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Bloody Hell: How Insufficient Access to Menstrual Hygiene Products Creates Inhumane Conditions For Incarcerated Women

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BLOODY HELL: HOW INSUFFICIENT ACCESS TO MENSTRUAL HYGIENE PRODUCTS CREATES INHUMANE CONDITIONS FOR INCARCERATED WOMEN

by: *Lauren Shaw**

ABSTRACT

For thousands of incarcerated women in the United States, dealing with menstruation is a nightmare. Across the country, many female prisoners lack sufficient access to feminine hygiene products, which negatively affects their health and rehabilitation. Although the international standards for the care of female prisoners have been raised in attempt to eliminate this issue, these standards are often not followed in the United States. This Comment argues that denial of feminine hygiene products to female prisoners violates human decency. Additionally, this Comment considers possible constitutional violations caused by this denial, reviews current efforts to correct this problem, and provides suggestions for possible legislative solutions.

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I. INTRODUCTION

Pop culture has opened our eyes to women in prison. *Orange is the New Black*, a fictional Netflix series about women in a corrections facility, has brought viewer attention to the treatment women receive in prison.¹ This newfound attention has raised awareness and opened the dialog for many women’s issues.² But television can romanticize the reality of prison conditions, which diminishes public awareness of other serious issues still prevalent in the prison system. For example, in *Orange is the New Black*, characters create makeshift shower shoes out of sanitary napkins to avoid contracting foot fungus from the prison showers.³ While this shows the innovative measures some prisoners take to endure their confinement, it also downplays a serious injustice women prisoners experience. This scene portrays that all women prisoners have ready access to feminine hygiene products. However, that is not true.

The inaccessibility of feminine hygiene products in prison leads to results that go beyond basic unhygienic practices. In many facilities, the distribution of these products is at the discretion of the corrections officers.⁴ Many women report that corrections officers use this discretion as a means of control by limiting access to feminine hygiene products as a punishment or form of humiliation.⁵ Additionally, facilities often sell feminine hygiene products in the commissary, but this does not provide adequate access because many women cannot afford to purchase them due to limited funds, increased prices, or both.⁶ Fur-

1. See Jane Caputi, *The Color Orange? Social Justice Issues in the First Season of Orange Is the New Black*, 48 J. POPULAR CULTURE 1130, 1141 (2016).

2. See *id.* at 1131–32.

3. Zoe Greenberg, *In Jail, Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html?smid=pl-share> [<https://perma.cc/DBE5-GB6E>].

4. *Id.*

5. *Id.*

6. *Id.*

ther, even if the women can afford them, the privilege to purchase items from commissary can be revoked.⁷

Although the awareness gained from pop culture is a step in the right direction for women's issues, prisoners' lack of access to feminine hygiene products is an injustice that deserves legal attention and correction. When asked about the *Orange is the New Black* scene of sanitary pads as shower shoes, a former prisoner said, "I'd rather get foot fungus than waste those things. . . . I had to go to war for each one of them."⁸

This Comment argues that to correct a serious social injustice, corrections institutions should provide sufficient feminine hygiene products to women prisoners at no cost. Part II of this Comment explains the problem with current practices and the associated risks of insufficient access to feminine hygiene products. Part III examines the United States' disregard for human rights and reviews the current international standard for the treatment of women prisoners. Part IV analyzes the constitutional protections afforded to prisoners and discusses the possibility of Eighth Amendment claims based on the denial of feminine hygiene products. Part V discusses the current efforts toward a solution to this problem and proposes principles for legislation as a possible solution.

II. THE PROBLEM

A. *Current Practices Attack Human Dignity*

Denying women prisoners products that are necessary to manage their menstruation can lead to unacceptable results. While not every female prisoner faces this problem, many women who were denied sufficient access to feminine hygiene products while incarcerated recount indecent and humiliating experiences.⁹ For example, in a New York state prison, a woman who was not provided any feminine hygiene products while she was menstruating was subjected to a strip search.¹⁰ While blood ran down her legs, the corrections officer berated her with degrading comments, including how disgusting she was.¹¹ In response, New York's Department of Corrections and Community Supervision announced that their policy was to provide the products as needed.¹² In Kentucky, a woman was brought into court

7. Ben Lockhart, *Some Inmates Lose Television, Spending Privileges as Prison Hunger Strike Reaches 5th Day*, DESERET NEWS UTAH (Aug. 4, 2015, 9:00 PM), <https://www.deseretnews.com/article/865633878/Some-inmates-lose-television-spending-privileges-as-prison-hunger-strike-reaches-5th-day.html> [https://perma.cc/5ZMT-B4BE].

8. Greenberg, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

pantless after a corrections facility denied her pants and feminine hygiene products for three days.¹³ While apologizing to the woman for what happened, the judge said, “this is completely inhumane and unacceptable, and I’m incredibly sorry you had to go through this.”¹⁴

The policies related to feminine hygiene in prisons are inconsistent throughout the criminal justice system, and specific policies for the provision of feminine hygiene products vary greatly among facilities.¹⁵ In some prisons, the women are permitted to get pads¹⁶ themselves whenever needed.¹⁷ However, in many facilities, guards have complete discretion over the distribution of feminine hygiene products.¹⁸ Policies that give correctional officers extensive control over this deeply personal aspect of women’s lives create easy opportunities for abuses of power. Some facilities require women to ask a guard, often male, each time they need a feminine hygiene product.¹⁹ This leads to unequal treatment when guards unevenly distribute the products to specific housing units or even specific individuals they favor.²⁰ Additionally, the unchecked discretion allows guards to deny feminine hygiene products as a form of punishment or as a way to reinforce their dominance over the women.²¹

Even when women are given feminine hygiene products, they are often insufficient in quality, quantity, or both. Frequently, the pads they are provided have a low absorbency and do not have wings.²² And due to limited access, women have had to wear feminine hygiene

13. Mazin Sidahmed, *Woman Enters Court Without Pants After Jail ‘Fails to Provide Hygiene Products’*, GUARDIAN (Aug. 1, 2016, 1:23 PM), <https://www.theguardian.com/us-news/2016/aug/01/louisville-jail-woman-no-pants-court> [https://perma.cc/NM93-TDRF].

14. *Id.*

15. Michael Alison Chandler, *Federal Prisons Must Now Provide Free Tampons and Pads to Incarcerated Women*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated-women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee_story.html?utm_term=.179bda85bbc2 [https://perma.cc/LS3Q-AFEA].

16. In this Comment, I use the terms “pad,” “sanitary towel,” and “sanitary napkin” interchangeably.

17. *Id.*

18. *Id.*

19. *Id.*

20. See Greenberg, *supra* note 3.

21. See *id.*

22. Kristina Marusic, *The Sickening Truth About What It’s Like to Get Your Period in Prison*, WOMEN’S HEALTH (July 7, 2016), <https://www.womenshealthmag.com/life/women-jail-periods> [https://perma.cc/P2HE-JSRW]. Women may use various types of feminine hygiene products during menstruation, such as sanitary pads, tampons, and menstrual cups. See *Types of Best Feminine Hygiene Products*, CURE JOY (Feb. 28, 2017), <https://www.curejoy.com/content/best-feminine-hygiene-products/> [https://perma.cc/WBY4-5BFS]. Variations may also be found within the specific types of feminine hygiene products. *Id.* Both tampons and sanitary pads typically come in different sizes and levels of absorbency. *Id.* The products may also come with specific features. For example, some sanitary pads have wings—extra adhesive material on the sides that fold and stick to underwear—to help secure the pad in place.

products past the recommended length of usage—to the point that pads have slid out of their clothes onto the floor.²³ It is recommended that women use twenty feminine hygiene products per menstrual cycle, but some prison policies only allot ten feminine hygiene products per month.²⁴ Further, women’s menstrual cycles vary in length and frequency, so having a set allotment of products does not sufficiently accommodate individual needs.²⁵ The types of feminine hygiene products available in prison are also limited. Although many women prefer tampons,²⁶ prisons typically do not provide them.²⁷ This grants correctional officers yet another opportunity to wield power over the inmates. For example, a prisoner reported that a guard at Rikers Island Prison “threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they did not know when they would next be able to get tampons.”²⁸

Additionally, prison exacerbates the existing financial burden of obtaining feminine hygiene products. Women—both in and out of prison—generally agree feminine hygiene products are too expensive.²⁹ The cost of managing menstruation has even gained international attention.³⁰ In response, “[t]he United Nations has declared menstrual hygiene a public-health, gender-equality and human rights issue”³¹ While women feel this burden internationally, it can be especially crippling to incarcerated women.³² Feminine hygiene products are sometimes sold at the prison commissary, but many women cannot afford them because they are expensive and the women lack financial resources.³³ Some prisoners are employed during incarceration

How to Use Pads, U BY KOTEX, <https://www.ubykotex.com.au/femcare-products/pads/using> (last visited Jan. 6, 2017) [<https://perma.cc/NHF7-7DN8>].

23. See Marusic, *supra* note 22.

24. Francine Barchett, *Pads in Prisons: Addressing Gender Disparities in New York State*, ROOSEVELT INST. (2017), <http://rooseveltinstitute.org/wp-content/uploads/2017/05/621-1.pdf> [<https://perma.cc/KVB4-5M2F>].

25. *Id.*

26. Francesca Branch, *Vaginal Douching and Racial/Ethnic Disparities in Phthalates Exposures Among Reproductive-Aged Women: National Health and Nutrition Examination Survey 2001–2004*, ENVTL. HEALTH 4 tbl.1 (2015), <https://ehjournal.biomedcentral.com/track/pdf/10.1186/s12940-015-0043-6> [<https://perma.cc/8ZQ9-Q4J6>].

27. See Barchett, *supra* note 24.

28. Greenberg, *supra* note 3.

29. See Susan Johnston Taylor, *The Pink Tax: Why Women’s Products Often Cost More*, U.S. NEWS (Feb. 17, 2016, 11:16 AM), <https://money.usnews.com/money/personal-finance/articles/2016-02-17/the-pink-tax-why-womens-products-often-cost-more> [<https://perma.cc/A7TS-WMTW>].

30. Jennifer Weiss-Wolf, *America’s Very Real Menstrual Crisis*, TIME (Aug. 11, 2015), <http://time.com/3989966/america-menstrual-crisis/> [<https://perma.cc/RM8J-P3S6>].

31. *Id.*

32. Abigail Durkin, Note, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle Against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 159–61 (2017).

