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## The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism

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THE GROUND ON WHICH WE ALL STAND: A  
CONVERSATION ABOUT MENSTRUAL EQUITY  
LAW AND ACTIVISM

*Bridget J. Crawford,\* Margaret E. Johnson,\*\*  
Marcy L. Karin,\*\*\* Laura Strausfeld,\*\*\*\* and  
Emily Gold Waldman\*\*\*\*\**

ABSTRACT

*This essay grows out of a panel discussion among five lawyers on the subject of menstrual equity activism. Each of the authors is a scholar, activist, or organizer involved in some form of menstrual equity work. The overall project is both enriched and complicated by an intersectional analysis.*

*This essay increases awareness of existing menstrual equity and menstrual justice work; it also identifies avenues for further inquiry, next steps for legal action, and opportunities that lie ahead. After describing prior and current work at the junction of law and menstruation, the contributors evaluate the successes and limitations of recent legal changes. The authors then turn to conceptual issues about the relationship between menstrual equity and gender justice, as well as the difference between equity and equality. The essay concludes with consideration of the future of menstrual equity and menstrual justice work. The authors envi-*

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*sion an expanded, inclusive group of individuals working for greater gender justice.*

INTRODUCTION  
(BRIDGET J. CRAWFORD)

Periods are having their moment. Lots of moments, actually. Ever since *Cosmopolitan* magazine proclaimed 2015 to be “The Year the Period Went Public,”<sup>1</sup> a small but growing number of lawyers and activists in the United States have turned their focus to the intersection of law, public policy, and menstruation. Menstrual hygiene products—meaning tampons, pads, menstrual cups, and the like—are not affordable or available for all who need them.<sup>2</sup> Furthermore, due to lack of regulatory oversight, these products may or may not be entirely safe to use.<sup>3</sup> Concerned about affordability, availability, and safety, these lawyers and activists, with the assistance of some journalists and lawmakers, have taken up the cause of menstrual equity. The phrase “menstrual equity” refers to the idea that society needs to recognize openly (and without shame or stigma) and take into account the fact that approximately one-half of the human population menstruates for a large portion of their lives.<sup>4</sup>

There is a key conceptual distinction between *equality* and *equity*. Equality demands the same treatment for all people, regardless of their

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1. Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN (Oct. 13, 2015), <https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public> (identifying eight defining events that highlighted the political, legal, and cultural aspects of menstrual equity, including Kiran Gandhi’s running the London Marathon while “free bleeding” and Canada’s repeal of the tampon tax); see also Malaka Garib, *Why 2015 Was the Year of the Period, and We Don’t Mean Punctuation*, NPR (Dec. 31, 2015), <https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and-we-dont-mean-punctuation> (“This year has been epic for menstruation, with news and social media catapulting the once hush-hush topic into the open.”).
  2. See, e.g., JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC 66–70 (2017) (describing difficulty of homeless and poor women in accessing menstrual products and places to maintain personal hygiene during menstruation and otherwise).
  3. See *id.* at 23 (discussing failure of federal Food and Drug Administration to mandate disclosure of ingredients used in tampons and pads).
  4. See *id.* at xvi (defining menstrual equity as follows: “[i]n order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available to those who need them. The ability to access these items affects a person’s freedom to work and study, to be healthy, and to participate in daily life with basic dignity.”); see also Bridget Crawford *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST LAW PROFESSORS (Nov. 22, 2016), <https://perma.cc/4RN8-2CR5> (describing menstrual equity as a three-pronged effort to increase safety of menstrual hygiene products, access to them, and their affordability so that women can be “fully equal players in society.”).

differences. Equity seeks fair treatment for all people, in light of their differences.<sup>5</sup> Because of the biological fact of menstruation, only an equity approach can ensure that menstruators have safe and affordable access to the menstrual hygiene products they need in order to be full participants in society.<sup>6</sup>

The belief that menstrual equity is a beginning step on the path to gender equity motivates this work. As activist and attorney Jennifer Weiss-Wolf has said, “Our issues aren’t all the same, but whether you’re dissecting it by poverty or gender or any issues that affect things like access, participation, equality, justice, democracy [menstrual equity touches] all those things. This is why we can’t leave it out.”<sup>7</sup> In other words, by focusing on the basic needs of menstruators, the architects of law and society can find a way to address every single issue that impacts gender equity. Menstrual equity, then, is “the ground we all need to stand on.”<sup>8</sup>

This Essay takes the form of a written conversation about menstrual equity law and activism. It grows out of our panel discussion on the subject at the 21<sup>st</sup> Annual Women’s History Conference at Sarah Lawrence College in March, 2019.<sup>9</sup> The conference theme, “Intersectional Activism in the Age of Gender Based Violence and Authoritarian Oppression,” invited each of us to consider how menstrual equity work is both enriched and complicated by an intersectional analysis.<sup>10</sup> We want-

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5. See *infra* notes 134–140 and accompanying text.

6. The use of the term “menstruators” instead of “females” or “girls and women” is intentional. As Margaret Johnson explains, the term “menstruator” is intended “to be inclusive of all persons who menstruate,” such as “women, transgender males, intersex persons, [non-]binary persons, and other persons who have the capacity for a menstrual cycle.” Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. (forthcoming 2019).

7. Anna Druet, *Menstrual Equity is the Ground We All Need to Stand on*, HELLOCLUE (Sept. 19, 2018), <https://helloclue.com/articles/culture/menstrual-equity-is-the-ground-we-all-need-to-stand-on> (quoting Jennifer Weiss-Wolf).

8. *Id.*

9. See SARAH LAWRENCE COLLEGE 21ST ANNUAL WOMEN’S HISTORY CONFERENCE, CONFERENCE SCHEDULE, <https://www.sarahlawrence.edu/womens-history/conference> (last visited Mar. 4, 2019).

10. Intersectionality is the term used to describe interlocking forms of oppression that may arise out the multiple identities that apply to any one individual. Most scholars attribute the phrase—at least, in the legal context—to Kimberlé Crenshaw’s work on Black women in the employment discrimination context. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U CHI. LEGAL. F. 139, 149 (“Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all

ed to memorialize the conversations we had at the conference and extend our dialogue. In this article, we attempt to identify avenues of further inquiry, next steps for legal action, and opportunities that lie ahead in the effort to make the law more responsive to human needs.

In Section I, each of us describes how we came to be working in scholarly or activist projects related to menstruation. Section II asks each of us to evaluate recent legal changes. In Section III, we take up conceptual issues about the relationship between menstrual equity and gender justice, as well as the difference between equity and equality. In Section IV, we consider the future of menstrual equity work—whether scholarly, policy-oriented, or activist-based—and offer suggestions for expanding the group of individuals working for safe, affordable, and available menstrual products.

### I. WHY MENSTRUAL EQUITY NOW?

*Can you explain how you came to be interested in menstrual equity?*

**Laura Strausfeld:** I came to be interested in menstrual equity via the tampon tax, which I first noticed in 1989 when I moved to New York City to attend law school. I recall buying tampons and Chapstick at the drugstore and noticing the tampons were taxed and the Chapstick wasn't. I looked up the law and saw that products used "by humans for the preservation of health" were exempt from sales tax.<sup>11</sup> Lip balm fit that regulatory description, but menstrual products did not. The only reason why this was so, I surmised, was that there was an almost-entirely male legislature at the time the law was passed.

The tampon tax has always represented a problem much larger than a few cents on the dollar. As a young lawyer, I researched and wrote a memorandum outlining a class action lawsuit against New York State. I tried unsuccessfully to get a law firm to file it. When I moved to California in the early 1990s, I researched California's law, drafted a memorandum outlining a class action against California, and made pro-

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of them."); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1244 (1991) ("I used the concept of intersectionality . . . to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.").

11. N.Y. COMP. CODES R. & REGS. tit. 20, § 528.4 (Westlaw through June 15, 2019).

gress in that direction. I saw that a bill finally had been introduced to exempt menstrual products in New York.<sup>12</sup> I naively assumed it would pass. I had a lot to learn. Finally, my daughter started menstruating and I got mad all over again. Everyone who has known me since my twenties knows how much I hate the tampon tax.

Starting in 2015, my email inbox began filling up with links to articles, of which Jennifer Weiss-Wolf was writing the most impressive and serious.<sup>13</sup> She was assuming a leadership role in what would become a new “menstrual equity” movement. I reached out to her in early 2016 to let her know I had a lawsuit ready to file and to ask for her partnership in attracting media and pressuring New York State to take action. We partnered with the estimable civil rights law firm Emery Celli Brinckerhoff & Abady LLP to file the case,<sup>14</sup> and within two weeks the New York State Assembly voted unanimously to do the right thing. As of September 1, 2016, we were no longer paying sales tax on menstrual supplies in New York.<sup>15</sup>

Soon after that success, Jennifer suggested we continue this work together. We formed our non-profit Period Equity, which is still the only law and policy organization devoted to achieving menstrual equity in the U.S.<sup>16</sup>

**Margaret Johnson:** I direct the Bronfein Family Law Clinic at the University of Baltimore School of Law. In my legal clinic, student attorneys represent indigent clients in family law matters and work on community-based projects.<sup>17</sup> In the fall 2016 semester, a student sug-

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12. See N.Y. State Assemb. A03765, 1999 Leg., Assemb. Reg. Sess. (N.Y. 1999).

13. See, e.g., 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/>; Jennifer Weiss-Wolf, *Helping Women and Girls. Period. Part Two.*, N.Y. TIMES (Apr. 22, 2015), <https://kristof.blogs.nytimes.com/2015/04/22/helping-women-and-girls-period-part-two/>.

14. See Complaint, *Seibert v. New York State Dep't of Taxation and Fin.* (N.Y. Sup. Ct. 2016), <http://www.ecbalaw.com/wp-content/uploads/2016/03/Tampon-Tax.-Revised-Class-Action-Summons-and-Complaint-3-3-16-00243311x9CCC2.pdf>.

15. *Governor Cuomo Announces Sales Tax Exemption for Feminine Hygiene Products Now in Effect*, NEW YORK STATE PRESSROOM (Sept. 1, 2016) <https://www.governor.ny.gov/news/governor-cuomo-announces-sales-and-use-tax-exemption-feminine-hygiene-products-now-effect>.

16. See *Mission & History*, PERIOD EQUITY, <https://www.periodequity.org/mission-and-history> (last visited Oct. 8, 2019).

17. BRONFEIN FAMILY LAW CLINIC AT THE UNIVERSITY OF BALTIMORE SCHOOL OF LAW, <http://law.ubalt.edu/clinics/familylaw/index.cfm>.



gested working with the Reproductive Justice Inside (RJI) Coalition<sup>18</sup> to examine the reproductive justice policies in Maryland's prisons and jails. Our task was to investigate the full-range of reproductive health care for residents.

During the course of the RJI Coalition's work, we learned that women residents did not have adequate access to menstrual products.<sup>19</sup> The RJI Coalition ran menstrual product drives during its community fora to raise awareness about reproductive healthcare in Maryland's correctional facilities. Learning that there were only limited policies regarding reproductive health care in the facilities, RJI worked with legislators in Maryland to propose two bills: one for reproductive health care policies and the other to require that facilities provide freely accessible menstrual products to the residents of the facilities.<sup>20</sup>

At one of RJI's community fora, I sat on a panel with Amy Fettig, Deputy Director, American Civil Liberty Union's National Prison Project.<sup>21</sup> Having learned about the many injustices women who are incarcerated face and wanting to help address those injustices, I picked her brain about where scholarship would be most useful. She suggested in the area of menstrual products. So I set about conducting research and learned that the menstrual injustice that exists in prisons and jails also exists in workplaces, schools, and our greater society. This led to my recent law review article, *Menstrual Justice*.<sup>22</sup>

**Marcy Karin:** My introduction to menstrual equity happened in the summer of 2016 after I moved to Washington, D.C. to direct the Legislation Clinic at UDC Law.<sup>23</sup> My goal was to design a clinic where

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18. See generally Reproductive Justice Inside, FACEBOOK, <https://www.facebook.com/rjinside/> (Facebook page of the Reproductive Justice Inside).

19. See *Written Testimony Regarding Hearing on SB 598 Before the Maryland General Assembly Senate Judicial Proceedings Committee* (Md. 2018) (written testimony of Kimberly Haven, Women's Justice Consortium) (discussing Maryland facilities' lack of products, enough products, or products with effective absorbency for the menstruator's flow); Brian Witte, *#MeToo Helps Shine Light on Access to Feminine Hygiene Products in Prison*, NBC NEWS (Mar. 28, 2018), <https://www.nbcnews.com/news/us-news/metoo-helps-shine-light-access-feminine-hygiene-products-prison-n860946>.

20. S.B. 598, 2018 Leg., 440th Sess. (Md. 2018); H.B. 797 2018 Leg., 440th Sess. (Md. 2018).

21. See generally *ACLU Nat'l Prison Project*, ACLU, <https://www.aclu.org/other/aclu-national-prison-project> (last visited Oct. 8, 2019) (describing the goals of the ACLU National Prison Project).

22. Johnson, *supra* note 6.

23. See generally *Legislation Clinic*, UDC LAW, <https://www.law.udc.edu/page/Legislation-Clinic> (last visited Oct. 8, 2019) (describing the work of the Legislation Clinic at the University of the District of Columbia, David A. Clarke School of Law).

UDC Law students could learn how to be “legislative lawyers” who operate at the intersection of text, law, policy, and politics by representing community-based efforts to engage in systemic reform.<sup>24</sup> To accomplish this goal, I had to find the right clients and projects. I began by looking at the D.C. Council’s upcoming calendar for pending legislation that would positively impact District residents and offer Clinic students the opportunity to develop competencies in legislative lawyering. During that docket review, I uncovered an upcoming hearing on a bill to remove the “tampon tax” and another pending bill to improve access to menstrual products and diapers in schools and shelters.<sup>25</sup> This was my first exposure to public policy related to menstruation, and I realized that I had much to learn. My next step was to conduct preliminary research on the issue, including the tax’s disparate impact on the basis of sex, and conduct community outreach to determine if there was anything the Clinic could do to help. Ultimately, Bringing Resources to Aid Women’s Shelters (BRAWS) became one of our first clients and representing BRAWS on efforts to remove the tampon tax was our first substantive project.<sup>26</sup> During that first semester, we developed legal and policy arguments in support of this local legislation, drafted oral and written testimony for BRAWS, and helped the organization successfully advocate for a new law to exclude menstrual products from the sales tax in D.C.<sup>27</sup>

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24. See Chai R. Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L. REV. 785 (2003) (providing a framework for this type of lawyering and law school clinics that want to engage in this work).

