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Holly Seibold

Gianna Fienberg

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## FREE TO BLEED: VIRGINIA HOUSE BILL 83 AND THE DIGNITY OF MENSTRUATING INMATES

*Holly Seibold & Gianna Fienberg\**

\* Holly Seibold is the Founder and Executive Director of BRAWS ([www.BRAWS.org](http://www.BRAWS.org)). Since January 2015, Holly and her team have distributed over two million period products and undergarments to women and girls in crisis. Holly is a fierce defender of women and girls, advocating for the passage of smart public policy. Holly serves on the Virginia Council on Women, an advisory council in the Executive Branch of state government. She also leads the Virginia Menstrual Equity Coalition, along with partner organizations, Richmond-based Period Patch and Sylvia's Sisters. Gianna Fienberg is a member of the class of 2019 at the University of Richmond School of Law and the Executive Editor of the *Richmond Public Interest Law Review* for Volume 22. She would like to thank her co-author, Holly Seibold, for her incredible work toward achieving menstrual equity and the entire *Richmond Public Interest Law Review* for all of their hard work preparing this article for publication. Finally, she would also like to thank Emma Greger, Liliás Gordon, and David Forsyth for their support and friendship.

## ABSTRACT

*For many individuals, their monthly period is an embarrassing and stigmatizing event, but for those who are homeless or have a low income, are students, or are incarcerated, it is something much more dangerous. A lack of menstrual hygiene can lead to serious health risks including skin infections, urinary tract and bladder infections, and toxic shock syndrome. Because of the cost of menstrual supplies, though, many are prevented from adequately caring for their menstrual health. Students, the homeless and low-income, and the incarcerated are regularly confronted by a lack of access to menstrual supplies and are thus forced to use whatever material is available to make their own. These challenges are compounded in jails where inmates are entirely dependent upon correctional officers to meet their needs. Few jurisdictions have sought to lessen this menstrual inequity, but in 2018, the Virginia General Assembly took steps to diminish the burden on incarcerated women in the Commonwealth by passing House Bill 83. House Bill 83 requires the Virginia Department of Corrections to provide free menstrual products to female prisoners and inmates. While this legislation is limited, it is a step in the right direction to ensuring menstrual equity for all those in the Commonwealth.*

## INTRODUCTION

For many people who menstruate, the onset of one's period each month raises a number of choices with serious educational, economic, and social consequences. Students who are unable to afford supplies of their own miss school, leading to gaps in the curriculum and an inequitable education.<sup>1</sup> Many of them are not able to participate in extracurricular programs, causing them to miss opportunities for success.<sup>2</sup> Additionally, homeless women<sup>3</sup> who are unable to manage their menstruation are imprisoned by their own bodies. Their freedom and dignity are stripped away for a week each month,

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<sup>1</sup> See Barbara Goldberg, *U.S. Women Push Back Against Stigma, Cost of Menstruation*, REUTERS (Mar. 8, 2016), <https://www.reuters.com/article/us-usa-menstruation/u-s-women-push-back-against-stigma-cost-of-menstruation-idUSKCN0WA1RG>.

<sup>2</sup> *Id.*

<sup>3</sup> The authors recognize that menstruation is an experience that is not limited to just women. Transgender men and non-binary individuals face some of the greatest challenges when it comes to menstrual equity. As a result, this paper attempts to use gender-inclusive language. However, occasionally, use of gendered terms, such as "women" and "girls," was unavoidable.

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often rendering them unable to work. Low-income families, living just above the poverty line, are forced to make tough choices - food or tampons? school supplies or pads?

Unfortunately, there is no federal legislation supporting menstruation, even though over half of the U.S. population has a menstrual period at some point in their life.<sup>4</sup> The average person menstruates for thirty-eight years of their life and uses upwards of 240 pads or tampons per year.<sup>5</sup> People risk developing serious infections if they are unable to remain clean during menstruation.<sup>6</sup> Yet menstrual products are subject to sales taxes in most states, unlike other medically necessary supplies.<sup>7</sup> Many women simply go without any menstrual products or they make their own supplies out of whatever materials are available to them.<sup>8</sup>

Menstruating individuals often encounter the greatest inequities in prisons and jails. Inmates are entirely dependent upon correctional officers to meet their needs. When the correctional facility fails to provide inmates with a sufficient supply of menstrual products, inmates often have to go without because they are unable to buy their own as they make only a few cents per day and charities are not permitted to send donations to the incarcerated.<sup>9</sup>

In the 2018 General Assembly session in Virginia, lawmakers introduced a number of bills focused on improving menstrual equity in the Commonwealth. While bills to exempt menstrual products from Virginia's sales tax and a bill that would require middle and high schools to stock supplies in the girls' restroom ultimately failed, House Bill 83 (HB 83), a bill requiring

<sup>4</sup> See Abigail Jones, *Periods, Policy and Politics: Menstrual Equity is the New Thing*, NEWSWEEK (May 8, 2017), <https://www.newsweek.com/periods-policy-and-politics-menstrual-equity-new-thing-596027>.

<sup>5</sup> Jessica Kane, *Here's How Much a Woman's Period Will Cost Her Over a Lifetime*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/period-cost-lifetime\\_n\\_7258780](https://www.huffpost.com/entry/period-cost-lifetime_n_7258780) (stating that "1 tampon every 6 hours = 4 tampons per day x 5 days of a period = 20 tampons per cycle x 456 periods = 9,120 tampons. At 36 tampons per box, that's 253.3 boxes x \$7 = \$1,773.33").

<sup>6</sup> Jennifer Bennett, *The Tampon Tax: Sales Tax, Menstrual Hygiene Products, and Necessary Exemptions*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 183, 195 (2017); Mary Bowerman, *Toxic Shock Syndrome, Infections: What if I Leave a Tampon in for Too Long?*, USA TODAY (June 3, 2017), <https://www.usatoday.com/story/news/nation-now/2017/06/03/what-if-leave-tampon-too-long/342305001/>.

<sup>7</sup> See Bennett, *supra* note 6, at 192–93.

<sup>8</sup> TONJANIQUE EVANS ET AL., UNIV. OF D.C. SCH. OF LAW LEGISLATION CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 15 (2018), [https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018\\_periods\\_policy\\_report.pdf](https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf).

<sup>9</sup> See VA. DEP'T OF CORR., OPERATING PROCEDURE NO. 220.1, GIFTS AND DONATIONS 1–2 (2016) (outlining specific exceptions to the prohibition on gifts and donations that do not include menstrual hygiene products); Chandra Bozelko, *Prisons That Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, GUARDIAN (June 12, 2015), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights>.

Virginia to provide free menstrual products to female prisoners and inmates, succeeded.<sup>10</sup>

Part I of this article will explain the need for menstrual equity in the United States by examining the difficulties that students, the homeless and low-income, and the incarcerated face when attempting to gain access to pads and tampons. Efforts at the federal and state levels to improve access to menstrual supplies for the incarcerated are reviewed in Part II. Part III will look specifically at Virginia's recent successful attempt to improve access for incarcerated women through HB 83. This section will explain the work that was done to get HB 83 passed, what the bill actually provides for, and some of the shortcomings of HB 83. Finally, this paper concludes by acknowledging that while there is still more work to be done, HB 83 is an important step forward in ensuring that the incarcerated are able to live their lives with dignity.

