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## Tampon Taxes, Discrimination, and Human Rights

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# TAMPON TAXES, DISCRIMINATION, AND HUMAN RIGHTS

BRIDGET J. CRAWFORD\* & CARLA SPIVACK\*\*

This Article makes two contributions to the study of taxation. First, it argues that the “tampon tax”—an umbrella term to describe sales, VAT, and similar “luxury” taxes imposed on menstrual hygiene products—illustrates how deeply embedded gender is in legal structures such as the tax system that are thought to be neutral. Second, this Article posits that tax reform is an essential tool in achieving both gender equality and human rights. In recent months, activists around the globe have harnessed the power of the Internet to raise awareness of the tampon tax. In response to pressure from constituents, five states and Canada have repealed their tampon tax. Active repeal campaigns are underway in Australia, the United Kingdom, and several other countries. Where public pressure has not been an effective technique, those seeking to challenge the tampon tax in the United States have turned to litigation. In four states, class action lawsuits have been filed seeking repeal of the tax and a refund for back taxes paid, alleging equal protection violations. In the international context, human rights law may provide a promising foundation for similar legal challenges to the tampon tax because human rights law takes a capacious approach to gender equality. In the European Court of Human Rights, for example, there are several tax cases that recognize gender-differentiated taxes as a form of impermissible discrimination. This Article explains how the tampon tax is both a form of gender discrimination and a violation of human rights norms. Full realization of gender equality will require revision of tax laws. As a cultural matter, the tampon tax has gone unnoticed because of a history of cultural (and legal) unease about women’s bodies in general and menstruation in particular. Women’s (involuntary) bleeding is meant to happen “out of sight, out of mind,” whereas men’s (voluntary) bleeding in war, for example, is valorized. A new generation of activists, relying heavily on the Internet, is deeply engaged in cultural and legal reform efforts designed to create positive change in the practical realities of women’s lives.

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#### INTRODUCTION

Most state and federal laws in the United States no longer contain sex-based classifications. Women can serve on juries.<sup>1</sup> Women can obtain credit cards in their own names.<sup>2</sup> Women have an equal right to be appointed as an administrator of a decedent's intestate estate.<sup>3</sup> Female military personnel receive the same dependency benefits as male military personnel do.<sup>4</sup> Female and male athletes have the right to

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1. Civil Rights Act of 1957, Pub. L. No. 85-315, § 152, 71 Stat. 634, 638 (codified as amended at 28 U.S.C. § 1861 (1988)) (permitting women to serve on federal juries even if state law prohibited them from serving on state juries). Women did not have the ability to serve on juries in all fifty states until 1973. *See* JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 225 (1991).

2. *See* Equal Credit Opportunity Act, and amendments, 15 U.S.C. §§ 1691-1691f (1976) (prohibiting discrimination in credit transactions on account of sex or marital status, among other characteristics).

3. *See Reed v. Reed*, 404 U.S. 71, 74 (1971) (declaring unconstitutional an Idaho statute that preferred males over females as an administrator of a decedent's estate).

4. *See Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (declaring unconstitutional federal law that automatically awarded dependent benefits to male

equal opportunity to participate in sports at federally-funded educational institutions.<sup>5</sup> For the most part, overt discrimination has been eliminated from the law in the United States and other western democracies. Notwithstanding this sea change in the law over the last fifty years, however, pockets of legally sanctioned discrimination still exist in the structure or application of some laws. For example, a law may appear to be neutral on its face, but have a disparate impact on one sex. Similarly, a law as implemented may incorporate or exacerbate existing gender bias.<sup>6</sup> The tax law is no exception.

The tax law contains numerous examples of non-obvious gender bias. Consider, for example, the fact that in the United States, employers who are sued for gender discrimination can deduct their payouts as business expenses, but women (and men) who suffer from employment discrimination on the basis of their gender must include the award in their gross income.<sup>7</sup> Careful scrutiny reveals that gender is deeply embedded in what seem to be facially neutral tax laws. One example of this is the “tampon tax”—an umbrella term that refers to sales, value-added tax (VAT), and similar taxes imposed on menstrual hygiene products, whether tampons or not. That these products are subject to taxation—when there are no comparable products used by men, and the closest analogues avoid taxation—illustrates that tax reform is an essential component of a larger effort to achieve gender equality. Because gender equality is an integral part of a robust human rights agenda, tax reform also must be understood as key to realizing more meaningful human rights.

Women around the globe are speaking out against the tampon tax in unprecedented numbers. The crux of their argument is this: Over half the world’s population use menstrual hygiene products for multiple

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military members but required female military members to demonstrate a spouse’s economic dependency).

5. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012) (providing that “[n]o person in the United States shall . . . be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance”).

6. See Anthony C. Infanti & Bridget J. Crawford, *Introduction*, in *CRITICAL TAX THEORY: AN INTRODUCTION* xxi, xxi (2009) (explaining the goals of critical tax theory as wanting “to uncover bias in the tax laws” and “to explore and expose how the tax laws both reflect and construct social meaning”).

7. See Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 *S. CAL. REV. L. & WOMEN’S STUD.* 223, 254 (1998) (“The privileging of what are termed ‘physical’ harms, defined to exclude effects of employment discrimination, operates to subordinate the very real injuries experienced by those individuals denied equal opportunity to succeed on their jobs as a result of their gender or race.”).

days every month for at least thirty years,<sup>8</sup> but many countries' tax systems treat these items as luxuries and not necessities. On-line campaigns such as "Don't Tax My Period" in Australia<sup>9</sup> and the multi-national "Bloody Disgrace" movement<sup>10</sup> draw attention to the inequities of the tampon tax. In early 2016, a popular YouTube interviewer asked a somewhat surprised President Obama for his views on the tax, which he explained as resulting from women's historic absence from legislatures.<sup>11</sup> This explanation is partial at best. The lack of attention to the sales tax imposed on menstrual hygiene products has roots in misperceptions about menstruation, hostility to women's physicality, and the culturally enforced invisibility of women's bodies. By understanding access to affordable menstrual hygiene products as a human rights issue, the sales tax emerges as a key obstacle to gender equality and human rights. In the context of other sales taxes that fall disproportionately on women, such as taxes on baby diapers and breast

8. One study estimates that a woman in a low-income country can expect to menstruate for approximately 1,400 days in a lifetime. Colin Sumpter & Belen Torondel, *A Systematic Review of the Health and Social Effects of Menstrual Hygiene Management*, 8 PLOS ONE (Apr. 26, 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3637379/> [<https://perma.cc/E4VV-TFSM>]. A popular press source estimates that in the United States, a woman will spend approximately \$18,000 on menstruation-related products during her lifetime. See Kimberly Yam, *Free Tampons, Pads Now Stocked in Bathrooms Across Brown University Campus*, HUFFINGTON POST (Sept. 7, 2016, 6:01 PM), [http://www.huffingtonpost.com/entry/bathrooms-across-brown-universitys-campus-are-now-stocked-with-free-tampons-pads\\_us\\_57d03400e4b0a48094a6df9e](http://www.huffingtonpost.com/entry/bathrooms-across-brown-universitys-campus-are-now-stocked-with-free-tampons-pads_us_57d03400e4b0a48094a6df9e) [<https://perma.cc/AK8R-H9QA>].

9. See Subeta Vimalarajah, *Stop Taxing My Period!*, COMMUNITYRUN <https://www.communityrun.org/petitions/stop-taxing-my-period> [<https://perma.cc/7Q7R-8S85>] (last visited Mar. 12, 2017) (online petition addressed to Australian state and territorial treasurers).

10. BLOODY DISGRACE, <https://www.facebook.com/bloodydisgraceorg> [<https://perms.cc/A3MY-L9WY>] (last visited Apr. 11, 2017). If the average American woman pays an estimated \$18,000 on menstruation-related products during her lifetime, see *supra* note 8, and one assumes that figure consists only of the pre-tax cost of tampons and pads and that sales tax is imposed at a rate of five percent, then one can estimate the average lifetime cost of tampon tax as \$800.

11. *Ingrid Nilsen Interviews Obama*, at 03:34 YOUTUBE (Jan. 16, 2016), <https://youtu.be/K2OaaWjB6S8> [<https://perma.cc/4CE4-EKSA>] (saying "I have to tell you, I have no idea why states would tax these [tampons] as luxury items. I suspect it's because men were making the laws when those taxes were passed. And I think it is pretty sensible for women in those states that you just mentioned to work to get those taxes removed."); see also Prachi Gupta, *Obama: Tampon Tax Probably Exists Because Only Dudes Were Making Laws*, COSMOPOLITAN (Jan. 15, 2016), <http://www.cosmopolitan.com/politics/news/a52262/president-obama-responds-totampon-tax/> [<https://perma.cc/7EAK-KARY>]; Maya Rhoden, *President Obama Doesn't Understand the 'Tampon Tax' Either*, TIME (Jan. 15, 2016), <http://time.com/4183108/obama-tampon-tax-sanitary/> [<https://perma.cc/L8SR-B9RR>].

pumps in some jurisdictions,<sup>12</sup> attention to this tax exposes the discriminatory practices that are facilitated by societal and fiscal concealment. The tampon tax is a case study in the way that gender is embedded in legal structures, making tax reform an essential tool in achieving both gender equality and human rights.

Part I of this Article provides a snapshot overview of the current sales taxes on menstrual hygiene products throughout the world. In most of the states in the United States, these items are subject to sales tax.<sup>13</sup> In much of the European Union, these products are treated as luxuries and are subject to the highest rate of VAT.<sup>14</sup> Part II situates the discussion of the tax on menstrual hygiene products in a broader cultural context of ridicule, shame, disgust, and silence about women's bodily functions. Part III explains how access to affordable menstrual hygiene products relates to human rights to be free from discrimination, to sanitation, to education, to dignity, and to work.<sup>15</sup> The discussion refers to examples from India and Kenya to illustrate the importance of access to both affordable menstrual hygiene products and private, hygienic sanitation facilities. Part IV explains the actions that some state and local governments in the United States have taken to facilitate access to menstrual hygiene products, including elimination of all sales taxes and the provision of free products in public schools, jails, and homeless shelters.<sup>16</sup> This Part then transitions to a discussion of legal strategies that either are being employed or could be used in jurisdictions that cannot or will not voluntarily repeal the tampon tax. In the United States, a class action law suit was an effective catalyst for change in at least one jurisdiction, and there is similar litigation pending in three other states.<sup>17</sup> Although no similar case has come before the European Court of Human Rights or the European Court of Justice, both of those courts have recognized the link between taxation and human rights. This Part discusses the European cases that might be helpful precedents for a future challenge. Part V explores why the tampon tax has become a global issue, and how activists have deployed social media to mobilize popular opposition to the tax on menstrual hygiene products.

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12. Bethany McDonald, *Infant Supplies and Sales Tax*, AVALARA TRUSTFILE (June 10, 2016), [https://trustfile.avalara.com/blog/infant-supplies-and-sales-tax/\[https://perma.cc/Y3PU-V6X8\]](https://trustfile.avalara.com/blog/infant-supplies-and-sales-tax/[https://perma.cc/Y3PU-V6X8]) (on taxation of diapers and breast pumps in certain jurisdictions); Van Thompson, *Are Baby Diapers Exempt or Taxable?*, NEST, <http://budgeting.thenest.com/baby-diapers-exempt-taxable-29440.html>.

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part III.A.-C.

16. *See infra* Part IV.A.

17. *See infra* Part IV.B.

The Article concludes with a discussion of the importance of public attention to this issue and the relationship of the tampon tax to tax reform generally. The tampon tax represents the kinds of gender inequities that exist in the current law and that will continue to flourish in the absence of gender-based budgeting analyses. In a culture of silence about the gendered impact of tax laws, it will be impossible to achieve equality. The tampon tax has spurred citizens world-wide to advocate for fairer tax laws. In talking without shame about women's bodily functions, women (and some men) are demanding that the tax law rid itself of this instance of blatant gender discrimination.

## I. AN OVERVIEW OF SALES TAX ON MENSTRUAL HYGIENE PRODUCTS

### A. *General Theory of Sales and VAT Tax Exemptions*

The sales tax is familiar to most people. In the United States, each of the fifty states decides whether to implement a state sales tax system (there is no national sales tax in the United States). Five states—Alaska, Delaware, Oregon, Montana, and New Hampshire—have decided not to impose a sales tax.<sup>18</sup> The remaining forty-five states do impose and collect sales tax. The fiscal importance of the sales tax cannot be overstated. Aggregate sales tax collected by the states far exceeds state income tax revenue.<sup>19</sup> In 2015, for example, states collected over \$430 billion in sales taxes, but just over \$338 billion in income taxes.<sup>20</sup> The sales tax is a meaningful source of revenue for the states that impose it.

In the forty-five states that have a sales tax, the system generally works as follows: the state imposes a tax on the sale of tangible property.<sup>21</sup> The retail seller collects the tax from the customer and then pays the tax to the state. By statutory definition, most sales get swept into the “taxable” net, unless they are specifically excluded from taxation.<sup>22</sup> Commonly excluded from the sales tax are food, medical

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18. See Taryn Hillin, *These are the U.S. States that Tax Women for Having Periods*, FUSION (June 3, 2015, 12:33 PM), <http://fusion.net/story/142965/states-that-tax-tampons-period-tax/> [<https://perma.cc/9U84-F3PU>].