25. See *Hearing Before the D.C. Council on D.C. B21-0696, The Feminine Hygiene and Diapers Sales Tax Exemption Amendment Act of 2016* (Sept. 28, 2016); B. B21-0692, *Improved Access to Diapers and Feminine Hygiene Products Amendment Act* (D.C. 2016), <http://lims.dccouncil.us/Legislation/B21-0696>.

26. See generally *Bringing Resources to Aid Women’s Shelters*, BRAWS, <http://www.braws.org> (last visited Sept. 7, 2019) (describing the mission of the organization as “[b]ringing dignity and empowerment to women and girls living in shelters by providing new personally fitted undergarments and menstrual supplies.”).

27. See D.C. CODE ANN. § 47-2005(38)(A) (Westlaw through September 11, 2019) (exempting from sales tax “feminine hygiene products” defined as “sanitary napkin[s], sanitary towel[s], tampon[s], menstrual cup[s], or sanitary pad[s]”). The legislation that exempted menstrual products also created a new exemption for diapers. *Id.* See also *Hearing Before the D.C. Council Comm. on Fin. & Revenue on D.C. B21-0696, The Feminine Hygiene and Diapers Sales Tax Exemption Amendment Act of 2016* (Sept. 28, 2016) (testimony of BRAWS), [http://www.braws.org/uploads/2/5/6/1/25613867/braws\\_testimony\\_final\\_scan.pdf](http://www.braws.org/uploads/2/5/6/1/25613867/braws_testimony_final_scan.pdf); *Hearing Before the D.C. Council Comm. on Fin. & Revenue on D.C. B21-0696, The Feminine Hygiene and Diapers Sales Tax Exemption Amendment Act of 2016* (Sept. 28, 2016) (oral testimony of BRAWS), [www.braws.org/uploads/2/5/6/1/25613867/braws\\_oral\\_testimony\\_9.28.16\\_hearing.pdf](http://www.braws.org/uploads/2/5/6/1/25613867/braws_oral_testimony_9.28.16_hearing.pdf).

This initial win helped solidify the Legislation Clinic's client services model and piqued my interest in removing barriers to economic security related to periods. This early success was short-lived, however, due to a feature of the D.C. legislative process that requires the repeal of any law that is not funded after two budget cycles.<sup>28</sup> Thus, to implement the new law, the District needed to allocate money to the general revenue fund to cover the amount it would no longer collect from taxing these products. During the first budget cycle, I worked with my then-colleagues Monica Bhattacharya and Laurie Morin to supervise an unsuccessful effort to appropriate money to allow the tampon tax repeal to be implemented.<sup>29</sup> Undeterred, we helped BRAWS try again the next year,<sup>30</sup> and the "tampon tax" portion of the law was funded, starting with Fiscal Year 2019.<sup>31</sup>

We also helped BRAWS build the case for national menstrual equity legislation by drafting *Periods, Poverty, and the Need for Policy: A Re-*

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28. D.C., RULES OF ORG. & PROC. FOR THE COUNCIL., art. VII, e. 736 (a)-(b), <https://dccouncil.us/wp-content/uploads/2018/10/PR22-0001a.pdf> (stating that any new provision that is subject to appropriations shall be repealed in the third fiscal year after it becomes law if it remains unfunded). According to the Chief Financial Officer of the District, the District collected around \$3.5 million annually from the sales tax on menstrual products and diapers. Memorandum from the Chief Financial Officer Jeffrey S. DeWitt to the D.C. Council Chairman Phil Mendelson (Oct. 25, 2016), <http://lims.dccouncil.us/Download/35554/B21-0696-Fiscal-Impact-Statement1.pdf>. Mayor Bowser declined to fund the repeal during her proposed Fiscal Year 2018 budget and, despite community efforts to convince them otherwise, the Council also failed to appropriate the needed funds to implement the new policy during the first fiscal year.
29. See, e.g., BRAWS, FACEBOOK (May 4, 2017), <https://www.facebook.com/BRAWSoSrg/videos/1811332229184332>.
30. See, e.g., *Budget Oversight Hearing Before the Committee of the Whole*, D.C. Council (Apr. 27, 2018) (Testimony of BRAWS), [http://dc.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=4503](http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4503); Holly Seibold, *D.C. Moves One Step Closer to Menstrual Equity*, WASH. POST (Apr. 27, 2018), <http://tinyurl.com/y5seuvv6> (BRAWS founder arguing that the D.C. Council should fund the sales tax exemption for menstrual products).
31. Mayor Bowser included the necessary funds to cover the repeal on menstrual products (but not diapers) in her proposed Fiscal Year 2019 budget (projected cost of \$403,000 for the year). FY 2019 Proposed Budget and Financial Plan, Table 3-12, Policy Proposals Impacting General Fund Revenues, Fiscal Years 2018-2022, 110, 112, <https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DC%20GOVT%20FY%202019%20BUDGET%20-%20VOLUME%201%20-%20EXECUTIVE%20SUMMARY%20-%20FINAL%20FOR%20PRODUCTION%20-%20203-20-18.pdf#page=110>. The Council followed this recommendation and approved these funds. D.C. Code § 22-158 (2018). The repeal on the diaper tax remained unfunded. However, Mayor Bowser included funds to cover both the menstrual and diaper products in her Fiscal Year 2020 budget. B23-209, T.VII.G. (2019), <http://lims.dccouncil.us/Download/42120/B23-0209-Introduction.pdf>.

*port on Menstrual Inequity in the U.S.*<sup>32</sup> Our white paper features the personal testimony of school-age girls, formerly incarcerated women, teachers, and shelter administrators about their lived experiences with menstrual inequity. It also contextualizes these stories within the larger menstrual equity movement by providing an overview of current and proposed local, state, and federal law that addresses menstrual equity in schools, shelters, and correctional facilities; it concludes by inviting readers to join the movement.<sup>33</sup> Finally, we engaged in policy efforts to remove other barriers related to full access and affordability of menstrual products in D.C. and Virginia.

**Bridget Crawford:** I came to the larger project as a tax lawyer and teacher. I was interested in the “tampon tax”—the state sales tax imposed on menstrual hygiene products. There are five states—Alaska, Delaware, Oregon, Montana, and New Hampshire—that have no sales tax at all on any products.<sup>34</sup> At the time I started looking at the issue, there were five states—Maryland, Massachusetts, Pennsylvania, Minnesota, and New Jersey—with general sales tax systems but exemptions (that continue in effect) for menstrual hygiene products, on the grounds that these are “necessities.”<sup>35</sup> Since I began my research, there are now five more states—New York, Connecticut, Illinois, Florida, and Nevada, as well as the District of Columbia—that exempt menstrual hygiene products from sales tax.<sup>36</sup>

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32. BRAWS: BRINGING RESOURCES TO AID WOMEN’S SHELTERS & UNIVERSITY OF THE DISTRICT OF COLUMBIA DAVID A. CLARKE SCHOOL OF LAW, LEGISLATION CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES (May 2018) [*hereinafter* BRAWS & UDC LEGISLATION CLINIC], <http://bit.ly/BRAWSMenstrualEquity>.

33. *Id.*

34. See Taryn Hillin, *These Are the U.S. States That Tax Women for Having Periods*, FUSHION (June 3, 2015), <http://fusion.net/story/142965/states-that-tax-tampons-period-tax/>.

35. *Id.*

36. See, e.g., Karen Zraick, *22 States Considered Eliminating the ‘Tampon Tax’ This Year. Here’s What Happened*, N.Y. TIMES (Jul. 12, 2019), <https://nyti.ms/2xJaZ8a> (describing the legislative repeal of sales tax on menstrual hygiene products in the time period 2016 through 2018). In 2019, California Governor Gavin Newsom effectively eliminated the sales tax on menstrual hygiene products and diapers by means of a budgetary measure that is effective through 2025. See, e.g., Jennifer Weiss-Wolf, *Tampon Tax: California’s Budget Tweak Is Not Enough—The Practice Should Be Banned Nationwide*, NEWSWEEK (May 19, 2019), <https://www.newsweek.com/tampon-tax-california-budget-not-enough-illegal-1421100> (describing history of efforts by California’s lawmakers to change the state income tax law and Governor Newsom’s 2019 fiscal reforms, which are only temporary and are not a result of a change in the state’s sales tax law).

When I started researching in this area, I stumbled upon the class action lawsuit filed by a group of plaintiffs in New York (I did not know then, but later learned, that Laura was the force behind the litigation).<sup>37</sup> The plaintiffs alleged a violation of the Equal Protection Clause of the federal and state constitutions, without elaboration.<sup>38</sup> I began looking into the issue further and discovered that similar actions had been filed in Florida, Ohio, and California.<sup>39</sup> I am not a constitutional law expert, but I could not immediately see how the sales tax violated the Equal Protection Clause. It was more obvious, though, that any tax on these products was deeply related to human rights issues. I wrote a paper with Professor Carla Spivack at Oklahoma City University College of Law arguing that taxes that make menstrual hygiene products more expensive violate the right to be free from discrimination and rights to health, education, work, and dignity.<sup>40</sup> We suggested that some international human rights tribunals might be receptive to those claims, but that we were not aware of any cases that had been brought in those venues.<sup>41</sup>

Shortly after I posted the paper to the Social Sciences Research Network, I got an email from Laura and her Period Equity co-founder Jennifer Weiss-Wolf saying basically, “Hey, who are you? We’d like to meet you.”<sup>42</sup> We got together for coffee and I learned that Laura had laid the groundwork for the New York class action litigation (although her name did not appear on the filing papers).<sup>43</sup> I was so amazed by the

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37. See Complaint, *Seibert v. New York State Dep’t of Taxation and Finance*, *supra* note 14; see also Crawford, *supra* note 4.

38. Complaint, *Seibert v. New York State Dep’t of Taxation and Finance*, *supra* note 14.

39. See Complaint, *Wendell v. Florida Department of Revenue*, 2016 CA 001526 (Fla. Cir. Ct. Jul. 6, 2016); Complaint, *DiSimone v. California*, No. CGC-16-552458 (Cal. Super. Ct. June 8, 2016); Complaint, *Rowitz v. Ohio Dep’t of Taxation*, 2016-00197 (Ohio Ct. Claims, filed Mar. 14, 2016) (dismissed without prejudice and re-filed as *Rowitz v. State of Ohio*, No. 16-CV-003518 (Franklin Co. Ct. Common Pleas April 11, 2016)).

40. See Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WISC. L. REV. 491, 512–27 (2017) (detailing ways that the high cost of menstrual hygiene products implicate or interfere with full exercise of various rights enumerated in international agreements, including the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention on Human Rights; and the African Charter on Human and Peoples’ Rights).

41. *Id.* at 522.

42. Email from Laura Strausfeld to Bridget Crawford (on file with author).

43. See, e.g., Crawford, *supra* note 4 (describing Strausfeld’s role in instigating and guiding class action lawsuit challenging New York’s sales tax on menstrual hygiene products). Cf. Complaint, *Seibert v. New York State Dep’t of Taxation and Finance*, *supra* note 14 (not listing Laura Strausfeld’s name).

way Laura and Jennifer thought about the issues from a legal and policy perspective, but also from the perspective of activists. Talking to them reminded me that substantial legal change can occur more easily when public opinion is brought to bear. And the tampon tax seems like such an obvious issue of gender-based unfairness. It is an issue that can be reduced to dollars and cents. People see that the sales tax is imposed only on products used by people who menstruate. The majority of menstruators are girls and women. So people understand this as a gender-based tax.

**Emily Gold Waldman:** My involvement began when Bridget, my Pace Law colleague and co-author, presented to our faculty about her work on the tampon tax. I attended that presentation and—as a constitutional law professor—I was immediately intrigued when she mentioned that equal protection challenges had been filed. I wanted to understand more about them. In particular, I was curious whether the plaintiffs were arguing that the tampon tax (i.e., the failure to exempt menstrual hygiene products from the sales tax) was akin to a facial sex-based classification. I could see the potential for that argument. But I could also see the challenges, especially in light of *Geduldig v. Aiello*, where the Supreme Court held that unfavorable treatment of pregnancy didn't amount to a facial sex-based classification.<sup>44</sup>

The more I thought about it, the more I thought that *Geduldig* shouldn't necessarily preclude the argument that the tampon tax amounts to a sex-based classification—and the more I wanted to explore whether and how the argument could work. The result of that exploration, and the many conversations Bridget and I had about the issue, is our co-authored piece, *The Unconstitutional Tampon Tax*, which was published in the *Richmond Law Review*.<sup>45</sup> There, we argue that it is unconstitutional to impose a sales tax on menstrual hygiene products while providing a necessity-based exemption to other roughly analogous male and unisex products.<sup>46</sup> This is an argument that the plaintiffs had been raising in their complaints, and we sketch it out in more detail.

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44. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

45. Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 442 (2019).

46. *Id.*

*Why do you think that periods are “having a moment” now in the public conversation?*

**Bridget Crawford:** I think that, in parts of the United States, we are beginning to overcome long-standing cultural taboos against talking about women’s bodily functions. Massive credit goes to YouTube interviewer Ingrid Nilsen who asked President Obama why some states impose sales tax on menstrual hygiene products.<sup>47</sup> The question definitely got the President’s attention. It also made many more young people aware of the issue. The taboo continues to be strong in many parts of the United States and elsewhere, though.

**Emily Gold Waldman:** I think the tampon tax is one of those issues where, once someone raises it, it immediately resonates with others. Many of us hadn’t fully realized that we were paying sales tax on menstrual hygiene products while other equally necessary (or less necessary) products were tax-exempt. I think the immediate reaction, upon learning about the phenomenon, is that it is unfair and irrational. That has inspired more and more people to get involved, and numerous legislators have been listening and responding.

**Margaret Johnson:** Many people have done a lot of hard work to raise awareness and effectuate change of society’s view of menstruation and for menstruators. For instance, Cass Bliss created the comic book character Toni the Tampon to raise awareness regarding menstruation by transgender and gender nonbinary persons.<sup>48</sup> As high school students, Nadya Okamoto and Vincent Furand co-founded the non-profit organization *Period.* to eradicate period poverty, namely the lack of products, in schools and to address menstrual stigma.<sup>49</sup> Jennifer Weiss-Wolf and Laura Strausfeld founded Period Equity to work on various policy initiatives to create greater menstruator access to menstrual products.<sup>50</sup> And

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47. *President Obama Talks with YouTube Star Ingrid Nilson About the Tampon Tax*, 3:34, WASH. POST (Mar. 15, 2016), [https://www.washingtonpost.com/video/business/youtube-star-ingrid-nilsen-talks-with-president-obama-about-the-tampon-tax/2016/03/15/f2e4bb0a-eea9-11e5-a9ce-681055c7a05f\\_video.html](https://www.washingtonpost.com/video/business/youtube-star-ingrid-nilsen-talks-with-president-obama-about-the-tampon-tax/2016/03/15/f2e4bb0a-eea9-11e5-a9ce-681055c7a05f_video.html).