## I. THE NEED FOR MENSTRUAL EQUITY

Overwhelming feelings of shame, disgust, and fear of periods has firmly established a societal norm that discourages discussion of menstruation. Because of the lack of women in leadership positions, women feel like their needs do not matter, and rarely speak up in their workplaces, schools, or homes. People who menstruate are taught from an early age to be discrete and keep their periods a secret in order to keep men from feeling uncomfortable. As a result, vulnerable individuals, particularly the young, low-income, and incarcerated, are unable to receive equitable treatment in their daily lives.

### A. Students

People who menstruate face a variety of social, physical, and mental challenges associated with their periods. From an early age, girls are taught to be ashamed of their periods and to conceal their menstrual supplies. Furthermore, discomfort during menstruation can lead to a decline in produc-

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<sup>10</sup> See Michael Alison Chandler, *Virginia Lawmakers Seek to Make Menstrual Products More Affordable, Available*, WASH. POST (Jan. 22, 2018), [https://www.washingtonpost.com/local/social-issues/virginia-lawmakers-push-to-make-menstrual-products-more-affordable-available/2018/01/22/b60346ee-f7b7-11e7-a9e3-ab18ce41436a\\_story.html?utm\\_term=.bc42c9559ddd](https://www.washingtonpost.com/local/social-issues/virginia-lawmakers-push-to-make-menstrual-products-more-affordable-available/2018/01/22/b60346ee-f7b7-11e7-a9e3-ab18ce41436a_story.html?utm_term=.bc42c9559ddd); Allison Norlian, *Virginia Prisoners to Receive Free Feminine Hygiene Products*, NBC 12 (Apr. 11, 2018), <http://www.nbc12.com/story/37933988/virginia-prisoners-could-soon-receive-free-feminine-hygiene-products/>.

tivity.<sup>11</sup> These effects are only compounded when students do not have reliable access to menstrual products. Ensuring reliable access to pads and tampons and destigmatizing periods are necessary steps to enable girls to reach their full potential.

People are taught to keep their period a secret. Companies advertising pads and tampons frequently emphasize that their products are “discrete.”<sup>12</sup> People who menstruate often speak in euphemisms when referring to their periods, particularly in the presence of men.<sup>13</sup> In schools, students are encouraged to conceal their pads and tampons by tucking them into their sleeves.<sup>14</sup> Moreover, the stigma surrounding periods leads parents to delay teaching their children about menstruation.<sup>15</sup> According to one survey of girls living in the United Kingdom who are between the ages of fourteen and twenty-one, 14% of girls said they did not know what was happening when they first began menstruating, and 26% recounted that they did not know what to do during their first period.<sup>16</sup> One nineteen-year old girl reported that she “used to always make up excuses to avoid telling people [she] was on [her] period.”<sup>17</sup>

These feelings of shame and embarrassment are only heightened when students do not have reliable access to menstrual products. In 2017, a report by the Girl Scouts of the USA revealed that 41% of girls live in low-income families and 19% live in poverty.<sup>18</sup> With tampons and pads potentially costing \$7 to \$10 a box, students often go without.<sup>19</sup> Shockingly, one survey revealed that 42% of girls admitted to using a makeshift sanitary replacement, like toilet paper or a sock, because of an inability to afford menstrual products.<sup>20</sup> Still, girls are frequently too uncomfortable to ask teachers, especial-

<sup>11</sup> See *Almost Half of Girls Aged 14-21 are Embarrassed by Their Periods*, PLAN INT’L UK (Oct. 9, 2017), <https://plan-uk.org/media-centre/almost-half-of-girls-aged-14-21-are-embarrassed-by-their-periods> [hereinafter PLAN INT’L UK].

<sup>12</sup> See Julie Beck, *Don’t Let Them See Your Tampons*, ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/dont-let-them-see-your-tampons/394376/>.

<sup>13</sup> Tomi-Ann Roberts et al., “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCHOL. WOMEN Q. 131, 132 (2002).

<sup>14</sup> See Beck, *supra* note 12.

<sup>15</sup> Roberts et al., *supra* note 13, at 132–33.

<sup>16</sup> PLAN INT’L UK, *supra* note 11.

<sup>17</sup> *Id.*

<sup>18</sup> See THE GIRL SCOUT RESEARCH INST., *THE STATE OF GIRLS 2017: EMERGING TRUTHS AND TROUBLING TRENDS* 4, 8 (2017), [https://www.girlscouts.org/content/dam/girlscouts-gsusa/forms-and-documents/about-girl-scouts/research/GSUSA\\_State-of-Girls-Report\\_2017.pdf](https://www.girlscouts.org/content/dam/girlscouts-gsusa/forms-and-documents/about-girl-scouts/research/GSUSA_State-of-Girls-Report_2017.pdf) [hereinafter GIRL SCOUT RESEARCH INST.] (reflecting the impact of poverty on girls measured in 2015).

<sup>19</sup> EVANS ET AL., *supra* note 8, at 11; Jennifer Weiss-Wolf & Dasha Burns, *Why Feminine Hygiene Products Should be Free in School*, NEWSWEEK (Apr. 20, 2016), <http://newsweek.com/let-girls-learn-michelle-obama-tampons-pads-education-450244> (discussing the role of Michelle Obama’s Let Girls Learn initiative in the provision of free feminine hygiene products in schools).

<sup>20</sup> *40% of Girls Have Used Toilet Roll Because They’ve Struggled to Afford Sanitary Wear*, Survey Re-

ly male teachers, for pads or tampons.<sup>21</sup> There is also no guarantee that schools have these products on hand.<sup>22</sup> This problem is even worse for transgender and non-binary students who face additional shame and barriers to access.<sup>23</sup> Because the number of people living in poverty is on the rise, access to sanitary materials is likely to be a growing problem.<sup>24</sup>

The stigmatization of periods has a real and negative impact on the lives of those who menstruate. One study compared the reactions of other persons in a room to a woman who dropped a tampon from her purse to those reactions to a woman who dropped a hair clip.<sup>25</sup> The results revealed that the woman who dropped a tampon was perceived as less competent and less likable.<sup>26</sup> Participants in the experiment were even more likely to physically distance themselves from the woman who dropped a tampon.<sup>27</sup>

Embarrassment and anxiety over one's period can be extremely distracting for menstruating students. It is not uncommon for students to skip school due to their period.<sup>28</sup> One survey found that 49% of girls claim to have missed at least one day of school because of their period.<sup>29</sup> This can lead to lasting consequences beyond the loss of a single day's instruction. Students with too many unexcused absences can be labeled a "truant" and receive a variety of punishments, including weekend classes and court charges.<sup>30</sup> Students also reported having difficulty concentrating and feeling self-conscious during class while on their period.<sup>31</sup> Studies demonstrate that a lack of access to menstrual products leads to a decline in academic achievement among girls.<sup>32</sup>

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veals, PLAN INT'L UK (Mar. 12, 2018), <http://plan-uk.org/media-centre/40-of-girls-have-used-toilet-roll-because-theyve-struggled-to-afford-sanitary-wear>.