19. See *2015 Annual Survey of State Government Tax Collections*, UNITED STATES CENSUS BUREAU (Sept. 23, 2016), <https://www.census.gov/govs/statetax/> [<https://perma.cc/E92B-TXML>].

20. *Id.*

21. See, e.g., Timothy R. Hurley, *Curing the Structural Defect in State Tax Systems: Expanding the Tax Base to Include Services*, 61 MERCER L. REV. 491, 497 (2010).

22. *Id.*

supplies, and necessities.<sup>23</sup> And as of April 1, 2017, in thirty-eight of the United States and in the District of Columbia, menstrual hygiene products are subject to sales tax, typically because they are classified as non-medical items or non-necessities.<sup>24</sup>

In many other countries, a national VAT system is the norm. Under a VAT system, tax is imposed at each stage in the production and distribution process, with the final stage coming when the product is sold to the retail customer.<sup>25</sup> In the European Union, to give just one example, the VAT allows for four categories of taxation: (1) exempt; (2) zero tax (meaning technically subject to taxation but no tax is charged); (3) “reduced rate” of not less than five percent for items deemed “necessities” (listed on a particular schedule); and (4) the “standard rate” of fifteen percent or more for “luxuries.”<sup>26</sup> Individual countries cannot change or eliminate VAT taxes on their own; tax rates are strictly controlled.<sup>27</sup> Any reduction in VAT rates in European Union countries must be approved by the European Union Parliament.<sup>28</sup>

Items in the exempt category include healthcare services, sports activities, and education-related expenses such as university fees and

23. Sarah Larimer, *The ‘Tampon Tax,’ Explained*, WASH. POST (Jan. 8, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/?utm\\_term=.39d2a424cde7](https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/?utm_term=.39d2a424cde7) [<https://perma.cc/4NQZ-PCUJ>].

24. See Hillin, *supra* note 18; Linda Qiu, *Are Pads and Tampons Taxed but Viagra and Rogaine Not?*, PUNDITFACT (Jan. 22, 2017, 3:51 PM), <http://www.politifact.com/punditfact/statements/2017/jan/22/ashley-judd/are-pads-and-tampons-taxed-viagra-and-rogaïne-not/> [<https://perma.cc/89DK-D7ZK>]. Legislation that repealed the sales tax on menstrual hygiene products in Connecticut and the District of Columbia is scheduled to take effect in the near future. See *infra* Part IV.B.2.

25. See, e.g., Raquel Alexander & LeAnn Luna, *Value-Added Taxes: An Ingredient in Corporate Tax Reform*, 21 KAN. J.L. & PUB. POL’Y 409, 412–14 (2012) (describing basic structure of VAT).

26. Council Directive 2006/112, art. 99, of the Council of the European Union of 28 Nov. 2006 on the Common System of Value Added Tax, 2006 O.J. (L 347) 1, 24 (“The reduced rates shall be fixed as a percentage of the taxable amount, which may not be less than 5 %.”). The difference between the categories of exempt and zero tax is significant insofar as an item in the “zero” category can be moved up to one of the higher tax categories (but cannot return to the zero category). Annex III lists the goods eligible for taxation at the reduced rate. See *id.* at annex III; see also Michael Randall, *The ‘Tampon Tax’: A UK and EU Standstill*, EU LAW ANALYSIS (Oct. 28, 2015), <http://eulawanalysis.blogspot.com/2015/10/the-tampon-tax-uk-and-eu-standstill.html> [<https://perma.cc/6TW8-5YXS>]. Member countries also may maintain any reduced rates or exemptions in force as of December 31, 1975 that satisfy certain conditions. Council Directive 2006/112, *supra* note 26, at art. 98, annex III.

27. See Council Directive 2006/112, *supra* note 26, at art. 96–97.

28. See Council Directive 2006/112, *supra* note 26, at pmb. ¶ 29 (“To prevent divergences in the standard rates of VAT applied by the Member States from leading to structural imbalances in the Community and distortions of competition in some sectors of activity, a minimum standard rate of 15 % should be fixed, subject to review.”); see also European Union: Economic and Social Committee: Opinion on Direct and Indirect Taxation ¶ 1.1.2 (Mar. 19, 1996).



supplies.<sup>29</sup> The exempt classification seems to have a fairly rational basis: items required for basic living or with an agreed-upon social utility—*i.e.*, supplies for children, many cultural activities, and charitable giving—are tax exempt.<sup>30</sup> Included in the “zero rating” (or no tax) category are those items that are seeming “necessities.”<sup>31</sup> Items in this category include children’s clothing and footwear, medical supplies, and basic foodstuffs (like bread, flour, cheese, cereals, milk, fruit, vegetables, pasta, and sugar).<sup>32</sup> Items eligible for the reduced rate are the supply of water and electricity for residential use, movie tickets, and hairdressing services.<sup>33</sup> Items taxed at the standard rate, in contrast, are prepared and catered foods, alcoholic beverages, and adult clothing.<sup>34</sup>

To a certain extent, the system of value-added taxation is based on a rubric of “human flourishing.”<sup>35</sup> That is, the theory underlying the VAT is that certain goods that humans need to reach their full potential—not just physical necessities, like food and shelter, but also education and culture—should be accessible, without tax, to individuals in all member states. It is difficult to see consistency in the application of the human flourishing framework, however, as clothing, to give just one example, would seem to be necessity for human flourishing regardless of whether worn by a child or an adult. For that reason, it is not obvious how much explanatory power the human flourishing framework has.

29. VALUE ADDED TAX ACT 1994, SCHEDULE 9: EXEMPTIONS, (UK) <http://www.legislation.gov.uk/ukpga/1994/23/schedule/9> [<https://perma.cc/88F7-GEXU>].

30. *Id.*

31. *See, e.g.*, VALUE ADDED TAX ACT 1994, SCHEDULE 8: ZERO-RATING, (UK) <http://www.legislation.gov.uk/ukpga/1994/23/schedule/8> [<https://perma.cc/8H8Y-28Q5>].

32. *See, e.g.*, HM Revenue & Customs, *VAT Rates on Different Goods and Services*, GOV.UK (Feb. 4, 2016) <https://www.gov.uk/guidance/rates-of-vat-on-different-goods-and-services> [<https://perma.cc/8GPF-PHU4>] (listing various goods and services and applicable VAT rates).

33. Council Directive 2006/112, *supra* note 26, at annex III (list of all items eligible for reduced rate).

34. *See, e.g.*, HM Revenue & Customs, *VAT Notice 709/1: Catering and Take-Away Food*, GOV.UK (Oct. 7, 2013), <https://www.gov.uk/government/publications/vat-notice-7091-catering-and-take-away-food/vat-notice-7091-catering-and-take-away-food> [<https://perma.cc/XF68-94U9>] (describing tax rates applicable to catered foods); HM Revenue & Customs, *supra* note 32 (describing tax rates applicable to adult clothing).

35. *See, e.g.*, Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537 (2016) (describing general relationship between and among tax systems, communities, and human flourishing); Diane Elson, *The Reduction of the UK Budget Deficit: A Human Rights Perspective*, 26 *INT’L REV. APPLIED ECON.* 177, 179 (2012) (describing human flourishing as a goal of government economic policies).

Note further that even though there is a union-wide VAT and four categories of taxation, the European Union sets the minimum rate in each of the two taxable categories.<sup>36</sup> Individual national rates within the two taxable categories may vary from country to country.<sup>37</sup> In most states in the European Union, menstrual hygiene products are subject to taxation as non-essential luxury items, and as such, are taxed at the highest permissible rate.<sup>38</sup> The tax on menstrual hygiene products is twenty-five percent in Denmark and nineteen percent in Germany, for example.<sup>39</sup> In the United Kingdom, the tampon tax rate is only five percent.<sup>40</sup> Even if one accepts the human flourishing rubric for the VAT classifications, the tampon tax seems like even more of an anomaly in the European Union than in the United States: while some states seem to provide tax exemptions with a similar rationale—Massachusetts does

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36. See *supra* note 26 and accompanying text.

37. See EUROPEAN COMMISSION, VAT RATES APPLIED IN THE MEMBER STATES OF THE EUROPEAN UNION, SITUATION AT 1ST JANUARY (2017), [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/vat/how\\_vat\\_works/rates/vat\\_rates\\_en.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf) [<https://perma.cc/D8JU-H7WF>] (listing VAT rates in member states).

38. Jessica Phelan, *Tampon Tax is Real. Women Everywhere Pay Their Government Extra to Have Periods*, GLOBALPOST (Aug. 15, 2015, 4:15 AM), <http://www.globalpost.com/article/6630542/2015/08/13/what-tampon-tax-and-where-do-women-have-pay-it> [<https://perma.cc/M6QD-JFRE>] (detailing VAT rates in many European countries). For a discussion of the difference between a sales tax and VAT, see Malcolm Gillis et al., *Indirect Consumption Taxes: Common Issues and Differences Among the Alternative Approaches*, 51 TAX. L. REV. 725 (1996) (explaining differences among sales tax, VAT, and business transfer tax).

39. Phelan, *supra* note 38, at 2 (listing rates in each country and explaining that Denmark, Sweden, and Norway impose a standard VAT rate of 25%; Italy imposes a tax of 22%; and Germany imposes a tax of 19%).

40. See Hannah Ellis-Petersen, *Tampon Tax: £15m Raised to be Spent on Women's Charities*, GUARDIAN (Nov. 25, 2015, 9:31 AM), <https://www.theguardian.com/uk-news/2015/nov/25/tampon-tax-15m-womens-charities-george-osborne-spending-review> [<https://perma.cc/ATD7-KWT9>] (referring to efforts to end the five percent VAT on menstrual hygiene products). Every British woman will pay an estimated 922 pounds over her lifetime in taxes on menstrual hygiene products. Laura Coryton, *Periods Come With £18,450 Price Tax. #EndTamponTaxAlready!!*, CHANGE.ORG (Sept. 3, 2015), [https://www.change.org/p/1550755/u/13003696?utm\\_source=petition\\_update&utm\\_medium=facebook&utm\\_campaign=fb\\_comment&fb\\_comment\\_id=870892312996965\\_870953549657508#fb9b84823998ec](https://www.change.org/p/1550755/u/13003696?utm_source=petition_update&utm_medium=facebook&utm_campaign=fb_comment&fb_comment_id=870892312996965_870953549657508#fb9b84823998ec) [<https://perma.cc/8F9Y-WB2H>] (online petition started by woman in London to urge women to speak out against tampon tax). The yearly total raised by the tampon tax in Britain is estimated to be £15 million. See Ellis-Petersen, *supra* note 40 (reporting on former Chancellor of the Exchequer George Osborne's intended actions with respect to £15 million in tax on menstrual hygiene products). In France, until a recent reduction by that country's Parliament, the tax generated annual revenue of €55 million. See Randall, *supra* note 26 (describing French government's opposition to a vote by members of French Parliament that would have reduced VAT on menstrual hygiene products to five percent).

not tax food and clothing, for example<sup>41</sup>—many other states in the United States seemingly impose taxes wherever political expediency dictates.<sup>42</sup>

### *B. Tampon Taxes in the United States*

In the United States, the existence, structure, and administration of the state sales tax is left to each state. In the thirty-eight states that impose a tax on menstrual hygiene products, the decision does not seem to be universally deliberate. Some states have actively decided to tax these products, while others seem not to have considered the issue explicitly, yet do not classify menstrual hygiene products into any of the categories that the state recognizes as tax-exempt.

One state that taxes menstrual hygiene products is Florida. The Florida Department of Revenue imposes a six percent sales tax on all items sold,<sup>43</sup> unless that item is designated as exempt.<sup>44</sup> (As is typical in many states, some counties in Florida impose an additional tax on top of the state sales tax.<sup>45</sup>) Products that are tax-exempt include medical products and supplies, medicinal drugs, and “common household remedies recommended and generally sold for internal or external use in the cure, mitigation, treatment, or prevention of illness or disease in human beings, but not including cosmetics or toilet articles, notwithstanding the presence of medicinal ingredients therein.”<sup>46</sup> Both the Florida Statute and the Florida Administrative Code specifically state that the common household remedies that will be exempt from sales tax are those on a list “prescribed and approved by the Department of Business and Professional Regulation and certified to the

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41. See Mass. Dep’t of Rev., *A Guide to Sales and Use Tax*, MASS.GOV, <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax-guide.html> [<https://perma.cc/DZG2-W55A>] (last visited Apr. 3, 2017) (listing tax-exempt items as “apparel and fabric goods” and “food and meals”).

42. See *supra* Part I.A.

43. See *Florida’s Discretionary Sales Surtax*, FLORIDA DEP’T REVENUE, <http://floridarevenue.com/dor/taxes/discretionary.html> [<https://perma.cc/68RT-QGUQ>].

44. FLA. STAT. § 212.08 (2016).

45. In Leon County, Florida (the home of the state capital, Tallahassee), for example, there is an additional 1.5% county tax imposed on top of the state sales tax of 6%. See *Tip # 12A01-17: Leon County Discretionary Sales Surtax Continues at 1.5% Rate*, FLORIDA DEP’T REVENUE (Nov. 19, 2012), <http://floridarevenue.com/dor/tips/tip12a01-17.html> [<https://perma.cc/G5NT-TE8N>].