33. See *id.* at 161.

tion, but there are not always enough jobs for everyone.³⁴ Further, in some states, all prison jobs are unpaid.³⁵ The women who have paying jobs while incarcerated earn far below minimum wage—on average 75¢ per day.³⁶ This makes it very difficult to afford feminine hygiene products. For example, a box of ten tampons at the Nebraska Correctional Center for Women costs up to \$2.34, depending on the size.³⁷ At this price, it would take an incarcerated woman earning the national average more than three days to afford one box of tampons. Further, a recent report from the ACLU of Nebraska showed this price of tampons was 20% to 50% higher than the price outside of prison.³⁸ Corrections facilities treat feminine hygiene products as luxury items rather than basic human necessities.³⁹

B. *The Harmful Effects of Denying Access to Feminine Hygiene Products*

1. Medical Risks

Rather than bleeding through their clothes, which happens fairly often,⁴⁰ many women in prison turn to alternative methods of controlling their menstruation. Women report wearing multiple hygiene products at once for extended periods of time or using bunches of toilet paper, which is also rationed.⁴¹ Others have even resorted to making tampons out of mattress stuffing.⁴² While women who use these alternative measures avoid walking around in bloody clothes, they often subject themselves to something even worse—serious health risks.

34. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/D92T-RAAQ>].

35. *Id.* In Alabama, Arkansas, Florida, Georgia, and Texas, there is no pay for regular prison jobs. *Id.*

36. See Durkin, *supra* note 32, at 161.

37. *Let Down and Locked Up: Nebraska Women in Prison*, ACLU NEB. 10 (Oct. 19, 2017), https://www.aclunebraska.org/sites/default/files/field_documents/women_in_prison_2017_10.pdf [<https://perma.cc/33XU-LTFB>]. The Nebraska Correctional Center for Women no longer offers these escalated prices due to an ACLU investigation which caused the Nebraska Department of Correctional services to make a policy change. See *infra* notes 227–32 and accompanying text.

38. Grant Schulte, *Nebraska's ACLU: Prisons Charge Inmates Too Much for Tampons*, ASSOCIATED PRESS (Oct. 19, 2017), <https://www.apnews.com/84074541703c4b21bc194176b6823651> [<https://perma.cc/6CRV-FUHD>].

39. *Id.*

40. See Marusic, *supra* note 22.

41. Angelika Schlanger, *One Woman's Experience: What It's Like to Have Your Period in Prison*, BROADCAST (Nov. 30, 2016), <https://www.mylola.com/blog/one-womans-experience-like-period-prison/> [<https://perma.cc/2EXA-TZFB>].

42. Rachel Baye, *State Lawmakers Seek to Give Tampons to Prisoners*, WYPR (Feb. 13, 2018), <http://wypr.org/post/state-lawmakers-seek-give-tampons-prisoners> [<https://perma.cc/TN4G-RGTG>].

Throughout the world, the options women have to manage their period vary drastically depending on their economic status and the resources available to them.⁴³ Due to the restrictive conditions of prison, the methods that women resort to are often unhygienic and carry serious risks.⁴⁴ Most recent research on the risks of menstrual hygiene mismanagement focuses on developing countries because the scientific community considers affluent countries to have already solved this problem.⁴⁵ But many women in America, especially those who are incarcerated, are still exposed to similar risks because of inadequate menstrual hygiene management.⁴⁶

Studies show that insufficient menstrual hygiene management in India is linked to increased chances of developing cervical cancer.⁴⁷ This is particularly concerning considering the similarities between the menstrual hygiene practices of women in developing countries and incarcerated women. Just like many women in United States prisons, women in Tanzania and Nigeria often must use toilet paper as a means to control their menstruation.⁴⁸ Further, women in both American prisons⁴⁹ and developing countries often use unwashed rags to control their menstruation, which can cause an abundance of infections.⁵⁰ Similarly, a Connecticut woman prisoner was not provided feminine hygiene products and had to resort to using her sock.⁵¹ In addition to toilet paper or mattress stuffing, women prisoners have reported rolling up pads and using them as makeshift tampons.⁵² Women who are unable to remove this sort of “tampon” place themselves in danger of developing many health conditions.⁵³ Thus, the alternative methods used by women in prison, similar to the unhygienic practices of women in developing countries, creates many unnecessary health risks.

The increased health risks that incarcerated women take to manage their periods can have dire consequences. Throughout their development, tampons have been associated with serious health risks when

43. Colin Sumpter & Belen Torondel, *A Systematic Review of the Health and Social Effects of Menstrual Hygiene Management*, PLOS 1 (Apr. 26, 2013), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0062004&type=printable> [<https://perma.cc/Z5FC-GP6E>].

44. Weiss-Wolf, *supra* note 30.

45. Anne Sebert Kuhlmann et al., *Menstrual Hygiene Management in Resource-Poor Countries*, 72 OBSTETRICAL & GYNECOLOGICAL SURV. 356, 356 (2017).

46. Weiss-Wolf, *supra* note 30.

47. *Id.*

48. Sumpter & Torondel, *supra* note 43.

49. Baye, *supra* note 42.

50. Weiss-Wolf, *supra* note 30.

51. Victoria Law, *A New Memo Orders Federal Prisons to Provide Tampons—But How Well Is It Being Followed?*, REWIRE NEWS (Oct. 23, 2017, 4:52 PM), <https://rewire.news/article/2017/10/23/new-memo-orders-federal-prisons-provide-tampons-well-followed/> [<https://perma.cc/VP4U-SNSS>].

52. *Id.*

53. *Id.*

used improperly.⁵⁴ Specifically, improper tampon use is largely associated with Toxic Shock Syndrome (“TSS”).⁵⁵ TSS results from bacterial infections and can cause fever, low blood pressure, vomiting, seizures, shock, renal failure, and even death.⁵⁶ Increased awareness of the disease and its relation to tampon misuse has lowered the frequency of TSS in the United States.⁵⁷ For example, it is now recommended that women change their tampons at a minimum every four to eight hours.⁵⁸ The prohibition against manufacturers using certain materials in tampons has also lowered the prevalence of the disease.⁵⁹ While the incidence of TSS has significantly decreased, it is a result of better regulations on tampons and an increase in their proper usage.⁶⁰ But improper tampon use can still cause TSS, and the consequences can be critical.⁶¹

For example, in 1975 a tampon called Rely was made with an extremely absorbent synthetic material, carboxymethylcellulose (“CMC”).⁶² Rely’s marketing, which publicized the extended length of time that a woman could use just one tampon, caused some women to use only one Rely tampon for their entire period.⁶³ Other countries banned Rely tampons due to their inclusion of harmful chemicals such as CMC, but they became surprisingly popular throughout the United States.⁶⁴ Although Congress decided to impose stricter regulations on tampons in 1976, Rely had already begun testing, so it was allowed in stores without meeting the new standards.⁶⁵ By 1980, almost 25% of women were using Rely.⁶⁶ In response to Rely’s popularity, other tampon manufacturers began to introduce similar products.⁶⁷

From October 1979 to May 1980, there were fifty-five cases of TSS nationwide, seven of which were fatal.⁶⁸ In response, the Centers for Disease Control and Prevention (“CDC”) investigated, later reporting

54. Ashley Fetters, *The Tampon: A History*, ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/394334/> [<https://perma.cc/ZTF5-NKBK>].

55. *Id.*

56. *Toxic Shock Syndrome*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/toxic-shock-syndrome/symptoms-causes/syc-20355384> (last visited Mar. 11, 2018) [<https://perma.cc/TV54-C6B5>].

57. Tracee Cornforth, *How to Reduce Your Risk of Toxic Shock Syndrome*, VERY WELL HEALTH (Oct. 17, 2018), <https://www.verywellhealth.com/how-to-reduce-your-risk-of-toxic-shock-syndrome-3521119> [<https://perma.cc/Q5MH-ANDC>].

58. *Toxic Shock Syndrome*, *supra* note 56.

59. *See id.*

60. *See id.*

61. Cornforth, *supra* note 57.

62. Fetters, *supra* note 54.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

that there was a link between the use of tampons and TSS.⁶⁹ Three-quarters of the women who developed TSS had used Rely tampons.⁷⁰ Rely was taken off of the shelves after the CDC's report, but it was too late. By the end of 1980, there were 812 reported cases of TSS; thirty-eight were fatal.⁷¹ By 1983, there were more than 2,200 reported cases.⁷²

Although it was too late to keep Rely off the shelves, tampons became safer when Congress amended the Federal Food, Drug, and Cosmetic Act ("FDCA"). The FDCA grants the Food and Drug Administration ("FDA") broad regulatory authority, including the authority to regulate medical devices.⁷³ In 1976, Congress enacted the Medical Device Amendments ("MDA") in response to public concern about dangerous medical devices.⁷⁴ Under the MDA, all medical devices must be classified into three categories (Class I, Class II, and Class III), and regulations are imposed based on the classification.⁷⁵ Originally, tampons were merely cosmetics under the FDCA, but under the MDA, they were reclassified as a Class II medical device.⁷⁶ This elevated classification requires "special controls" in addition to the "general controls" Class I devices require⁷⁷ because the general controls alone are insufficient to ensure the device is safe.⁷⁸

Stricter regulations and public awareness of the risks of misusing tampons have decreased TSS cases, but incarcerated women still face these risks because of the alternative methods they use.⁷⁹ For example, due to the low quality of the feminine hygiene products in prison, some women use three tampons at a time.⁸⁰ Additionally, some women in prison do not change tampons as often as recommended in an effort to extend their use of such a scarce and costly product, thus increasing their risk of developing TSS.⁸¹

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Jamie Kohen, *The History of the Regulation of Menstrual Tampons*, DIGITAL ACCESS TO SCHOLARSHIP AT HARV. 3 (Apr. 6, 2011), <https://dash.harvard.edu/bitstream/handle/1/8852185/Kohen.pdf?sequence=1> [<https://perma.cc/B26K-5DS7>].

74. *Id.*

75. *Id.* at 4.

76. *See* Fetters, *supra* note 54; *see also* Kohen, *supra* note 73, at 4–5.

77. Kohen, *supra* note 73, at 5. Class I devices are subject to general controls. *Classify Your Medical Device*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/default.htm> (last visited Jan. 19, 2018) [<https://perma.cc/PXT7-UVRN>]. Class II devices are subject to general controls and special controls. *Id.* Class III devices are subject to general controls and premarket approval. *Id.*

78. 21 U.S.C. § 360c(a)(1)(B) (2012).