<sup>21</sup> EVANS ET AL., *supra* note 8, at 10.

<sup>22</sup> EVANS ET AL., *supra* note 8, at 12 (explaining that not every school has a "pad teacher" to provide pads or tampons to students and that there is no federal legislative proposals that explicitly address menstrual equity in schools).

<sup>23</sup> EVANS ET AL., *supra* note 8, at 7.

<sup>24</sup> GIRL SCOUT RESEARCH INST, *supra* note 18 (reflecting the impact of poverty on girls measured in 2015).

<sup>25</sup> Roberts et al., *supra* note 13, at 131.

<sup>26</sup> *Id.* at 135.

<sup>27</sup> *Id.* at 136.

<sup>28</sup> Goldberg, *supra* note 1.

<sup>29</sup> PLAN INT'L UK, *supra* note 11.

<sup>30</sup> EVANS ET AL., *supra* note 8, at 9.

<sup>31</sup> PLAN INT'L UK, *supra* note 11.

<sup>32</sup> EVANS ET AL., *supra* note 8, at 9.

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## B. The Homeless and Low-Income

Feelings of shame surrounding periods and a lack of access to menstrual products are not confined to the schoolhouse. These problems persist throughout a menstruating person's life and have the greatest impact on those who are already struggling to get by. For the homeless and low-income, menstrual products are prohibitively expensive. Furthermore, in many states, sanitary supplies are not exempt from sales tax, and people are unable to use public benefits to purchase pads and tampons.

The average menstruating person experiences about 456 periods throughout their life.<sup>33</sup> It is recommended that a person change out their pads or tampons every four to eight hours; therefore, menstruating individuals use approximately four products per day.<sup>34</sup> With the average period lasting between three to seven days, this adds up to an average of about twenty products every cycle.<sup>35</sup> A typical box of thirty-six pads or tampons costs \$7.<sup>36</sup> Thus, a person who menstruates spends upwards of \$70 on menstrual products every year.<sup>37</sup> These numbers do not include other common costs associated with periods, such as pain killers for cramps or new underwear due to blood stains.<sup>38</sup> Having a period is an expensive burden.

It is estimated that 553,742 people in the United States are homeless.<sup>39</sup> Of that number, 39% identify as women and 21% are children.<sup>40</sup> Many homeless women are survivors of domestic abuse; thus, they enter domestic violence shelters when they separate from their abuser.<sup>41</sup> However, most shelters are ill-equipped to handle the demand for pads and tampons.<sup>42</sup> Historically, pads and tampons have been the least donated items, yet most

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<sup>33</sup> Kane, *supra* note 5.

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

<sup>35</sup> *Id.* (determining the average of twenty products per cycle for someone who uses four tampons per day over the course of a five-day cycle).

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

<sup>37</sup> Jennifer Weiss-Wolf, *Helping Women and Girls. Period.*, N.Y. TIMES (Jan. 28, 2015), <https://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period>.

<sup>38</sup> Kane, *supra* note 5.

<sup>39</sup> OFFICE OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2017).

<sup>40</sup> *Id.* at 9.

<sup>41</sup> AM. CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, DOMESTIC VIOLENCE AND HOMELESSNESS 1-3, <https://www.aclu.org/other/domestic-violence-and-homelessness> (last visited Oct. 26, 2018).

<sup>42</sup> Lisa De Bode, *Hygiene and Heartache: Homeless Women's Daily Struggle to Keep Clean*, ALJAZEERA AM. (Jan. 13, 2015), <http://america.aljazeera.com/articles/2015/1/13-scared-to-walk-the-street.html>; Caitlin Yoshiko Kandil, *Poor Women in Dire Need of Feminine Hygiene Products*, L.A. TIMES (Feb. 28, 2016), <http://www.latimes.com/socal/weekend/news/tn-wknd-et-0228-feminine-products-20160221-story.html>.

demanded.<sup>43</sup> Food pantries, church groups, student council drives, and the scouts, while well intentioned, typically do not ask for tampons when collecting donations for such shelters.<sup>44</sup>

This lack of resources is problematic because the failure to maintain proper hygiene during one's period raises numerous health risks, such as skin infections, urinary tract and bladder infections, and toxic shock syndrome.<sup>45</sup> Moreover, the instability of homelessness can cause individuals who once had regularly-scheduled cycles to experience unpredictable periods.<sup>46</sup> Some people report heavier and longer bleeding after becoming homeless, therefore requiring more, yet still unavailable, menstrual products.<sup>47</sup> Without menstrual products, menstruating individuals resort to toilet paper, paper towels, old rags, socks, or diapers to soak up the blood.<sup>48</sup>

Despite being classified as "medical devices" by the Food and Drug Administration and described as a "medical necessity" by the American Medical Association, most states re-categorize pads and tampons as nonessential.<sup>49</sup> As a result, pads and tampons are not exempt from state sales tax; instead they are taxed at a rate as high as 10.02% in Louisiana (5.63% in Virginia).<sup>50</sup> However, items such as Viagra, Rogaine, condoms and shampoo are tax exempt because they are considered medical necessities.<sup>51</sup> Only

<sup>43</sup> De Bode, *supra* note 42; Eleanor Goldberg, *For Homeless Women, Getting Their Period Is One Of The Most Difficult Challenges*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.com/2015/01/14/homeless-women-tampons\\_n\\_6465230.html](https://www.huffingtonpost.com/2015/01/14/homeless-women-tampons_n_6465230.html); Brittny McNamara, *How Periods Perpetuate Homelessness*, TEEN VOGUE (Dec. 20, 2017), <https://www.teenvogue.com/story/homelessness-and-periods>; Yoshiko Kandil, *supra* note 42.

<sup>44</sup> Yoshiko Kandil, *supra* note 42.

<sup>45</sup> Bowerman, *supra* note 6; De Bode, *supra* note 42.

<sup>46</sup> McNamara, *supra* note 43.

<sup>47</sup> *Cf. id.* (explaining the increased difficulty in accessing menstrual products for the homeless and how homelessness caused stress that lead to irregularities in one woman's cycle).

<sup>48</sup> EVANS ET AL., *supra* note 8, at 9.

<sup>49</sup> U.S. DEP'T OF HEALTH & HUM. SERVS., OBSTETRICS & GYNECOLOGY DEVICES BRANCH, GUIDANCE FOR INDUSTRY AND FDA STAFF: MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(K)S) 14 (July 27, 2005) (describing pads and tampons as medical devices); Press Release, Am. Med. Ass'n, AMA Adopts New Policies on Final Day of Annual Meeting (June 15, 2016), <https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting> (describing tampons and pads as a medical necessity); Bennett, *supra* note 6, at 192–93 (discussing states' classification of tampons and pads as inessential).