46. § 212.08(2)(a); FLA. ADMIN. CODE ANN. r. 12A-1.020 (2017) (exempting drugs, medicinal drugs, common household remedies from taxation used by hospitals, health care entities, or other licensed practitioners).

Department of Revenue.”<sup>47</sup> That Internet-accessible list includes adhesive tape, alcohol swabs, bandages, gauze, first aid kits, minoxidil for hair regrowth, and hemorrhoid treatments.<sup>48</sup> It does not include menstrual hygiene products; those products are subject to sales tax under Florida law. Furthermore, from a theoretical perspective, it is not clear that menstrual hygiene products could be classified as tax-exempt on the grounds that they are used “for treatment, or prevention of illness or disease in human beings,”<sup>49</sup> at least not any illness or disease on the part of the user. Menstruation, after all, is a natural biological occurrence that does not signify any lack of health on the part of the menstruating girl or woman.

Yet menstrual hygiene products are obviously not “cosmetics,” which the statute defines as “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance” such as makeup and body lotions (subject to taxation).<sup>50</sup> Nor are menstrual hygiene products clearly “toilet articles,” defined as those “advertised or held out for sale for grooming purposes” or “customarily used for grooming purposes,” such as soap, toothpaste, and shampoo (all subject to taxation).<sup>51</sup> The Florida tax on menstrual hygiene products seems to exist because these products have not been designated as exempt, although they do not clearly fit into the established taxable categories either.

New York is another state that, up until September 1, 2016, imposed a sales tax on menstrual hygiene products.<sup>52</sup> Generally speaking, New York imposes a four percent sales tax on the sale of

47. FLA. STAT. § 212.08(2)(a) (2016); FLA. ADMIN. CODE ANN. r. 12A-1.020 (2017).

48. FLA. DEP’T OF REV., FORM DR-46NT: NONTAXABLE MEDICAL ITEMS AND GENERAL GROCERY LIST 1 (2016), [http://dor.myflorida.com/Forms\\_library/current/dr46nt.pdf](http://dor.myflorida.com/Forms_library/current/dr46nt.pdf) [<https://perma.cc/JAN2-TEAX>].

49. § 212.08(2)(a).

50. § 212.08(2)(b)(2).

51. § 212.08(2)(b)(3).

52. Act of May 19, 2016, N.Y. Tax Law § 1115, N.Y. S07838, [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=S07838&term=2015&Summary=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S07838&term=2015&Summary=Y&Text=Y) [<https://perma.cc/EAD6-L6SD>] (exempting “feminine hygiene products, including, but not limited to, sanitary napkins, tampons and panty liners” from sales tax) and Act of May 19, 2015, N.Y. TAX LAW § 1115, N.Y. A07555A, [http://nyassembly.gov/leg/?default\\_fld=%0D%0A&leg\\_video=&bn=A07555A&term=2015&Summary=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=A07555A&term=2015&Summary=Y&Text=Y) [<https://perma.cc/Y8TT-PFHM>] (same). The repeal took effect on September 1, 2016. For press coverage, see Associated Press, *Legislature Cuts Taxes on Tampons and Other Feminine Hygiene Products*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/nyregion/new-york-legislature-cuts-taxes-on-feminine-hygiene-products.html> [<https://perma.cc/4MWA-6UG4>].

“tangible personal property.”<sup>53</sup> Specifically exempt from the sales tax are food and food products “sold for human consumption” (but not candy, beer, or wine);<sup>54</sup> “medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics and toilet articles;”<sup>55</sup> and drugs and medicines used “in the cure, mitigation, treatment or prevention of illnesses or diseases . . . but not including cosmetics or toilet articles.”<sup>56</sup> By regulation, the New York State Department of Taxation and Finances defines “drugs” and “medicines,” which are tax-exempt, as articles that are recognized for use in the prevention, diagnosis, and treatment of disease as well as “articles (other than food) intended to affect the structure or any function of the human body.”<sup>57</sup> Oral contraceptives are tax-exempt, as are intrauterine birth control devices.<sup>58</sup> An example of tax-exempt medical devices are “bandages, gauze and dressings.”<sup>59</sup> Examples of tax-exempt “products consumed by humans for the preservation of health”<sup>60</sup> include acne medications,<sup>61</sup> dandruff shampoos,<sup>62</sup> douches (except those acting only as deodorants),<sup>63</sup> and foot powders.<sup>64</sup>

Perhaps because of the complexity of New York law, the State Department of Taxation and Finances promulgates a “Guide to Sales Tax for Drugstores and Pharmacies.”<sup>65</sup> This guide specifically denominates as tax-exempt condoms,<sup>66</sup> “incontinence liners,”<sup>67</sup> and “products that are intended as a hair regrowth treatment for use by human beings who experience hair loss or gradually thinning hair.”<sup>68</sup> The same publication explicitly stated prior to September 1, 2016 that “feminine hygiene products” are “generally used to control a normal

53. N.Y. TAX LAW § 1105(a) (2016).

54. § 1115(a)(1).

55. § 1115(a)(3).

56. *Id.*

57. N.Y. COMP. CODES R. & REGS. tit. 20, § 528.4(b)(1)(i-ii) (2017).

58. § 528.4(b)(3), Example 2.

59. § 528.4(g)(1), Example 2.

60. § 528.4(b)(3).

61. § 528.4(b)(3), Example 4.

62. § 528.4(b)(3), Example 5.

63. § 528.4(b)(3), Example 7.

64. § 528.4(b)(3), Example 8.

65. Publication 840: A GUIDE TO SALES TAX FOR DRUGSTORES AND PHARMACIES, N.Y. STATE DEP'T OF TAX'N AND FIN. (1998), <https://www.tax.ny.gov/pdf/publications/sales/pub840.pdf> [<https://perma.cc/2283-9SE5>].

66. *Id.* at 12.

67. *Id.*

68. *Id.* at 8.

bodily function and to maintain personal cleanliness” and thus are subject to sales tax.<sup>69</sup> One national expert in state and local taxation has speculated that the New York tax classification of menstrual hygiene products was not the result of animus, but rather represented a good faith attempt to “implement a very technical definition.”<sup>70</sup> In any event, the decision to tax menstrual hygiene products in New York was a deliberate one, and one with consequences borne primarily by girls and women.

### *C. Tampon Taxes in the European Union*

The essential legal instrument regulating VAT application across the European Union, the E.U. VAT Directive (Directive), includes a minimum standard rate of fifteen percent.<sup>71</sup> The Directive contains three provisions relevant to the imposition of VAT on menstrual hygiene products. Article 98 states that Member States may apply a discretionary reduced rate of five percent to goods and services listed in Annex III.<sup>72</sup> Annex III lists “contraception and sanitary products” as candidates for the reduced rate.<sup>73</sup> Menstrual hygiene products were charged at the standard rate in the United Kingdom until the 2000 Budget, for example. Then the VAT rate on menstrual hygiene products was lowered to five percent.<sup>74</sup>

Further support for reclassification of menstrual hygiene products as VAT-exempt exists in Article 132 of the VAT Directive which permits VAT exemptions that are in the “public interest,” including, for example, “medical care.”<sup>75</sup> In addition, Articles 2 and 3(3) of the Treaty of the European Union make reference to ensuring equality

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69. *Id.* at 9. The law changed prospectively as of September 1, 2016. See *infra* note 282 and accompanying text; see also Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Sale and Use Tax Exemption for Feminine Hygiene Products Now in Effect (Sept. 1, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-sales-and-use-tax-exemption-feminine-hygiene-products-now-effect> [<https://perma.cc/HDQ2-5A5K>].

70. Telephone Interview by Bridget J. Crawford with Arthur R. Rosen, Partner, McDermott, Will & Emery (July 6, 2016) (saying that “In my heart of hearts, I do not believe that the tax administrators in New York had any discriminatory intent in mind. I believe that there was an effort to implement a very technical definition of the statutory exemption and that is the reason we have the situation with the feminine hygiene products being subject to tax”).

71. Council Directive 2006/112, *supra* note 26, at pmb1. ¶ 29.

72. *Id.* at art. 98 (providing that “Member States may apply either one or two reduced rates”).

73. *Id.* at annex III.

74. Randall, *supra* note 26.

75. Council Directive 2006/112, *supra* note 26, art. 132.

between men and women.<sup>76</sup> Making menstrual hygiene products VAT-exempt would be a symbolic step to uphold these values, but the European Parliament would have to approve the changes.<sup>77</sup>

So far, it is unclear how post-Brexit Britain plans to address the issue of the tampon tax (along with many other issues). The tax on menstrual hygiene products became a (perhaps surprising) wedge issue in the Brexit contest, but then reform efforts disappeared after the vote.<sup>78</sup> Currently, Her Majesty's Revenue and Customs classifies menstrual hygiene products as "non-essential items, luxury," while such things as edible sugar flowers and private jet maintenance are classified as "necessities."<sup>79</sup> Some Tory politicians used the European Union tax forced on Britain as an argument in favor of the exit from the European Union.<sup>80</sup> When it joined the Common Market in 1973, Britain

76. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. 1, art. 2, art. 3(2). The Official Journal of the European Union is available online at <http://eur-lex.europa.eu/> [<https://perma.cc/H9Y6-N2H2>].

77. Perhaps because of the significant revenue generated by the tampon tax, reform has been elusive. On October 15, 2015, members of the French Parliament voted against reducing the rate of French VAT on menstrual hygiene products from 20% to 5.5%. Jon Stone, *French Parliament Votes to Cut 'Tampon Tax' VAT on Women's Sanitary Products*, INDEP. (Dec. 15, 2015), <http://www.independent.co.uk/news/uk/politics/french-parliament-votes-to-cut-tampon-tax-vat-on-womens-sanitary-products-a6773676.html> [<https://perma.cc/7M4V-89UY>] (pointing out that the "change brings France broadly into line with the UK, where the charge on women's sanitary products is 5 per cent"). The French government had opposed the change likely because of the estimated fifty-five million (approximately £40 million or \$61.8 million) in taxes that it would have lost. *Id.* Only after the French government was able to put aside enough money to make up for the likely revenue loss did a second vote reduce the tax to 5.5%. *See id.* (describing French government's change of position). In 2015, British members of Parliament voted against the proposal to remove VAT on feminine hygiene products. *See* Randall, *supra* note 26; *see also* *France Rejects 'Tampon Tax' Change*, BBC (Oct. 15, 2015), <http://www.bbc.com/news/world-europe-34538672> [<https://perma.cc/5EVT-ZAR3>].

78. *See, e.g., Labour Claims 'Tampon Tax' Victory Amid Tory Rebellion*, BBC (Mar. 21, 2016), <http://www.bbc.com/news/uk-politics-35860525> [<https://perma.cc/P8P2-9UDC>]; Jeremy Wilson, *Tampons Are Being Used as a Weapon in the Tories' War Against the EU*, BUS. INSIDER (Mar. 18, 2016, 10:55 AM), <http://www.businessinsider.com/euroseptics-taking-advantage-of-tampon-tax-2016-3> [<https://perma.cc/2CYB-VC96>] ("[I]ncreasingly the tampon tax issue has become a battleground for those fighting on both sides of the EU referendum debate.").

79. *See, e.g., Helen Glaberson, Tampons are Taxed Whereas Edible Sugar Flowers Are Not*, GOOD HOUSEKEEPING (Feb. 10, 2015), <http://www.goodhousekeeping.co.uk/news/five-percent-tampon-tax-edible-sugar-flowers-crocodile-meat-not-taxed> [<https://perma.cc/8MFW-T4QK>] (citing Laura Coryton, *Stop Taxing Periods. Period. #EndTamponTax*, CHANGE.ORG <https://www.change.org/p/george-osborne-stop-taxing-periods-period> [<https://perma.cc/4GK4-7SXF>] (last visited Apr. 2, 2017)).

80. *See, e.g., Richard Teather, Tax Policy After Brexit*, INST. OF ECON. AFF. (June 28, 2016), <https://iea.org.uk/blog/tax-policy-after-brexit>

had imposed a VAT of either 17.5% or 10% on menstrual hygiene products to bring its tax rates into line with the rest of the European Union countries.<sup>81</sup> A campaign in 2000 won a reduction of the tax to five percent, but to eliminate it entirely as a member of the European Union would require approval from Brussels, a fact the Tories used as evidence of European “oppression.”<sup>82</sup> In early 2016, David Cameron secured the agreement of all twenty-eight European Union leaders to reduce the tax, but when the European Parliament took up the reform package, there was no consideration of reform of the tax on menstrual hygiene products.<sup>83</sup> In fact, in a separate action, the European Parliament voted against allowing individual states to impose a reduced rate of taxation on these products.<sup>84</sup> Chancellor George Osborne told the British Parliament that he was committed to getting the European Union rules changed, and that in the meantime, he would have the money raised by the tax on menstrual hygiene products donated to charities that help women (so, in effect, charging women for protection from domestic violence, a service government should provide).<sup>85</sup>

In general, European Union tax law and its stated underlying principles seem to offer some avenues for challenging the tax on tampons.<sup>86</sup> Whether these will be more productive than challenges in

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[<https://perma.cc/7AGM-N22F>] (“[W]ill the UK government give in to every demand for reduced rates for ‘special’ products, or will it stand up for a sensible, modern VAT?”).