79. *See* Schulte, *supra* note 38.

80. Marusic, *supra* note 22.

81. Schulte, *supra* note 38.

In addition to the risks women face from improperly using tampons or alternative imitations, prisoners improperly using pads are also subject to increased health risks.⁸² Sanitary pads, which are also classified as medical devices and regulated by the FDA,⁸³ pose a health risk when they are not changed regularly.⁸⁴ Wearing sanitary pads for extended periods of time can cause many bacterial infections, specifically vaginal yeast infections.⁸⁵ To lower the risk of infection, it is recommended that women change their pad every four hours.⁸⁶ This is obviously not possible for women prisoners when facilities only provide ten or fewer pads per month, and the average period lasts two to seven days.⁸⁷

2. Negative Effects on Rehabilitation

Lack of access to feminine hygiene products interferes with a prisoner's rehabilitation. In developing countries, many young women do not go to school when they are menstruating due to the embarrassment that would result from attending without adequate feminine hygiene products.⁸⁸ Similarly, in the United States, many incarcerated women's rehabilitation is disrupted because they lack access to feminine hygiene products.⁸⁹ For example, a Brooklyn public defender testified to the New York City Council that an inmate at Rikers Island Prison who lacked access to feminine hygiene products asked her social worker not to meet with her during the inmate's period to avoid the shame and embarrassment of bleeding through her clothes during their meetings.⁹⁰ Additionally, women have declined to visit with their families and attorneys because the women were on their periods.⁹¹ Visitation is extremely beneficial for lowering recidivism,⁹² and pris-

82. *How Often Should I Change My Pad*, PANTYPROP (May 6, 2016), <https://www.pantyprop.com/single-post/2016/05/06/How-Often-Should-I-Change-My-Pad> [https://perma.cc/S8A8-LN3N].

83. U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY AND FDA STAFF—MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(k)s) 6 (2005), <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm071799.pdf> [https://perma.cc/HH9C-VLK3]. Sanitary pads are considered a Class I medical device. *Id.*

84. *How Often Should I Change My Pad*, *supra* note 82.

85. *See id.*

86. *Id.*

87. Barchett, *supra* note 24.

88. *Every Woman's Right to Water, Sanitation and Hygiene*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrighttowater-sanitationandhygiene.aspx> (last visited Nov. 11, 2017) [https://perma.cc/SH6W-KG6H].

89. Greenberg, *supra* note 3.

90. *Id.* Subsequently, New York City passed a law that requires their city corrections facilities to provide feminine hygiene products for free. *See infra* notes 277–80 and accompanying text.

91. Baye, *supra* note 42.

92. *See, e.g.*, MINN. DEP'T OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 27 (2011), <https://mn.gov/doc/assets/11-11MNPrisonVisitation>

oners have a constitutional right to meet with their attorneys.⁹³ Women should not be shamed out of these benefits and rights.

III. GLOBAL RECOGNITION AND INTERNATIONAL STANDARDS FOR WOMEN PRISONERS

A. *U.S. Noncompliance with International Standards for Human Rights*

The United States purports to be at the forefront of promoting and upholding human rights.⁹⁴ The United States also claims that, because of the national interest in human rights, it strives to hold other nations accountable to the obligations of international human rights instruments and universal norms.⁹⁵ Despite these claims, the United States has a reputation for abiding by international laws and standards only when convenient.⁹⁶ Regarding the international standards for women prisoners, the United States' reputation is fitting. The Bangkok Rules are the current international standard for women prisoners.⁹⁷ Although the Bangkok Rules are a nonbinding agreement,⁹⁸ many other countries have taken steps to implement the rules into their criminal justice systems.⁹⁹ Despite the international push for respecting and

Study_tcm1089-272781.pdf [https://perma.cc/X6FA-FQHM] (finding that visitation reduces recidivism by 13% for felons and 25% for technical violation revocations); see also John Rudolf, *Prison Visits Make Inmates Less Likely to Commit Crimes After Release, Study Finds*, HUFFPOST (Dec. 7, 2011, 7:27 PM), https://www.huffpost.com/2011/12/07/prison-visits-inmates_n_1135288.html [https://perma.cc/7YPD-2SMQ].

93. MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 12:27 (5th ed. 2017).

94. *Human Rights*, U.S. DEP'T ST., <https://www.state.gov/j/drl/hr/> (last visited Feb. 25, 2018) [https://perma.cc/X5BY-EPEU].

95. *Id.*

96. Mark A. Pollack, *Who Supports International Law, and Why?: The United States, The European Union, and The International Legal Order*, 13 INT'L J. CONST. L. 873, 874 (2015).

97. G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (Mar. 16, 2011).

98. *Bangkok Rules: Women in Detention Have Rights Too*, ASS'N FOR PREVENTION TORTURE (Nov. 6, 2011), https://www.apr.ch/en/news_on_prevention/bangkok-rules/ [https://perma.cc/XQ22-R4HX].

99. *PRI's Bangkok Rules E-bulletin: November 2015*, PENAL REFORM INT'L (Nov. 2015), <https://cdn.penalreform.org/wp-content/uploads/2013/09/PRI's-quarterly-e-bulletin-on-the-Bangkok-Rules-on-women-in-the-criminal-justice-system.pdf> [https://perma.cc/Q79Z-UMBP]. In 2015, the Public Security Directorate from Jordan participated in a roundtable with Penal Reform International and the Danish Institute against Torture to discuss the efforts of Jordan prisons to implement the Bangkok Rules. *Id.* In October 2015, twenty-three officers from Uganda received training on how to implement the Bangkok Rules. *Id.* More recently, in November 2017 Penal Reform International provided training on the Bangkok Rules to prison and probation officers from Kenya. *PRI's Bangkok Rules E-bulletin: January 2018*, PENAL REFORM INT'L (Jan. 2018), <https://mailchi.mp/penalreform/quarterly-e-bulletin-with-news-and-resources-on-women-in-criminal-justice-systems-2742965> [https://perma.cc/GC2Y-RSC7].

protecting the human rights of women prisoners, the United States continues to fall behind.

B. *International Standards for Women Prisoners:
The Bangkok Rules*

With over half-a-million females in prison or awaiting trial worldwide, the specific needs of women prisoners have gained international attention.¹⁰⁰ In 1957, the United Nations set the first international standard for the treatment of prisoners by adopting the Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”), but women were hardly considered.¹⁰¹ In 2010, the rules underwent revisions to reflect the major changes in human rights and criminal justice standards.¹⁰² On December 21, 2010, the United Nations General Assembly adopted the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, commonly referred to as the Bangkok Rules.¹⁰³ Before the Bangkok Rules were adopted, the international standard for the treatment of prisoners did not address the special needs of women.¹⁰⁴ Further, prison facilities and internal procedures were generally designed for men because women made up significantly less of the prison population.¹⁰⁵ The Bangkok rules signified the international acknowledgment of women’s gender-specific needs within the criminal justice system.¹⁰⁶ These rules were unanimously adopted, proving international agreement to respect and meet women’s needs.¹⁰⁷ Specifically, as a member of the United Nations, the United States has agreed to these standards.¹⁰⁸

Thirteen of the seventy rules specifically address hygiene and health care.¹⁰⁹ Although personal hygiene was addressed in the Standard

100. See PENAL REFORM INT’L, UN BANGKOK RULES ON WOMEN OFFENDERS AND PRISONERS: SHORT GUIDE 3 (2013), <https://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf> [<https://perma.cc/ACH3-CGBG>].

101. *UN Nelson Mandela Rules (Revised SMR)*, PENAL REFORM INT’L, <https://www.penalreform.org/priorities/prison-conditions/standard-minimum-rules/> (last visited Sept. 30, 2018) [<https://perma.cc/E8FD-HWCP>].

102. *Id.*

103. G.A. Res. 65/229, *supra* note 97.

104. See PENAL REFORM INT’L, *supra* note 100, at 4.

105. *Id.*

106. *Id.*

107. See *id.*

108. See *id.*

109. TOMRIS ATABAY, GUIDANCE DOCUMENT ON THE UNITED NATIONS RULES ON THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 1 (2013), <https://www.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Documents-on-Bangkok-Rules-October-2013.pdf> [<https://perma.cc/ALS8-7M5M>].

Minimum Rules, the Bangkok Rules expressly state the necessity of providing free feminine hygiene products.¹¹⁰ Rule Five states:

The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, *including sanitary towels provided free of charge . . .*¹¹¹

Thus, to meet the international *minimum* standard, women prisoners should have easily accessible sanitary towels free-of-charge.¹¹² One rationale behind this rule is that ensuring prisoners have the ability to maintain their own personal hygiene is important for their rehabilitation.¹¹³ This ability not only promotes health and prevents disease, but it also significantly impacts prisoners' sense of human dignity.¹¹⁴ Rule Five recognizes the specific hygiene needs of female prisoners and acknowledges that these needs must be met to promote the health and human dignity of women.¹¹⁵

The Bangkok Rules represent a significant step toward protecting the rights of women in the criminal justice system, but these standards are ineffective if they are not put into practice.¹¹⁶ In light of the benefits that these rules could have on inmate rehabilitation, all facilities should meet or attempt to meet these standards. Further, many of the rules can be implemented without additional funding.¹¹⁷ The rules merely require a "change in awareness, attitude[,] and practices—and in particular a committed investment in the training of prison staff, policy-makers, prison administrators[,] and others who engage with women in the criminal justice system."¹¹⁸ Thus, by ignoring its commitment to the Bangkok Rules and the international trend for women prisoners' rights, the United States shows a disregard for the human rights of incarcerated American women.

IV. THE U.S. CONSTITUTION: INDIVIDUAL FIXES FOR INDIVIDUAL VIOLATIONS

A. *Limits on the Constitutional Rights of Prisoners*

There was a time in American history when prisoners were considered to have no constitutional rights.¹¹⁹ During this time, the hands-off doctrine prevented courts from considering whether prisoners retained any constitutional rights.¹²⁰ Courts felt it was not their role to

110. *Id.* at 33.

111. G.A. Res. 65/229, *supra* note 97, (emphasis added).

112. ATABAY, *supra* note 109, at 33–34.

113. *Id.*

114. *Id.* at 33.