<sup>50</sup> JARED WALCZAK & SCOTT DRENKARD, TAX FOUND., STATE AND LOCAL SALES TAX RATES 2018 2 (2018), <https://files.taxfoundation.org/20180313143458/Tax-Foundation-FF572.pdf> [hereinafter WALCZAK & DRENKARD].

<sup>51</sup> Victoria Hartman, Note, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U.L. REV. 313, 315, 317 (2017) (explaining that Rogaine, condoms, and dandruff shampoo were tax exempt in New York long before the state legislature finally exempted tampons and sanitary pads); Ema Sagner, *More States Move to End 'Tampon Tax' That's Seen as Discriminating Against Women*, NAT'L PUB. RADIO (Mar. 25, 2018), <https://www.npr.org/2018/03/25/564580736/more-states-move-to-end-tampon-tax-that-s-seen-as-discriminating-against-women> (noting that Chapstick, Viagra, and dandruff shampoo are three of thousands of health and personal care items that are exempt from

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nine states<sup>52</sup> currently exempt menstrual supplies from sales tax, and five other states<sup>53</sup> do not have a sales tax. The sales tax is a regressive tax. This means that low-income families are disproportionately impacted because those who earn less pay a larger percentage of their overall salary to sales tax.<sup>54</sup> People who earn more have greater financial flexibility to buy in bulk or shop sales and, therefore, pay less overall.<sup>55</sup>

While taxes drive up the cost of menstrual products, public benefit programs limit the resources that help low-income people afford these items. Menstrual supplies are not included in the Supplemental Nutrition Assistance Program (food stamps), nor are they part of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) or Medicaid.<sup>56</sup> In fact, some people sell their food stamps in order to afford menstrual products.<sup>57</sup> Furthermore, Flexible Spending Accounts (FSA) are not acceptable funds to be used when purchasing pads and tampons.<sup>58</sup> Frustratingly, shelters are not permitted to use federal grant money to purchase menstrual supplies, leaving them entirely dependent on community donations.<sup>59</sup>

### C. The Incarcerated

Incarcerated people face the greatest barriers to accessing menstrual products. Supplies are often only available for purchase at marked-up prices, and when inmates are given these supplies, they are frequently provided with an insufficient number of menstrual products. Furthermore, it can be extremely humiliating and risky for an incarcerated person to ask a guard for more menstrual supplies, due to the inherent power imbalance and the stigma surrounding menstruation. Sometimes, correctional facilities simply do not have menstrual products on-hand, forcing inmates to create their

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sales tax in many U.S. states).

<sup>52</sup> Sagner, *supra* note 51 (stating that Connecticut, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York and Pennsylvania exempt menstrual supplies from sales tax).

<sup>53</sup> WALCZAK & DRENKARD, *supra* note 50, at 3 (stating that Alaska, Delaware, Montana, New Hampshire, and Oregon do not have a sales tax).

<sup>54</sup> Bennett, *supra* note 6, at 190.

<sup>55</sup> See Eleanor Goldberg, *Poor People Have to Spend More Money on Toilet Paper Than the Rich: Study*, HUFFINGTON POST (Mar. 28, 2016), [https://www.huffingtonpost.com/entry/poor-households-have-to-spend-more-on-toilet-paper-than-well-off-households-study\\_us\\_56f56eccc4b014d3fe22fe65](https://www.huffingtonpost.com/entry/poor-households-have-to-spend-more-on-toilet-paper-than-well-off-households-study_us_56f56eccc4b014d3fe22fe65).

<sup>56</sup> Julie Kosin, *Getting Your Period is Still Oppressive in the United States*, HARPER'S BAZAAR (Oct. 9, 2017), <https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/>; Jessica Valenti, *The Case for Free Tampons*, GUARDIAN (Aug. 11, 2014), <https://www.theguardian.com/commentisfree/2014/aug/11/free-tampons-cost-feminine-hygiene-products>.

<sup>57</sup> Valenti, *supra* note 56.

<sup>58</sup> *Feminine Hygiene Products: FSA Eligibility*, FSASTORE, <https://fsastore.com/FSA-Eligibility-List/F/Feminine-Hygiene-Products-E300.aspx> (last visited Oct. 26, 2018).

<sup>59</sup> See EVANS ET AL., *supra* note 8, at 14.

own pads and tampons out of whatever materials are available to them. Incarcerated individuals deserve to have their periods treated like any other medical necessity and to experience their periods without shame or fear of repercussions.

In 2017, the United States incarcerated approximately 219,000 women.<sup>60</sup> The number of women incarcerated has risen by about 700% since 1980.<sup>61</sup> Policies governing menstruation, if they exist, are often handled on a prison-by-prison or jail-by-jail basis.<sup>62</sup> However, the result ends up being the same: supplies are scarce.<sup>63</sup>

The incarcerated regularly report not having a sufficient supply of menstrual products. For example, in Connecticut, inmates receive five pads per week to split with their cell mate.<sup>64</sup> This amounts to ten pads per cycle for each person.<sup>65</sup> With the average period lasting five days, this means each inmate only gets to change out her pad once a day, risking infection.<sup>66</sup> Moreover, these prison pads are flimsier than the typical pad available for purchase in a store; these pads do not have wings and frequently fail to stick to the person's underwear.<sup>67</sup> Some prisons simply do not provide any menstrual products at all.<sup>68</sup> One woman, Tara Oldfield-Parker, recounted her experience of getting her period after just being arrested.<sup>69</sup> She asked an officer for a pad, only to be told that the jail did not have any.<sup>70</sup> After waiting an hour and a half, Tara received a sterile gauze pad that the officer procured from an ambulance.<sup>71</sup> This gauze pad was designed to bandage wounds and had no adhesive.<sup>72</sup>

<sup>60</sup> Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2017*, PRISON POL'Y INITIATIVE (Oct. 19, 2017), <https://www.prisonpolicy.org/reports/pie2017women.html>.

<sup>61</sup> THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls-1980-2016.pdf>.

<sup>62</sup> Zoe Greenberg, *In Jail, Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Bozelko, *supra* note 9; see also Maya Schenwar, *In Prison, Toilet Paper is the New Tampon*, MS. MAGAZINE BLOG (Apr. 12, 2010), <http://msmagazine.com/blog/2010/04/12/in-prison-toilet-paper-is-the-new-tampon/> (explaining that "there are never enough feminine hygiene products to go around.").

<sup>65</sup> Bozelko, *supra* note 9.

<sup>66</sup> *Id.*; see Alex Ronan, *Menstruation Can Become Humiliation in Prisons*, CUT (June 16, 2015), <https://www.thecut.com/2015/06/menstruation-can-become-humiliation-in-prisons.html>.

<sup>67</sup> Bozelko, *supra* note 9.

<sup>68</sup> Ronan, *supra* note 66.