48. Brittney McNamara, *Period Activist Cass Clemmer Responds to Hate After Posting Period Photo*, TEEN VOGUE (Aug. 2, 2017), <https://www.teenvogue.com/story/period-activist-cass-clemmer-what-its-like-to-get-periods-while-transgender>.

49. See NADYA OKAMOTO, *PERIOD POWER: A MANIFESTO FOR THE MENSTRUAL MOVEMENT* vii-ix (2018).

50. See *Mission & History*, *supra* note 16.

the Society for Menstrual Cycle Research has done work on these issues since 1977.<sup>51</sup> The list, of course, goes on.

**Marcy Karin:** The media has played a large role. First, traditional media has put stories about periods “above the fold” on the front page, instead of relegating them to specialty sections in the back.<sup>52</sup> Columns have appeared in popular magazines, radio shows have included segments, and stories appear on the nightly news in growing numbers.<sup>53</sup> Second, social media has provided a platform to support people sharing their experiences with menstruation and to connect menstrual advocacy campaigns across the globe.<sup>54</sup> In addition to improving menstrual education, social media platforms provide people who may have once felt isolated the ability to connect easily. It also allows individual voices, messages, and local campaigns to be shared, amplified, built upon, and

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51. SOCIETY FOR MENSTRUAL CYCLE RESEARCH, <http://www.menstruationresearch.org/about/> (last visited Sept. 5, 2019) (discussing how the Society is composed of diverse disciplinary researchers regarding menstruation and holds regular conferences, publishes the Women’s Reproductive Health journal, and conducts advocacy on these issues).
52. See, e.g., Michael Alison Chandler, *The Once-Whispered Topic of Women’s Menstruation Now Has Political Cachet*, WASH. POST (Aug. 7, 2017), [https://www.washingtonpost.com/local/social-issues/the-once-womens-whispered-topic-of-womens-menstruation-now-has-political-catchet/2017/08/07/cdeae46c-68a2-11e7-8eb5-cbccc2e7bfbf\\_story.html](https://www.washingtonpost.com/local/social-issues/the-once-womens-whispered-topic-of-womens-menstruation-now-has-political-catchet/2017/08/07/cdeae46c-68a2-11e7-8eb5-cbccc2e7bfbf_story.html); Stephanie Ebbert, *For Young Activists, a New Cause: Period Parity*, BOSTON GLOBE (June 12, 2019), <https://www.bostonglobe.com/metro/2019/06/12/for-young-activists-new-cause-period-parity/qy52VKpWaqAgih3zT7YRL/story.html>.
53. See, e.g., Abigail Jones, *Periods, Policy and Politics: Menstrual Equity Is the New Thing*, NEWSWEEK (May 8, 2017), <http://www.newsweek.com/periods-policy-and-politics-menstrual-equity-new-thing-596027>; Rep. Grace Meng, Opinion, *Our Laws Period-Shame Women—So I’m Going to Change Them*, MARIE CLAIRE (Feb. 17, 2017), <https://www.marieclaire.com/politics/a25464/congresswoman-grace-meng-menstrual-equity-bill>; Nurith Aizenman, *People Are Finally Talking About the Thing Nobody Wants to Talk About*, NAT’L PUB. RADIO: GOATS AND SODA (June 16, 2015, 5:50 PM), <https://www.npr.org/sections/goatsandsoda/2015/06/16/414724767/people-are-finally-talking-about-the-thing-nobody-wants-to-talk-about>; Mike Carter-Conneen, *Women Urge DC Council to End So-Called ‘Tampon Tax,’* WJLA (Sept. 28, 2016), <http://wjla.com/news/local/women-urge-dc-council-to-end-so-called-tampon-tax>; Tom Sherwood, *DC Weighs Eliminating ‘Tampon Tax,’* WJLA (Sept. 28, 2016), <http://wjla.com/news/local/women-urge-dc-council-to-end-so-called-tampon-tax>.
54. See, e.g., *Demand Menstrual Equity*, THINX, <https://www.shethinx.com/pages/menstrual-equity>; Garib, *supra* note 1; Danielle Keiser, *How a Menstruation-themed Social Media Campaign Spurred a Movement for a Global Awareness Day. Period.*, BILL AND MELINDA GATES FOUNDATION (July 22, 2013), <https://www.impatientoptimists.org/Posts/2013/07/How-a-Menstruationthemed-Social-Media-Campaign-Spurred-a-Movement-for-a-Global-Awareness-Day-Period#.XQ5SHvZFzD4>.



connected into a larger movement by adding hashtags such as *#menstruationmatters*, *#menstrualequity*, *#axethetax*, or *#periodpoverty*.<sup>55</sup>

It also helps that legislators are talking about periods at all levels of the government, including both potential legislation and improving policies and practices related to menstrual management in their own offices.<sup>56</sup> Stocking supplies in congressional bathrooms and offices may seem like a symbolic effort. But it matters for menstruating legislators, staffers, and visitors. It also serves as a prompt for conversations in these spaces to educate colleagues and visitors about menstrual equity and the importance of access to these supplies.

**Laura Strausfeld:** What looks like a “moment” is really what one might call a “tipping point;” a growing wave of interest has finally captured the public’s attention.<sup>57</sup>

*What are you working on now and how is that connected to other areas of the law?*

**Marcy Karin:** My next paper, tentatively called *Periods and Workplace Policy*, proposes an expansion of federal employment law to normalize and destigmatize menstrual management at work.<sup>58</sup> Currently, the inability to address periods at work is an obstacle to full workplace equality and economic security for some. Periods happen at work, but few employers voluntarily have created workplace policies that protect workers’ needs to manage menstruation. This topic also has not been

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55. Performing a search of any of these hashtags on Twitter, Instagram, or other platforms captures posts, likes, retweets, and other engagements from users across the country and globe. See, e.g., search results for “#menstruationmatters,” TWITTER (Sept. 5, 2019), <https://twitter.com/search?q=%23menstruationmatters&src=typd>.

56. See Letter from Zoe Lofgren, Chairperson, Committee on House Administration, Congress of the United States, to U.S. Representatives Debbie Wasserman Schultz, Sean Patrick Maloney & Grace Meng (Feb. 11, 2019), <http://cdn.videos.rollcall.com/author/2019/02/2.11.19-zl-to-dws-meng-spm-re-menstrual-products.pdf> (instructing the Chief Administrative Officer of the U.S. Congress to stock menstrual products in the congressional Office Supply Store).

57. Decades-long behind-the-scenes activity by members of the Society for Menstrual Cycle Research and other researchers and activists culminated in a cover story for *Newsweek* in 2016. See Abigail Jones, *The Fight to End Period Shaming Is Going Mainstream*, NEWSWEEK (Apr. 20, 2016), <https://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html>. For an overview of menstrual equity activism and action, see Karen Zraick, *It’s Not Just the Tampon Tax: Why Periods Are Political*, N.Y. TIMES (July 22, 2019), <https://nyti.ms/2O5erRP>.

58. Marcy Karin, *Periods and Workplace Policy* (Aug. 12, 2019) (unpublished manuscript) (on file with author).

the specific subject of collective bargaining. Further, existing laws fail to require access to breaks, leave, flexible scheduling, or sanitary and safe spaces to change or apply menstrual products. At the same time, periods and blood are stigmatized, gendered, and subject to religious, social, and other mores. The corresponding shame and lack of menstrual education makes some workers susceptible to discrimination, intimidation, and harassment. This structural mismatch prevents people from properly managing periods at work and ignores the adverse employment decisions that are taken on the basis of menstruation, or otherwise against menstruating individuals. That's a problem.

After analyzing this reality, the paper builds on recent legal developments applicable to discrimination, disability, poverty, and feminist jurisprudence to recommend a three-part amendment to existing law.<sup>59</sup> This proposal would: (1) create menstrual accommodations at work, including access to reasonable, job-protected break time, and products that allow people to menstruate at work in the way they want, without fear of retaliation or retribution; (2) require access to clean water and sanitary facilities to address blood exposure; and (3) cover menstruating individuals under existing discrimination laws.<sup>60</sup> Amending the law and successfully implementing this proposal should remove (or at least reduce) the structural barriers related to menstruation at work. It also supports economic security through safe, accommodated, and affordable access and ability to use menstrual products at work.

**Emily Gold Waldman:** I also write in the area of employment discrimination, which has some interesting connections to menstrual equity concerns. For example, I've been very interested to learn more about my co-authors' work in pushing for reforms to ensure that employers accommodate menstruators' needs, such as break times and privacy.

My work on the tampon tax also got me thinking about an article I just published, entitled *The Preferred Preferences in Employment Discrimination Law*.<sup>61</sup> In that article, I explore which customer preferences can form the basis of successful employer defenses to employment discrimi-

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59. *Id.* This proposal involves amending or promulgating guidance interpreting the following federal laws: the Fair Labor Standards Act of 1934, 29 U.S.C. § 201 et seq., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000-e et seq., the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655 et seq.

60. *Id.*

61. Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C.L. REV. 91 (2018).

nation claims.<sup>62</sup> I saw that courts tend to be more deferential when the customer preference aligns with ingrained social conventions and norms.<sup>63</sup> For example, I looked at two well-known cases where female employees (a news anchor and a bartender, respectively) challenged workplace policies that required them to have a traditionally feminine look in terms of hair and make-up.<sup>64</sup> In both cases, the women lost—with the courts minimizing how burdensome these policies really were, both financially and psychologically.<sup>65</sup>

While it's not an exact parallel, I see some connections to the tampon tax: another burden being placed on women—one closely connected to their physicality—has been going under the radar. It's important to bring this burden out in the open, quantify it, and ensure that necessary products connected to female biology aren't receiving less favorable tax treatment than other necessities. And the tampon tax issue is also an entry point into thinking about broader questions about the ways in which society has ignored or minimized the burdens connected with menstruation and other physical manifestations of female biology, such as pregnancy and breastfeeding. In these cases, even limited accommodations (such as break times, rest times, and temporary modifications to certain work duties) can make a big difference.

**Margaret Johnson:** My article *Menstrual Justice*<sup>66</sup> examines menstrual injustice as another form of structural intersectionality,<sup>67</sup> the operation of subordinating power affecting different and overlapping classes of persons, such as persons who are female and Black or experiencing poverty and are transgender, in different ways. It examines the vast patchwork of menstrual injustices, including harassment, discrimination, constitutional violations, insults, indignities, health and economic disadvantages, and exclusion and essentialization that affect menstrua-

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62. *Id.* at 94.

63. *Id.* at 96.

64. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc); *Craft v. Metromedia*, 766 F.2d 1205, 1210 (8th Cir. 1985).

65. *Jespersen*, 444 F.3d at 1109 (describing employer's requirement that female employees wear make-up without any recognition of cost of such cosmetics to female employees); *Craft*, 766 F.2d at 1214, 1221 (describing how female television news anchor required to wear same outfit no more than once every three to four weeks, with preference for clothing by brand-name designers, whereas male television news anchors permitted to wear same suit twice in same week, with no recognition of disproportionate economic burden placed on women).

66. Johnson, *supra* note 6.

67. Crenshaw, *Mapping the Margins*, *supra* note 10, at 1265.

tors in different ways.<sup>68</sup> The structures of institutions such as schools, workplaces, government institutions, family, religion, and the law all contribute to pervasive and intersectional menstrual injustices. For instance, young girls at the intersection of gender and age in schools face restricted bathroom access, negatively affecting their dignity.<sup>69</sup> And transgender males and nonbinary persons at the intersection of gender and gender identity may be excluded from structural reforms to address menstruation in the workplace, schools, shelters, and correctional facilities, because they are inaccurately seen as non-menstruators.<sup>70</sup> Tackling the patriarchy alone will not eradicate menstrual injustice. Because that injustice operates at the intersection of gender, race, class, ability, gender identity, and other personal identities, we must tackle it as a form of structural intersectionality. To do so, we must use legal and other strategies to address the injustices through discrimination law, constitutional law, health law, and policy changes.<sup>71</sup> The article uses the structural intersectionality lens to identify additional legal and community advocacy towards menstrual justice.<sup>72</sup>

**Bridget Crawford:** I teach and study taxation. To me, the tax law is a particularly interesting and concrete lens for examining inequality. It is no coincidence that the path to the *Obergefell* same-sex marriage decision was paved by a tax case, *Windsor v. United States*.<sup>73</sup> When people became aware that Edith Windsor paid an estate tax bill of over \$360,000 that she would not have paid had her deceased spouse been male, the disparate treatment of same-sex couples and different-sex couples was glaringly clear.<sup>74</sup> When confronted with the concrete financial consequences of discrimination, most justice-loving people can recog-

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68. Johnson, *supra* note 6.

69. *Id.* at 42 (citing Doha Madani, *Girls Reportedly Bleeding Through Pants Due to Charter School Bathroom Policy*, HUFFPOST (Apr. 30, 2018 9:44 PM), [https://www.huffingtonpost.com/entry/charter-school-bathroom-policy-periods\\_us\\_5ae7a19be4b04aa23f26463c](https://www.huffingtonpost.com/entry/charter-school-bathroom-policy-periods_us_5ae7a19be4b04aa23f26463c) (Noble Network of Charter Schools has 18 campuses and 12,000 students.)).

70. *Id.* at 2.

71. *Id.*

72. *Id.* at 68–69.

73. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013).

74. *Windsor*, 570 U.S. at 753 (explaining that Windsor’s claim for an estate refund of \$363,053 initially was denied by the Internal Revenue Service on the grounds that Ms. Windsor was not a “surviving spouse” of decedent Thea Spyer for federal purposes, even though the State of New York recognized the two women as married for state law purposes).

nize it as unfair.<sup>75</sup> I plan to continue to explore how taxation can serve as a lens for understanding inequality issues.