115. *Id.*

116. PENAL REFORM INT'L, *supra* note 100, at 10.

117. *Id.*

118. *Id.*

119. MUSHLIN, *supra* note 93, § 1:3.

120. *Id.*

rule on prisoners' treatment while imprisoned but rather only to release those who were confined illegally.¹²¹ In 1970, this doctrine met its demise in *Wolf v. McDonnell*, when the Supreme Court stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."¹²² Before *Wolf*, the deference given to prison administrators was unfettered because courts refused to become involved in the treatment of prisoners.¹²³ By abolishing the hands-off doctrine, the Court established that there are limitations on the deference owed to prison administrators and that prisoners are owed judicial review to ensure their rights are not violated.¹²⁴

Though the Constitution has the power to breach prison walls, courts have established there are limitations on prisoners' constitutional rights.¹²⁵ In *Jones v. North Carolina Prisoner's Labor Union, Inc.*, the Supreme Court considered the extent of a prisoner's First Amendment rights, stating "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights . . . which are implicit in incarceration."¹²⁶ Thus, limitations on some freedoms and rights, such as the right to travel, are inherent in the nature of being incarcerated.¹²⁷

Not only do prisoners face different standards because they are incarcerated, but they also face different standards depending on the right at issue.¹²⁸ Accordingly, there is no uniform standard to determine whether a prisoner's constitutional rights were violated.¹²⁹ Rather, the Supreme Court uses different standards for prisoners depending on the constitutional right at issue.¹³⁰

B. Possible Constitutional Violations: The Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment.¹³¹ When the Amendment was drafted, its purpose was to prohibit tor-

121. *Id.*

122. *Wolf v. McDonnell*, 418 U.S. 539, 555-56 (1974).

123. *See id.* at 555-56.

124. MUSHLIN, *supra* note 93, § 2:2.

125. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977).

126. *Id.*

127. MUSHLIN, *supra* note 93, § 2:3.

128. *Id.*

129. *Id.*

130. *Id.* The four approaches of the Supreme Court are:

(1) The objective and subjective tests for determination of Eighth Amendment violations; (2) The procedural due process model for determination of issues relating to individual disciplinary decisions to which an inmate is subjected; (3) The analysis reserved for specially protected rights in prison, including the right of access to the courts and the right to be free from discrimination; and (4) The rational relationship test of *Turner v. Safley* for the determination of most substantive constitutional rights.

Id.

131. U.S. CONST. amend. VIII.

ture and other barbarous punishments.¹³² Accordingly, early applications involved determining the constitutionality of inhumane punishments and methods of execution.¹³³ But the Supreme Court established long ago that the scope of the Eighth Amendment's protection is not set in stone.¹³⁴ Rather, its meaning is based on the "evolving standards of decency that mark the progress of a maturing society."¹³⁵ Thus, the Supreme Court has held that the Eighth Amendment protects from "more than physically barbarous punishments."¹³⁶

Even though the Eighth Amendment is the only amendment that specifically addresses prisoners' rights,¹³⁷ the Supreme Court did not consider its applicability to prison conditions until *Estelle v. Gamble* in 1976.¹³⁸ Although *Estelle* was the first Supreme Court case of its kind, it established the current standard used when prisoners allege the medical care they received in custody violated their Eighth Amendment right.¹³⁹

In *Estelle*, a prisoner claimed that he received insufficient medical treatment after an injury, which equated to cruel and unusual punishment.¹⁴⁰ This required the Court to determine whether medical mistreatment could amount to a constitutional violation.¹⁴¹ The Court clarified when the government is punishing someone by incarceration, it is obligated to provide medical care.¹⁴² Further, the Court held that the Eighth Amendment is violated by a "deliberate indifference to serious medical needs of prisoners."¹⁴³ This holding established the two requirements to prove prisoners' rights have been violated by insufficient medical treatment.¹⁴⁴ First, the prisoner must have a serious

132. *Gregg v. Georgia*, 428 U.S. 153, 169–70 (1976).

133. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

134. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

135. *Id.* at 101.

136. *Estelle*, 429 U.S. at 102.

137. MUSHLIN, *supra* note 93, § 3:1.

138. *Id.* § 3:2; *see also Estelle*, 429 U.S. at 97. Before 1976, the Eighth Amendment was rarely invoked, and the Court primarily considered it when deciding whether a formal sanction was constitutional. MUSHLIN, *supra* note 93, § 3:2.

139. MUSHLIN, *supra* note 93, § 4:2.

140. *Estelle*, 429 U.S. at 98–101. After injuring his back during a work assignment, numerous doctors attended to the prisoner, but he argued more should have been done to diagnose and treat his injury. *Id.* at 98, 107.

141. *See id.* at 97.

142. *Id.* at 103.

143. *Id.* at 104. Although *Estelle* is considered a landmark decision, the court actually held the prisoner's rights were not violated. *Id.* Other than providing a few examples of conduct that would amount to violations, the Court did not establish how to determine whether these requirements have been met. *Id.* at 104–05.

144. Kate Walsh, Comment, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 COLUM. J.L. & SOC. PROBS. 45, 60 (2016).

medical need.¹⁴⁵ Second, there must have been deliberate indifference to that need.¹⁴⁶

After *Estelle*, the Court provided additional clarification on the scope of the Eighth Amendment's protections. While the *Estelle* Court examined whether a specific incident was a violation, the Court later broadened the Eighth Amendment's protection to cover general prison conditions.¹⁴⁷ The Court held that prison conditions "alone or in combination, may [reach such a level that they] deprive inmates of the minimal civilized measure of life's necessities."¹⁴⁸

The Court has also expanded on the necessary requirements to prove a violation. It made clear that all Eighth Amendment claims have an objective *and* subjective requirement.¹⁴⁹ Objectively, the deprivation must be sufficiently serious.¹⁵⁰ Subjectively, the prison official must have had a "sufficiently culpable state of mind."¹⁵¹ In terms of the *Estelle* medical care standard, the medical need must be objectively serious, and the deprivation must result from the defendant's subjective deliberate indifference to the medical need.¹⁵² The Court also explicitly rejected the argument that a different standard would apply to continuing or systemic violations.¹⁵³ Thus, for class action suits or challenges to prison conditions in general, plaintiffs must prove there was a "deliberate indifference to inmate health or safety."¹⁵⁴

The Supreme Court has not yet advised how to evaluate the seriousness of a prisoner's medical need to determine whether the objective requirement is met.¹⁵⁵ The Second Circuit, however, has provided a non-exhaustive list of factors to consider: "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) [whether] chronic and substantial pain [exists]."¹⁵⁶ Additionally, showing an injury is not always necessary because the Supreme Court has held the Eighth Amendment also protects against imminent dangers.¹⁵⁷ But when analyzing the seriousness of a potential harm, a court must con-

145. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

146. *Id.*

147. *Rhodes v. Chapman*, 452 U.S. 337, 344–45 (1981).

148. *Id.* at 347.

149. *Wilson*, 501 U.S. at 298.

150. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

151. *Id.*

152. MUSHLIN, *supra* note 93, § 4:2.

153. *Wilson*, 501 U.S. at 300.

154. *Farmer*, 511 U.S. at 834.

155. *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003).

156. *Id.* (internal quotations omitted) (citing and quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992)).

157. *Helling v. McKinney*, 509 U.S. 25, 34 (1993). The Supreme Court held that a valid cause of action under the Eighth Amendment could be claimed when alleging

sider more than the mere scientific and statistical seriousness of the harm or likelihood that it would occur.¹⁵⁸ It must consider “[w]hether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”¹⁵⁹ The Court has also recognized that inadequate sanitation and hygiene during incarceration may give rise to an Eighth Amendment claim.¹⁶⁰ Lower courts have interpreted this to mean that “[t]he failure to regularly provide . . . sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions.”¹⁶¹

The subjective culpable-prison-official requirement of Eighth Amendment claims is also a controversial topic.¹⁶² Although liability under *Estelle* only required more than mere negligence, the Court later equated a deliberate indifference requirement to that of reckless disregard of risk of serious harm.¹⁶³ Thus, unless a prison official “knows of and disregards an excessive risk to inmate health or safety,” the Eighth Amendment is not violated.¹⁶⁴ The subjective requirement of all Eighth Amendment violations is based on the reasoning that cruel and unusual *punishments* are prohibited, not merely cruel and unusual *conditions*.¹⁶⁵ But including a subjective requirement means that no matter how objectively terrible a prison condition is, a court may find the condition constitutional because a prison official did not meet the scienter requirement.¹⁶⁶

The high burden of proof makes it difficult for women prisoners to make a successful Eighth Amendment claim based on insufficient feminine hygiene products, but there may be hope for similar claims in the future. In *Semelbauer v. Muskegon County*, women prisoners from Michigan filed a class action suit based on multiple claims alleging Muskegon County Jail violated their constitutional rights.¹⁶⁷ Notably, the plaintiffs alleged their Eighth Amendment rights were violated because the jail denied them feminine hygiene products and toiletries.¹⁶⁸ Their complaint explained that women in the jail were

deliberate indifference to exposure that could “pose an unreasonable risk of serious damage to . . . future health.” *Id.* at 35.

158. *Id.* at 36.

159. *Id.*

160. MUSHLIN, *supra* note 93, § 3:68–3:69.

161. *Atkins v. Cty. of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005) (quoting *Dawson v. Kendrick*, 527 F. Supp. 1252, 1288–89 (D.C.W. Va. 1981), *aff’d on other grounds sub nom.* *Bellotto v. Cty. of Orange*, 248 Fed. App’x 232 (2d Cir. 2007).

162. MUSHLIN, *supra* note 93, § 3:14.

163. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

164. *Id.* at 837.

165. *Id.*

166. MUSHLIN, *supra* note 93, § 3:14.

167. *Semelbauer v. Muskegon Cty.*, No. 1:14-cv-1245, 2015 WL 9906265, at *1 (W.D. Mich. Sept. 11, 2015).

168. *Id.* at *8.

not adequately provided feminine hygiene products, which resulted in multiple women bleeding through their clothes.¹⁶⁹ The court reinforced that hygiene was a basic need protected under the Eighth Amendment but dismissed for failure to state a plausible claim because, individually, the women only alleged single, temporary delays in their access to feminine hygiene products.¹⁷⁰ Further, the court explained that the plaintiffs' claims were only "de minimis deprivations" and therefore did not violate their civil rights.¹⁷¹ Under this reasoning, at least one federal court has left open the possibility that women prisoners who are denied feminine hygiene products beyond single, temporary deprivations could make a colorable Eighth Amendment claim.