<sup>69</sup> Greenberg, *supra* note 62.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Pads, tampons, and panty liners are available for purchase in commissaries, but often at a marked-up price.<sup>73</sup> Most inmates enter prison indigent and only make around seventy-five cents a day for their labor.<sup>74</sup> As a result, they are unable to afford these mislabeled “luxury items.”<sup>75</sup> Additionally, products are subject to price hikes at any time.<sup>76</sup> Even when an inmate has the resources to purchase these over-priced menstrual products, there is no guarantee that the commissary will have a sufficient supply on-hand. It is not uncommon for inmates to wait one to two weeks for new sanitary products to be re-stocked after the commissary runs out.<sup>77</sup> Inmates trade food for tampons because menstrual products are “a higher currency than sugar, coffee, and cigarettes.”<sup>78</sup>

Even when a facility is given the resources necessary to meet the hygiene needs of inmates, power dynamics within the prison or jail prevent inmates from accessing the products they require. At one prison in New York, guards forced inmates to show them their dirty pads to receive “extra” supplies.<sup>79</sup> One inmate recounted an instance where a correctional officer “threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them.”<sup>80</sup> Many describe the experience of asking a male guard for an additional pad as “humiliating” and “degrading,” further demonstrating the impact of stigmatizing periods.<sup>81</sup>

The incarcerated are frequently forced to sit in blood-stained clothes for days at a time, even when visiting their lawyers, social workers, or loved ones.<sup>82</sup> Additionally, correctional officers use menstrual products to turn inmates against each other by only giving supplies to certain units or certain individuals.<sup>83</sup> Halle, a California inmate, summarized the problem best when she said, “Pads are not dispensed as they are supposed to be. We are forced to reuse them, we are forced to beg for what we need, and if an of-

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<sup>73</sup> AM. CIVIL LIBERTIES UNION NEB., NEBRASKA WOMEN IN PRISON LET DOWN AND LOCKED UP 10 (2017), [https://www.aclunebraska.org/sites/default/files/field\\_documents/women\\_in\\_prison\\_2017\\_10.pdf](https://www.aclunebraska.org/sites/default/files/field_documents/women_in_prison_2017_10.pdf) [hereinafter ACLU NEB.].

<sup>74</sup> Bozelko, *supra* note 9.

<sup>75</sup> ACLU NEB., *supra* note 73.

<sup>76</sup> *Id.*

<sup>77</sup> See Bozelko, *supra* note 9; Schenwar, *supra* note 64.

<sup>78</sup> Greenberg, *supra* note 62.

<sup>79</sup> TAMAR KRAFT-STOLAR, CORR. ASS’N OF N.Y., REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS 67 (2015), <http://www.correctionalassociation.org/wp-content/uploads/2015/03/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>.

<sup>80</sup> Greenberg, *supra* note 62.

<sup>81</sup> EVANS ET AL., *supra* note 8, at 21; Bozelko, *supra* note 9; Greenberg, *supra* note 62.

<sup>82</sup> Greenberg, *supra* note 62.

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

ficer is in a bad mood they are allowed to take what we have and say we are hoarding.”<sup>84</sup>

Faced with a scarce supply of menstrual products, inmates frequently fashion their own sanitary devices; however, this solution comes with many risks.<sup>85</sup> One former-inmate, Chandra Bozelko, explained how she would combine six pads together to create a form of diaper.<sup>86</sup> This was the only way she could prevent the pads from falling out of her underwear.<sup>87</sup> Many other people report constructing homemade pads and tampons out of toilet paper, “using as little of it as possible, since [toilet paper] is also rationed.<sup>88</sup> The ingenuities are punishable offenses in jails and prisons.<sup>89</sup> By creating their own tampons and pads, inmates are guilty of having “contraband” and face a variety of punishments, including a delay in their release date.<sup>90</sup> Additionally, officers are reluctant to give inmates greater supplies because of their variety of additional uses, namely as cleaning supplies.<sup>91</sup>

Lack of access to menstrual products for students, the homeless and low-income, and the incarcerated is all connected. The stigma surrounding periods discourages people who menstruate from asserting their needs in all contexts.<sup>92</sup> Furthermore, impoverished people are disproportionately likely to end up in prison or jail.<sup>93</sup> Still, unlike students, the homeless, or the low-income, inmates are unable to obtain sanitary products from an outside source, such as family, friends, or charity groups.<sup>94</sup>

## II. REFORM EFFORTS FOR THE INCARCERATED

Within a single state, a variety of governmental entities set prison policies. The federal government regulates federal prisons, state governments control state prisons, local governments dictate the conditions of local jails, and individual prison wardens set some policies for their own facilities.<sup>95</sup> Thus, reforming prison conditions and ensuring menstrual equity is a chal-

<sup>84</sup> AM. CIVIL LIBERTIES UNION OF CAL., REPRODUCTIVE HEALTH BEHIND BARS IN CALIFORNIA 20 (2016), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2016/01/Reproductive-Health-Behind-Bars-in-California.pdf>.

<sup>85</sup> EVANS ET AL., *supra* note 8, at 21.

<sup>86</sup> Bozelko, *supra* note 9.

<sup>87</sup> *Id.*

<sup>88</sup> Schenwar, *supra* note 64.

<sup>89</sup> EVANS ET AL., *supra* note 8, at 21.

<sup>90</sup> *Id.*

<sup>91</sup> Bozelko, *supra* note 9.

<sup>92</sup> EVANS ET AL., *supra* note 8, at 3, 7, 17.

<sup>93</sup> ACLU NEB., *supra* note 73, at 5.

<sup>94</sup> ACLU NEB., *supra* note 73, at 10.

<sup>95</sup> *See* EVANS ET AL., *supra* note 8, at 20–21, 23–24.

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lenging task. Still, there is a growing movement at both the federal and state levels to provide the incarcerated with basic menstrual equity.

#### A. Federal Efforts

In response to numerous news articles detailing prison conditions for people who menstruate and growing support for prison reform, a handful of Democratic senators and representatives introduced legislation in 2017 to provide menstrual equity in federal prisons. While the various federal legislative efforts have been unsuccessful, a unilateral Department of Justice order issued in 2017 requires the federal government to provide people in federal prisons with access to an assortment of menstrual products.<sup>96</sup> Unfortunately, the DOJ has not been effective at enforcing the order.

In July 2017, Senators Cory Booker (D-NJ), Elizabeth Warren (D-MA), Dick Durbin (D-IL), and Kamala Harris (D-CA) introduced the Dignity for Incarcerated Women Act (S. 1524) to improve the treatment of federal prisoners.<sup>97</sup> The bill proposed an extensive slate of reforms designed to enhance the dignity of women in prisons, such as ending the shackling and solitary confinement of pregnant women and increasing contact between incarcerated mothers and their children.<sup>98</sup> A portion of this bill included increased access to menstrual products:

(j) Inmate Health.—

(1) HEALTHCARE PRODUCTS.—

(A) AVAILABILITY.—The Director shall make the healthcare products described in subparagraph (C) available to prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner.

(B) QUALITY OF PRODUCTS.—The Director shall ensure that the healthcare products provided under this paragraph conform with applicable industry standards.