**Laura Strausfeld:** Period Equity, the non-profit I co-founded, focuses on three aspects of menstrual equity: the tampon tax, access, and safety. Regarding the tax, Period Equity has joined forces with LOLA, a company that makes organic menstrual products,<sup>76</sup> to launch *Tax Free. Period.*<sup>77</sup> This is an aggressive legal advocacy and media campaign to challenge the thirty-four states still taxing menstrual products with the goal of ending the practice by April 15, 2020.<sup>78</sup> My hope is that by the time anyone reads this, we'll have had some, if not complete, success. A major reason we feel ready to pursue such a bold campaign is because of the legal research and writing Bridget and Emily have done on the unconstitutionality of the tampon tax.<sup>79</sup>

Regarding access to menstrual supplies, Period Equity's close coordination with the New York City Council on the 2016 legislative package—the first of its kind in the country, requiring free menstrual products in schools, shelters, and jails—has been replicated in states across the U.S., including Arizona,<sup>80</sup> California,<sup>81</sup> Connecticut,<sup>82</sup> Illinois,<sup>83</sup>

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75. See, e.g., Crawford & Spivack, *supra* note 40, at 546 (describing taxation as “a unique vehicle for understanding and communicating about discrimination”).

76. See *About Us*, LOLA, <https://www.mylola.com/pages/about> (“LOLA tampons are made of 100% organic cotton.”) (last visited Sept. 7, 2019).

77. See *Is Your State Taxing Your Period?*, TAX FREE. PERIOD., <https://www.taxfreeperiod.com> (providing overview of joint campaign by Period Equity and LOLA to eliminate sales tax on menstrual hygiene products in all states by 2020); see also Brittney McNamara, *Lola and Period Equity Launch Campaign to Dismantle the Tampon Tax Nationwide*, TEEN VOGUE (June 11, 2019), <https://www.teenvogue.com/story/lola-and-period-equity-launch-anti-tampon-tax-campaign> (describing awareness campaign aimed at both legislators and the general public and supported by Serena Williams and Karlie Kloss).

78. See, e.g., Estrella Jaramillo, *Female Founders Call Tampon Tax Unconstitutional and Put a Deadline on Reform*, FORBES (June 11, 2019), <https://www.forbes.com/sites/estrellajaramillo/2019/06/11/female-founders-call-tampon-tax-unconstitutional-and-put-a-deadline-on-reform/#56e7234c25fe> (describing “Tax Free. Period.” campaign by Period Equity and LOLA to end the sales tax on menstrual hygiene products in 35 states that retain the tax).

79. See Crawford & Waldman, *supra* note 45, at 481–82 (setting forth arguments that sales taxes on menstrual hygiene products do not pass intermediate scrutiny because these products are a unique proxy for female sex and there is no exceedingly persuasive justification for the imposition of the tax).

80. See *ADC Statement on Policy Revision Involving Feminine Hygiene Products*, ARIZ. DEP'T OF CORR. (Feb. 13, 2018), <https://corrections.az.gov/article/adc-statement-policy-revision-involving-feminine-hygiene-products> (reading, “. . . the department will continue to provide sanitary napkins free of charge to all of its female inmates, regardless of need,” with thirty six pads per month available to each inmate).

Maryland,<sup>84</sup> New Hampshire,<sup>85</sup> and Virginia,<sup>86</sup> among others. The U.S. Congress and current administration has embraced “access” too, signing into law the FIRST STEP Act requiring free menstrual products for incarcerated women. Legislation to allow people to set aside pre-tax dollars to buy menstrual products—first proposed in Jennifer Weiss-Wolf’s *New York Times* op-ed—was introduced in Congress in 2018.<sup>87</sup>

Finally, regarding safety, Period Equity collaborates with scientists, non-profits, and private attorneys to research litigation strategies directed toward making sure menstrual products are safe. Given that we live in the kind of world where tampons are still taxed, it’s likely that

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81. See CAL. ED. CODE § 35292.6 (LEXIS through Chapters 1–70, 72–106, 114, 116–121, 149, 157, 159, and 161 of the 2019 Regular Session) (requiring certain public schools to stock restrooms with menstrual hygiene products).
  82. Governor’s B. No. 13, Gen. Assemb., 2018 Feb. Sess. (Ct. 2018), See Ct. Gen. Ass. Bill No. 13 (2018), <ftp://ftp.cga.ct.gov/2018/tob/s/2018SB-00013-R00-SB.htm> (“An Act Concerning Fair Treatment of Incarcerated Women,” requiring correctional staff at York Correctional Institution to provide “tampons and sanitary napkins” to inmates upon request).
  83. See Pub. Act 1000163, 100 Gen. Assemb., Reg. Sess. (Ill. 2018), <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=100-0163> (requiring school districts to make available to students in grades 6 through 12 “tampons and sanitary napkins for use in connection with the menstrual cycle”).
  84. See, e.g., Cameron Dodd, *Governor Signs Prison Menstrual Pads Bill*, FREDERICK NEWS-POST (Apr. 24, 2018), [https://www.fredericknewspost.com/governor-signs-prison-menstrual-pads-bill/article\\_3d5b8f47-24e5-5765-b416-6dcd68677440.html](https://www.fredericknewspost.com/governor-signs-prison-menstrual-pads-bill/article_3d5b8f47-24e5-5765-b416-6dcd68677440.html) (requiring state correctional facilities to provide menstrual hygiene products to women incarcerated there).
  85. See, e.g., *New Hampshire Now Requires Schools to Stock Free Menstrual Products in Bathrooms*, CBS BOSTON (July 17, 2019), <https://boston.cbslocal.com/2019/07/17/new-hampshire-law-schools-free-menstrual-feminine-hygiene-products-bathrooms> (describing Governor Sununu’s signing into law a bill that requires availability of menstrual hygiene products in various middle and high school bathrooms).
  86. See, e.g., Allison Norlian, *Virginia Prisoners to Receive Free Feminine Hygiene Products*, NBC12 (Apr. 11, 2018), <https://www.nbc12.com/story/37933988/virginia-prisoners-could-soon-receive-free-feminine-hygiene-products> (describing Governor Ralph Northam’s signing into law a bill that makes menstrual hygiene products available at no charge in all state jails and prisons).
  87. Weiss-Wolf, *supra* note 2; see also Shay Maunz, *Meet the Women Who Helped Repeal New York’s Tampon Tax*, GLAMOUR (Sept. 1, 2016), <https://www.glamour.com/story/meet-the-women-who-helped-repeal-new-yorks-tampon-tax> (profiling New York City Councilwoman Julissa Ferreras Copeland and Period Equity co-founder Jennifer Weiss-Wolf); Grace Meng et al., *Women Are Finally Winning the Period Rights Fight*, NEWSWEEK (Jan. 25, 2018), <https://www.newsweek.com/women-finally-winning-period-rights-fight-790990>.

few people have paid attention to the long-term safety of products women insert into and use near their vaginas.<sup>88</sup>

*As you have presented your work elsewhere, have you faced any resistance from colleagues who question whether this is an appropriate subject for legal scholarship or work?*

**Bridget Crawford:** I'll be honest. The first time I presented my tampon tax work was in the summer of 2016 during an informal workshop with colleagues at my home institution. I made a point of adopting a light-hearted tone, and talking about "people who menstruate and those who love them" having the experience of buying tampons or pads.<sup>89</sup> I wanted to make clear that this was not just an issue of concern to half the population, and that menstrual equity was a topic that deserved consideration as a matter of broader gender justice. Both my audience and I were a bit uncomfortable at first, but after some initial nervous laughter, my colleagues took the project seriously and helped me think about many dimensions that I hadn't even considered, such as the inability of beneficiaries of the federal Supplemental Nutrition Assistance Program and Women, Infants and Children Program to use those benefits to buy menstrual hygiene products.<sup>90</sup>

**Emily Gold Waldman:** I'm glad that Bridget made that presentation, because that's what introduced me to the issue. I think this question is particularly resonant because squeamishness about discussing

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88. See, e.g., Safe Drinking Water & Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.5 et seq. (Westlaw through 1986) (providing for state legislation against toxic chemicals that is more far-reaching than federal regulations); Brian Bienkowski, *How Diapers and Menstrual Pads are Exposing Babies and Women to Hormone-Disrupting, Toxic Chemicals*, ENVTL. HEALTH NEWS (Jan. 28, 2019), <https://www.ehn.org/diapers-and-menstrual-pads-chemicals-2627099478.html> (reporting on results of South Korean study finding that most diapers and menstrual hygiene pads contain harmful chemicals that can be absorbed via genitalia); Laura Strausfeld, *The Serious Dangers of Tampons—And You Have to Pay Taxes on Them as Well*, ALTERNET, Apr. 24, 2017, <https://www.alternet.org/2017/04/other-tampon-tax> (stating "commercially marketed tampons, made of toxic materials, may be seriously endangering women's health.").

89. Presentation on file with the author.

90. *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., <http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap>; *What Can SNAP Buy?*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. (Sept. 4, 2013), <https://www.fns.usda.gov/snap/eligible-food-items> (listing those items that may be purchased with SNAP benefits; notably absent are menstrual hygiene products).

menstruation likely played a role in the tampon tax predicament in the first place. For menstrual hygiene products to end up on the list of tax-exempt products, someone needs to raise the issue and talk about it. For too long, that didn't happen. So it's really important that we get past that discomfort or sense that this isn't worth talking about—only then can the issue be addressed. And in my own experience so far, people have been receptive to and interested in both the legal and policy aspects of this issue.

**Laura Strausfeld:** I'm regularly reminded—yet somehow I still repeatedly forget—that many people don't feel comfortable talking about menstruation. I grew up very differently and credit my father, a retired obstetrician/gynecologist. Regularly on call, he frequently spoke to patients on the phone, including while we were having dinner. He would step a few feet away from the table and calmly ask, "How much are you bleeding? How often do you need to change your pad?" Then he would hang up, sit back down, and resume eating with us. Menstruation and women's health generally were spoken about very matter-of-factly in my childhood home, a practice I have come to appreciate more and more while doing this work.

While speaking to men about the tampon tax, I've come to believe that many don't fully comprehend the nature of menstrual "flow,"<sup>91</sup> by which I mean that it happens indiscriminately and often is unplanned, compared to urination, which for most people is voluntary and can be controlled until one has access to a toilet. In my experience, once people who do not menstruate better understand menstruation—for example, by my graphically describing the prospect of "leaking" in public spaces like subway cars—the reaction I often get is a kind of, "Well, in that case, women should have free access to all the tampons and pads they need."

**Margaret Johnson:** I had two interesting experiences when I presented my *Menstrual Justice* draft to my faculty at the University of Baltimore School of Law.<sup>92</sup> The first was prior to the presentation. I shared my PowerPoint slides with a colleague. One was of Rupi Kaur lying in

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91. See, e.g., Lauren Schumacker, *7 Surprising Things Men Think About Periods*, ROMPER (July 6, 2018), <https://www.romper.com/p/7-surprising-things-men-think-about-periods-9655301>.

92. See Johnson, *supra* note 6.



bed with a spot of blood on her sweatpants and one on her bed sheets.<sup>93</sup> I use this example in my paper to discuss the censoring of menstruation by society. Instagram took down the post not once, but twice.<sup>94</sup> My colleague had a very strong reaction, and said, “Please do not show this PowerPoint slide.” I had a range of emotions in response to this request. I wanted to respect my colleague and not make her and my other colleagues uncomfortable, but I also did not want to be complicit in perpetuating the taboo around this subject. In the end, I chose not to show the photo, deciding that the most important part of my presentation was sharing my paper, not the photo, with as few obstacles as possible so my colleagues would listen and learn about menstrual injustice.

The second experience occurred during my presentation to my faculty, when a male faculty member asked me whether our students had barriers to accessing menstrual products. I did not know the answer and told him so. I then convened a group of student leaders and asked them if students had issues accessing menstrual products. They started sharing stories of leaving school when they bled unexpectedly, how they kept a shared stash of products for themselves and friends, and how the school pantry carried free products but had very limited access. As a result of this conversation, the students and I crafted a proposal to the Dean requesting the provision of menstrual products in the law school’s women’s and gender-neutral bathrooms.<sup>95</sup> Faculty and student groups signed onto the letter in support of the proposal.<sup>96</sup> The Dean is working on implementing the proposal. We hope that in making the text of our proposal available as a publicly accessible template,<sup>97</sup> other students and faculty can use it to help obtain free or subsidized products at their schools as well.

**Marcy Karin:** Honestly, *I* questioned the subject’s scholarly appropriateness at first. Or, more accurately, I questioned whether men-

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93. Emma Gray, *The Removal of Rupi Kaur’s Instagram Photos Shows How Terrified We Are of Periods*, HUFFPOST (Mar. 27, 2015 3:26 PM), [https://www.huffingtonpost.com/2015/03/27/rupi-kaur-period-instagram\\_n\\_6954898.html](https://www.huffingtonpost.com/2015/03/27/rupi-kaur-period-instagram_n_6954898.html).

94. See Johnson, *supra* note 6, at 5, 19 (describing Instagram’s judgment that the photo was inappropriate and removing it, only to later reinstate it as a result of the public outcry that the photograph was of a common and relatable experience for all menstruators).

95. Margaret E. Johnson et al., *Free Menstrual Hygiene Product Proposal*, UNIV. OF BALTIMORE SCHOOL OF LAW CENTER ON APPLIED FEMINISM (Jan. 28, 2019) [http://law.ubalt.edu/centers/caf/menstrual\\_justice.cfm](http://law.ubalt.edu/centers/caf/menstrual_justice.cfm) (providing template of successful proposal at the University of Baltimore School of Law).

96. *Id.* (students signed on to a redacted version).

97. *Id.*

struation was a scholarly or professional space that I wanted to occupy outside of the protective cover of the client-centered lawyering work the Legislation Clinic was performing for BRAWS. It is one thing to talk about period policy on behalf of a client and the menstruating individuals that they support; it is something else to do so under one's own name. It reminds me of conversations I had when I was presenting an article about the impact of breastfeeding at work.<sup>98</sup> In presenting that paper, a handful of people—primarily, but not exclusively, older male colleagues—would get visibly embarrassed when I used words or images related to lactation, expressing milk, breasts, and biology. Initially, I was not keen on having more scholarship on topics that made some people so uncomfortable.

Also, I'm admittedly still self-conscious talking publicly about periods at times. That's exactly part of the problem, though. As a result, I'm committed to doing my part and joining BRAWS, this essay's co-authors, and others in helping eliminate the stigma and integrating the impact of periods into the academic, public policy, and general discourse.

In terms of client work, I initially explored whether it was appropriate to require students to work on menstrual issues. At first, I offered students the choice to work on another client project if they were not comfortable being attached to period policy publicly at this early stage in their careers. Later, we questioned whether students that identified as male should be required to work with BRAWS. Ultimately, no students asked for other client work and our male students made valuable contributions to our client's menstrual equity work, including public testimony at the D.C. Council.