C. *Deference to Prison Administration*

Although courts may recognize deprivations of feminine hygiene products as colorable Eighth Amendment claims in the future, successful claims would not lead to a real solution. This is because courts give extensive deference to prison administrators when determining the validity of a prison regulation.¹⁷² Further, courts impose judicial restraint when an invalid regulation requires correction.¹⁷³ Thus, a successful claim in court does not ensure a prison regulation will be changed to bring relief to all prisoners. A successful individual claim only ensures relief for the individual claimant.

As previously mentioned, a court's analysis depends on the constitutional right at issue, and *Turner v. Safley* established the default analysis for claims that a prisoner's constitutional right has been infringed when a more specific test is not applicable.¹⁷⁴ But *Turner* is also significant because it explained the policies behind the deference the judicial branch gives to prison administrators when determining the validity of a prison practice.

In *Turner*, Plaintiffs brought a class action suit challenging the constitutionality of regulations in a Missouri prison.¹⁷⁵ The Court declined to apply strict scrutiny as the standard of review, despite its previous use of the framework for prisoners' constitutional claims.¹⁷⁶ Instead, the Court used a much lower standard of scrutiny in an attempt to balance two principles of analyzing prisoners' constitutional

169. *Id.*

170. *Id.* at *9.

171. *Id.* at *10.

172. *See Turner v. Safley*, 482 U.S. 78, 85-91 (1987).

173. *See Lewis v. Casey*, 518 U.S. 343, 362-63 (1996).

174. MUSHLIN, *supra* note 93, § 2:4.

175. *Turner*, 482 U.S. at 81. The first regulation restricted inmates' correspondence with inmates at other institutions, and the second restricted inmates' right to marry. *Id.* at 81-82.

176. *Id.* at 83-89; *see also Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974).

claims.¹⁷⁷ The first principle is that the Court has the responsibility of protecting prisoners' rights that are infringed by prison regulations.¹⁷⁸ The second principle is that courts are not equipped to handle prison administration and reform.¹⁷⁹ The Court further explained that the problems that arise in prisons are complex and not likely corrected by judicial decree.¹⁸⁰ The Court also noted that running a prison is the responsibility of the legislative and executive branches, so to respect the separation of powers, the judiciary should act with restraint regarding prison administration.¹⁸¹ Further, federal courts should give additional deference when a state facility is involved in the claim.¹⁸²

In light of these policies, the Court created a reasonable relationship test to analyze prisoners' constitutional claims.¹⁸³ Under this test, even if a prison regulation negatively impacts a prisoner's constitutional rights, the "regulation is valid if it is reasonably related to legitimate penological interests."¹⁸⁴ Whether the regulation is reasonably related to a legitimate penological interest depends on four factors: (1) "whether there is 'a valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";¹⁸⁵ (2) "whether there are alternative means of exercising the right" at issue;¹⁸⁶ (3) the degree the accommodation of the asserted constitutional right will have an "impact on guards and other inmates, and on the allocation of prison resources generally";¹⁸⁷ and (4) whether there is an "absence of ready alternatives," evidencing the reasonableness of the regulation.¹⁸⁸ Using the reasonable relationship test, courts grant extensive deference to prison administration with respect to the validity of their regulations. Thus, it would be unlikely for a court to invalidate a prison regulation, even if it did not provide sufficient access to menstrual hygiene products, so long as a prison administrator could point to a legitimate penological interest for the regulation.

The difficulties of reforming prison regulations through the court system do not end at *Turner*. Even if a regulation has been found invalid, the ways a court can grant a remedy is complex and does not

177. See *Turner*, 482 U.S. at 81–92.

178. *Id.* at 84.

179. *Id.* at 84–85.

180. *Id.* at 84.

181. *Id.* at 84–85.

182. *Id.* at 85.

183. MUSHLIN, *supra* note 93, § 2:10.

184. *Id.* § 7:3. "Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes." *Bull v. City & Cty. of S.F.*, 595 F.3d 964, 996 (9th Cir. 2010).

185. *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

186. *Id.* at 90.

187. *Id.*

188. *Id.*

effectuate change easily.¹⁸⁹ This is due to the Court's reluctance to intrude on the deference afforded to prison administrations to handle their internal affairs.

For example, in *Lewis v. Casey*, a district court found the Arizona Department of Corrections liable for failing to provide inmates adequate access to the courts.¹⁹⁰ To determine the appropriate relief, the district court appointed a law professor who proposed a system-wide permanent injunction, which included twenty-five pages of detailed instructions.¹⁹¹ Without significant changes, the court adopted the injunction.¹⁹² On appeal, the Supreme Court declared the lower court's actions were a model of what not to do when granting relief.¹⁹³ Further, the Court found the district court's order did not give sufficient consideration to state prison authorities.¹⁹⁴ The Court explained that in consideration of comity, states should be given the first opportunity to correct the internal errors of prison administration.¹⁹⁵ The Court suggested the district court should have given the responsibility to an official from the department of corrections rather than a law professor.¹⁹⁶ It also suggested that it was inappropriate to place limitations on the remedies available.¹⁹⁷

In *Casey*, the Supreme Court pointed to *Bounds v. Smith* as an example of proper judicial restraint.¹⁹⁸ In *Bounds*, after invalidating a regulation, a district court gave the Department of Corrections the task of creating a constitutional program.¹⁹⁹ The district court then examined the Department's proposal and approved it after minor changes.²⁰⁰ The *Casey* Court explained this was an admirable process because the lower court did not infringe on the role of prison administrators and allowed them wide discretion within constitutional limitations.²⁰¹

Additionally, although *Casey* was a class action suit, the Court found only two plaintiffs had actually suffered an injury.²⁰² The Court explained that a remedy must be limited to the inadequacy that

189. MUSHLIN, *supra* note 93, § 3:93.

190. *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

191. *Id.* at 347, 363.

192. *Id.* at 347.

193. *Id.* at 363.

194. *Id.* at 362.

195. *Id.*

196. *Id.* at 363.

197. *Id.*

198. *Id.* at 362-63 (citing *Bounds v. Smith*, 430 U.S. 817 (1977)).

199. *Id.* at 362.

200. *Id.* at 362-63.

201. *Id.* at 363.

202. *Id.* at 356.

caused a plaintiff's injury.²⁰³ Accordingly, the two injuries did not support a system-wide remedy.²⁰⁴

Under the Supreme Court's suggested method, the same Department of Corrections that implemented an unconstitutional regulation is given the responsibility of creating the new regulation. For example, if a regulation that provides an insufficient amount of feminine hygiene products was found invalid, the same department that created that regulation would be responsible for devising the new plan. Further, the remedy will only go as far as the inadequacy that caused actual injury, so without a system-wide injury there will not be system-wide relief. Deprivations in one facility within a prison system do not guarantee relief in other facilities if no claims specific to those other facilities have been brought successfully in court.

Thus, out of respect for the separation of powers, courts are very cautious about stepping on the toes of prisons' administrations. Extensive deference is given in determining the constitutional validity of a prison regulation, and even if a regulation is found invalid, the responsibility of correcting the problem is placed back into the hands that caused it. Further, courts only have system-wide involvement if there is sufficient justification for system-wide relief. Without successful claims involving multiple facilities throughout a prison system, relief will be limited to individuals who have made successful claims in court. Therefore, because of judicial restraint and the substantial deference given to prison administrations, successful claims in court will likely not lead to a real solution for the many women prisoners with insufficient access to feminine hygiene products.

V. THE SEARCH FOR A SOLUTION: LEGISLATION TO CORRECT THE INJUSTICE

A. *Current Efforts Toward a Solution*

As women prisoner's inadequate access to feminine hygiene products gains more recognition as a serious issue, more efforts are made in search of a solution. Although no current proposition would fix the problem for all incarcerated women, any current effort toward a solution is a step in the right direction.

1. Federal

On August 1, 2017, the Federal Bureau of Prisons released an operations memorandum titled "Provision of Feminine Hygiene Products."²⁰⁵ The memorandum's purpose was to give guidance on the

203. *Id.* at 357.

204. *Id.* at 360.

205. *Operations Memorandum on Provision of Feminine Hygiene Products*, FED. BUREAU PRISONS (Aug. 1, 2017), https://www.bop.gov/policy/om/001_2017.pdf [<https://perma.cc/7HFU-KG6Q>].

specific feminine hygiene products that prisons should provide to inmates.²⁰⁶ The memorandum applies to all federal facilities that house female inmates.²⁰⁷ According to the memorandum, wardens are responsible for ensuring that inmates have access to regular and super-size tampons, regular and super-size pads with wings, and regular panty liners.²⁰⁸ Most importantly, all of these products are to be provided free of charge.²⁰⁹ The memorandum also requires that the commissary continue to offer at least one kind of tampon, pad, and panty liner.²¹⁰ Although the products are supposed to be free, the memorandum prohibits any significant increase to the facilities current expenses on feminine hygiene products.²¹¹

While the provision of free feminine hygiene products is a step in the right direction, this memorandum is not a complete solution. First, the memorandum only applies to federal facilities, meaning it offers no aid to the thousands of women incarcerated in state facilities.²¹² By exclusively applying to federal facilities, only about 13,000 of the approximately 111,500 women in prison benefit from this change.²¹³ Second, the memorandum is completely ineffective if not enforced. When asked about the memorandum, the Bureau of Prisons Information, Policy, and Public Affairs Division commented that although institutions may vary on the type of product they provide, the operations memorandum was being followed and women were being provided feminine hygiene products for free.²¹⁴ But a survey conducted by prison advocacy groups showed a different result. Of the twenty-eight surveyed facilities, women from fourteen facilities reported the operations memorandum was not being followed.²¹⁵ Some facilities have made changes, but they were insufficient. For example, before the memorandum, a federal prison in Victorville, California, only provided one box of tampons per unit of about 130 women.²¹⁶ After the memorandum was issued, each unit received two boxes.²¹⁷ Without

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. The operations memorandum only applies to federal prisons because the Federal Bureau of Prisons only oversees federal facilities. Lindsay Kramer, *What Are the Main Differences Between State and Federal Corrections?*, LEGAL BEAGLE, <https://legalbeagle.com/8214304-main-between-state-federal-corrections.html> (last updated Mar. 15, 2018) [<https://perma.cc/5PA5-3VTN>]. State facilities for offenders of state crimes are overseen by the individual state governments and thus are not subject to the federal operations memorandum. *Id.*

213. E. ANN CARSON & ELIZABETH ANDERSON, *PRISONERS IN 2015* (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/98WF-NAYM>].