(C) PRODUCTS.—The healthcare products described in this subparagraph are—

(i) tampons;

(ii) sanitary napkins<sup>99</sup>

However, no action was taken on the bill after it was introduced in the Senate.<sup>100</sup>

<sup>96</sup> U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, OPERATIONS MEMORANDUM NO. 001-2017, PROVISIONS OF FEMININE HYGIENE PRODUCTS (2017), [https://www.bop.gov/policy/om/001\\_2017.pdf](https://www.bop.gov/policy/om/001_2017.pdf) [hereinafter OPERATIONS MEMORANDUM NO. 001-2017].

<sup>97</sup> Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (1st Sess. 2017).

<sup>98</sup> Elizabeth Kiefer, *Senators Cory Booker & Elizabeth Warren Demand “Dignity” for Women Behind Bars*, REFINERY 29 (July 12, 2017), <https://www.refinery29.com/2017/07/163017/dignity-incarcerated-women-act-prisonreform-bill>.

<sup>99</sup> Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. § 4050(j) (1st Sess. 2017).

Another piece of federal legislation, the Menstrual Equity for All Act of 2017 (HR 972), aimed to provide more comprehensive reform.<sup>101</sup> This bill, introduced by Congresswoman Grace Meng (D-NY), is the first piece of legislation in Congress to help different populations of women and girls gain access to menstrual items. The Menstrual Equity for All Act would reduce the cost of menstrual products for all people by providing tax credits and exclusions for the distribution or purchase of menstrual products.<sup>102</sup> Most notably, the bill provides that all states that receive grants under the Edward Byrne Memorial Justice Assistance Grant Program must certify to the DOJ every year that all female inmates in the state have free access to menstrual products.<sup>103</sup> If a state fails to meet this requirement, the DOJ must reduce that state's funding under the grant by 20% and reallocate those funds to states that satisfy the certification requirement.<sup>104</sup> While this would be an important step forward, the bill allows the Attorney General to define "menstrual hygiene products;"<sup>105</sup> thus, there is no guarantee that incarcerated women receive products of sufficient quality. Additionally, while the tax credit under the bill applies to anyone who uses menstrual products, the provision regarding inmates is not gender-inclusive.<sup>106</sup> Nonetheless, the bill failed to make it out of the House Ways and Means Committee.<sup>107</sup>

Despite the failure to pass any federal legislation, the DOJ decided to act.<sup>108</sup> In August 2017, the DOJ, under the direction of Attorney General Jeff Sessions, issued a memo requiring federal prisons to ensure female inmates have unobstructed access to menstrual supplies by providing the following items on demand and at no-cost:

- "Tampons, regular and super size;
- Maxi Pads, with wings, regular and super size;
- Panty liners, regular."<sup>109</sup>

<sup>100</sup> *See id.*

<sup>101</sup> *See* Menstrual Equity for All Act of 2017, H.R. 972, 115th Cong. (1st Sess. 2017).

<sup>102</sup> *Id.* § 3.

<sup>103</sup> *Id.* § 5(a).

<sup>104</sup> *Id.* § 5(b).

<sup>105</sup> *Id.* § 5(d).

<sup>106</sup> *Compare* Menstrual Equity for All Act of 2017, H.R. 972, 115th Cong. § 3(c) (1st Sess. 2017) (applying the tax credit to any individual who uses menstrual hygiene products), *with* Menstrual Equity for All Act of 2017, H.R. 972, 115th Cong. § 5(a) (1st Sess. 2017) (applying the provision solely to female inmates).

<sup>107</sup> *See All Actions: H.R. 972*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/972/all-actions?overview=closed#tabs> (last visited Oct. 26, 2018).

<sup>108</sup> OPERATIONS MEMORANDUM NO. 001-2017, *supra* note 96.

<sup>109</sup> *Id.*

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However, this policy contains several limitations. First, the mandate only applies to federal prisons.<sup>110</sup> Additionally, the memo specifically states that it is meant for female inmates, again refusing to recognize the menstrual needs of transgender men and non-binary individuals.<sup>111</sup> Finally, the memo stated that federal prisons “should not significantly increase overall expenditures for female hygiene products beyond current levels.”<sup>112</sup> Moreover, it appears the DOJ is currently either unprepared or unwilling to enforce its memo. In October 2017, two months after the policy was put in place, eleven federal facilities were still not in compliance.<sup>113</sup>

## B. State and Local Efforts

The major problem with federal efforts to improve the conditions for the incarcerated is that the federal government only controls federal prisons. The vast majority of incarcerated women are in state facilities. Of the 219,000 women incarcerated, approximately 195,000 are held in state prisons and jails.<sup>114</sup> Fortunately, many states have recognized the need for menstrual equity in prisons and jails, and organizations like the American Civil Liberties Union (ACLU) have had some success bringing lawsuits regarding menstrual equity in state courts.

While twelve states have considered legislation aimed at improving inmate access to menstrual products, only four states – Colorado, Kentucky, Maryland, and Virginia – and a few cities have actually enacted legislation.<sup>115</sup> In 2016, New York City became the first jurisdiction to provide for menstrual equity in correctional facilities.<sup>116</sup> The law requires officers to provide any “female individual” detained for forty-eight hours with menstrual hygiene products “as soon as practicable.”<sup>117</sup> Los Angeles County followed suit in 2017, with a motion requiring the county to provide tampons for individuals in juvenile detention.<sup>118</sup> Maryland’s 2018 legislation requires the state to provide female inmates with menstrual supplies upon admission

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Taylor Dolven, *Prisons are Still Charging Female Inmates for Having Their Periods*, VICE NEWS (Oct. 14, 2017), [https://news.vice.com/en\\_us/article/434qzg/prisons-are-still-charging-female-inmates-for-having-their-periods](https://news.vice.com/en_us/article/434qzg/prisons-are-still-charging-female-inmates-for-having-their-periods).

<sup>114</sup> Kajstura, *supra* note 60.

<sup>115</sup> EVANS ET AL., *supra* note 8, at 22.

<sup>116</sup> Jennifer Weiss-Wolf, *New York Makes History, with Tampons and Pads*, N.Y. TIMES (June 21, 2016), <https://kristof.blogs.nytimes.com/2016/06/21/new-york-makes-history-with-tampons-and-pads>.

<sup>117</sup> N.Y.C. ADMIN. CODE § 9-141 (2016).