81. Compare Amelia Butterly, *Why the ‘Tampon Tax’ is Here to Stay - For a While at Least*, BBC (Sept. 2, 2015), <http://www.bbc.co.uk/newsbeat/article/31299254/why-the-tampon-tax-is-here-to-stay---for-a-while-at-least> [<https://perma.cc/2E7P-MDMB>] (describing 17.5% tax rate) with *How the UK Taxes Periods*, REASONABLE APPROXIMATION (Feb. 22, 2015), <http://reasonableapproximation.net/2015/02/22/how-the-uk-taxes-periods.html> [<https://perma.cc/TU36-ZQDS>] (providing close reading of the United Kingdom-based *Stop Taxing Periods*. *Period* petition and explaining that the claim that VAT on menstrual hygiene products in 1973 was not likely to have been 17.5% because the products were standard-rated, or subject to taxation at the standard rate, which was 10% in 1973).

82. See Wilson, *supra* note 78.

83. See *European Parliament Vote Against Reduced Tampon Tax*, UKIP (May 26, 2016), [http://www.ukip.org/european\\_parliament\\_vote\\_against\\_reduced\\_tampon\\_tax](http://www.ukip.org/european_parliament_vote_against_reduced_tampon_tax), [<https://perma.cc/BZ7X-JXG7>].

84. See Louise Bours, *Anger as EU Rejects Tampon Tax Reduction*, GAZETTE (May 28, 2016, 7:00 AM), <http://www.blackpoolgazette.co.uk/news/anger-as-eu-rejects-tampon-tax-reduction-1-7935982> [<https://perma.cc/P377-P569>].

85. See Paul Waugh, *‘Tampon Tax’ Set To Benefit ‘Long List’ Of Women’s Charities In Budget*, HUFFINGTON POST: U.K. (Mar. 15, 2016, 9:02 PM), [http://www.huffingtonpost.co.uk/entry/george-osborne-tampon-tax-womens-charities\\_uk\\_56e8742be4b03fb88ede542b](http://www.huffingtonpost.co.uk/entry/george-osborne-tampon-tax-womens-charities_uk_56e8742be4b03fb88ede542b) [<https://perma.cc/R9QB-VPCE>].

86. See *infra* Part V.B. The campaign to eliminate the VAT on menstrual hygiene products in member states of the European Union has become very broad-



the United States remains to be seen. While United States law provides for equal protection challenges, which would require a showing that similar products used by men are not taxed, European law calls for European Union-wide measures that advance equality between the sexes.<sup>87</sup> The latter, as a more general and aspirational directive, may provide more fertile ground for such challenges, as it seems to take into account such issues as the stigmatization of one sex which discrepant taxation arguably supports.

## II. A CULTURAL HISTORY OF THE TAMPON TAX

Male perceptions of menstruation are not necessarily based in the material reality of women's bodies. At least some of these perceptions seem to consist of terror at a flood of Biblical proportions. As far back as the first century, the Irish epic *The Táin* tells the story of a woman warrior who loses a battle because she begins to menstruate "making three great trenches, in each of which a household can fit."<sup>88</sup> A modern expression of the same hyperbole occurred when (male) NASA engineers asked Sally Ride, the first female astronaut, if one hundred tampons would be enough for her week-long trip in the space capsule.<sup>89</sup> These two anecdotes, 2,000 years apart, demonstrate a certain degree of both ignorance and anxiety about women's bodies, which may be related to the invisibility of this issue. What, exactly, is at the root of this sentiment? This Part attempts to trace and unravel some of the cultural roots of this—dare we say—hysteria, which tends to magnify

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based. As of September 2016, in the United Kingdom, the "Stop Period Tax. Period" group had gathered over 320,000 signatures on its on-line petition. Coryton, *supra* note 40 (reporting "This petition made change with 320,088 supporters!"). Similar campaigns have flourished in Malaysia and Germany and call on the governing bodies in those countries to remove the VAT on menstrual hygiene products. See Penelope Kemekenidou, *Senken Sie die Tamponsteuer #tampontax*, CHANGE.ORG, <https://www.change.org/p/bundesrat-senken-sie-die-tamponsteuer-tampontax> [<https://perma.cc/YT6P-HXPQ>] (last visited Mar. 2, 2017) (reporting 32,010 supporters for petition addressed to German lawmakers); Kamelia Shamsuddin, *Stop Taxing Malaysian Women for their Periods! Period.*, CHANGE.ORG <https://www.change.org/p/malaysian-government-stop-taxing-malaysian-women-for-their-periods-period> [<https://perma.cc/PS4P-WML4>] (last visited Mar. 2, 2017) (reporting 14,487 supporters for petition addressed to Malaysian lawmakers).

87. See *infra* Part V.B.

88. THE TAIN: TÁIN BÓ CÚALNG FROM THE BOOK OF LEINSTER 269 (Cecile O'Rahilly, ed., 1970).

89. See Ann Friedman, *Astronaut Sally Ride and the Burden of Being the First*, AM. PROSPECT (Jun. 19, 2014), <http://prospect.org/article/astronaut-sally-ride-and-burden-being-first> [<https://perma.cc/Y9QE-AH9J>] (describing how NASA engineers inquired of Ride, "Is 100 the right number?" She would be in space for a week. 'That would not be the right number,' she told them. At every turn, her difference was made clear to her").

the natural event of menstruation to unreal and overwhelming proportions.<sup>90</sup>

In the United States, tampons have traded one ill-fitting regulatory classification for another. Tampons originally were categorized as cosmetics for United States Food and Drug Administration regulatory purposes, which may explain some of the confusion over their status as “luxuries” today.<sup>91</sup> Congress changed this classification only in 1976, bringing tampons under the rubric of medical devices for purposes of consumer-labeling laws.<sup>92</sup> Ironically, this re-categorizing exempted manufacturers from having to list their contents on the packaging, allowing manufacturers to escape scrutiny for what some claim may be hazardous ingredients.<sup>93</sup> A recent bill introduced in the House of Representatives in 2016 seeks to force manufacturers to disclose the materials that comprise menstrual hygiene products.<sup>94</sup>

90. Religious attitudes toward menstruating women undoubtedly influence cultural perceptions. See, e.g., Jody Myers & Jane Rachel Litman, *The Secret of Jewish Femininity: Hiddenness, Power, and Physicality in the Theology of Orthodox Women in the Contemporary World*, in GENDER AND JUDAISM: THE TRANSFORMATION OF TRADITION 51, 51–71 (T.M. Rudavsky ed., 1995) (explaining traditional Judaic concept of *niddah*, separateness, as applied to menstruating women); Robert E. Charney, *The Limits of Religious Accommodation in Secular Public Schools*, 7 J. PARLIAMENTARY & POL. L. 247, 247 (2013) (describing practice at Muslim prayer service conducted for middle school students in which girls are separated from boys and menstruating girls are separated from non-menstruating girls). A complete discussion of religious attitudes is beyond the scope of this Article.

91. See Ashley Fetters, *The Tampon: A History*, ATLANTIC (June 1, 2015), <http://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/394334/> [<https://perma.cc/D5J8-V32V>] (describing recategorization under the Food, Drug and Cosmetic Act in 1976 to medical devices).

92. *Id.* The issue of the classification of menstrual hygiene products for purposes of federal tax law that permits taxpayers to pay for certain health-related expenses with pre-tax dollars that they have set aside in what are commonly known as flexible spending accounts. United States Representative Grace Meng, a Democrat from Queens, New York, has introduced federal tax legislation that would make menstrual hygiene products permissible purchases with funds from flexible spending accounts. H.R. 3117, 114th Cong. (2015); see *The Tampon Tax and Gender Equality*, WHARTON (Apr. 21, 2016), <http://knowledge.wharton.upenn.edu/article/bobel-weiss-wolf-tampon-tax/> [<https://perma.cc/S66H-YBUT>].

93. Fetters, *supra* note 91.

94. See Accurate Labeling of Menstrual Products Act of 2016, H.R. 5916, 114th Cong. (2016) (requiring labeling disclosure of the products that go into certain menstrual hygiene products as well as douches). This legislation was introduced by Representative Meng as part of a package that includes the Menstrual Products Tax Credit Act of 2016, H.R. 5917, 114th Cong. (2016), which would provide a tax credit for use of menstrual hygiene products by low-income women, and the Menstrual Products for Employees Act, H.R. 5929, 114th Cong. (2016) and Menstrual Products for Employees Act of 2016, H.R. 5915, 114th Cong. (2016), which would require certain employers with more than 100 employees to provide menstrual hygiene products to their workers at no cost. See generally Press Release, U.S. Congresswoman Grace Meng, Meng Introduces Package of Bills to Make Feminine Hygiene Products More

Male misperceptions and legislative re-classifications raise interesting questions about the fundamental core of Western cultural attitudes toward menstrual hygiene products. Why were tampons ever classified as a cosmetic; *i.e.*, a beauty product, rather than a product women use because of their biology? The difference between a medical device and a cosmetic one is, of course, that a cosmetic device is an option while a medical device is, for those who need it, a requirement. Why would there be confusion about whether menstrual hygiene products are necessary or optional?

It is easy to blame legal misclassification of menstrual hygiene products on the fact that men made the laws.<sup>95</sup> This comports with the impression that men generally do not understand what menstruation is, or even if they do, men do not care whether menstrual hygiene products are biological necessities. But such a facile response does not explain the particular *origin* of the confusion or disinterest. To be sure, all-male standard-setting bodies have long been ready to classify women's biology as debilitating and in need of medical intervention: witness the nineteenth century embrace of female hysteria<sup>96</sup> or the persistence of belief in the debilitating nature of premenstrual syndrome.<sup>97</sup>

Consider that related products, like diapers for babies and toddlers or even adult incontinence pads, are classified as tax-exempt in some jurisdictions (*i.e.*, they are not treated as luxuries).<sup>98</sup> What do menstrual hygiene products and diapers or incontinence pads have in common? All offer a solution to bodily functions that the wearer cannot control. Herein, perhaps, lies the source of the anxiety attending menstruation—or, rather, apparent confusion or disinterest about the necessity of menstrual hygiene products. The sentiment arises out of an anxiety caused by the specter of a specifically female adult who cannot control bodily effluvia. The possibility that an adult should have bodily emissions which she cannot control—adults of both sexes have learned

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Safe, Accessible, and Affordable to Women (July 26, 2016), <https://meng.house.gov/media-center/press-releases/meng-introduces-package-of-bills-to-make-feminine-hygiene-products-more> [<https://perma.cc/Q3C9-AWVW>].

95. See *supra* note 11 and accompanying text (citing President Obama's explanation for the existence of a tampon tax in the United States).

96. See, *e.g.*, Laura Briggs, *The Race of Hysteria: "Overcivilization" and "Savage" Woman in Late Nineteenth-Century Obstetrics and Gynecology*, 52 AM. Q. 246 (2000) (citing nineteenth century doctor George Beard's claims about widespread hysteria among women).

97. See Luciana Magnoni Reberte et al., *Men's Perceptions and Attitudes Toward the Partner with Premenstrual Syndrome*, 8 AM. J. MEN'S HEALTH 137, 140-42 (2014) (suggesting that twenty young Brazilian men surveyed did not understand natural aspects of premenstrual syndrome).

98. See, *e.g.*, MINNESOTA REVENUE, HEALTH PRODUCT EXEMPTIONS (2009) <http://www.revenue.state.mn.us/businesses/sut/factsheets/FS117E.pdf> [<https://perma.cc/Q6XR-J2GY>] (diapers and breast pumps exempt from state sales tax).

and are expected to control their urination and defecation (with exceptions for those who are very old)—is a deeply disturbing one to modern society, and one which both confirms women’s inferior status and raises fears about the control of bodily boundaries in general.<sup>99</sup> The last five hundred years or so of Western cultural development provide further clues to this anxiety.

There is a scholarly consensus that the late 1500s to the late 1800s, known as the early modern period, saw a fundamental change in cultural constructions of the body. As Mikhail Bakhtin, Norbert Elias, and others have argued, the issue “of bodily control took on a new interest and urgency in early modern European culture.”<sup>100</sup> The period saw a spate of conduct manuals instructing people on proper table manners and the control of natural functions, such as urination, defecation, sneezing, coughing, and the like.<sup>101</sup> Elias attributes the promulgation of these new standards to the twin desires of the ruling classes to control those beneath them, and to differentiate themselves from their social inferiors by maintaining “higher” standards of bodily control.<sup>102</sup> Elias identifies a turning point in this process as the 1530 publication of Erasmus’ treatise *De Civilitate de Morum Puerilium*, or a “[a] *lytell booke of good maners for children*” (a book of manners for children), aimed primarily at aristocratic boys, the “standard setters of the future.”<sup>103</sup> Bakhtin and Elias both ignore gender, but this is also the period which began to employ different standards of restraint for men and women, and to institute what Lacan calls “the laws of urinary segregation,” establishing gender-related norms of what bodily functions sexes could perform in each other’s presence.<sup>104</sup> Men who defecated in front of women were, in the words of a German court

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99. See generally Gail Kern Paster, *Leaky Vessels: The Incontinent Women of Jacobean City Comedy*, 18 *RENAISSANCE DRAMA* 43, 49 (1987).

