wide success, likely because morality and humiliation prevented the company from advertising such an “unmentionable” product. *Lister’s Towel’s*, *supra* note 40.

<sup>266</sup> Jacobs, *supra* note 38.

<sup>267</sup> Fetters, *supra* note 38.

<sup>268</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

<sup>269</sup> See Segran, *supra* note 126; see also *Talking About Periods*, *supra* note 258. Sixty-six percent (66%) of individuals around the world know nothing about menstruation until they begin menstruating. Seung Lee & Brad Kerner, Save the Children, *What Do Menstruating Girls Need in Schools?*, GLOBAL VILLAGE, [http://www.aglobalvillage.org/journal/issue9/adolescent\\_health/what-do-menstruating-girls-need-in-schools-seung-lee-brad-kerner-save-the-children/](http://www.aglobalvillage.org/journal/issue9/adolescent_health/what-do-menstruating-girls-need-in-schools-seung-lee-brad-kerner-save-the-children/) (last visited Jan. 4, 2018).

<sup>270</sup> Roisin O’Connor, *Menstruation Study Finds Over 5,000 Slang Terms for ‘Period,’* INDEPENDENT (Mar. 1, 2016, 12:01 PM), <http://www.independent.co.uk>

menstrual products, the individual may struggle just making it to the restroom without others suspecting it is “that time of the month.”<sup>271</sup> Five percent (5%) of women do not carry their purse to the restroom for fear that others will guess that it is “their time of the month.”<sup>272</sup>

Fortunately, however, the crimson tide is beginning to turn. While the fight for overall bathroom equality began almost immediately after the elimination of pay toilets,<sup>273</sup> only recently has menstruation taken a lead role in this fight. 2015 was named “The Year of The Period”<sup>274</sup> and “The Year the Period Went Public”<sup>275</sup> because menstruation, particularly the stigma and inequality associated with menstruation, received increased publicity in social media and news media.<sup>276</sup> In 2016 and 2017, the movement saw further popularity and success through the beginnings of actual “menstrual change.”<sup>277</sup> Now, menstruation and “menstrual equity” are becoming part of the discussion of overall equality, which is “evidence of [menstruators] taking their place as half the human race[.]”<sup>278</sup>

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/life-style/health-and-families/menstruation-study-finds-over-5000-slang-terms-for-period-a6905021.html; *Talking About Periods*, *supra* note 258.

<sup>271</sup> See Segran, *supra* note 126.

<sup>272</sup> Segran, *supra* note 126; see MURPHY’S LAW, *supra* note 9.

<sup>273</sup> This “potty parity” movement focuses on, among other things, access to an equal number of women’s restrooms, reducing the wait time in women’s restrooms, and even establishing default unisex bathrooms. *E.g.*, Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263, 273–76 (1991); Soraya Chemaly, *The Everyday Sexism of Women Waiting in Public Toilet Lines*, TIME (Jan. 5, 2015), <http://time.com/3653871/womens-bathroom-lines-sexist-potty-parity/>; Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 150 (2017).

<sup>274</sup> Makala 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-dont-mean-punctuation>.

<sup>275</sup> Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN (Oct. 13, 2015), <http://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public/>.

<sup>276</sup> See *id.*; Gharib, *supra* note 274.

<sup>277</sup> Jones, *supra* note 110; see also Segran, *supra* note 126.

<sup>278</sup> Gloria Steinem (@GloriaSteinem), TWITTER (Apr. 21, 2016, 11:31 AM), <https://twitter.com/gloriasteinem/status/723172288795807744>.



## CONCLUSION

On average, we spend thirty minutes a day in the restroom, which is approximately 608 days or around one and a half years of our lives.<sup>279</sup> While half of the population has the reassurance that every restroom will likely have everything necessary to effectively manage their bodily functions during this time, the other half has no such reassurance. Instead, the other half lives in constant anxiety and embarrassment, risks disease and discomfort, and compromises education and work because every restroom will likely not have everything they need to effectively manage their bodily functions.

When I got my first period, I was in a public park, away from home, no other female in sight, and without any menstrual hygiene products. I did the only thing my panicked, thirteen-year-old brain could think of at the time: I ripped about half of the toilet paper from the toilet paper dispenser in the public restroom and stuffed it in my underwear. Unlike millions of other people across the country, however, I was lucky. My father was close by and so was our nice, upper-middle-class home that was stocked with the necessary products.

If that public park restroom had free menstrual hygiene products, it would have saved a thirteen-year-old girl a lot of panic and discomfort. If every United States restroom outside the home had free menstrual hygiene products, it would save millions of people from stress, discomfort, and humiliation. It would eliminate the social stigma and shame surrounding menstruation. It would increase school attendance and work productivity. It would decrease disease and infections. It would ensure that the entire population could safely and effectively manage their bodily functions in public.

Toilet paper, and most other restroom necessities, became free when pay toilets were finally exposed and eliminated as a violation of human rights and equal protection. Menstrual hygiene products serve the same purpose. Requiring payment for menstrual hygiene products violates those same human rights and equal protections. However, menstrual hygiene products remain costly. For decades, menstruators have been forced to go with the flow and live in a BYOT society that requires them to either bring their own menstrual

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<sup>279</sup> See Sara Schwartz, *Common Bathroom Habits Revealed*, HUFFPOST (Dec. 6, 2017), [https://www.huffingtonpost.com/2014/03/27/bathroom-habits-\\_n\\_4987018.html](https://www.huffingtonpost.com/2014/03/27/bathroom-habits-_n_4987018.html).

hygiene products or face the bloody consequences. Like the end of pay toilets, it is time to expose and eliminate the BYOT policy as a violation of human rights and equal protection. It is time for this policy to end. Period.