## II. EVALUATING RECENT REFORM

*Has access to menstrual products increased, and if so how? What reform has been achieved and how do you evaluate its effectiveness?*

**Marcy Karin:** For some people, access has increased. Based on anecdotal evidence, menstrual education has improved,<sup>99</sup> voluntary collec-

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98. See Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATHOLIC L. REV. 329 (2014).

99. See Beth Greenfield, *What's the State of Menstruation Education in U.S. Schools? 'Significantly Lacking,' Say Experts*, YAHOO LIFESTYLE (Nov. 10, 2018), <https://www.yahoo.com/lifestyle/whats-state-menstruation-education-u-s-schools-significantly-lacking-say-experts-130030452.html> (providing a history of menstrual

tions and distributions of menstrual products have increased,<sup>100</sup> grants have funded deliveries to elementary, middle, and high school students who were unable to access menstrual supplies on their own,<sup>101</sup> and laws have made these products cheaper by removing the tax<sup>102</sup> and requiring access for some schools,<sup>103</sup> shelters,<sup>104</sup> jails and prisons,<sup>105</sup> government offices,<sup>106</sup> and other facilities.<sup>107</sup> Unfortunately, the economic and oppor-

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education in the United States and showing that there is room for further information to be integrated into secondary education).

100. See, e.g., Coshandra Dillard, *Equity, Period.*, TEACHING TOLERANCE (Spring 2019), <https://www.tolerance.org/print/110992> (describing the impact that a single teacher may have on increasing access); Kionna Dyces, “*Tampon Tree*” Brings in More Than 25K Menstrual Supplies for Women in Need, LOCALDVM (Dec. 28, 2018), <https://www.localdvm.com/news/virginia/tampon-tree-brings-in-more-than-25k-menstrual-supplies-for-women-in-need/> (highlighting an unusual collection effort that provided products to area menstruators that needed them); see generally Jennifer Weiss-Wolf, *Helping Women and Girls. Period.*, N.Y. TIMES (Jan. 28, 2015, 11:28 AM), <https://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period>.
101. See, e.g., BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 4 – 5 (describing grants that BRAWS has obtained to provide products to Virginia schools and the number of students they have supported with those funds).
102. See, e.g., D.C. CODE ANN. § 47-2005(38)(A) (LEXIS through Sept. 10, 2019); Ema Sagner, *More States Move to End ‘Tampon Tax’ That’s Seen as Discriminating Against Women*, NAT’L PUB. RADIO (Mar. 25, 2018, 8:01 AM), <https://www.npr.org/2018/03/25/564580736/more-states-move-to-end-tampontax-that-s-seen-as-discriminating-against-women>.
103. See, e.g., CAL. EDUC. CODE § 35292.6 (LEXIS through Chapters 1-70, 72-106, 114, 116-121, 149, 157, 159, and 161 of the 2019 Regular Session); MD. CODE ANN., HOUS. & CMTY. DEV. § 4-2401 (2019); N.Y.C., N.Y., ADMIN. CODE § 21-968 (LEXIS through Aug. 23, 2019).
104. See, e.g., MD. CODE ANN., HOUS. & CMTY. DEV. § 4-2401 (2019); N.Y.C., N.Y., ADMIN. CODE § 12-207 (LEXIS through August 23, 2019).
105. See, e.g., First Step Act, 18 U.S.C. § 4042 (LEXIS through Pub. L. No. 116-47) (requiring the Director of the Federal Bureau of Prisons to make tampons and sanitary napkins available to prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner); COL. REV. STAT. §§ 17-1-112(4), -113.6, -26-104.3, 26-1-136.5, 31-15-404 (LEXIS through 2018 Sess.) (providing people in custody access to free products in a range of city, county, and state facilities); see also Lucian Dervan, Mid-Year Resolution 109c, 2019 A.B.A. CRIM. JUST. SEC. REP. TO HOUSE OF DELEGATES 1 (encouraging the “unrestricted access [to] a range of free feminine hygiene products, including both tampons and sanitary pads, in sufficient quantities to address [the] needs” of “all women prisoners in all forms of detention, both adult and juvenile[.]”).
106. See, e.g., Sanjana Karanth, *House Lawmakers Can Now Purchase Menstrual Products With Office Funds*, HUFFPOST (Feb. 14, 2019), [https://www.huffpost.com/entry/house-women-menstrual-products-office-funds\\_n\\_5c65f2a2e4b05c889d1d6cb2](https://www.huffpost.com/entry/house-women-menstrual-products-office-funds_n_5c65f2a2e4b05c889d1d6cb2) (describing the advocacy efforts to secure the recent policy change that allows Members of Congress to purchase menstrual products with office funds); *supra* note 56 and accompanying text.

tunity costs of menstruating in the U.S. have not been well-documented and there is rarely a baseline from which to measure an increase in access or affordability. In addition, when making donations to shelters and other places where people in poverty are located, contributors are still less likely to donate menstrual products than items like clothing and food.<sup>108</sup> And in some jurisdictions, like D.C., lawmakers appeared to use the repeal of the tampon tax to justify the choice to let pending access bills die. Realistically, the new laws are not yet comprehensive and offer only patchwork access depending on where one lives. They also must be implemented to be effective.<sup>109</sup> That said, this is a moment. I'm optimistic that the moment is turning into a movement and will continue to grow.

**Margaret Johnson:** Obtaining true reform is really a two-step process. The first step is getting the law or policy in place requiring the provision of products. As of November 2018, twenty states require provision of menstrual products in correctional facilities, and some of those ensure free access to the products.<sup>110</sup> The second step is enforcement of compliance with the law or policy and educating the stakeholders about the law. In Maryland, we are now monitoring compliance with the new law providing free access to products in correctional facilities. While the single women's prison in Maryland is apparently providing products, we are still researching the jails' compliance. Another area where there has been a movement to increase access to products is at colleges and universities. As of January 2019, the following schools and others had successfully implemented programs to provide products: University of Minnesota, University of Nebraska at Lincoln, Bucknell University, University of Washington, Brown University, University of Pennsylva-

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107. See, e.g., TOWN OF BROOKLINE MASS., ANNUAL TOWN MEETING WARRANT, Art. 20 § 8.37, <https://www.brooklinema.gov/DocumentCenter/View/18847/WARRANT-2019-Annual-Town-Meeting> (providing free products in all public bathrooms in the town, including parks and libraries, starting July 1, 2021).

108. See BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 17 (sharing Catherine Read's remarks about donations to Britepaths in Virginia).

109. For example, the 2016 tampon tax repeal in the District had no impact until the law was implemented on October 1, 2018. See also Holly Seibold & Gianna Fienberg, *Free to Bleed: Virginia House Bill 83 and the Dignity of Menstruating Inmates*, 22 RICH. PUB. INT. L. REV. 69, 87 – 88, n.13 (2019) (noting the failure of DOJ to implement its new policy providing access to products in federal facilities and need to enforce Virginia's new law consistently); *infra* text accompanying note 110.

110. Katherine Haladay et al., *Progress on Providing Dignity to Menstruating Inmates*, HUMAN RIGHTS AT HOME BLOG (Dec. 9, 2018), [https://lawprofessors.typepad.com/human\\_rights/2018/12/progress-on-providing-dignity-to-menstruating-inmates.html](https://lawprofessors.typepad.com/human_rights/2018/12/progress-on-providing-dignity-to-menstruating-inmates.html).

nia, and Cornell University.<sup>111</sup> Students and I are working on adding University of Baltimore to that list.

As Laura reminds us, though, getting free access to products needs to be coupled with getting safe products.<sup>112</sup> Laboratory analysis of some menstrual pads shows the presence of toxins that could cause cancer, reproductive system harms, and autoimmune illnesses.<sup>113</sup> In addition, because disposable menstrual products create environmental landfill and other issues,<sup>114</sup> there should also be a push towards structural change in restrooms to provide private sanitation access for cleaning reusable, environmentally sustainable products.

Access to products needs to be free and void of coercion. This is especially true in the correctional setting where residents document that correctional officers have made access to products contingent on certain types of behavior.<sup>115</sup>

**Laura Strausfeld:** Free access to menstrual products has increased manifold, both as a result of individuals taking the initiative in their workplaces and also as a result of policy. New York City passed a bill requiring free supplies in all schools, shelters, and correctional facilities in June of 2016.<sup>116</sup> It was the first of its kind and has become the model for

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111. See, e.g., Johnson et al., *supra* note 95, at 1.

112. See Laura Strausfeld, *Making Tampons Free Can Make Them Safer, Too*, BLOOMBERG (Aug. 31, 2018), <https://www.bloomberg.com/opinion/articles/2018-08-31/making-tampons-free-can-make-them-safer-too> (arguing that institutional buyers, such as prisons and schools, should request consumer disclosure of contents of menstrual hygiene products).

113. See Chan Jin Park et al., *Sanitary Pads & Diapers Contain Higher Phthalate Contents than Those in Common Commercial Plastic Products*, 84 REPRO. TOXICOLOGY 114 (2019), <https://www.sciencedirect.com/science/article/pii/S0890623818302259>.

114. See, e.g., Nina Shen Rastogi, *What's the Environmental Impact of My Period?*, SLATE (Mar. 16, 2010), <https://slate.com/technology/2010/03/what-s-the-environmental-impact-of-my-period.html> (describing how the average menstruator is likely to produce over 60,000 pounds of garbage related to use of menstrual products during their lifetime).

115. Johnson, *supra* note 6 (citing Zoe Greenberg, *In Jail, Pads and Tampons are Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html>).

116. N.Y.C., N.Y., ADMIN. CODE §§ 9-141 (making available to female inmates in city jails free menstrual hygiene products upon request), 12-207 (making available free menstrual hygiene products in all city-run temporary shelters), 21-968 (providing free menstrual hygiene products in bathrooms in public schools serving female students in grades six through twelve) (LEXIS through Aug. 23, 2019). See also 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/>.

laws in other states, including Arizona, California, and Connecticut, to name just a few.<sup>117</sup> Worth noting, too, is the bipartisan nature of these access bills.<sup>118</sup> It was President Trump's Department of Justice that was the first to provide free menstrual products in federal prisons.<sup>119</sup> Effectiveness is another story, though, and Period Equity has a lot of work ahead to make sure these laws come with funding and an enforcement mechanism.

**Bridget Crawford:** The New York City Council legislation was a great step toward making menstrual products available to those in need. In 2019, a local Brooklyn paper reported on a two-year-long investigation by members of a Brooklyn Girl Scout troop.<sup>120</sup> These Scouts visited 23 Brooklyn schools, and only 18 percent of the schools had bathrooms where menstrual hygiene products were available and where there was a place to dispose of used products.<sup>121</sup> This is just one small example of the disconnect between policy and reality. The New York City Council passed the law to make the products available in city schools, but implementation is lagging.<sup>122</sup>

In terms of efforts to repeal the tampon tax, several states followed New York's lead and repealed their sales tax on menstrual hygiene products. There are now 35 states that retain the tampon tax, and many of those states' legislatures are poised to consider repeal legislation in the

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117. See, e.g., BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 20–24 (detailing various state laws related to provision of menstrual hygiene products to incarcerated women); Erin Polka, *The Monthly Shaming of Women in State Prisons*, PUBLIC HEALTH POST (Sept. 4, 2018), <https://www.publichealthpost.org/news/sanitary-products-women-state-prisons>.

118. See, e.g., James Varney, “Menstrual Equity”: Activist Fights to Correct Lawmakers’ Neglect of Feminine Needs, WASH. TIMES (Aug. 16, 2018), <https://www.washingtontimes.com/news/2018/aug/16/jennifer-weiss-wolf-menstrual-equity-requires-femi> (describing bi-partisan support for increased access to menstrual hygiene products).

119. See, e.g., Lydia O’Connor, *Federal Prisons Made Menstrual Products Free*, HUFFPOST (Feb. 7, 2018), [https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons\\_us\\_5a7b427be4b08dfc92ff5231](https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons_us_5a7b427be4b08dfc92ff5231) (describing change to federal prison policy).

120. Anna Quinn, *These Girl Scouts Brought “Menstrual Equity” to 200 BK Schools*, PATCH (Jan. 3, 2019), <https://patch.com/new-york/parkslope/these-girl-scouts-brought-menstrual-equity-200-bk-schools>.

121. *Id.*

122. See, e.g., Sarah Grossman, *NYC Mayor Signs Free Tampons for Schools, Jails, Shelters into Law*, HUFFPOST (July 14, 2016), [http://www.huffingtonpost.com/entry/new-york-citymayor-bill-de-blasio-signs-tampons-free-law\\_us\\_5787bc57e4b08608d3336b27](http://www.huffingtonpost.com/entry/new-york-citymayor-bill-de-blasio-signs-tampons-free-law_us_5787bc57e4b08608d3336b27).

coming months.<sup>123</sup> I think public opinion is squarely in favor of repeal,<sup>124</sup> and it is an issue that has bipartisan support. As a matter of fairness, state governments should not be funding themselves with a tax on products that menstruators—who tend to be mostly women and girls—need in order to work and to go to school.

### III. COMMON GROUND

*What is the connection between menstrual equity and gender equity?*

**Margaret Johnson:** There is a strong connection between menstruation and biological sex, but a distinction in gender. Ciswomen and girls menstruate.<sup>125</sup> Transgender boys and men menstruate.<sup>126</sup> Intersex persons menstruate.<sup>127</sup> Gender nonbinary persons menstruate.<sup>128</sup> Gender is the social construction of identity based on biological sex, gender roles, gender performance, and gender identity.<sup>129</sup> Women and menstruators are not the same set of persons because a transgender man may menstruate but a transgender woman may not. Therefore, aligning the menstrual equity movement with the gender equity movement may not be a perfect match. But a menstrual equity movement aligns with a gender equity movement in that both address social justice issues that impact persons because of their biological sex and the social constructions and assumptions about gender. Through policy work, advocacy, and writing, advocates like Jennifer Weiss-Wolf<sup>130</sup> have ensured that good

123. See, e.g., Bridget Crawford, *State Legislature Watch: #TamponTax Repeal Bills Live in 13 States*, FEMINIST LAW PROFESSORS (Feb. 4, 2019), <http://www.feministlawprofessors.com/2019/02/state-legislature-watch-tampon-tax-repeal-bills-live-in-13-states> (listing states with active repeal legislation under consideration).

124. See Zraick, *supra* note 36 (“The market research company OnePoll surveyed 2,000 women in the United States last month on behalf of Intimina, a menstrual cup manufacturer, and found that 67 percent of respondents thought a tax on period products was sexist.”).