100. See *id.* at 44.

101. *Id.*

102. *Id.*

103. *Id.* at 44–45.

104. *Id.* at 45 (quoting JACQUES LACAN, *ÉCRITS: A SELECTION* 151 (Alan Sheridan trans., 1977) (1966)). To be sure, this expectation that women and men should urinate separately has great hold in contemporary American culture. Without this expectation, there would be no basis for an objection to men or women—transgender or not—using any particular bathroom. See generally Jennifer Weiner, Opinion, *The Year of the Toilet*, *N.Y. TIMES* (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/opinion/the-year-of-the-toilet.html> [<https://perma.cc/BU3T-C6PE>] (describing conservative opposition to United States Department of Labor guidelines, among other laws and regulations, that allowed individuals to use the restroom of their choosing).

regulation from 1570, "rustics who have not been to court or lived among refined and honorable people."<sup>105</sup>

In this new hierarchy of bodily restraint, women occupied a lower rung than men.<sup>106</sup> Conventional wisdom had long endowed women with many bodily weaknesses men did not have, such as irrational longings during pregnancy.<sup>107</sup> As Gail Kern Paster has shown, in the early modern period, women's bodies became understood as lacking control of their boundaries, "leaky vessels"—moister than men's, controlled by the moon and liable to producing all sorts of liquids: breast milk, menstrual blood, tears, urine, and even vaginal discharge, none of which are subject to easy (or any) control.<sup>108</sup> Even emissions which were thought to be under control when emanating from men's bodies, such as urine, became shamefully out of control in women's. For example, the plot of Ben Jonson's comedy *Bartholomew Fair* turns in part on a woman's desperate search for a receptacle in which to urinate.<sup>109</sup> Similarly, a source of shame for Olivia in Shakespeare's *Twelfth Night* is that a male character claims to have seen her "make her great Ps."<sup>110</sup>

As early modern science and popular thought began to understand that bodily fluids were not all one substance, blood began to take on its own importance.<sup>111</sup> In the literary imagination, the salient difference between men's bleeding and women's bleeding is control.<sup>112</sup> In other words, men bleed because they want to (or at least voluntarily place themselves into a situation like battle, in which another male may cause them to bleed). In her analysis of Shakespeare's *Julius Caesar*, Gail Kern Paster explains the different meanings of male and female bleeding in early modern culture.<sup>113</sup> Men bleed because they "want to" (they choose to go to war, to commit suicide), or in a way that is controlled (being bled as a voluntary medical remedy, for example). Women bleed—*i.e.* menstrual bleeding, the kind of bleeding emblematic of women—without having a choice in the matter and

105. Paster, *supra* note 99, at 45 (quoting NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* 131 (Edmund Jephcott trans., 1978) (1939)).

106. *See, e.g.*, GAIL KERN PASTER, *THE BODY EMBARRASSED: DRAMA AND DISCIPLINE OF SHAME IN EARLY MODERN ENGLAND* 16 (1993) (describing "physiological differences paralleling and reproducing structures of social difference").

107. *See, e.g., id.* at 181 (longings of women understood as "deeply irrational, bizarre, or even pathological").

108. *See* Paster, *supra* note 99, at 44, 49–50.

109. BEN JONSON, *BARTHOLOMEW FAIR*, act 4, sc. 5.

110. WILLIAM SHAKESPEARE, *TWELFTH NIGHT*, act 3, sc. 5.

111. *See, e.g.*, Gail Kern Paster, "In the Spirit of Men There is No Blood": *Blood as Trope of Gender in Julius Caesar*, 40 *SHAKESPEARE Q.* 284, 286 (1989).

112. *Id.* at 286–87.

113. *Id.* at 284.

without control, thus making their effluvia not only involuntary but also punitive and indicative of weakness.<sup>114</sup> The male body epitomizes the self-containment and self-control which began to define the emerging bodily ideal in this period, while women represent the naturally self-transgressing body, the one which cannot seal off its orifices from the outside world and maintain its boundaries.<sup>115</sup> Recall that Caesar's body becomes effeminized by his assassination: his stabbing to death and subsequent display of his body reveal, in Paster's words, "a womanly inability to stop bleeding."<sup>116</sup> This difference—between women's menstrual bleeding and men's voluntary bloodlettings—understands the differences between men and women's bodies as relating to the ability to control oneself. In Shakespeare's *The Merchant of Venice*, Portia tries to establish her herself as worthy of being included in the male circle of conspirators by her self-wounding:<sup>117</sup> she stabs herself in the thigh to "efface the physical difference that separates her from her husband."<sup>118</sup> As Paster explains it, "[h]ers is not the involuntary wound of the leaking female body but the honorifically gendered, purgative, voluntary wound of the male."<sup>119</sup>

The early modern period's reconfiguration of bodily boundaries and bodily control have filtered into contemporary attitudes about menstruation. As the contemporary bumper sticker proclaims, one cannot trust something which "bleeds for five days and doesn't die."<sup>120</sup> Women's uncontrolled menstrual bleeding is reinforced as abnormal by treating menstrual hygiene products as cosmetic items or as luxuries. The tax treatment reinforces the notion that these products are optional indulgences for a body whose boundaries should be subject to control. This fantasy of the early modern period became foundational to human self-perception<sup>121</sup> and it continues to the present day.

In the occasional instances that women's menstruation is not treated as invisible, it is often described (and may be portrayed by women themselves) as something that is mentally or physically debilitating.<sup>122</sup> This understanding of menstruation is recognized as

114. *Id.* at 287.

115. *Id.* at 285.

116. *Id.*

117. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 2, sc. 1.

118. Paster, *supra* note 99, at 292.

119. *Id.* at 294 (emphasis omitted).

120. See also *SOUTH PARK: BIGGER, LONGER & UNCUT* (Paramount Pictures 1999) (in which the character of Mr. Garrison says, "I'm sorry Wendy, but I just don't trust anything that bleeds for five days and doesn't die").

121. See generally PASTER, *supra* note 106, at 2–3; PETER STALLYBRASS & ALON WHITE, *THE POLITICS AND POETICS OF TRANSGRESSION* (1986).

122. See Ellie Ross, *UK Company's New "Period Policy" Set to Give Women Time Off Work During Their Monthly Cycle*, SUN (Mar. 1, 2016, 3:47 PM),

having the potential for commercial gain for at least one male-owned company in the United Kingdom. The company Pink Parcel plays up the myth of a woman's menstrual period as a time of illness, selling "care packages" that can be delivered each month (for no small fee) containing chocolate, soothing tea, beauty products, as well as tampons.<sup>123</sup> Both in classic literature and in contemporary commerce, then, one can detect anxiety about women's bodily functions.

### III. THE TAMPON TAX AND HUMAN RIGHTS

The tampon tax is a human rights issue because menstrual hygiene—and affordable access to menstrual hygiene products—is inextricably linked to rights to health, sanitation, education, dignity, and work, among other rights. Eliminating taxes on menstrual hygiene products is consistent with the human right to be free from discrimination and other rights that flow from that. To be sure, sales tax and VAT are largely matters of domestic law for each nation or for a subdivision (such as a state, in the United States) in each nation. Even the European Union, which prescribes an overall value-added tax regime, does not prescribe specific rates (within the various categories).<sup>124</sup> If anything, the VAT Directive limits national leeway in reducing or increasing the value-added tax.<sup>125</sup> So the solution lies not with international treaties that deal with taxation,<sup>126</sup> but rather actions

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<https://www.thesun.co.uk/archives/news/276770/uk-companys-new-period-policy-set-to-give-women-time-off-work-during-their-monthly-cycle/> [https://perma.cc/X37T-KCJS] (describing goal of the policy as the creation of a "happier and more productive work environment"); see also Anna Breslaw, *Almost 40% of Women Use Their Period as an Excuse to Get Out of Lame Things*, JEZEBEL (Oct. 20, 2012, 2:00 PM), <http://jezebel.com/5953440/almost-40-of-women-use-their-period-as-an-excuse-to-get-out-of-lame-things> [https://perma.cc/VB7S-9H4C] (describing the results of a survey in which a large number of women said they "have used our menstrual cycle as an excuse to duck out of an activity that seemed unappealing at the time," including sexual relations).

123. Bridget Crawford, *Making Women's Periods Commercial-Chic (Who Benefits?)*, FEMINIST LAW PROFESSORS (July 22, 2016), <http://www.feministlawprofessors.com/2016/07/making-womens-periods-commercial-chic/> [https://perma.cc/QFM4-BDQY] (discussing "Period Subscription Boxes" sold by UK-based company Pink Parcel); see also Viv Groskop, *Teabags, Makeup and Sweets: Women Don't Need a Care Parcel for Their Periods*, GUARDIAN (Mar. 9, 2015, 2:14 PM), <https://www.theguardian.com/lifeandstyle/womens-blog/2015/mar/09/why-do-women-need-period-packs> [https://perma.cc/RFG2-5HHE] (revealing that the "company itself is owned by a man who wants to stay out of the spotlight. . . . Equal opportunities period-paranoia, please").

124. See *supra* Part I.C.

125. See *supra* Part I.C.

126. There are literally thousands of international treaties that deal with taxation. See, e.g., *International Tax*, INLAND REVENUE: AUTH. OF SING., <https://www.iras.gov.sg/irashome/Quick-Links/International-Tax/>

brought in courts and other appropriate venues to draw the connection between affordable menstrual hygiene products and women's equal participation in society.

#### *A. Right to Be Free From Discrimination*

Human rights law derives from a variety of sources, including international, regional, and specialized treaties. The Universal Declaration of Human Rights,<sup>127</sup> adopted by the United Nations General Assembly in 1948, is the foundational document that delineates the human rights that should be recognized by all member states. These include the right to equality and the right to be free from discrimination: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."<sup>128</sup> Because this document is a General Assembly Resolution, not a treaty, the principles of the Universal Declaration are implemented through treaties such as the International Covenant on Civil and Political Rights,<sup>129</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>130</sup> and regional agreements such as the European Convention for

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[<https://perma.cc/C8VU-5NLUJ>] (last visited Mar. 30, 2017) (providing links to all international tax agreements of Singapore); *Tax Treaties*, INLAND REVENUE: TE TARI TAAKE, <http://taxpolicy.ird.govt.nz/tax-treaties> [<https://perma.cc/92AD-U3HN>] (last visited Mar. 30, 2017) (providing list of double tax agreements and tax information exchange agreements between New Zealand and a variety of other nations); *United States Income Tax Treaties - A to Z*, IRS, <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> [<https://perma.cc/WJ6N-NML4>] (last visited Mar. 30, 2017) (listing countries with income tax treaties with the United States).

127. G.A. Res. 217 (III), Universal Declaration of Human Rights, at 71 (Dec. 10, 1948); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995-96) (describing Universal Declaration of Human Rights and General Assembly as having "a moral, political, and legal influence far beyond the hopes of many of its drafters" insofar as provisions have been the basis for various countries' domestic human rights law and have been incorporated into customary international law).

128. G.A. Res. 217 (III), *supra* note 127, at 73.

129. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

130. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Many of the rights in the International Covenant on Economic, Social and Cultural Rights are meant to be realized progressively, insofar as each state must "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." *Id.* at 5. The treaty's standard has been criticized as vague. See, e.g., Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational*



the Protection of Human Rights and Fundamental Freedoms,<sup>131</sup> the American Convention on Human Rights,<sup>132</sup> and the African Charter on Human and Peoples' Rights.<sup>133</sup>

Each of the implementing treaties contains specific provisions that prohibit discrimination and serve as the basis for the application of a variety of human rights, including the right of women to be free from discrimination and to equal protection under the law.<sup>134</sup> Consider, for example, Article 14 of the European Convention on Human Rights,<sup>135</sup>

Article 14 complaints must be brought in conjunction with one of the other articles which address substantive rights; the applicant must show discrimination in a substantive area.<sup>136</sup> Cases alleging violations of Article 14 in tax matters, for example, are brought under Article 1, Protection of Property, which states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law.

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*Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1672 (2004) (the treaty's "standard is also imprecise, leaving open to question the types of steps that would contribute to progressive realization, and the timetable within which those steps should be taken"). Some scholars have advocated successfully for a "minimum core standard" approach to the interpretation of the International Covenant on Economic, Social and Cultural Rights. See, e.g., Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises*, 44 GEO. WASH. INT'L L. REV. 473, 486 (2012) (describing minimum core obligations as the "raison d'être" of the treaty).

131. COUNCIL OF EUR., EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS § 1 (7th ed. 1971).

132. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 99 (1970) (entered into force July 18, 1978).

133. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

134. See generally PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (6th ed. 2015); EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY (Dagmar Schiek & Anna Lawson eds., 2016); NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES (Titia Loenen & Peter R. Rodrigues eds., 1999).

135. European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, as amended by Arts. 11 and 14, 2010, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [<https://perma.cc/9XLL-KJR3>].

136. *Van Raalte v. Netherlands*, App. No. 20060/92, Eur. Ct. H.R. at 9 (1997), <http://hudoc.echr.coe.int/eng?i=001-58031> [<https://perma.cc/S8TN-PFWZ>].