<sup>118</sup> Tim Loc, *County Supervisors Vote to Ensure Tampon Access for Juvenile Detainees*, LAIST (Jan. 25, 2017), [http://www.laist.com/2017/01/25/supervisors\\_vote\\_for\\_tampons.php](http://www.laist.com/2017/01/25/supervisors_vote_for_tampons.php).

into a correctional facility, upon request, and on a routine basis.<sup>119</sup> As these laws demonstrate, legislation concerning menstrual equity for the incarcerated vary dramatically in specificity, gender inclusivity, and age.<sup>120</sup>

Legislation is not the only route to change at the state level. Lawsuits are another option for organizations and individuals who care about menstrual equity in prisons. In 2014, the ACLU of Michigan sued Muskegon County on behalf of eight female inmates.<sup>121</sup> The ACLU alleged that Muskegon County Jail violated the constitutional rights of its female inmates in a number of ways, including the failure to provide an adequate supply of menstrual products.<sup>122</sup> Correctional officers provided as many as thirty women with only one pack of twelve pads to share.<sup>123</sup> One inmate recounted that when she requested pads, a correctional officer replied that she “was shit out of luck” and better not “bleed on the floor.”<sup>124</sup> However, the court ended up dismissing the allegation that the denial of menstrual products amounted to a constitutional violation.<sup>125</sup> Because the ACLU’s evidence consisted of single accounts of a denial of supplies, the court reasoned that these were only temporary, “de minimis deprivations, which do not rise to the level of civil rights violations.”<sup>126</sup> Thus, attacking menstrual inequities through the courts presents an up-hill battle.

### III. VIRGINIA HOUSE BILL 83

In 2018, Virginia became the most recent state to enact legislation to improve inmate access to menstrual supplies with the passage of HB 83.<sup>127</sup> While Virginia failed to pass other menstrual equity bills aimed at eliminat-

<sup>119</sup> H.B. 797, 2018 Gen. Assemb., 438th Sess. (Md. 2018).

<sup>120</sup> Compare N.Y.C. ADMIN. CODE § 9-141 (2016) (providing all female inmates with feminine hygiene products as soon as practicable and at the department’s expense), with *Loc. supra* note 118 (noting that pads will be free to girls and young women in juvenile detention, but tampons will only be available for purchase), and H.B. 797, Gen. Assemb., 438th Sess. (Md. 2018) (providing menstrual hygiene products to be provided at no cost to the female inmate on admission to the facility, a routine basis, and on request).

<sup>121</sup> Am. Civil Liberties Union of Mich., *ACLU of Michigan Sues Muskegon County Over Unconstitutional Policies, Hazardous Conditions at Jail* (Dec. 4, 2014), <http://aclumich.org/article/aclu-michigan-sues-muskegon-county-over-unconstitutional-policies-hazardous-conditions-jail>.

<sup>122</sup> Complaint at 13–14, *Semelbauer v. Muskegon Cty.*, No. 1:14-cv-01245-JTN, 2015 BL 499639 (W.D. Mich. Sept. 11, 2015).

<sup>123</sup> *Id.* at 13.

<sup>124</sup> *Id.*

<sup>125</sup> *Semelbauer v. Muskegon Cty.*, No. 1:14-cv-1245, 2015 U.S. Dist. LEXIS 189417, at \*28–30 (W.D. Mich. Sept. 11, 2015).

<sup>126</sup> *Id.* at \*29.

<sup>127</sup> Tianna Mosby, *Va. Law will Provide Free Tampons to Female Prisoners*, NEWS LEADER (Mar. 8, 2018), <https://www.newsleader.com/story/news/2018/03/08/va-law-provide-free-tampons-female-prisoners/406471002/>.

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ing the sales tax on menstrual products and increasing access in schools, HB 83 received little opposition.<sup>128</sup> Still, HB 83's vague language and broad grant of authority to State Board of Corrections means that it is unclear how exactly the bill will impact inmates in Virginia. However, HB 83 still represents the important recognition that menstruation is a biological function that needs to be treated like all other medical and hygienic necessities.

#### A. The Road to HB 83

HB 83 was a largely non-controversial bill. The push to improve menstrual equity came directly from former-inmates. Once the cause was taken up in the Virginia House of Delegates by Delegate Kaye Korey (D-Fairfax), it received almost entirely unanimous support as the bill made its way through both the House and Senate.<sup>129</sup>

In Virginia prisons and jails, approximately 15.3% of the incarcerated population are female.<sup>130</sup> Yet there is no uniform standard of distribution, pricing, or quantity for menstrual products in any of these facilities. In general, the Virginia Department of Corrections (VDOC) provides inmates with pads for free.<sup>131</sup> VDOC also reports that it began providing free tampons as well in 2018.<sup>132</sup> However, many local and regional jails within the Commonwealth do not provide free tampons.<sup>133</sup> Some do not even stock tampons in the prison commissaries for purchase.<sup>134</sup> Moreover, the pads that inmates do receive are often of poor quality.<sup>135</sup> Indeed, many inmates combine multiple pads together to make a "jail tampon."<sup>136</sup>

The movement around HB 83 began with former inmates themselves. Friends of Guest House (FOGH), a non-profit organization in Alexandria, Virginia, that focuses on helping formerly incarcerated women reenter the

<sup>128</sup> See H.B. 83 Feminine Hygiene Products; No Cost to Female Prisoners or Inmates, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB83> [hereinafter H.B. 83 VA. LEGIS. INFO. SYS.] (last visited Oct. 26, 2018); Chandler, *supra* note 10.

<sup>129</sup> H.B. 83 VA. LEGIS. INFO. SYS., *supra* note 128.

<sup>130</sup> AM. CIVIL LIBERTIES UNION OF VA., WOMEN IN THE CRIMINAL JUSTICE SYSTEM: PATHWAYS TO INCARCERATION IN VIRGINIA 17 (2018), [https://www.acluva.org/sites/default/files/field\\_documents/aclu-va\\_women\\_in\\_prison\\_report\\_2018\\_final\\_09062018.pdf](https://www.acluva.org/sites/default/files/field_documents/aclu-va_women_in_prison_report_2018_final_09062018.pdf).

<sup>131</sup> Mosby, *supra* note 127.

<sup>132</sup> Norlian, *supra* note 10.

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

<sup>134</sup> See, e.g., RIVERSIDE REGIONAL JAIL COMMISSARY MENU, [https://rrjva.org/wp/wp-content/uploads/2016/09/Riverside\\_VA\\_Menu062116.pdf](https://rrjva.org/wp/wp-content/uploads/2016/09/Riverside_VA_Menu062116.pdf) (last visited Oct. 26, 2018).

<sup>135</sup> EVANS ET AL., *supra* note 8, at 20.

<sup>136</sup> *Id.*

community, began sharing the stories of their clients.<sup>137</sup> Their clients are formerly incarcerated women, like Jennifer Smithmeyer and Ashely Palmer, who drew attention to the issue of menstrual equity in prisons and jails by explaining the challenges they faced managing menstruation in prison.<sup>138</sup> Their stories caught the attention of Delegate Kory, who met with FOGH to learn more.<sup>139</sup> As Delegate Kory explains, “Knowing that the female prison population in Virginia had grown by 300% over the past two years, I was eager to speak with them and learn how I might assist with their re-entry and learn how to stem the tide of women being sentenced to prison.” It was out of these meetings that HB 83 was formed.