125. See, e.g., *Menstrual Cycle*, OFFICE OF WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle>.

126. See, e.g., Wiley Reading, *My Period and Me: A Trans Guy’s Guide to Menstruation*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 91, 91 – 102 (Kate Farrell ed., 2018).

127. See, e.g., Arisleyda Dilone, *She’ll Become a Woman Later*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 3, 3-18. (Kate Farrell ed., 2018).

128. Brittney McNamara, *Period Activist Cass Clemmer Responds to Hate After Posting Period Photo*, TEEN VOGUE (Aug. 2, 2017), <https://www.teenvogue.com/story/period-activist-cass-clemmer-what-its-like-to-get-periods-while-transgender>.

129. See, e.g., Johnson, *supra* note 6.

130. See Weiss-Wolf, *supra* note 2.

legislative and policy reform happens and have kept the spotlight on important menstrual equity issues.

**Emily Gold Waldman:** I see menstrual equity as a subset of gender equity. For gender equity to be achieved, we need to take account of menstruation, pregnancy, and breastfeeding, and ensure that these natural biological processes aren't limiting women's ability to participate fully in school, the workplace, and other aspects of society. That requires certain accommodations; there's just no way around that, and no shame in acknowledging it. Our society has gotten some of the way there—for example, the Pregnancy Discrimination Act amended Title VII to require employers to accommodate pregnancy at least to the same extent that they accommodate other conditions that similarly limit employees' ability to work.<sup>131</sup> But we haven't gotten all the way there—if employers *don't* accommodate such conditions, they don't have to accommodate pregnancy either.<sup>132</sup> And similarly, there's no current requirement that any accommodations be made at all for menstruation, even though presumably most such accommodations would be quite minimal and not particularly disruptive for the employer.

**Marcy Karin:** Menstrual equity also falls under the larger gender equity umbrella. Interestingly, rejecting the gender lens and framing menstrual equity using the related, but distinct, human rights and dignity lens has helped move some local legislation.<sup>133</sup>

**Laura Strausfeld:** Menstrual equity is a necessary but not a sufficient condition for gender equity. I love learning from my co-panelists' answers to this question. As an activist, I focus on the fact that every menstrual equity win is a win for gender equity. It feels good and highly motivating to tick off wins en route to the larger, more elusive prize of gender equity.

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131. See Pregnancy Discrimination Act of 1978, 2 U.S.C.A. § 2000e(k) (Westlaw through 2019).

132. See *supra* notes 61 – 65 and accompanying text.

133. For example, compare Dignity Act, S.B. 1715, 2019 Sess. (Va. 2019), and H.B. 1593, 2017 Sess. (Va. 2017) with H.B. 952, 2016 Sess. (Va. 2016). Virginia legislators strategically changed the name of the legislation after receiving feedback that colleagues were uncomfortable using the words “tampon” and “feminine hygiene.” “Dignity,” by contrast, was considered a concept that more people could get behind and would not pigeon-hole the conversation as a “women’s” issue. Indeed, every year after the title of the proposed legislation was changed, Virginia moved closer to a tampon tax repeal.



*Should we be talking about gender equality instead of gender equity?*

**Bridget Crawford:** In the simplest terms, equality means treating all people the same. Equity means taking into account individuals' differences, and treating them in a way that allows them to reach the same goal, even if that means giving some people special consideration or a "boost" of sorts.<sup>134</sup> There is a popular graphic that shows three people of different heights trying to look over a fence to watch a baseball game.<sup>135</sup> The first frame shows all three people standing on identically-sized boxes.<sup>136</sup> The shortest person still cannot see the game, even with the boost.<sup>137</sup> That frame illustrates equality. All three people are treated the same, regardless of height. In the cartoon's second frame, each person stands on the number of boxes necessary to give a clear view of the game.<sup>138</sup> The shortest person needs two boxes; the mid-height person needs one; the tallest needs none.<sup>139</sup> Now all can see over the fence and watch the game.<sup>140</sup> That frame illustrates equity. Simply put, give each person the necessary means (a boost in height) to reach the same result (the ability to see over the fence).

The question of whether we should be talking about gender equality or gender equity depends a great deal on context. On the one hand,

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134. In feminist jurisprudence, scholars typically frame this distinction as one between "formal equality" and "substantive equality." See, e.g., Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER LAW & POL'Y 1 (1994) ("While a formal equality approach judges the form of a rule, requiring that it treat women and men on the same terms without special barriers or benefits due to their sex, a substantive equality approach looks to a rule's results or effects. It points out that equal treatment leads to outcomes that are unequal because of differences between men and women. Advocates of substantive equality demand that rules take account of these differences in order to eliminate the disadvantages they bring to women.").

135. See Craig Froehle, *The Evolution of an Accidental Meme: How One Little Graphic Became Shared and Adapted by Millions*, MEDIUM (Apr. 14, 2016), <https://medium.com/@CRAIG/the-evolution-of-an-accidental-meme-ddc4e139e0e4> (explaining creator's original use of the graphic and its subsequent evolution). But see Paul Kuttner, *The Problem with That Equity vs. Equality Graphic You're Using*, CULTURALORGANIZING, (Oct. 29 2016), <http://culturalorganizing.org/the-problem-with-that-equity-vs-equality-graphic> (critiquing graphic for not highlighting "root causes" of difference and preferring to show three height-differentiated figures attempting to watch the baseball game from a sloping ground, to show "the reason some people have more difficulty seeing than others is not because of their height, but because of the context around them.").

136. See Froehle, *supra* note 135.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

formal equality has a simple cognitive appeal. In many—indeed most—cases involving education, employment, and other aspects of public life, there is no reason to treat men, women, and people of all genders differently from each other. On the other hand, as Emily mentioned, approximately half of the population may experience certain biologically-related processes and conditions (menstruation, pregnancy, and breastfeeding). There is the biological fact that approximately half the population menstruates for a large portion of their lives and, for a particular window, has the ability to become pregnant and breastfeed. Menstruation, pregnancy, and lactation are not disabilities. They are normal processes and functions of the human body. There are good reasons for law and society to make certain accommodations for those who are menstruating, pregnant, or lactating. Biological differences bring to the surface cases in which formal equality may not be enough to achieve fairness.

**Emily Gold Waldman:** Under the Supreme Court’s long-standing interpretation of the Equal Protection Clause, the focus is very much on equality rather than equity. The relevant doctrinal tests proceed from the assumption that the sexes should be treated identically, and require the government to make persuasive justifications for sex-based classifications that yield differential treatment.<sup>141</sup> With the tampon tax, we were able to hook our article into that equality frame by pointing out that menstrual hygiene products aren’t tax-exempt even though other analogously necessary products are.<sup>142</sup> The ability to draw that comparison was an important piece of our argument.

But the equity frame goes further, and can address other important issues, like making sure that menstruating students and prisoners have access to products and that menstruating employees have appropriate break times. To borrow from Bridget’s example illustrating the difference between equality and equity, such accommodations are the “boost” that some menstruating students, prisoners, and employees may need so that they are able to function and thrive. There’s no obvious comparator there, since non-menstruating individuals do not require analogous accommodations. But that doesn’t make those needs less important.

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141. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

142. *See* Crawford & Waldman, *supra* note 45, at Section I.B (contrasting state taxation of menstrual hygiene products with other products that are not subject to taxation, such as t-shirts, rain ponchos, fur clothing, and candied cake decorations).

**Margaret Johnson:** While gender equality sounds great, it can be limiting because it seeks only to bring treatment of one group to the level of another group, whether or not the overall treatment is just. It can also be limiting because formal or substantive equality may address individual disparate treatment without addressing the systemic and structural operation of power that can cause oppression. The equality framework can be limiting because it examines issues without looking at the intersecting forms of oppression that include patriarchy, white supremacy, transphobia, and classism, for example, that create menstrual injustices. For instance, in feminist theory, substantive equality theory developed to address pregnancy discrimination because the formal equality theory, which was being used for sex-based discrimination claims, required a similarly situated male comparator.<sup>143</sup> Substantive equality accepted that males do not get pregnant and so moved away from equal treatment of men and women and instead looked to equal outcomes.<sup>144</sup> Non-subordination theory, which examines and addresses the systematic operation of power and oppression, then developed because the equality frameworks compared women to men and did not look to the power dynamic at the root of such claims as sexual harassment and domestic violence.<sup>145</sup> And intersectionality theory, which examines the operation of power as multidimensional and resulting from the intersection of gender, race, class, and other personal identity characteristics, then developed to address the critique that non-subordination theory addresses only the unidimensional gender analysis of power.<sup>146</sup>

I see the menstrual justice movement as requiring all strands of feminist legal theory and other critical legal theories to address the range of issues menstruators confront—from the taxing of products to harassment in the workplace to health disadvantages that impact all menstruators. I use the term “menstrual justice” instead of equality or equity in an attempt to seek reform. Menstrual injustice is structural intersectionality<sup>147</sup> and to eradicate it we need to address not only patriarchy but also white supremacy, transphobia, and classism.<sup>148</sup>

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143. Bartlett, *supra* note 134, at 2–6 (describing shortcomings of the formal equality approach when addressing problems of pregnancy discrimination, for example).

144. *Id.*

145. *Id.*

146. Crenshaw, *Mapping the Margins*, *supra* note 10, at 1244–45; Bartlett, *supra* note 134, at 15–16.

147. *See generally* Crenshaw, *Mapping the Margins*, *supra* note 10, at 1245–50.

148. Johnson, *supra* note 6.

**Marcy Karin:** The gender equity frame supports the creation of voluntary business practices and a legal framework that requires and/or encourages workplace accommodations such as break time and access to sanitary facilities to support menstrual management. Accommodations do not fit into an equality frame. Building on the explanation of the popular comic that Bridget described above,<sup>149</sup> accommodations are the provision of whatever number of boxes each individual needs to help see over the fence. Providing the same accommodation to every working menstruator does not provide the boost needed. Some of the menstrual access work suffers from the same critique. Removing the sales tax does not make products affordable to all—it helps make them more affordable, but it does not mean that all menstruators will have equitable access to the products needed at the time they are needed. Importantly, Margaret’s “menstrual justice” frame goes further in terms of combatting structural injustice in a critically important way and intentionally addresses the class realities that underlie this movement.<sup>150</sup>

**Laura Strausfeld:** Period Equity frames policy and legal change around “equity” rather than “equality.” Since half the population has needs unique to menstruation, if those needs are not met, half the population is denied equal access to civic society, such as school and work opportunities, that is afforded to the other half.

*What is gained and what is lost in talking about menstrual equity as the common ground “we all need to stand on”?*<sup>151</sup>

**Laura Strausfeld:** Menstrual equity is a rare bipartisan movement during a uniquely partisan period of contemporary politics. We’re not having bipartisan discussions about abortion, but menstrual equity enables us not only to discuss women’s bodies between the aisles, but also to find agreement and enact laws designed to protect human dignity.<sup>152</sup> That’s a major gain, which will be made greater if we can at some point in the future traverse from here to, say, a calm, productive discussion about reproductive rights.

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149. See Froehle, *supra* note 135 and accompanying text (describing the graphic illustrating the difference between “equality” and “equity”).

150. See Kuttner, *supra* note 135 (demonstrating pictorially “justice” by breaking down the fence that created the barriers that needed to be overcome in the “equality” and “equity” drawings).

151. See Druet, *supra* note 7 (quoting Jennifer Weiss-Wolf).

152. See, e.g., Jennifer Weiss-Wolf & Steve Andersson, *Republican or Democrat - We Can All Agree On Axing the Tampon Tax*, NEWSWEEK (Apr. 15, 2019), <https://www.newsweek.com/tampon-tax-republican-democrat-opinion-1391763>.

**Margaret Johnson:** Underscoring that menstrual injustices impact everyone somehow is a gain. In many ways, the menstrual equity movement has been a twenty-first century consciousness-raising circle conducted through social media and other fora. Through the consciousness-raising, menstruators have been able to surface, share, and connect their stories of menstrual injustices to identify the structured intersectionality at play. Menstrual injustice is a shared general experience, though the actual impact is different based on the structural intersectionality. I think having consciousness-raising around menstrual injustice is a necessary and important gain because it is the necessary predecessor to create and effectuate social change.

**Marcy Karin:** Before my students and I represented BRAWS, I did not know how interconnected menstrual equity was to reducing poverty or that an (inter)national movement to reduce period poverty had begun. Over time, as we unpacked menstrual equity via client work and in scholarship, it became clear that it matters, is connected to a myriad of other issues, and is just one piece of the larger social justice puzzle.<sup>153</sup>

This work offers opportunities for bipartisan collaboration at a time when those opportunities are few and far between. President Trump's Department of Justice twice issued operations memoranda allowing access to some products in federal prisons.<sup>154</sup> Republican governors, like Bruce Rauner of Illinois, have signed tampon tax repeals and school access bills,<sup>155</sup> and Republicans in Congress did not file a joint

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153. For example, access to menstrual products relates to a survivor's ability to address the aftermath of gender-based violence. BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 2; see BRAWS: *Bringing Resources to Aid Women's Shelters testimony*, *supra* note 30; see generally Weiss-Wolf, *supra* note 2. There is room for additional research into various connections, however. For example, the menstrual equity movement might benefit from a deeper analysis into the lessons learned from the social and human rights models of disability in terms of inclusiveness and justice.

154. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, OPERATIONS MEMORANDUM 003-2018, PROVISION OF FEMININE HYGIENE PRODUCTS (2018), *available at* <https://www.bop.gov/policy/om/003-2018.pdf>; FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, OPERATIONS MEMORANDUM 001-2017, PROVISION OF FEMININE HYGIENE PRODUCTS (2017), *available at* [https://www.bop.gov/policy/om/001\\_2017.pdf](https://www.bop.gov/policy/om/001_2017.pdf).

155. See, e.g., 35 ILL. COMP. STAT. ANN. 105/3-5(37) (West 2016); Alanna Vagianos, *New Hampshire Passes Law Requiring Free Menstrual Products in All Public Schools*, HUFFPOST (July 19, 2019), [https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools\\_n\\_5d31bd0de4b0419fd32bd119](https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools_n_5d31bd0de4b0419fd32bd119) (noting the role of Democratic legislatures and Republican Governor Chris Sununu in New Hampshire's new "period poverty bill" that requires access in public schools). See also FLA. STAT. ANN. § 212.08(nnn)

resolution to block the enactment of the D.C. tampon tax repeal, even though they have done so on other local issues.<sup>156</sup> This is positive. But talking about menstrual equity as a political issue has the potential to diminish momentum for voluntary practices. For that reason, I hope it remains a policy issue that people (including politicians) are able to support regardless of party affiliation or partisan politics.<sup>157</sup>

Another potential concern relates to framing menstrual equity as a reproductive justice issue. Doing so may result in a practical, political problem and potentially stall additional movement during the upcoming presidential election. Alternatively, and perhaps optimistically, menstrual equity may be front-and-center in the 2020 election. For the first time in history, presidential candidates have co-sponsored menstrual equity legislation,<sup>158</sup> and there's a chance that menstrual equity will appear as an issue on the campaign trail somehow or otherwise make it onto a candidate's platform.