The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>137</sup>

Consider also the anti-discrimination provisions of Article 26 of the International Covenant on Civil and Political Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion . . . .<sup>138</sup>

This broad anti-discrimination language elaborates on the Universal Declaration's commitment to equality and freedom from discrimination.<sup>139</sup>

Another rich source for international human rights for women in particular is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the United Nations General Assembly in 1979.<sup>140</sup> CEDAW consists of a preamble and thirty specific articles that many refer to as "an international bill of rights for women."<sup>141</sup> CEDAW Article 1 takes an expansive view of discrimination, defining it as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms

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137. European Convention on Human Rights, Protocol, art. 1, Mar. 20, 1952, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [<https://perma.cc/9XLL-KJR3>].

138. International Covenant on Civil and Political Rights, *supra* note 129, at art. 26.

139. *See supra* note 127.

140. G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination Against Women, at 193 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

141. *See, e.g.,* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1425 n.124 (2003).

in the political, economic, social, cultural, civil or any other field.<sup>142</sup>

The treaty was signed initially by sixty-four countries;<sup>143</sup> as of September 3, 2016, over 188 countries are parties to CEDAW.<sup>144</sup> The party states agree to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>145</sup> CEDAW was signed in 1980 by President Jimmy Carter, who sent the treaty to the Senate for advice and consent. The Senate Committee on Foreign Relations has never brought the treaty to a floor vote.<sup>146</sup>

A woman’s right to be free from discrimination is violated when menstrual hygiene products are subject to sales tax when there are no similar products that men must use because of an involuntary, biological monthly occurrence, and when the closest analogous products used primarily by men are not subject to taxation. Taxing products used primarily, or even exclusively, by women is to tax them on the basis of their sex, something which is prohibited by international human rights norms.

### B. Right to Health

According to a recent study by Nielsen and Plan India, just twelve percent of the nation’s estimated 355 million menstruating girls and women use sanitary napkins.<sup>147</sup> If these products were more affordable,

142. See G.A. Res. 34/180, annex, *supra* note 140, at art. 1.

143. *Short History of CEDAW Convention*, U.N. WOMEN <http://www.un.org/womenwatch/daw/cedaw/history.htm> [<https://perma.cc/S3Z2-Z455>] (last visited Mar. 30, 2017).

144. See *Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION (Mar. 30, 2017, 5:00 PM), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en) [<https://perma.cc/MB56-9YJD>] [hereinafter *Status of Treaties: CEDAW*].

145. See G.A. Res. 34/180, annex, *supra* note 140, at art. 2(f).

146. See *Status of Treaties: CEDAW*, *supra* note 144; see also Lisa Baldez, *U.S. Drops the Ball on Women’s Rights*, CNN (Mar. 8, 2013, 11:34 PM), <http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/> [<https://perma.cc/TH5D-4KA6>] (describing languishing of CEDAW in the United States Senate). For a critique of CEDAW, see generally Darren Rosenblum, *Unsex CEDAW, or What’s Wrong With Women’s Rights*, 20 COLUM. J. GENDER & L. 98 (2011). On countries conditioning acceptance of CEDAW with restrictive reservations, see Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643 (1990); Jennifer Riddle, *CEDAW Universal: A Critique of CEDAW’s Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT’L L. REV. 605 (2002).

147. Abigail Jones, *The Fight to End Period Shaming is Going Mainstream*, NEWSWEEK (Apr. 20, 2016, 6:01 AM),

more girls and women might prefer them over their current practices, which might include hand-washed cloth, grass or other sustainable substances fashioned into absorbent pads, or no menstrual products at all.<sup>148</sup> Any tax on tampons or pads makes it more difficult for women, especially poor women, to practice good menstrual hygiene. Poor hygiene may cause adverse physical health consequences, such as an increase in urogenital infections<sup>149</sup> like bacterial vaginal infections and vulva vaginal candidiasis.<sup>150</sup> But even if disposable tampons or sanitary napkins were more widely available, the lack of access to sanitation facilities would still be an obstacle to women flourishing in many parts of the world.

Article 12 of the International Covenant on Economic, Social, and Cultural Rights recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>151</sup> That right has been interpreted to include access to “facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.”<sup>152</sup> Health facilities, goods and services must be “accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination . . . .”<sup>153</sup> The right to health includes not only the right to health care, but also access to “the underlying determinants of health, such as access to safe and potable water and adequate sanitation.”<sup>154</sup>

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<http://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html> [<https://perma.cc/H54J-E57F>]; *but see* Sinu Joseph, *Why India Doesn't Need the Sanitary Napkin Revolution*, SWARAJYA (July 19, 2015, 1:24 PM), <https://swarajyamag.com/culture/why-india-doesnt-need-the-sanitary-napkin-revolution> [<https://perma.cc/TP5A-LJS7>] (criticizing Nielsen/Plan India study on a variety of grounds, including small sample size and mischaracterization of cloth absorption products as unsanitary).

148. *See, e.g.*, Dirk Gilson, *India's Menstruation Man*, AL JAZEERA, <http://interactive.aljazeera.com/aje/shorts/india-menstruation-man/> [<https://perma.cc/M5JJ-6KQY>] (last visited Mar. 30, 2017) (stating that 300 million women in India do not have access to safe menstrual hygiene products, describing cloth as one woman's preferred method of absorption of menstrual blood).

149. Padma Das et al., *Menstrual Hygiene Practices, WASH Access and the Risk of Urogenital Infection in Women from Odisha, India*, 10 PLOS ONE (June 30, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0130777> [<https://perma.cc/U4WJ-FPHJ>].

150. Sumpter & Torondel, *supra* note 8.

151. International Covenant on Economic, Social and Cultural Rights, *supra* note 130, at art. 12.

152. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 9, U.N. Doc. No. E/C.12/2000/4 (2000).

153. *Id.* ¶ 12(b).

154. *Id.* ¶ 11.

In 2015, the United Nations General Assembly passed and adopted, by consensus, a resolution acknowledging human rights to water and sanitation.<sup>155</sup> All member states thus recognize that “the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use,” and also that “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity . . . .”<sup>156</sup>

Access to water is especially important for women for a variety of reasons, including menstrual hygiene management. Menstrual hygiene management is an umbrella term given to a series of “best practices” for menstruating girls and women recommended by international humanitarian organizations like UNICEF and international health working groups like the Water Supply and Sanitation Collaborative Council.<sup>157</sup> These best practices include changing clothing and underwear regularly, changing hygienic pads several times a day, showering daily, washing the genitals after each trip to the bathroom, maintaining a normal school or work schedule, and eating a balanced diet.<sup>158</sup>

There is reason to believe that good menstrual hygiene management is elusive in much of the world. In one study of 160 adolescent girls in West Bengal in 2008, only 48.75% of girls knew that sanitary pads were used during menstruation and only 11.25% of girls used them.<sup>159</sup> A 2015 report by UNICEF and the World Health Organization found that at least 500 million women and girls lack access to basic sanitation facilities, which makes menstrual hygiene management difficult or impossible.<sup>160</sup>

155. G.A. Res. 70/169, The Human Rights to Safe Drinking Water and Sanitation (Dec. 17, 2015).

156. *Id.* ¶ 2.

157. See, e.g., MARNI SOMMER, UTILIZING PARTICIPATORY AND QUANTITATIVE METHODS FOR EFFECTIVE MENSTRUAL-HYGIENE MANAGEMENT RELATED POLICY AND PLANNING (2010), [http://www.sswm.info/sites/default/files/reference\\_attachments/SOMMER%202010%20Utilizing%20Participatory%20and%20Quantitative%20Methods%20for%20Effective%20Menstrual-Hygiene%20Management.pdf](http://www.sswm.info/sites/default/files/reference_attachments/SOMMER%202010%20Utilizing%20Participatory%20and%20Quantitative%20Methods%20for%20Effective%20Menstrual-Hygiene%20Management.pdf) [https://perma.cc/AUM6-X7JU].

158. SHARING SIMPLE FACTS: USEFUL INFORMATION ABOUT MENSTRUAL HEALTH AND HYGIENE, UNICEF 29-31 (2008), [http://www.susana.org/\\_resources/documents/default/2-1151-mhmbook.pdf](http://www.susana.org/_resources/documents/default/2-1151-mhmbook.pdf) [https://perma.cc/FA5Z-KE8J].

159. A. Dasgupta & M. Sarkar, *Menstrual Hygiene: How Hygienic is the Adolescent Girl?*, 33 IND. J. COMMUNITY MED. 77 (2008).

160. UNICEF & WORLD HEALTH ORGANIZATION, PROGRESS ON SANITATION AND DRINKING WATER 45 (2015),

### *C. Right to Education*

Lack of access to adequate menstrual hygiene facilities may lead girls or women to stay home from school, and to fail to participate fully in public life. In November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child,<sup>161</sup> which derived from the Universal Declaration of Human Rights and the International Covenants on Human Rights. As of June 20, 2016, 196 states are parties to this convention.<sup>162</sup> (The United States has signed the treaty, but the Senate has not yet given its advice and consent.<sup>163</sup>) It requires states to “ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health . . . .”<sup>164</sup>

In India, for example, twenty percent of girls reportedly drop out of school when they reach the age of menstruation.<sup>165</sup> In Kenya, government officials distribute approximately three million dollars worth of free sanitary pads at schools in poor communities so that girls will be more likely to stay in school.<sup>166</sup> The government supply is supplemented by private charities like the ZanaAfrica Foundation which delivers free menstrual hygiene products to girls, so that they are less likely to miss classes when they are menstruating for fear of staining their clothes, for example.<sup>167</sup> In 2004, the Kenyan government eliminated the sales tax on menstrual hygiene products in an effort to make them more affordable to girls and women.<sup>168</sup> In a country where over half the population lives on less than one dollar per day, the

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[http://files.unicef.org/publications/files/Progress\\_on\\_Sanitation\\_and\\_Drinking\\_Water\\_2015\\_Update\\_.pdf](http://files.unicef.org/publications/files/Progress_on_Sanitation_and_Drinking_Water_2015_Update_.pdf) [<https://perma.cc/2JMM-QGTL>].

161. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) (entered into force Sept. 2, 1990).

162. U.N. Human Rights Office of the High Comm’r, Convention on the Rights of the Child, Jun. 20, 2016, [http://www.ohchr.org/Documents/HRBodies/CRC/OHCHR\\_Map\\_CRC.pdf](http://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC.pdf) [<https://perma.cc/Z3U2-JKE7>].

163. *Id.*; see also *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION (Sept. 2, 1990), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) [<https://perma.cc/MR8S-N8VY>] (noting signature by the United States).

164. G.A. Res. 44/25, *supra* note 161, at art. 24(2)(e).

165. Jones, *supra* note 147.

166. Vicky Hallett, *What Kenya Can Teach the U.S. About Menstrual Pads*, NPR (May 10, 2016, 10:00 AM), <http://www.npr.org/sections/goatsandsoda/2016/05/10/476741805/what-kenya-can-teach-the-u-s-about-menstrual-pads> [<https://perma.cc/PG9J-F2L3>].

167. *Id.*

168. *Id.* at 2 (giving credit for Kenya’s progressive menstrual policies to female leaders in the country and some men who have championed the cause).

elimination of a twenty cent tax on the \$1.20 charged for an eight-pack of sanitary napkins can make a substantial difference in menstrual hygiene management.<sup>169</sup>

#### *D. Right to Work*

Inadequate menstrual hygiene also impairs women's right to work, another human right. Article 23.1 of the Universal Declaration of Human Rights states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."<sup>170</sup> Yet, a study in Bangladesh by HERProject, a global nonprofit that organizes women's empowerment programs in factories, found that seventy-three percent of female Bangladeshi garment workers said they missed an average of six days of work—and pay—a month due to vaginal infections, often caused by lack of menstrual sanitation.<sup>171</sup> Other studies confirm the finding that lack of menstrual hygiene products causes women to miss work.<sup>172</sup>

#### *E. Right to Dignity*

The 1948 Universal Declaration of Human Rights enshrined the right to dignity in its preamble, which states that: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>173</sup> Impairing access to hygiene, specifically menstrual hygiene, clearly undermines this right for women by making it difficult to maintain the cleanliness of women's bodies and then subjecting them to ridicule and stigma for that very lack of cleanliness. As the Human Rights Initiative at the Central European University puts it on its webpage, "[a]ll human rights stem from the fundamental right to human dignity. When people who are bleeding every month are forced

169. *Id.* at 4.

170. G.A. Res. 217 (III), *supra* note 127, at 71.

171. Amanda Klasing, *Menstrual Hygiene Day Links Periods and Human Rights*, WOMEN'S ENEWS (May 27, 2014) <http://womensenews.org/2014/05/menstrual-hygiene-day-links-periods-and-human-rights/> [<https://perma.cc/R4KS-27PX>].

172. *See, e.g.*, Kounteya Sinha, *70% Can't Afford Sanitary Napkins, Reveals Study*, TIMES OF INDIA (Jan. 23, 2011, 5:47 AM), <http://timesofindia.indiatimes.com/india/70-cant-afford-sanitary-napkins-reveals-study/articleshow/7344998.cms> [<https://perma.cc/F6LU-MW3X>] (reporting that a survey conducted in nine of India's largest cities showed that thirty-one percent of women reported missing an average of 2.2 days of work for this reason).