214. Law, *supra* note 51.

215. *Id.*

216. *Id.*

217. *Id.*

strictly enforcing the memorandum, women will not get the aid they need. Finally, the memorandum expired on August 1, 2018—merely one year after it was issued.²¹⁸ The same day, another identical memorandum was authorized but is set to expire on August 1, 2019.²¹⁹ One-year increments of higher standards are not the type of reform that can make real change, especially when many facilities waited months to make any changes to their policy.²²⁰ It is not clear what will happen after the new memorandum expires. Considering how the memoranda have been enforced, it is likely that if a new memorandum is not issued each year to continue this policy, many of the facilities will return to their old ways and women will lose the little access to feminine hygiene products they gained.

Female prisoners' lack of access to feminine hygiene products has also gained Congress's attention. On July 11, 2017, Senate Bill 1524 was introduced in the Senate.²²¹ The bill, titled "Dignity for Incarcerated Women Act of 2017," is aimed at improving the lives of female federal prisoners.²²² Most notably, the bill would largely improve the provision of feminine hygiene products. Section 2 of the bill would require, among other items, both tampons and sanitary napkins²²³ be provided at no cost and in a sufficient quantity for individual prisoners' needs.²²⁴ The bill was referred to the Senate Committee on the Judiciary, but no further action has been taken as of this writing.²²⁵

Additionally, commenters have noted that just three weeks after the Dignity for Incarcerated Women Act of 2017 was introduced, the Federal Bureau of Prisons released the Provision of Feminine Hygiene Products operations memorandum.²²⁶ The bill appears to have

218. *Operations Memorandum on Provision of Feminine Hygiene Products*, *supra* note 205.

219. *Operations Memorandum on Provision of Feminine Hygiene Products*, FED. BUREAU OF PRISONS (Aug. 1, 2018), <https://www.bop.gov/policy/om/003-2018.pdf> [<https://perma.cc/W796-S9DD>].

220. Law, *supra* note 51.

221. Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017).

222. *Id.* The bill also puts special emphasis on improving the lives of women prisoners who are primary caretaker parents. *Id.*

223. *Id.* at § 4050(j)(1)(C). The items required to be provided are "(i) tampons; (ii) sanitary napkins; (iii) moisturizing soap, which may not be lye-based; (iv) shampoo; (v) body lotion; (vi) Vaseline; (vii) toothpaste; (viii) toothbrushes; (ix) aspirin; (x) ibuprofen; and (xi) any other healthcare product that the Director determines appropriate." *Id.*

224. *Id.* at § 4050(j)(1)(A). The bill would also establish an office for prisoner placement determinations that would place parent prisoners "as close to their children as possible." *Id.* at § 4050(b). Further, the bill would place restrictions on the use of segregated housing, prohibit shackling of pregnant prisoners, and establish parenting classes for prisoners with children. *Id.* at § 4050(d)–(e).

225. *All Actions S. 1524—115th Congress (2017–2018)*, CONGRESS, <https://www.congress.gov/bill/115th-congress/senate-bill/1524/all-actions?overview=closed#tabs> (last visited Nov. 1, 2018) [<https://perma.cc/7XPR-5AQU>].

226. Erin Delmore, *Do You Get Tampons in Prison? The Law Is Moving Toward Menstrual Equality*, BUSTLE (Aug. 16, 2017), <https://www.bustle.com/p/do-you-get>

already improved federally incarcerated women's lives by putting pressure on the Federal Bureau of Prisons, but enacting the bill would ensure the women who have received more access to feminine hygiene products would keep it past a memorandum's expiration date. Similar to the operations memorandum, this bill is a positive step for women, but it is not a complete solution. First, the bill neglects the majority of incarcerated women because it only grants access to federal prisoners. Second, the bill does not require different sizes of tampons and pads, which disregards that specific types of products are necessary for individual needs.²²⁷ Finally, the bill is completely ineffective if it is not passed. Thus, while proposed legislation is a positive sign for women prisoners, Senate Bill 1524 is far from a real solution.

2. State and Local Government

Many state and local governments are also working to find solutions to women prisoners' lack of access to feminine hygiene products. In October 2017, Nebraska prisons were brought into the spotlight for their poor treatment of women prisoners after the ACLU of Nebraska released an investigative report.²²⁸ Its investigation discovered Nebraska prisons and jails charged 20% to 50% more for feminine hygiene products than the price in local stores.²²⁹ The report also noted the recent release of the Federal Bureau of Prisons' Provision of Feminine Hygiene Products operations memorandum and the Dignity for Incarcerated Women Act of 2017.²³⁰ After the report, a Nebraskan state senator asked the Department of Corrections to review their policy.²³¹

Pressure from the ACLU and state legislators was effective because the Nebraska Department of Correctional Services changed its policy.²³² As of this writing, women prisoners are provided generic brand tampons and pads for free, and name brand products are available in

tampons-in-prison-the-law-is-moving-toward-menstrual-equality-77060 [https://perma.cc/582Q-YEMX].

227. See Marusic, *supra* note 22.

228. *Let Down and Locked Up: Nebraska Women in Prison*, *supra* note 37, at 3.

229. Press Release, ACLU of Nebraska, ACLU: Tampons and Pads Are Treated as a Luxury Item by Nebraska Prisons and Jails (Oct. 19, 2017), <https://www.aclunebraska.org/en/press-releases/aclu-tampons-and-pads-are-treated-luxury-item-nebraska-prisons-and-jails> [https://perma.cc/5DNB-L65J]; see also *Let Down and Locked Up: Nebraska Women in Prison*, *supra* note 37, at 10.

230. *Let Down and Locked Up: Nebraska Women in Prison*, *supra* note 37, at 10.

231. Maggie Cunningham, *Free Feminine Hygiene Products Now Available to NCDC Female Inmates*, KETV (Jan. 17, 2018, 1:04 PM), <http://www.ketv.com/article/free-feminine-hygiene-products-now-available-to-ncdc-female-inmates/15333490> [https://perma.cc/9Y75-PPWX].

232. Martha Stoddard, *New Prison Policy Will Offer Free Tampons, Lower Prices on Other Hygiene Products*, OMAHA WORLD-HERALD (Jan. 18, 2018), http://www.omaha.com/news/nebraska/new-prison-policy-will-offer-free-tampons-lower-prices-on/article_ebd8f138-fbe0-11e7-b2f9-fbd605296f19.html [https://perma.cc/MGN4-X2BK].

the commissary for the same prices local stores charge.²³³ This is an example of how exposing women prisoners' lack of access to feminine hygiene products can bring about positive change.

This issue also gained national attention when women across Arizona sent pads, tampons, and money to State Representative Thomas Shope's office after he stalled a bill that would increase women prisoners' access to feminine hygiene products.²³⁴ The bill—House Bill 2222—would provide inmates in Arizona unlimited feminine hygiene products for free and appropriate \$80,000 to the Department of Corrections to complete the task.²³⁵ The bill would provide women with tampons, pads, and alternative products such as menstrual sponges and menstrual cups.²³⁶

On February 5, 2018, House Bill 2222 came before the all-male Military Veterans and Regulatory Affairs Committee.²³⁷ In support of the bill, Representative Salman described how the current policy—twelve free pads per month—was unfair because the women only made 15¢ per hour, and additional products cost \$3.20 for sixteen pads or \$2.05 for ten tampons.²³⁸ Women could make medical requests for additional products, but their medical visit costs \$4, and their request could still be denied.²³⁹ Even with medical approval, the women were limited to only twenty-four pads.²⁴⁰ Former inmates also testified they had to wear multiple pads at a time because the quality was so poor and that many inmates would still bleed on their uniform.²⁴¹ If that

233. *Id.*

234. Amir Vera, *Why Women in Arizona are Sending a State Representative Pads and Tampons*, CNN, http://www.cnn.com/2018/02/13/health/women-pads-arizona-state-representative-trnd/?iid=OB_health_core_homepage (last updated Feb. 13, 2018, 3:04 PM) [<https://perma.cc/84GJ-XCUH>]; see also Amy Held, *Arizona Department of Corrections Changes Sanitary Pad Policy Following Backlash*, NPR (Feb. 15, 2018, 9:26 PM), <https://www.npr.org/sections/thetwo-way/2018/02/15/586134335/arizona-department-of-corrections-changes-sanitary-pad-policy-following-backlash> [<https://perma.cc/4MX2-HQEX>].

235. H.B. 2222, 53d Leg., 2d Reg. Sess. (Ariz. 2018).

236. *Id.* Menstrual sponges, a product made of sea sponges, are a natural alternative to tampons. See *Sponge Tampons*, CLOTH PADS, <https://clothpads.wordpress.com/sponges/> (last visited Feb. 16, 2018) [<https://perma.cc/N8GB-V6YY>]. The products are reusable up to six to twelve months and can be less expensive than tampons but are not as effective for heavy periods. *Id.* Menstrual cups are also an alternative to tampons but are not as natural. See *Menstrual Cups*, CLOTH PADS, <https://clothpads.wordpress.com/menstrual-cups/> (last visited Feb. 16, 2018) [<https://perma.cc/H4FS-WGQA>]. Menstrual cups form a reservoir that collects blood until removed, and if properly maintained, can be reused for years. *Id.*

237. Vera, *supra* note 234.

238. *Id.*

239. Kaila White, *Arizona Legislator Kills Bill That Would Have Given Female Inmates Free Feminine Products*, AZCENTRAL, <https://www.azcentral.com/story/news/politics/legislature/2018/02/12/mail-pads-tampons-arizona-rep-tj-shope-stall-bill-in-mates-free-menstrual-products-rep-athena-salman/330496002/> (last updated Feb. 12, 2018, 6:27 PM) [<https://perma.cc/5FBN-FGYJ>].