#### IV. THE FUTURE OF MENSTRUAL EQUITY

*What do you see as the “next wave” of menstrual equity activism? What are the questions or policy matters that might be next on the agendas of menstrual equity lawyers, policy-makers, or activists?*

**Marcy Karin:** I know I'm repeating myself, but access and ability to use menstrual products at work safely, without fear of reprisal or retribution, must be a part of the next wave. The movement to date has already started working on this—it has surfaced compelling stories about the mismatch between the way that various workplaces are struc-

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(West 2017); Monique Geiger & Kim Garcia, *Rauner Approves Appeal of Sales Tax on Tampons*, CHICAGO TRIB. (Aug. 19, 2016), <https://www.chicagotribune.com/politics/ct-bruce-rauner-tampon-tax-met-0821-20160819-story.html>; Andrea Gonzalez-Ramirez, *Florida Is Eliminating Its Tampon Tax*, REFINERY29 (May 30, 2017), <https://www.refinery29.com/en-us/2017/05/156663/florida-ending-tampon-tax-law>.

156. See, e.g., Jenna Portnoy, *House Votes to Repeal DC's Death with Dignity Law*, WASH. POST (Sept. 14, 2017), [https://www.washingtonpost.com/local/dc-politics/house-votes-to-repeal-dcs-death-with-dignity-law-senate-has-yet-to-act/2017/09/14/663b4722-98be-11e7-82e4-f1076f6d6152\\_story.html?utm\\_term=.d834ba837751](https://www.washingtonpost.com/local/dc-politics/house-votes-to-repeal-dcs-death-with-dignity-law-senate-has-yet-to-act/2017/09/14/663b4722-98be-11e7-82e4-f1076f6d6152_story.html?utm_term=.d834ba837751).

157. See, e.g., Jennifer Weiss-Wolf & Steve Andersson, *supra* note 152; Ema Sagner, *More States Move to End “Tampon Tax” That's Seen as Discriminating Against Women*, NPR (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>.

158. See Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. § (d)(2) (2017) (sponsored by Senators Cory Booker, Kirsten Gillibrand, Kamala Harris, and Elizabeth Warren).

tured and people's needs related to menstruation at work.<sup>159</sup> Collectively, these stories make the case for change. The next step is figuring out how to address those needs in a way that can garner some political momentum at the local and national levels. Part of that work will be connecting this to other needed workplace reforms as Emily and Margaret suggest.

Beyond the workplace, I hope the menstrual equity movement gets involved in addressing needs in the immigration system, including ensuring access to menstrual products in family detention centers and at the borders. The ongoing efforts to reform menstrual management access policies in the criminal justice system offer a strong model for this work.<sup>160</sup>

Also, like a number of my co-panelists have already mentioned, additional menstrual education is needed. And it is needed earlier in one's lifetime and development, especially as the age of menstrual onset continues to lower in the U.S.<sup>161</sup> Along these lines, I'm inspired by the BRAWS Preteen/Teen Advisory Council, which meets monthly to learn how to be menstrual "ambassadors," engaging and supporting others in schools and their broader community.<sup>162</sup> Similarly, the Girl Scouts and others have gotten involved locally and across the country.<sup>163</sup> Peer support is growing, including from non-menstruators like the Parkland high school student who carried menstrual products in his clear back-

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159. Johnson, *supra* note 6, at 25 – 33, 49 – 50; Weiss-Wolf, *supra* note 2; see Karin, *supra* note 58.

160. See *supra* notes 18–21, 104, 109 and accompanying text. See also BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 20–24.

161. See Susan Scutti, *Puberty Comes Earlier and Earlier for Girls*, NEWSWEEK (Jan. 26, 2015), <https://www.newsweek.com/2015/02/06/puberty-comes-earlier-and-earlier-girls-301920.html>.

162. *PreTeen/Teen Council*, BRAWS: BRINGING RESOURCES TO AID WOMEN'S SHELTERS, <http://www.braws.org/preteen-teen-council.html>.

163. See, e.g., Christina Lockett, *Rising to the Occasion*, FAIRFAX NEWS (Mar. 15, 2019), <http://e-edition.fairfaxtimes.com/Olive/ODN/FairfaxCountyTimes/Default.aspx>; Debbie Truong, *Her School's Restrooms Didn't Have Pads or Tampons. So She Took Matters Into Her Own Hands*, WASH. POST (Dec. 29, 2018), [https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffd-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffd-11e8-862a-b6a6f3ce8199_story.html); Chelsey Sanchez, *Brooklyn Girl Scouts Find City Isn't Fully Implementing Menstrual Equity Law*, GOTHAM GAZETTE (Dec. 28, 2018), <https://www.gothamgazette.com/city/8163-brooklyn-girl-scouts-find-city-isn-t-implementing-menstrual-equity-law-see-redress>; Emily Benson, *Meet the Girl Scout Fighting Period Poverty*, AUSTIN WOMAN (Nov. 21, 2018), <https://atxwoman.com/meet-girl-scout-fighting-period-poverty/>.

pack.<sup>164</sup> These and other ways of involving pre-menstruators, early menstruators, and non-menstruators matter. They matter in terms of increasing education, combating stigma, and building the next generation of advocates who are growing up without the same types of stigma around blood and biology that I did.

**Emily Gold Waldman:** I hope that menstrual equity activism will join forces with efforts regarding pregnancy accommodations. I was very disturbed by a recent *New York Times* article entitled *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*.<sup>165</sup> As the title suggests, there are many reported instances of pregnant women working in manual labor jobs where employers refused to provide them with light-duty assignments—even where the women had doctors’ notes recommending them.<sup>166</sup> As noted above, the Pregnancy Discrimination Act doesn’t require such accommodations—employers only have to provide them if they are already accommodating other employees who are “similar in their ability or inability to work.”<sup>167</sup> Efforts to pass a new federal law that would require employers to accommodate pregnant workers have so far stalled, but many states have passed laws requiring pregnancy accommodations.<sup>168</sup> I hope that the rest of the states (and the federal government) will do so as well.

**Margaret Johnson:** Another area I would like to see explored is menstruation as a form of reproductive labor.<sup>169</sup> Reproductive labor theorists argue that the social reproduction of unwaged pregnancy, child care, and housework, which produces the social good of future market workers, is a form of patriarchy and white supremacy.<sup>170</sup> I think it could be helpful to fit menstruation in that same frame. To achieve menstrual justice, we should consider how there could be payment for menstua-

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164. Elly Belle, *Cameron Kasky Filled His Clear Backpack with Tampons*, TEEN VOGUE (Apr. 4, 2018), <https://www.teenvogue.com/story/cameron-kasky-filled-his-clear-backpack-with-tampons>.

165. Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://nyti.ms/2AkT4qJ>.

166. *Id.*

167. See Pregnancy Discrimination Act of 1978, 2 U.S.C.A. § 2000e(k) (West, Westlaw through 2019).

168. See, e.g., Silver-Greenberg & Kitroeff *supra* note 164 (explaining that the federal legislative efforts have stalled but that at least 23 states have passed such laws); see also, e.g., N.Y. EXEC. LAW § 296(3)(a)-(b) (McKinney 2019).

169. Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 54–55 (1997).

170. *Id.*



tion, such as Nike's paid period leave,<sup>171</sup> flexible work hours and workplaces for menstruators, and Marcy's idea of paid breaks for menstruators.<sup>172</sup>

**Laura Strausfeld:** I hope to see “next wave” menstrual equity activism as part of the consumer protection, criminal rights, and education movements. For example, as consumers, menstruating people need to advocate for products that are tested over the long-term for safety. As criminal rights advocates, we need to make sure incarcerated women are treated with dignity generally, including around their periods. As education advocates, in addition to providing free menstrual supplies to keep children from skipping school, we need comprehensive sex education that teaches boys about menstruation and women's bodies, and teaches girls about menstrual health and about female sexuality generally.

*What legal or policy issues remain to be explored in relation to menstruation?*

**Marcy Karin:** Laura's contributions surrounding product safety are critical. Two related issues that could use additional critical thinking are the environmental impact of menstrual products and access to water, as Bridget's work with Oklahoma City University School of Law Professor Carla Spivack explores.<sup>173</sup> For example, advocates of menstrual cups often mention that they are environmentally friendly. But menstrual cups are not yet realistic alternatives for people living in shelters or working in non-traditional jobs due to a lack of access to needed water, sanitary storage, and disposal options. Nor is it realistic for menstruators that have not received education about insertion, use, or cleaning. Our cultural norms, practices, and structures do not currently support widespread use of these alternative products.<sup>174</sup>

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171. See, e.g., Hazel Sheffield, *Should Women Have the Right to Take Time Off During Their Periods?*, INDEP. (Mar. 2, 2016), <https://www.independent.co.uk/news/business/news/menstrual-leave-period-pain-womens-rights-a6907261.html> (describing Nike's introduction of paid menstrual leave in 2007).

172. Johnson, *supra* note 6, at 70.

173. Crawford & Spivack, *supra* note 40.

174. There is some promising new research about menstrual cups. Anna Maria van Eijk et al., *Menstrual Cup Use, Leakage, Acceptability, Safety, and Availability: A Systematic Review and Meta-Analysis*, THE LANCET (July 16, 2019), [https://doi.org/10.1016/S2468-2667\(19\)30111-2](https://doi.org/10.1016/S2468-2667(19)30111-2). However, further study is needed. Some results mentioned the ability of menstruators to carry water bottles with them or delay emptying cups to facilitate cleaning and use. Not all menstruators would be able to do so, which may lead to other results than those included in the studies captured in the report. See *id.*

**Margaret Johnson:** I am focused on addressing the stigma around menstruation that is at the root of many forms of menstrual injustice, like employment discrimination, microaggressions, lack of access to products, and lack of prioritization of product safety and sustainability. The conversation about eradicating the stigma of menstruation is happening as seen in the impressive work of my co-authors and their collaborators. It is also seen in a steady stream of cultural developments aimed to destigmatize menstruation, the latest of which are the new period emoji<sup>175</sup> and the Academy Award for the short documentary film *Period. End of Sentence.*<sup>176</sup> There is so much more conversation to be had about the menstrual injustices that exist and a lot more action to be taken to address them. To make change, we need to have these conversations, we need solid research, and we need affected community members and other advocates who can share this information with courts and policymakers.

One underexplored important area is product safety. I am excited about the research Laura is doing in this area and look forward to all of us learning a lot more about what menstruators are putting in or next to their bodies for nearly six years of their lives (when one adds up all the days).

**Bridget Crawford:** One of the issues on my mind is what I call “menstrual capitalism,” or the growing commercial industry that intentionally uses positive, feminist-oriented messages about women’s bodies and female empowerment in order to sell menstrual-related products—and sometimes other products, too.<sup>177</sup> Who stands to benefit from this

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175. See Sarah Mervosh, *New Emojis Are Coming: Interracial Couples, Guide Dogs, Falafel and More*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/technology/new-emoji.html> (reporting on Unicode Consortium’s announcement of several new emojis, including a red blood drop for menstruation); see also Bridget J. Crawford (@ProfBCrawford), TWITTER (Feb. 8, 2019, 05:09 EST), <https://twitter.com/ProfBCrawford/status/1093859445229133826> (“A period emoji? I know enough to respect what I don’t understand, even when my first reaction is skepticism. Will be curious how people actually use this emoji. And who, if anyone, is profiting from it? #menstrualcapitalism”).

176. PERIOD. END OF SENTENCE. (Netflix 2018); see also *Oscar Nominees*, ABC OSCARS, <https://oscar.go.com/nominees/documentary-short/period-end-of-sentence>.

177. See, e.g., Bridget J. Crawford (@ProfBCrawford), TWITTER (Aug. 1, 2018, 05:55 EST), <https://twitter.com/ProfBCrawford/status/1024639683547070466> (“But keep eye on how female empowerment (mis)used to sell products. #Menstrualequity & #menstrualcapitalism co-exist”); Bridget J. Crawford (@ProfBCrawford), TWITTER (Sept. 14, 2018, 10:04 EST), <https://twitter.com/ProfBCrawford/status/1040647595255840768> (“Taxpayers bear (most of) the cost of what public schools

type of capitalism? To the extent that an established or start-up company donates a percentage of its profits to menstruators in need, or devotes a portion of its revenue to education about menstruation, those are good results.<sup>178</sup> But feminist messaging should not give any company a free pass. Consumers need to hold these companies accountable. How much money is devoted to “charity”? Which charities? What are the charities doing with the money?

My colleagues who specialize in environmental law also remind me that it is not enough to talk about getting safe menstrual products to those who need them. We also need to think about menstrual hygiene and environmental sustainability issues. Too often, used menstrual products end up in landfills or contribute to water pollution in communities that do not have centrally managed waste-disposal systems.<sup>179</sup>

The promulgation of western-style menstrual hygiene products also may disrupt cultural norms and practices in some other parts of the world.<sup>180</sup> In most of the U.S., menstruators in need likely would welcome free or low-cost access to safe menstrual hygiene products and a place to change them. But when those products are introduced—whether by non-governmental organizations or by profit-seeking corporations—in other countries that do not have a history of using commercial products, it is important to consider what impact the displacement of traditional products will have.<sup>181</sup> In some cases, the use of disposable

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provide to students. I’m predicting lots of ‘public-private partnerships’ between school districts and manufacturers. #menstrualcapitalism”).