173. G.A. Res. 217 (III), *supra* note 127.

into seclusion, must use damp and soiled materials, are treated as second class citizen[s], dignity is difficult to maintain.”<sup>174</sup>

The United Nations Human Rights Office has recognized this connection as well: in March 2014, it organized a conference called *Inspiring Change to Promote Women’s Rights and Dignity*, which explored women’s advances in securing their rights and dignity in areas like access to water, sanitation, and hygiene.<sup>175</sup> Jyoti Sanghera, Chief of the Human Rights Office Economic and Social Issues Section, explained that the “stigma around menstruation and menstrual hygiene is a violation of several human rights, most importantly of the right to human dignity . . . .”<sup>176</sup> Increasing the cost of menstrual sanitation products by taxing them as luxuries rather than necessities clearly implicates women’s right to dignity.

### *E. Human Rights Challenges to Tampon Tax*

#### 1. VENUES

Framing women’s affordable access to menstrual hygiene products as a human rights issue opens the door to the possibility of appealing to international or regional bodies to address a complaint brought by an individual who alleges that the tax on menstrual hygiene products violates her right to be free from discrimination. In the case of the International Court of Justice (ICJ), however, only states can submit a dispute to the ICJ,<sup>177</sup> and it is difficult to see how one state would challenge another’s domestic sales tax regime. But individuals may bring complaints against a state party under certain human rights treaties. Possible international venues might include the Human Rights Committee (for alleged violations of the International Covenant on Civil and Political Rights), the Committee on Elimination of Discrimination Against Women (for alleged violations of CEDAW), the Committee on Economic, Social and Cultural Rights (for alleged violations of the International Covenant on Economic, Social and Cultural Rights), and

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174. Human Rights Initiative, *Menstrual Hygiene Day*, CENT. EUR. UNIV. (Oct. 27, 2015), <https://hrsi.ceu.edu/news/2015-10-27/menstrual-hygiene-day> [<https://perma.cc/J7AN-P4EC>].

175. Human Rights Office of the High Commissioner, *Every Woman’s Right to Water, Sanitation and Hygiene*, UNITED NATIONS (Mar. 14, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrighttowatersanitationandhygiene.aspx> [<https://perma.cc/LRM2-XPL6>].

176. *Id.* (quoting Jyoti Sanghera, Chief of the U.N. Human Rights Office of Economic and Social Issues Section).

177. *How the Court Works*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> [<https://perma.cc/PN46-44WQ>] (last visited Apr. 12, 2017).



the Committee on the Rights of the Child (for alleged violations the Convention on the Rights of the Child).<sup>178</sup> Possible regional venues include the European Court of Human Rights, the African Charter on Human and Peoples' Rights, the African Commission on Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights.<sup>179</sup> The European Court of Human Rights is an especially promising venue in light of some precedents in that court which suggest a connection between gender-differentiated tax treatment and human rights violations.<sup>180</sup>

## 2. PRECEDENTS IN EUROPEAN COURT OF HUMAN RIGHTS

So far, no cases have come before the European Court of Human Rights or the European Court of Justice challenging the tax on menstrual hygiene products. But both courts have decided cases that recognize a connection between taxation and human rights.<sup>181</sup> Generally speaking, the successful tax challenges have rested on a differential treatment of men and women under the tax laws. These cases implicate either Article 14 of the European Convention of Human Rights (the right to freedom from discrimination) and an alleged violation of Article 1's protection of property provisions<sup>182</sup> or Article 26 of the International Covenant on Civil and Political Rights (the right to freedom from discrimination).<sup>183</sup>

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178. Human Rights Office of the High Commissioner, *Human Rights Treaty Bodies – Individual Communications: 23 FAQ About Treaty Body Complaints Procedures*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#overviewprocedure> [https://perma.cc/UA83-RJHZ] (last visited Mar. 31, 2017).

179. See generally Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779 (1990) (describing international and regional treaties as sources for challenging discrimination against women).

180. *Id.*

181. See, e.g., Iwona Krzeminska, *Human Rights' Expansion Into the Tax Field 2, 5* (unpublished paper) (on file with Author and the University of Warsaw). In 1996, the European Commission of Human Rights rejected a challenge to the United Kingdom's tax law that treated married couples differently than unmarried couples. See *Lindsay v. United Kingdom*, App. No. 11089/84, 9 Eur. H.R. Rep. 355 (1986). The European Commission on Human Rights was abolished in 1998. See Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 268 n.286 (2007) (describing legal devolution of European Commission on Human Rights).

182. See *supra* notes 135–137.

183. International Covenant on Civil and Political Rights, *supra* note 129.

One illustrative case is *Van Raalte v. The Netherlands*.<sup>184</sup> In that case, the European Court of Human Rights evaluated a provision of Dutch law that exempted unmarried, childless women forty-five years of age and older from paying taxes under the General Childcare Benefits Act, but did not exempt similarly-situated men.<sup>185</sup> Petitioner, a sixty-three year-old unmarried man with no children, was assessed a tax and he objected on the grounds of sex discrimination under both Article 1 of the Netherlands Constitution (banning discrimination on the basis of sex) and Article 1 of Protocol 1 of the European Convention on Human Rights (the right to freedom from discrimination).<sup>186</sup> After exhausting local remedies, the petitioner filed a claim with the European Court of Human Rights.<sup>187</sup> The Court found that no compelling reasons existed for the differing treatment.<sup>188</sup> It rejected the Dutch government's claim that imposing the tax on older, childless women would cause them emotional harm, and that women should be exempt from the tax but similarly situated men should have to pay the tax.<sup>189</sup>

Another case similarly addresses gender-based tax laws. In *Hobbs v. United Kingdom*,<sup>190</sup> petitioners were widowers who had applied for the so-called "Widow's Bereavement Allowance" (WBA), a particular tax benefit available to widows but not to widowers.<sup>191</sup> The Inland Revenue denied all of the claims because of the sex of the applicants, *i.e.*, they were widowers, not widows.<sup>192</sup> The law authorizing the WBA had been abolished prospectively for deaths occurring after April 6, 1999, but the applicants' claims had all arisen between 1997 and 1999, before the date of abolition.<sup>193</sup> The applicants claimed that the Inland Revenue's refusal to grant them the WBA because of their sex was a violation of European Convention on Human Rights Article 14, taken in conjunction with Protocol 1 of Article 1.<sup>194</sup>

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184. *Van Raalte v. Netherlands*, App. No. 20060/92, Eur. Ct. H.R. (1997), <http://hudoc.echr.coe.int/eng?i=001-58031> [<https://perma.cc/S8TN-PFWZ>].

185. *Id.* After the challenged assessment, but before the case reached the European Court of Human Rights, this sex-based distinction was abandoned. *Id.* at 8.

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* at 13–14.

190. *Hobbs v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. (2007), [http://www.menschenrechte.ac.at/orig/14\\_5/Hassan.pdf](http://www.menschenrechte.ac.at/orig/14_5/Hassan.pdf) [<https://perma.cc/6TFL-FANT>].

191. *Id.* at 2.

192. *Id.* at 2–4.

193. *Id.* at 3, 9.

194. *Id.* at 12.

In deciding for the petitioners, the court began by acknowledging that “Article 14 does not prevent a Member State from treating groups differently in order to correct ‘factual inequalities’ between them . . . .”<sup>195</sup> Indeed, the court went on, “in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article.”<sup>196</sup> Nonetheless, different treatment is discriminatory if it fails to “pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”<sup>197</sup> In this context, the court noted that the WBA had been introduced at a time when Great Britain charged married couples as single entities, allowing a man to claim a tax allowance for the wife’s earnings. For the man, this allowance continued for a year after the wife’s death, whereas a widow did not receive such a benefit. Thus, the WBA had been a remedial measure when adopted, meant to cure a gendered discrepancy. The court observed, however, that the government had introduced separate taxation of married men and women in 1990–1991, and that therefore the WBA became obsolete at that point.<sup>198</sup> For the tax law to continue to offer a tax benefit to women that it did not offer to men constituted a violation of Article 14 in conjunction with Article 1 of Protocol 1.<sup>199</sup>

In a similar case, *Willis v. United Kingdom*,<sup>200</sup> the European Court of Human Rights found that another set of differing tax benefits for men and women violated Article 14 and Article 1 of Protocol 1.<sup>201</sup> In *Willis*, the petitioner’s wife had been the family breadwinner until she died of cancer at age forty.<sup>202</sup> The widower-petitioner applied for the benefits to which a widow would have been entitled in the same circumstances, namely, a widow’s payment and widowed mother’s allowance (the couple had two minor children at the time of the wife’s death).<sup>203</sup> The government rejected both claims.<sup>204</sup> Petitioner then brought a claim alleging violations of Article 14 and Article 1 of Protocol 1, as well as a violation of Article 8, which guarantees the right to “respect for his private and family life.”<sup>205</sup> The court found that

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195. *Id.*

196. *Id.*

197. *Id.* at 13.

198. *Id.*

199. *Id.*

200. *Willis v. United Kingdom*, App. No. 36042-97, Eur. Ct. H.R. (2002), [http://www.menschenrechte.ac.at/orig/14\\_5/Hassan.pdf](http://www.menschenrechte.ac.at/orig/14_5/Hassan.pdf) [<https://perma.cc/PUE9-KB3C>].

201. *Id.*

202. *Id.* at 2.

203. *Id.*

204. *Id.*

205. *Id.* at 12.

the disparate treatment of men and women in regard to the two benefits was “not based on any objective and reasonable justification” and that it therefore violated the European Convention on Human Rights.<sup>206</sup>

The European Court on Human Rights reached a similar conclusion in the *Zeman v. Austria*.<sup>207</sup> In *Zeman*, the petitioner’s retirement pension from the state had been adjusted downward due to his receipt of a portion of his deceased wife’s pension as well as his own, a provision that applied to widowers and not to widows.<sup>208</sup> In fact, the government had added a provision to the pension plan in 1994, which further differentiated men and women. This, the court found, was unjustifiable and a violation of the Article 14 and Article 1 of Protocol 1.<sup>209</sup>

Taken together, these cases suggest that the European Court of Human Rights is willing to hear cases that allege gender-based tax discrimination as a human rights issue. *Raalte* offers perhaps the most promising analogy, in that it invalidated a tax burden placed on only one sex without apparent justification. The court’s reasoning in *Raalte*, however, stressed that the discrepant tax treatment had no factual basis because it did not reflect reality: it noted that women forty-five years of age or older may well become eligible for benefits under the Act by marrying a man with children, or, with advances in technology, having her own biological children, or adopting, and that men under the age of forty-five may be unable to procreate.<sup>210</sup> Thus, the court invalidated the law by undercutting the biologically-based assumptions that the government used to justify it. In the case of the tax on menstrual hygiene products, there is an undeniable, biological difference between men and women that makes women and girls the primary consumers of these products. But there is a strong argument to be made that women are paying these taxes because they are women. There are no products that men just use because of an involuntary, biological monthly occurrence. Indeed the closest analogous products that address men’s biological needs, such as condoms, are taxed at the reduced rate under the VAT.

An important issue implicated by any case that might be brought in the European Court of Human Rights or any other court or committee

206. *Id.* at 10. The court declined to find a violation with respect to a third benefit applied for, the “widow’s pension,” because it found that he would not have been eligible for that benefit even if he had been a widow, at the item he applied for. *Id.* at 12.

207. App. No. 23960/02, Eur. Ct. H.R. (2006), <http://hudoc.echr.coe.int/eng?i=001-76137> [<https://perma.cc/37WS-RFL9>].

208. *Id.* at 5.

209. *Id.* at 7.

210. *Van Raalte v. Netherlands*, App. No. 20060/92, Eur. Ct. H.R. at 12 (1997), <http://hudoc.echr.coe.int/eng?i=001-58031> [<https://perma.cc/S8TN-PFWZ>].

is the question of remedy. Pecuniary remedies are available, although losses may be awarded on an equitable basis, instead of actual financial loss suffered.<sup>211</sup> But because the tax on menstrual hygiene products has been so lucrative to governments, the court might be reluctant to award more than symbolic pecuniary damages. Indeed, the enormity of the tax revenue from the sale of menstrual hygiene products is one of the main reasons that the efforts of the French legislature, for example, to repeal the tax failed in the first place.<sup>212</sup> For administrative and political reasons, then, it seems unlikely that the European Court of Human Rights would be willing to order a large-scale payment of refunds to all consumers. It declined to award even individual damages in *Hobbs*<sup>213</sup> and *Raalte*,<sup>214</sup> for example, even though the court found that the tax laws were discriminatory.