240. *Id.*

241. *Id.*

occurred, the women were punished by losing phone privileges or commissary privileges, leaving them unable to purchase additional products.²⁴² The committee also received a list of complaints, which included one from a woman who was only provided half a box of extra pads when she was continuously bleeding for six weeks after giving birth.²⁴³ A former nurse for incarcerated women who attended the hearing in support of the bill commented how the alternative methods prisoners currently use can increase bacteria and cause TSS.²⁴⁴ A former inmate also spoke to the committee about the positive effects the bill could have on incarcerated women's attitude and morale.²⁴⁵

Despite the persuasive testimony, committee members were concerned that providing "unlimited" products would lead to vandalism.²⁴⁶ The warden of the Perryville prison, agreed vandalism could be a problem but noted that this did not happen often.²⁴⁷ There were also budgetary concerns about requiring administration to provide unlimited products.²⁴⁸ In response to committee concerns, Representative Salman was open to negotiations on the "unlimited" language.²⁴⁹

House Bill 2222 passed through the Military Veterans and Regulatory Affairs Committee by a 5-4 vote,²⁵⁰ but it then hit a roadblock. The bill needed a House Rules Committee hearing to continue, but Representative Shope stalled the bill in light of the Department of Corrections attempting to revise their policy.²⁵¹ This caused backlash from the community and ignited the #LetItFlow campaign, which garnered national attention.²⁵² People began sending money and feminine hygiene products to Representative Shope's office as donations

242. *Id.*

243. *Id.*

244. Jimmy Jenkins, 'Pads and Tampons and the Problems with Periods: All-Male Committee Hears Arizona Bill on Feminine Hygiene Products in Prison, KJZZ, <https://kjzz.org/content/602963/pads-and-tampons-and-problems-periods-all-male-committee-hears-arizona-bill-feminine> (last updated Feb. 12, 2018, 12:54 PM) [<https://perma.cc/3WDS-UHWE>].

245. *Id.*

246. *Feminine Hygiene Products; Requirements; Appropriation: Hearing on H.B. 2222 Before the H. Comm. on Military, Veterans, & Regulatory Affairs*, 53d Leg., 2d Reg. Sess. (Ariz. 2018), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20340&meta_id=496684 [<https://perma.cc/Z3J3-NQPL>].

247. *Id.* Kim Currier is the current warden of the Perryville prison. *Id.*

248. *Id.* The budgetary concerns were raised by Ray Martinez, a retired deputy warden and a member of the committee. *Id.* Martinez also suggested raising the quality of the products to lower the number of products women would have to use. *Id.*

249. Jenkins, *supra* note 244.

250. *Id.* H.B. 2222 passed through the committee with a 5-4 vote despite comments from the committee chairman such as, "I'm almost sorry I heard the bill . . . I didn't expect to hear pads and tampons and the problems of periods." *Id.* The chairman also called the prisoners liars. *Id.*

251. Vera, *supra* note 234. Representative Thomas Shope is the Chairman of the House Rules Committee. *Id.*

252. *Id.*

for incarcerated women.²⁵³ Using the hashtag #LetItFlow, many documented their donations on social media and demanded House Bill 2222 receive a hearing.²⁵⁴ The ACLU of Arizona also questioned if the Department of Corrections could properly handle this issue, while simultaneously facing possible fines for providing insufficient health care to their inmates.²⁵⁵ On February 13, 2018, the Arizona Department of Corrections released its new policy, which raised the minimum number of products the women receive to thirty-six pads per month instead of twelve.²⁵⁶ Due to the new policy, House Bill 2222 died in committee,²⁵⁷ but this is another example of how exposing the issue can result in relief for incarcerated women.

The policy changes from the Nebraska and Arizona Departments of Corrections are positive changes, but they are not real solutions because policy changes are not as effective as legislation. First, departments can easily change their policy, so there is no guarantee these policies will be maintained in the future. Policy changes, unlike legislation, do not secure a long-term solution to the problem. Second, the ramifications for violating a department policy are handled internally.²⁵⁸ This does not provide the same incentive for compliance or accountability as violations of law, which are handled in court and preserved by public record.²⁵⁹ Therefore, while these policy changes are steps in the right direction, legislation would be a more appropriate and effective means for a solution.

Some states have passed legislation regarding women's access to feminine hygiene products. In Colorado, the state budget bill was amended to designate \$40,000 to the Department of Corrections, specifically to provide tampons to women prisoners.²⁶⁰ But a budgetary

253. *Id.*

254. *Id.*; see also Held, *supra* note 234.

255. White, *supra* note 239.

256. Press Release, Ariz. Dep't of Corr., ADC Statement on Policy Revision Involving Feminine Hygiene Products, (Feb. 13, 2018), <https://corrections.az.gov/article/adc-statement-policy-revision-involving-feminine-hygiene-products> [https://perma.cc/A6NQ-4K9N].

257. Amir Vera, *Female Inmates in Arizona Only Got 12 Free Pads a Month. A Movement Helped Triple That.*, CNN, <http://www.cnn.com/2018/02/14/us/arizona-department-of-corrections-feminine-hygiene-products/index.html> (last updated Feb. 14, 2018, 11:50 AM) [https://perma.cc/GTC8-TQJW]. After the release of the new policy, a spokesperson said that the hearing would now be "redundant." *Id.* Additionally, Representative Salman considered the policy revision a victory and indicated he would not continue to push for the bill the following session. *Id.* Salman has also contacted the Governor's office about possibly adding tampons to the revised policy and is still hoping for a more permanent solution in the future. *Id.*

258. See ARIZ. DEP'T OF CORR., DEPARTMENT ORDER MANUAL: ADMINISTRATIVE INVESTIGATIONS AND EMPLOYEE DISCIPLINE § 601.15 (2018), https://corrections.az.gov/sites/default/files/policies/600/0601-effective_042318.pdf [https://perma.cc/ZY9T-7KTM].

259. See *id.*

260. John Tomasic, *Colorado House Dems Green Light 'Orange is the New Black' Prison Tampon Budget Amendment*, COLO. POL. (Apr. 6, 2017), <https://coloradopoli>

amendment lacks the structure to ensure women are actually provided the tampons because it does not address the quantity, quality, or distribution of the products.²⁶¹ For example, the appropriations report claims the previous policy—pads for free or tampons for purchase—would be changed to allow the prisoners the option of free tampons or pads.²⁶² However, as of this writing the Colorado Department of Corrections policy on feminine hygiene products merely states that facilities will provide adequate feminine hygiene supplies.²⁶³ By not addressing how these supplies are distributed, there is no assurance the women will receive the products sufficiently or at all.

Recently, the Virginia Legislature took steps toward a solution when both legislative chambers unanimously passed House Bill 83, which requires feminine hygiene products to be provided to women prisoners for free.²⁶⁴ The bill was approved by the Governor and took effect July 1, 2018.²⁶⁵ Although this is a victory for the citizens of Virginia, the bill is not everything it could have been. The introduced bill sought to amend the statutory provisions of the Code of Virginia that governs the treatment of prisoners.²⁶⁶ The bill as introduced also codified the specific products—sanitary napkins, pads, and tampons—that would be provided for free.²⁶⁷ However, a house committee substitute drastically changed the bill before passage.²⁶⁸ The substituted version no longer amends any statutory provision; rather, it requires the Department of Corrections to create a plan that ensures the women are provided free feminine hygiene products.²⁶⁹ Additionally, the substitute does not clarify the specific products that must be provided.²⁷⁰

These changes drastically diminish what House Bill 83 could have accomplished as introduced. First, by allowing the Department of Cor-

tics.com/clorado-house-dems-green-light-orange-is-the-new-black-prison-tampon-bud-get-amendment/ [https://perma.cc/BQ7L-MPNA]. The amendment was proposed by Representatives Leslie Herod and Faith Winter. *Id.*

261. *See* S.B. 17-254, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2017).

262. COLO. JOINT BUDGET COMM., APPROPRIATIONS REPORT FISCAL YEAR 30 (2017), <https://leg.colorado.gov/sites/default/files/fy17-18apprept.pdf> [https://perma.cc/5VNX-ZQEE].

263. COLO. DEP'T OF CORRECTIONS, AR-850-11, OFFENDER CLOTHING AND BEDDING ISSUE, DRESS CODE, HYGIENE, AND GROOMING (2018).

264. H.B. 83, 2018 Leg., Reg. Sess. (Va. 2018). The bill passed through the house with 100 yeas and zero nays. *Feminine Hygiene Products; No Cost to Female Prisoners or Inmates*, VA.'S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=hb83&submit=go> (last visited Mar. 9, 2018) [https://perma.cc/6R35-QG7M]. The bill passed through the senate with forty yeas and zero nays. *Id.*

265. *See* Act of Apr. 18, 2018, ch. 815, 2018-4 Va. Adv. Legs. Serv. 1, 1 (LexisNexis).

266. H.B. 83, 2018 Leg., Reg. Sess. (Va. 2018) (as introduced Jan.10, 2018).

267. *Id.*

268. H.B. 83, 2018 Leg., Reg. Sess. (Va. 2018) (as reported by H. Comm. on Militia, Police & Pub. Safety).

269. *Id.*

270. *Id.*

rections to create the plan, the legislature has essentially given the discretion to continue current practices, which would not cause a positive change for women prisoners. Second, by not explicitly stating the types of products that must be provided, the bill removes the assurance that women will have options that best fit their individual needs. Third, by not explicitly stating a procedure or standard for distribution, the bill does not guarantee the women will be provided a sufficient supply of products. Thus, the unanimous vote of the Virginia legislature signifies the acknowledgement that these products are necessities and should be provided for free, but the bill is still not a complete solution.

The Maryland Legislature also took positive steps toward a solution for women prisoners. On January 31, 2018, Senate Bill 598 was introduced in the Senate.²⁷¹ This bill requires state and local correctional facilities to have a written policy and procedure ensuring that prisoners are provided both tampons and pads for free. Most notably, this bill requires the policy to include that the women are provided the products upon admission, on a routine basis, and on request.²⁷² The bill also requires facilities to maintain a sufficient supply for the inmate population.²⁷³ Further, the bill requires the facilities keep records of the availability of the products, and the records are subject to review.²⁷⁴ Senate Bill 598 was unanimously passed through the Senate.²⁷⁵ This bill was also cross-filed,²⁷⁶ and its counterpart—House Bill 797—was unanimously passed through the House of Representatives.²⁷⁷ On April 24, 2018, the Governor of Maryland signed the bills into law.²⁷⁸ The new law took effect October 1, 2018.²⁷⁹

There are many positive aspects of Maryland's new law. By requiring the facilities to provide both tampons and pads for free, the law ensures the women have a free option that best fits their needs. The law also ensures individual women have a sufficient supply by setting a minimum standard of when the products must be provided. Additionally, the law acknowledges the deference given to prison adminis-

271. S.B. 598, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).

272. *Id.*

273. *Id.*

274. *Id.*

275. S. 2018-379, Reg. Sess. (Md. 2018), <http://mgaleg.maryland.gov/2018RS/votes/Senate/0379.pdf> [<https://perma.cc/Z75B-T9XK>].