178. See, e.g., *Giveback*, THINX, <https://www.shethinx.com/pages/giveback> (stating that part of profits from sales of absorbent underwear meant to be worn without pads during menstruation are used to support educational programs that reached 800 school children in 2018-2019).
179. See, e.g., Dominique Mosbergen, *5 Ways to Make Your Period Better for the Environment*, HUFFPOST (Dec. 12, 2018), <https://tinyurl.com/yyc6m5oj> (describing ways that used menstrual products contribute to pollution).
180. See also Penelope A. Phillips-Howard et al., *Menstrual Needs and Associations with Sexual and Reproductive Risks in Rural Kenyan Females: A Cross-Sectional Behavioral Survey Linked with HIV Prevalence*, 24 J. WOMEN’S HEALTH 801 (2015) (reporting that commercially-made menstrual hygiene pads are available to elite women only, and that other girls and women resort to “traditional practice” or the transactional exchange of sex with men who supply them with pads in return); see Yudhijit Bhattacharjee, *How an Indian Innovator Reverse-Engineered the Making of Sanitary Pads*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/interactive/2016/11/13/magazine/design-issue-sanitary-pads-inida.html> (describing traditional practice by Indian women of using rags, and the reluctance of even the wife of the inventor of a cheaper, more hygienic menstrual pad to deviate from traditional practices).
181. See, e.g., Rajanbir Kaur et al., *Menstrual Hygiene, Management, and Waste Disposal: Practices and Challenges Faced by Girls/Women of Developing Countries*, J. ENVTL. PUB. HEALTH (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5838436>.

or reusable pads, underwear, or menstrual cups may be welcome and appropriate. Menstruators may have access to water and appropriate sanitation facilities. But if they do not, it may be that traditional practices are more conducive to local lifestyles. It is not merely a question of making products more available. We also have to ask about the conditions in which those products become available.

**Laura Strausfeld:** Aside from the projects I've already described, Period Equity is exploring procurement regulation at the state and city level to make sure that schools tasked to provide free menstrual products are supplying the safest products available. This discussion has provided food for thought for even more policy initiatives than we have on our already long list. The employment law innovations and issues surrounding "menstrual capitalism" most appeal to me. Finally, given my background as a plaintiff's class action attorney, I follow news of tort cases with female plaintiffs—such as the transvaginal mesh<sup>182</sup> and talcum powder<sup>183</sup> class actions—and regularly feel we need to do a lot better at protecting female consumers. I've been exploring various ways to do that and welcome ideas from legal academics.

*What challenges do legal structures themselves—or the law itself—present for those working in this area?*

**Laura Strausfeld:** The biggest challenge is still equitable representation of women in legislative bodies and—I almost forgot again—the taboo around publicly discussing menstruation and vaginas.

**Emily Gold Waldman:** When writing our tampon tax article,<sup>184</sup> I was really struck by the artificial binary of current equal protection doctrine, and the fact that the tampon tax has the potential to fall between the gaps of a facial classification challenge and a facial neutrality challenge. The wrinkle with the facial classification argument is that the

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182. See, e.g., Matthew Goldstein, *As Pelvic Mesh Settlements Near \$8 Billion, Women Question Lawyers' Fees*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/business/pelvic-mesh-settlements-lawyers.html> (describing that transvaginal mesh litigation "ranks as one of the biggest mass tort cases in United States history, in terms of claims filed, number of corporate defendants, and settlement dollars").

183. See, e.g., Roni Caryn Rabin & Tiffany Hsu, *Johnson & Johnson Feared Baby Powder's Possible Asbestos Link for Years*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html> (describing history and outcome of litigation in which plaintiffs alleged that the company ignored the known carcinogenic effects of its product).

184. Crawford & Waldman, *supra* note 45.

tampon tax isn't technically a sex-based classification, even though for all intents and purposes, menstrual hygiene products are a proxy for female sex. The hurdle with the facial neutrality argument is that there isn't "smoking gun" evidence of an intent to harm women, even though it seems logical that a combination of unawareness and squeamishness resulted in states' failures to include menstrual hygiene products on the lists of tax-exempt necessities. *Geduldig* drew an even more artificial binary between "pregnant women" and "nonpregnant persons."<sup>185</sup> I hope that jurisprudence will evolve in the direction of recognizing that classifications about menstruation, pregnancy, and breastfeeding are inextricably linked to classifications about women.

**Margaret Johnson:** I think we need to figure out a way to be inclusive of all menstruators and their particular situations while working towards major change. This can be a struggle. As Kimberlé Crenshaw discusses in explaining structural intersectionality, "persons at the intersection are situated in different subordinated groups that 'frequently pursue conflicting political agendas.'"<sup>186</sup> On the other hand, not every area of reform will create a struggle. For instance, simply focusing on menstruators as opposed to women may create a simple solution for policy work. If a new law aims to provide free products to school children and teens, incarcerated persons, or persons in shelters, the law can be gender neutral to include more menstruators.

**Marcy Karin:** Existing laws that operate in this space are piecemeal and incomplete. Given all the ways that periods intersect with life, there is no one-size-fits-all legal response. No one law or policy will address all menstrual management, access, and affordability needs or cover all menstruating individuals in a way that works for them, their families, communities, employers, and businesses.

*What advice do you have for lawyers, law students, activists, or concerned citizens who want to get more involved in menstrual equity issues?*

**Laura Strausfeld:** I have two pieces of advice and I'd apply this to getting involved with any social justice movement: Do the research and work collaboratively. The number one lesson I learned over 30 years with a draft tampon tax lawsuit in my drawer is that effecting change takes smarts, persistence, and collaboration. I regularly recommend Jen-

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185. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

186. Johnson, *supra* note 6 (citing Crenshaw, *Mapping the Margins*, *supra* note 10, at 1251–52).

nifer's book *Periods Gone Public* to every new menstrual equity activist who approaches me because it narrates how this work came about.<sup>187</sup> No laws were simply "introduced," nor did well-placed articles simply appear. They were deliberately conceived and pitched to legislators and the media. Our successes so far at Period Equity have combined advocacy, media, and litigation.<sup>188</sup> I heartily encourage lawyers and law students interested in menstrual equity to consider what kind of work they'd like to contribute (policy, advocacy, legal research, or litigation work, for example) and reach out to us via the Period Equity website.<sup>189</sup>

**Margaret Johnson:** I recommend working with the community of persons affected by the menstrual injustice you seek to address. Recognize the capacity and capability of those community members. Ensure they have a voice and leadership on the issue. Seek to model your process for advocacy on empowerment, participation, and inclusion so that your goal of justice in the outcome is matched in your process.<sup>190</sup>

**Bridget Crawford:** My advice is don't wait for someone to respond to a need you see. If your school or local community does not provide free or low-cost menstrual hygiene products to those who most need them, take action. Talk to other students, school administrators, community leaders, and the local press. Enlist the support of anyone who can be helpful. And never forget the power that you have right in your hand—the power of social media. Young people today are especially savvy about how to harness technology in service of social justice. Start a petition on Change.org. Start a hashtag campaign. Get local newspapers involved. I think twenty-first century community organizing sometimes gets a bad rap as "slacktivism." I see it quite differently.

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187. See Weiss-Wolf, *supra* note 2.

188. See Weiss-Wolf, *supra* note 13; Complaint, *Seibert v. New York State Dep't of Taxation and Fin.*, *supra* note 14; *Governor Cuomo Announces*, *supra* note 15 (describing engagement of law firm Emery Celli Brinckerhoff to file a class action lawsuit Period Equity had prepared after the introduction of multiple unsuccessful bills in the New York State legislature); Hillin, *supra* note 34 (describing how our non-profit organization Period Equity organized media coverage to apply additional pressure); A07555, 2016 St. Assemb., Reg. Sess. (N.Y. 2015) (the lawsuit was filed March 3, 2016; the State Assembly passed a bill exempting feminine hygiene products from sales tax 12 days later on March 15, 2016; the Senate passed it on May 25, 2016 and the Governor signed it on July 21, 2016).

189. See PERIOD EQUITY, <https://www.periodequity.org>.

190. See, e.g., Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 411–14 (2012) (describing importance of community education and outreach as the source of liberation).

Harnessing social media to achieve change is quite an active project. And young people see opportunities and connections that were not available to generations before them. There's much good that can come from social media when trying to change hearts and minds. That's not to say I am naive. The internet can be a cesspool, too. But when used to distribute messages of inclusivity and justice, social media is a powerful tool.

**Marcy Karin:** Is "Ditto Karin" an appropriate answer? No? Okay, let me explain. I agree with Laura that someone interested in this space could connect with an existing coalition to get started. All that is necessary is one call, email, direct message, or tweet to Period Equity,<sup>191</sup> the Virginia Menstrual Equity Coalition,<sup>192</sup> or whatever group is working on menstrual inequity in your area. I'm confident that all of them would welcome additional volunteers and help.

It also is important to recognize, make space for, and amplify the voices of people who would be impacted by a policy. This is one of the reasons I was so proud of "Voices of Women and Girls on Menstruation, Dignity, and the Issue of Access," a congressional briefing that the Legislation Clinic and BRAWS hosted on November 29, 2017, and which was co-sponsored by Senators Tim Kaine and Cory Booker and Representatives Gerry Connolly and Grace Meng.<sup>193</sup> Rather than having a series of policy wonks stand on the Hill and opine about why legislation was needed to address periods, the briefing centered directly on formerly incarcerated women, pre-teen and teenage girls in schools, and teachers and directors of nonprofits serving homeless and low-income women, girls, and families.<sup>194</sup> These people had the literal microphone to amplify their voices. They could share how they have been directly affected by the issue of inadequate and unaffordable access to menstrual products. More spaces like that are needed. Lawyers, law students, advocates, and others also can add their individual voices to the choir,<sup>195</sup> as well as help frame and facilitate the collective power to impact public policy.

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191. See Period Equity (@PeriodEquity), TWITTER, <https://twitter.com/periodequity?l>.

192. See Virginia Menstrual Equity Coalition, FACEBOOK, <https://www.facebook.com/groups/1508568875863894>.

193. See Voices of Women and Girls on Menstruation, Dignity, and the Issue of Access, BRAWS: BRINGING RESOURCES TO AID WOMEN'S SHELTERS, <http://www.braws.org/past-events.html> (reporting on congressional briefing held on November 29, 2017 with the assistance of the UDC Legislation Clinic).

194. *Id.*

195. BRAWS & UDC LEGISLATION CLINIC, *supra* note 32, at 25.

Talk about periods, even if you are like me and uncomfortable doing so. It will help raise awareness. Then look around your own spaces. Chances are that each of us could make a difference in an office, school, business, place of worship, park, or other location in your community. Are products available in these spaces? If not, organize something to cover that need or connect with a group that will. Start at the micro level, and then let's all work together on the national and international movements.

Finally, I'll end with a general observation that this issue already likely touches your work and passion. You just might need to be the one to make the connection. As my work shows, this is a workplace fairness issue. This is about criminal justice reform. This is about constitutional principles, equal protection, and tax. This is about safety, public health, families, and business. And that's not all. If you care about education, equal rights, human rights, immigration, eradicating poverty, or supporting people with disabilities, people who are experiencing homelessness, survivors of violence, or people engaged in military service, this is your issue. Welcome to the movement.

#### CONCLUSION

*(Bridget J. Crawford)*

Open discussion and uncensored representation of menstruation will help move law and society in the direction of recognizing the biological needs of approximately half the population. Normalizing menstruation through communication—whether through activism, scholarship, art, or other formats—is a way to lessen, and hopefully remove, the traditional stigmas associated with the “private” bodily function of involuntary bleeding by menstruators several days a month every month for between thirty and forty years.<sup>196</sup> As Gloria Steinem famously wrote in her essay, “If Men Could Menstruate”:

Clearly, menstruation would become an enviable, worthy, masculine event: Men would brag about how long and how much. . . . Gifts, religious ceremonies, family dinners, and stag parties would mark the day. . . . Sanitary supplies would

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196. See, e.g., Sarah L. Thomas & Charlotte Ellertson, *Nuisance or Natural and Healthy: Should Monthly Menstruation Be Optional for Women?*, 355 THE LANCET 922 (2000) (reporting on results of a study of U.S. girls and women, with the average girl experiencing menstruation starting at age 12.5 likely to experience approximately 450 periods before menopause).



be federally funded and free. . . . Generals, right-wing politicians, and religious fundamentalists would cite menstruation (“*men*-struation”) as proof that only men could serve God and country in combat.<sup>197</sup>

Although Steinem’s essay has a light-hearted tone, its message is serious. Menstruation has been stigmatized or ignored throughout history because of its association with girls and women. Both silence about bodies and the disparagement of menstruators and their needs are obstacles to the flourishing of all people. Each of my co-panelists is working to advance gender equity and, in turn, the betterment of all people.

Each of us comes to menstrual law or activism with our own perspectives, interests, backgrounds, and experience, whether criminal law, employment law, health and safety law, tax law, constitutional law, community organizing, advocacy, or some other specialty. What all of these trajectories and subject matters—and indeed all areas of the law—have in common is the core relevance of the functions of human bodies, including human bodies that menstruate. That, I believe, is what it means to call menstrual equity the ground on which we all need to stand.<sup>198</sup>

To be sure, there are important differences among equality, equity, and justice. There are different pathways for achieving each. Yet all of the menstrual-related work described in this essay understands equal access to education, work, and every facet of public life as a precondition that must be satisfied if society is to achieve full human flourishing—regardless of biological sex, gender, gender identity, or gender expression.<sup>199</sup> Laws and policies that take into account the biological processes of half the population need not be realized fully before work can begin (and continue) to eradicate ableism, abuse, apathy, bigotry, child victimization, cruelty to human and non-human animals, despair, destruction of the environment, health disparities, gender discrimination, homelessness, homophobia, indifference, mistreatment of prisoners, over-incarceration, poverty, racism, religious intolerance, transphobia, violence, and xenophobia. The broader justice project is never sequential. It runs along multiple tracks simultaneously. It overlaps, intersects,

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197. Gloria Steinem, *If Men Could Menstruate*, MS. (Oct. 1978), reprinted in GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 337 (1983).

198. See Druet, *supra* note 7.

199. See generally Kathryn M. Stanchi et al., *Why Women: Judging Transnational Courts and Tribunals*, CONN. J. INT’L L. (forthcoming 2019), <https://papers.ssrn.com/abstract=3337965> (arguing for importance of abandoning traditional gender binaries in any discussion of human diversity).

crosses over itself, and refolds many times, in many directions. Lawyers, activists, and concerned citizens can assist each other by drawing connections between and among their projects, boosting each others' signals, and drawing attention to the interconnectedness of issues. Justice is a mosaic that comes into focus when many individuals and groups make multiple contributions.

The invitation to make the law more responsive to human needs necessarily requires critiquing, re-envisioning, and possibly even dismantling structures and systems that encourage or tolerate gender unfairness. Drawing a distinction between menstruators and non-menstruators need not create division between a group that is predominantly female and a group that is predominantly male. All parts of public life become enriched when every member of society has the opportunity to participate, unhindered by biological differences.

The work continues. ♣