In December 2017, Delegate Kory introduced HB 83 in the Virginia House of Delegates.<sup>140</sup> HB 83 directs the State Board of Corrections to create and implement a policy to provide menstrual products to female inmates free of charge.<sup>141</sup> HB 83 quickly drew support from numerous co-patrons in the House and Senate.<sup>142</sup> The bill passed the House and Senate unanimously and was signed by Governor Ralph Northam on April 18, 2018.<sup>143</sup> The bill went into effect on July 1, 2018.<sup>144</sup>

#### B. The Text of HB 83

With the passage of HB 83, Virginia became one of four states to enact legislation concerning the menstrual needs of people in prisons and jails.<sup>145</sup> However, the impact of HB 83 is still uncertain, as the bill does not provide any policy details in its text. Instead, HB 83 simply requires the Virginia State Board of Corrections and VDOC to adopt and implement their own policies.

Virginia HB 83 states, in its entirety:

§ 1. The State Board of Corrections shall adopt and implement a standard to ensure the provision of feminine hygiene products to female inmates without charge.

<sup>137</sup> See *About Us*, FRIENDS OF GUEST HOUSE, <https://friendsofguesthouse.org/about> (last visited Oct. 26, 2018); *We Are Making HERstory TOMORROW in Virginia!*, BRINGING RES. TO AID WOMEN’S SHELTERS, <https://mailchi.mp/braws/bill-signing> (last visited Oct. 26, 2018).

<sup>138</sup> EVANS ET AL., *supra* note 8, at 20.

<sup>139</sup> Norlian, *supra* note 10.

<sup>140</sup> H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>141</sup> *Id.*

<sup>142</sup> See H.B. 83 VA. LEGIS. INFO. SYS., *supra* note 128.

<sup>143</sup> *Id.*

<sup>144</sup> Norlian, *supra* note 10.

<sup>145</sup> See EVANS ET AL., *supra* note 8, at 22, 32.

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§ 2. The Director of the Department of Corrections shall adopt and implement a policy and procedure to ensure the provision of feminine hygiene products to female prisoners without charge.<sup>146</sup>

Unlike much of the legislation enacted in other states, HB 83 is vague.<sup>147</sup> It leaves the substance of the policy up to the discretion of the State Board of Corrections (for local/regional facilities) and VDOC (for state facilities).<sup>148</sup> There is no legislative definition of “feminine hygiene products.”<sup>149</sup> There are no requirements that Virginia prisons and jails provide inmates with supplies on an as-needed basis or that they provide as many products as the inmates require. Facilities are simply required to provide menstrual products.<sup>150</sup>

Thus, it is unclear from the text of the bill itself what improvements HB 83 will bring about for inmates in Virginia. After all, prior to the enactment of HB 83, VDOC already provided pads at no cost to the inmates.<sup>151</sup> Based solely on the text of HB 83, the State Board of Corrections and VDOC could satisfy its requirements simply by expanding VDOC’s current practices to local and regional jails.<sup>152</sup> Furthermore, while VDOC claims to be able to cover the estimated \$33,769 annual cost of HB 83, it is unclear how local and regional jails will pay for the menstrual products.<sup>153</sup>

Additionally, HB 83 is not, on its face, gender-inclusive.<sup>154</sup> Ideally, legislation seeking to provide the incarcerated with dignity should aim to be more inclusive. However, transgender and non-binary inmates are generally housed according to their biological sex while in prison or jail.<sup>155</sup> Therefore,

<sup>146</sup> H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>147</sup> Compare H.B. 797, 2018 Gen. Assemb., 438th Sess. (Md. 2018) (detailing the facilities and procedures that must be in place regarding menstrual hygiene products), with H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018) (stating only that “[f]eminine hygiene products, including sanitary napkins, sanitary pads, and tampons, shall be provided to female prisoners without charge.”).

<sup>148</sup> H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Mosby, *supra* note 127 (stating that “[c]urrently, the Virginia Department of Corrections and some local and regional jails offer pads to inmates for free; however, tampons must be purchased.”).

<sup>152</sup> H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); see Deb Belt, *Free Feminine Hygiene Products May be Given to Virginia Prisoners*, RICH. PATCH (Feb. 23, 2018), <https://patch.com/virginia/richmond/free-feminine-hygiene-products-may-be-given-virginia-prisoners> (explaining that “[t]he Virginia Department of Corrections already offers pads at no charge, but tampons are only available through commissaries, meaning inmates must pay for them. Officials said the previously estimated \$33,769 annual cost to supply the products could be covered within the department’s budget.”).

<sup>153</sup> Belt, *supra* note 152.

<sup>154</sup> H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>155</sup> See Jenny Gathright, *The Guidelines for Protection of Transgender Prisoners Just Got Rewritten*, WMRA (May 12, 2018), <http://www.wmra.org/post/guidelines-protection-transgender-prisoners-just-got-rewritten#stream/0>.

under HB 83 they will likely still not receive access to the supplies they require.

Notably, HB 83 does not address any of the inequities that result from the power imbalance between correctional officers and inmates. If the State Board of Corrections and VDOC adopt policies that still require inmates to request additional supplies from officers, the stigma and discomfort surrounding periods may prevent many inmates from getting their needs met.

Nevertheless, the spirit, if not the letter, of the law is groundbreaking. The clear intent behind HB 83 is to provide inmates with a variety of menstrual products in quantities sufficient to meet every inmate's needs. Moreover, because many inequities in prisons and jails derive from the broad discretion that correctional officers are afforded, requiring a written policy to be adopted and enforced is meaningful.<sup>156</sup>

### CONCLUSION

Virginia, like the rest of the United States more broadly, continues to struggle to combat the harmful effects of stigmatizing periods. In 2018, the Virginia General Assembly failed to pass a bill making menstrual supplies exempt from the state sales tax and failed to pass a bill that would mandate school districts provide access to menstrual supplies in school bathrooms that serve students in grades 6-12.<sup>157</sup> Additionally, in September 2018, the VDOC announced a new policy banning anyone wearing a tampon or menstrual cup from visiting inmates held in state facilities.<sup>158</sup> However, the order was quickly suspended after its announcement was met with significant backlash.<sup>159</sup> HB 83 is a significant step forward. This bill stands for the idea that the incarcerated deserve to live with dignity, and it recognizes that menstrual products are a basic, hygienic need, not a luxury. U.S. Senator Booker captured the importance of menstrual equity for the incarcerated best when he said, "you can always judge the greatness of a society by looking at who it imprisons and how it treats them: The United States of America doesn't compare well to our industrial peers, doesn't hold up well to the values we preach within our country and to the world."<sup>160</sup>

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<sup>156</sup> See generally H.B. 83, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>157</sup> Chandler, *supra* note 10.

<sup>158</sup> Laurel Wamsley, *Virginia Prisons Ban Visitors from Wearing Tampons, Citing Contraband Concerns*, NAT'L PUB. RADIO (Sept. 24, 2018), <https://www.npr.org/2018/09/24/651258081/virginia-prisons-ban-visitors-from-wearing-tampons-citing-contraband-concerns>.

<sup>159</sup> Christina Caron, *After Outcry, Virginia Reverses Tampon Ban for Visitors to Prisons*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/tampons-ban-prisons-virginia.html>.

<sup>160</sup> Kiefer, *supra* note 98.