276. A cross-filed bill is an identical bill that is introduced in both chambers. Dep't of Legislative Servs., *Legislative Lingo*, MD. GEN. ASSEMBLY 5, <http://mgaleg.maryland.gov/pubs-current/current-legislative-lingo.pdf> (last visited Mar. 10, 2018) [<https://perma.cc/Z5MX-DBD2>].

277. H. 2018-193, Reg. Sess. (Md. 2018), <http://mgaleg.maryland.gov/2018RS/votes/House/0193.pdf> [<https://perma.cc/DU75-XHFH>].

278. See Press Release, Larry Hogan, Governor of Maryland, Bills to be Signed by the Governor (Apr. 24, 2018), <https://governor.maryland.gov/wp-content/uploads/2018/04/DLS-Press-Release-Abbreviated-Signed-April-24-2018.pdf> [<https://perma.cc/KY45-7VCZ>].

279. MD. CODE ANN., §§ 4–214, 9–616 (LexisNexis 2017 Supp.).

tration by allowing them to create their own policy, while also explicitly requiring certain standards be included. These requirements act as safeguards against the facilities abusing their discretion.

Local governments are also making an impact on ensuring women prisoners have access to feminine hygiene products. On July 13, 2016, New York City passed a local ordinance that guarantees inmates are provided feminine hygiene products upon request.²⁸⁰ The ordinance, which the city council unanimously passed,²⁸¹ defines feminine hygiene products to include tampons and pads.²⁸² When signing the bill into law, Mayor Bill de Blasio said, “There should be no stigma around something as fundamental as menstruation These laws recognize that feminine hygiene products are a necessity—not a luxury.”²⁸³

B. *Proposed Legislation*

Although the previously mentioned efforts to solve this problem are positive steps in the right direction, none of them provide a complete solution for all women prisoners. The best solution for all incarcerated women is for federal and state legislative branches to take action by enacting laws at the federal and state level that ensure women prisoners are supplied with sufficient feminine hygiene products. The following Sections explain why legislation is necessary at both the federal and state level and propose concepts that would be beneficial if included in future legislation addressing this issue.

1. Federal

Federal legislation is necessary because it will provide a more permanent and enforceable standard than mere policy reforms like the operations memorandums.²⁸⁴ Further, federal prisoners do not have a right to be housed in the same state they committed their offense; rather, they may be transferred between federal facilities across the

280. N.Y.C., N.Y., ADMINISTRATIVE CODE § 9-141 (Supp. 2018). This ordinance applies to all female inmates in the New York City Department of Correction’s custody. *Id.*

281. Sarah Ruiz-Grossman, *NYC Mayor Signs Free Tampons for Schools, Jails, Shelters Into Law*, HUFFINGTON POST, https://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law_us_5787bc57e4b08608d3336b27 (last updated July 14, 2016) [<https://perma.cc/WXM8-NPZ4>]; see also Press Release, Bill de Blasio, Mayor, New York City Mayor de Blasio Signs Legislation Increasing Access to Feminine Hygiene Products for Students, Shelter Residents and Inmates (July 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/611-16/mayor-de-blasio-signs-legislation-increasing-access-feminine-hygiene-products-students> [<https://perma.cc/EP3U-ZNLP>]. The bill was part of a package of legislation that increased inmates’, students’, and shelter residents’ access to feminine hygiene products. *Id.*

282. N.Y.C., N.Y., ADMINISTRATIVE CODE § 9-141 (2016).

283. Press Release, Bill de Blasio, *supra* note 281.

284. See *supra* notes 206–20 and accompanying text.

country.²⁸⁵ Without a federal mandate that specifies a policy for providing feminine hygiene products, their provision is at the discretion of individual facilities. Thus, a nationwide standard is necessary to ensure that all women in federal facilities have sufficient access to feminine hygiene products, regardless of the facility's location.

To effectively combat women prisoners' insufficient access to feminine hygiene products, the federal legislation should meet certain criteria. First, the legislation should specify that the women must receive the feminine hygiene products at no cost to the inmates. Due to these women's dire financial circumstances, they should be provided these necessities for free. Additionally, this would be a step toward implementing the Bangkok Rules, showing a respect for international standards and these women's human rights.

Second, the legislation should require facilities to provide a sufficient quantity for an individual's needs. Not all women's periods are the same length or frequency, and feminine hygiene products must be changed frequently to avoid health risks. The legislation should take these concerns into account and not place limits on the number of products an inmate can access. The sufficiency language would also avoid using over-expansive terms such as "unlimited," which would minimize some of the concerns state legislators have expressed regarding proposed bills. Additionally, such language would not require facilities to provide the products to postmenopausal inmates who no longer need them, lowering costs.

Third, the legislation should specify the specific types and sizes of products that are provided. The legislation should, at a minimum, provide sanitary napkins with wings and tampons in both regular and super-size. The type and size of product necessary to manage a woman's period varies based on the individual. A provision mandating multiple sizes and types of products would help meet the specific needs of each prisoner. It may also be beneficial to include other types of products such as menstrual sponges or cups because many of these products are reusable and thus would lower the cost of replacing non-reusable products.

Finally, Congress should include financial appropriations to assist the facilities in implementing the requirements and avoid the facilities syphoning funds needed elsewhere. Further, it may also be cost-beneficial for the legislation to provide generic products for free and specify that name brand products remain available for purchase in the commissary. This would allow facilities to lower expenses by purchasing generic products while also providing the inmates with additional options.

285. MUSHLIN, *supra* note 93, § 11:12. "There simply no federal statutory or regulatory right not to be transferred from prison to prison within the federal system, absent special circumstances." *Id.*

2. State

Legislation is also necessary at the state level because federal prison laws do not apply to state-run institutions. Thus, to find a solution for every incarcerated woman, each state would need to implement its own legislation addressing women prisoners' insufficient access to feminine hygiene products. This legislation should also meet the previously mentioned criteria to effectuate real change in the lives of women prisoners and to recognize that these products are not a luxury, but a necessity.

C. *Cost of Implementation*

Based on the cost estimations of previously proposed legislation, implementing legislation of this nature would be very inexpensive for the federal and state governments. For example, before Virginia's House Bill 83 was substituted, the Department of Planning and Budget estimated that it would only cost \$33,769 each year to provide sanitary napkins, pads, and tampons to all female inmates.²⁸⁶ Further, it was estimated that this small cost could be absorbed by the existing budget, meaning no additional funds were required.²⁸⁷ Similarly, when Colorado amended its budget bill to delegate \$40,000 for the provision of free tampons, no additional taxpayer funds were needed. To acquire the funds, the Joint Budget Committee recommended appropriating from the Youthful Offender System because such a small decrease would not harm the program.²⁸⁸ Further, when compared to Colorado's \$26.8 billion budget,²⁸⁹ \$40,000 is negligible. Additionally, before Arizona House Bill 2222 was stalled, the state estimated that \$80,000 would cover the cost of providing prisoners unlimited feminine hygiene products.²⁹⁰ This was also intended to cover providing menstrual cups and similar items that can be more expensive than tampons or sanitary pads.²⁹¹ Although \$80,000 may seem large compared to the other states' estimations, it is still modest considering Arizona's annual budget is over \$9.5 billion.²⁹² Compared to the amount of money in state budgets and the funds given to various departments of corrections, the cost to provide sufficient feminine hygiene prod-

286. 2018 *Fiscal Impact Statement*, DEP'T PLAN. & BUDGET, <https://lis.virginia.gov/cgi-bin/legp604.exe?181+oth+HB83F122+PDF> (last visited Mar. 9, 2018) [<https://perma.cc/TX5Z-SEWK>].

287. *See id.*

288. Memorandum from the Colo. Joint Budget Committee (Apr. 27, 2017), https://leg.colorado.gov/sites/default/files/doc_memo_04-27-17.pdf [<https://perma.cc/763G-2N53>].

289. Tomasic, *supra* note 260.

290. H.B. 2222, 53d Leg., 2d Reg. Sess. (Ariz. 2018).

291. *Id.*

292. *State of Arizona Executive Budget Summary Fiscal Year 2018*, ARIZ. GOVERNOR, (Jan. 2017), <https://azgovernor.gov/sites/default/files/governor/documents/executivebudget-summary.pdf> [<https://perma.cc/5C2J-QESL>].

ucts is miniscule. Thus, legislation of this nature is a small price to pay for human dignity.

VI. CONCLUSION

Many incarcerated women in the United States lack sufficient access to menstrual hygiene products. The denial of these necessary products goes beyond an unfortunate consequence of incarceration; it is an attack on the dignity of women. Although not every woman prisoner is subjected to this problem, those that are report humiliating and degrading experiences. Additionally, when the provision of these products is at the discretion of corrections officers, there are easy opportunities for guards to abuse their power. When women are provided these products, their needs are often still not met because of the low quantity or quality. This causes many women to resort to alternative methods of menstrual hygiene management. As a result, the women are subjected to increased health risks. This problem also negatively affects women's self-esteem and rehabilitation.

International communities have recognized that women prisoners have needs separate and distinct from men. Although the United States claims to be a leader in human rights, its penal system neglects many of the human rights of women. For example, the United Nation's minimum standards for the treatment of women prisoners require feminine hygiene products to be provided for free. Although these standards are nonbinding, many countries have taken steps to implement them into their criminal justice systems. By neglecting women's need for feminine hygiene products, the United States' facilities are falling behind the international movement to uphold the rights of women prisoners.

The judicial system has an obligation to protect the constitutional rights of prisoners, but the solution to these women's problems will probably not be found in court. Prisoners can bring claims under the Eighth Amendment for deprivations of medical care and unhygienic or unsanitary conditions. Lower courts have even suggested that deprivations of feminine hygiene products could rise to the level of an Eighth Amendment claim under certain circumstances. However, even if a successful claim is made, the problem will not be solved because courts give extensive deference to prison administrations when analyzing the constitutionality of prison regulations. Further, courts exercise judicial restraint in correcting invalid regulations, giving the states the first opportunity to correct the internal errors of prison administration.

Federal, state, and local governments have made efforts to solve this problem, but no effort has been a complete solution. Corrective legislation will be the most likely solution for women prisoners' insufficient access to feminine hygiene products. Because the federal and

state corrections systems operate independently, legislation is required at both the federal and state level. Effective legislation should require multiple types and sizes of feminine hygiene products be provided to the inmates at no cost. Further, the products must be of sufficient quality and provided in sufficient quantity to account for women's individual needs. The legislation should also provide funds to the appropriate department to aid in meeting the new requirements. These proposed ideas would provide the best solution for all women prisoners who lack sufficient access to feminine hygiene products.