In *Hobbs*, the petitioners argued that they should be compensated for the amount they would have received had they been eligible for the WBA, based on the principle of *restitutio in integrum*, *i.e.*, the right to be made whole.<sup>215</sup> They also argued that compensation would provide an incentive for states not to engage in discrimination.<sup>216</sup> They correctly pointed out that the European Court of Justice had on many occasions used compensation as a way of “levelling up”—giving the complainant the same benefits as the favored group—rather than “levelling down”—denying compensation because neither group should have received the benefit.<sup>217</sup> But the European Court of Human Rights declined to award damages in *Hobbs*, calling the WBA an “anachronistic relic” that the government had abandoned in 1994. Justice did not require, said the Court, that “an anomaly should be further extended.”<sup>218</sup> The rationale

211. See, e.g., COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, THE EUROPEAN COURT OF HUMAN RIGHTS: QUESTIONS AND ANSWERS FOR LAWYERS 12–13 (2014), [http://www.echr.coe.int/documents/guide\\_echr\\_lawyers\\_eng.pdf](http://www.echr.coe.int/documents/guide_echr_lawyers_eng.pdf) [<https://perma.cc/42XA-ZH6W>] (explaining that “just satisfaction” may be awarded for pecuniary damage but “the Court may decide on an equitable basis not to award the full loss suffered”); Fernanda Nicola & Ingrid Nifosi-Sutton, *Assessing Regional Cooperation: New Trends Before the European Court of Human Rights and the European Court of Justice*, 15 HUM. RTS. BRIEF 11 (2007) (explaining that “Until recently, the ECHR’s attitude toward reparations has been quite conservative, because it regards its power to afford reparations as discretionary. It has limited itself to stating that a violation of the Convention has occurred and awarding pecuniary or non-pecuniary compensation together with legal costs and expenses”).

212. See Randall, *supra* note 26.

213. *Hobbs v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. at 18–19 (2007), [http://www.menschenrechte.ac.at/orig/14\\_5/Hassan.pdf](http://www.menschenrechte.ac.at/orig/14_5/Hassan.pdf) [<https://perma.cc/6TFL-FANT>]

214. See generally *Van Raalte*, App. No. 20060/92, Eur. Ct. H.R.

215. *Hobbs*, App. No. 29750/09, Eur. Ct. H.R. at 14–15.

216. *Id.*

217. *Id.* at 15.

218. *Id.* at 16.

seems to be that the benefit the complainants were denied had never been justifiable, and therefore there was nothing for which to compensate them. The WBA had “unduly favoured widows” over all other taxpayers.<sup>219</sup> Unjustified at the time, and since abandoned, the anomalous benefit did not give rise to compensation.

The court similarly declined to award damages in *Raalte*, even though it found that tax payments had been made under a law which violated the International Covenant on Civil and Political Rights.<sup>220</sup> The court noted that the finding of a violation of Article 1 of Protocol 1 does not “entitle the applicant to retrospective exemption from contributions under the scheme in question.”<sup>221</sup> These cases suggest that the European Court of Human Rights would be unwilling to award any damages at all in a case challenging the tax on menstrual hygiene products.

Arguably the tampon tax is different because it is more visible than the taxes in the cases cited, and it is ongoing. While *Hobbs*, for example, involved a tax scheme which had been abolished, thus eliminating the need for the deterrent effect of a damages award, the tampon tax scheme is alive and well. Members of one sex pay a discriminatory tax that benefits society at large, but the tax causes hardship to many girls and women. For that reason, the tampon tax may present a clear case for a class-based damages award. Politically, however, it might present more difficulty, unless substantial public opinion is brought to bear.

Because of a variety of legal traditions in the United States, direct appeals to state or local government or to domestic courts are more likely than international human rights bodies to be a plaintiff’s first line of recourse against the tampon tax. The next part discusses how legislators, activists, and plaintiffs have attempted to remedy the financial inequities of the tampon tax.

#### IV. THE TAMPON TAX AND INEQUALITY

##### A. Direct Government Action: The New York Example

In June 2016, the New York City Council unanimously passed a law that makes tampons and pads available for free in all New York City public schools, homeless shelters, and jails.<sup>222</sup> Approximately

219. *Id.* at 17.

220. *Van Raalte v. Netherlands*, App. No. 20060/92, Eur. Ct. H.R. at 15 (1997), <http://hudoc.echr.coe.int/eng?i=001-58031> [<https://perma.cc/S8TN-PFWZ>].

221. *Id.*

222. *See, e.g.*, Sarah Ruiz-Grossman, *NYC Mayor Signs Free Tampons for Schools, Jails, Shelters Into Law*, HUFFINGTON POST (July 14, 2016, 3:29 PM),

300,000 girls and women are expected to benefit from this reform.<sup>223</sup> In a press release that accompanied his signing the bill into law, New York City 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 . . . .”<sup>224</sup> Mayor de Blasio specifically recognized the connection between good menstrual hygiene and school attendance, saying, “No young person should miss class or be embarrassed at school because she needs a tampon or pad.”<sup>225</sup> The legislation is especially significant given that an estimated seventy-nine percent of all New York City public school students come from low-income families.<sup>226</sup> The city council member who sponsored the legislation, Julissa Ferreras-Copeland, described menstrual hygiene products as a necessity. The legislation, she said, “is the only one of its kind, and it says periods are powerful. Menstrual hygiene products are as necessary as toilet paper—and no one is freaking out about toilet paper.”<sup>227</sup> Significantly, the New York City law received national and international press in outlets

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[http://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law\\_us\\_5787bc57e4b08608d3336b27](http://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law_us_5787bc57e4b08608d3336b27) [https://perma.cc/4B7P-76GR].

223. *Woman’s Groups Call on SNP to Offer Free Tampons to Scots Women*, EVENING TIMES (Aug. 16, 2016), [http://www.eveningtimes.co.uk/news/14684951.Woman\\_s\\_groups\\_call\\_on\\_SNP\\_to\\_offer\\_free\\_tampons\\_to\\_Scots\\_women/](http://www.eveningtimes.co.uk/news/14684951.Woman_s_groups_call_on_SNP_to_offer_free_tampons_to_Scots_women/) [https://perma.cc/NE8Z-MPZQ] (estimating number of girls and women reached by New York City’s distribution of free feminine hygiene products).

224. Office of the Mayor, *Mayor de Blasio Signs Legislation Increasing Access to Feminine Hygiene Products for Students, Shelter Residents and Inmates*, NYC (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/R7NJ-Y7TS].

225. *Id.* (adding that, “As a father, husband and feminist, I am proud to sign these bills into law”).

226. Maggie Mallon, *New York City is About to Give Free Tampons to People Who Need Them Most*, GLAMOUR (June 22, 2016, 12:00 PM), <http://www.glamour.com/story/new-york-city-is-about-to-give-free-tampons-to-people-who-need-them-most> [https://perma.cc/EC5H-J848].

227. *Id.* (calling the New York City legislation “remarkable”).

including the *Huffington Post*,<sup>228</sup> *Slate*,<sup>229</sup> *U.S. News*,<sup>230</sup> *Glamour*,<sup>231</sup> and the BBC.<sup>232</sup>

Legislation similar to New York's is under consideration in Sydney, Australia.<sup>233</sup> Free menstrual hygiene products would be available not only in homeless shelters, but also in libraries and sporting venues.<sup>234</sup> Sydney City Councillor Edward Mandla has explained that he hopes that the government example would have a ripple effect in the private sector. "There's money for everyone and lots of talk about equality. But there's little in practical leadership solutions . . . 'Providing free sanitary products is a low cost solution that ought to inspire corporations around Australia to follow suit.'"<sup>235</sup> In Sydney, as in the United States, there are already a variety of private efforts to supply menstrual hygiene products in homeless shelters,<sup>236</sup> so municipal legislation might lessen the need for private intervention.

Regardless of the outcome of the Sydney legislation, the New York legislation already has spurred activists in other locations to begin

228. Ruiz-Grossman, *supra* note 222.

229. Christina Cauterucci, *New York City Council Approves Free Tampons and Pads in Schools, Prisons, and Shelters*, SLATE (June 22, 2016, 5:50 PM), [http://www.slate.com/blogs/xx\\_factor/2016/06/22/new\\_york\\_city\\_council\\_votes\\_to\\_give\\_free\\_tampons\\_and\\_pads\\_to\\_women\\_in\\_schools.html](http://www.slate.com/blogs/xx_factor/2016/06/22/new_york_city_council_votes_to_give_free_tampons_and_pads_to_women_in_schools.html) [<https://perma.cc/K6Q6-AT88>].

230. Jennifer Peltz, *Free Tampons in NYC*, U.S. NEWS (June 21, 2016, 6:34 PM), <http://www.usnews.com/news/news/articles/2016-06-21/nyc-weighs-novel-law-on-free-tampons-in-schools-elsewhere> [<https://perma.cc/45MX-FLS9>].

231. Mallon, *supra* note 226.

232. 'Menstrual Equity': *Free Tampons for New York City Schools and Jails*, BBC (June 22, 2016), <http://www.bbc.com/news/world-us-canada-36597949> [<https://perma.cc/62WU-7L37>].

233. David Nield, *Sydney is Planning to Become the Second City to Offer Free Tampons to Women*, SCIENCE ALERT (July 22, 2016), <http://www.sciencealert.com/sydney-joins-new-york-in-offering-free-tampons-for-women> [<https://perma.cc/23PP-JKTL>].

234. *Id.*

235. Libby-Jane Charleston, *Sydney May be the First City to Provide Free Sanitary Items*, HUFFINGTON POST: AUSTRALIA (July 22, 2016, 7:13 AM), <http://www.huffingtonpost.com.au/2016/07/20/sydney-may-be-the-first-city-to-provide-free-sanitary-items/> [<https://perma.cc/7KAT-HSML>] (quoting Councillor Edward Mandla).

236. See Kristen Amiet, *Sanitary Products Could Soon Be Free for Sydney Women*, ELLE: AUSTRALIA (July 22, 2016), <http://www.elle.com.au/news/zeitgeist/2016/7/free-sanitary-products-sydney/> [<https://perma.cc/FN3W-ARAQ>] (describing work of Share the Dignity in Queensland and the Melbourne Period Project in Victoria); see also FOR THE LOVE OF WOMEN (FLOW), <http://www.helloflow.org/> [<https://perma.cc/6XMZ-YBHZ>] (last visited Apr. 1, 2017) (a Florida-based "non-profit organization providing feminine care products to females in need"); RACKET, <http://www.weracket.com/> [<https://perma.cc/4U34-V9M8>] (last visited Apr. 1, 2017) (a New York City-based organization whose mission is "to redefine menstrual hygiene products as essential; to provide menstruating people access to these products").



to pressure their governments to provide free menstrual hygiene products. For example, women in Scotland have called on the national government for intervention.<sup>237</sup> In the United States, there is a “Free the Tampons” movement based in Ohio that seeks to “drive demand for freely accessible tampons and pads in restrooms outside the home.”<sup>238</sup> In Dane County, Wisconsin, free menstrual hygiene products are available in some public buildings.<sup>239</sup> Whether local or state governments will respond to or expand existing programs, however, may depend in large part on a debate about the role of government in providing basic necessities to its citizenry.<sup>240</sup>

In countries with less developed economies or established wealth, there is no realistic possibility that the government will provide free menstrual hygiene products. Schools are unlikely to have the financial resources to do so, either. It is important (and more realistic) to focus on improving access to basic sanitation and toileting facilities in schools and workplaces. In schools in developing nations, it is important that girls have access to private toileting facilities where they can change their menstrual hygiene products. An estimated half of schools in developing nations do not have toilets at all, so this is an urgent priority.<sup>241</sup>

237. See, e.g., *Woman's Groups Call on SNP to Offer Free Tampons to Scots Women*, *supra* note 223.

238. FREE THE TAMPONS, <http://www.freethetampons.org/> [<https://perma.cc/8N5M-JZY2>] (last visited Apr. 1, 2017) (“The Free the Tampons Foundation believes that every bathroom outside the home should provide freely accessible items that women need for their periods. We think women shouldn't have to worry about an unexpected physical need becoming an overwhelming emotional ordeal.”).

239. See Peltz, *supra* note 230 (describing Wisconsin legislation).

240. The Undergraduate Council of Students at Brown University recently decided to allocate some of its funds (presumably derived at least in part from tuition or fees paid by students) to provide free tampons and pads in many university restrooms. See Yam, *supra* note 8. Note, however, that this was a student decision (presumably not opposed by the university), as opposed to a decision driven by the university administration. In the United Kingdom, the University of East Anglia apparently sells menstrual hygiene products at cost. See Randall, *supra* note 26.

241. Michelle Truong, *Touch the Pickle: Demystifying Menstruation Around the World*, COLUMBIA UNIV.: MAILMAN SCH. OF PUB. HEALTH (Nov. 4, 2015), <https://www.mailman.columbia.edu/public-health-now/news/touch-pickle-demystifying-menstruation-around-world> [<https://perma.cc/7V8Z-7A3H>] (“UNICEF estimates that about half of schools in the developing world do not have toilets, and among those that do, many facilities are not specific for girls, who may find it shameful and embarrassing to navigate menstruation in unisex toilets and latrines”). Once a school has a toilet, unfettered access to it (without having to request a key from a teacher, for example) may help keep girls in school. COLUMBIA UNIV. MAILMAN SCH. OF PUB. HEALTH & UNICEF, WASH IN SCHOOLS EMPOWERS GIRLS' EDUCATION: PROCEEDINGS OF THE MENSTRUAL HYGIENE MANAGEMENT IN SCHOOLS VIRTUAL CONFERENCE 11 (2012), [http://www.unicef.org/wash/schools/files/WASH\\_in\\_Schools\\_Empowers\\_Girls\\_Educ](http://www.unicef.org/wash/schools/files/WASH_in_Schools_Empowers_Girls_Educ)

Intuitively one understands that there are substantial economic losses associated with menstruating girls and women who absent themselves from the public sphere, but there is limited data available.<sup>242</sup> A 2006 study funded by the David and Lucile Packard Foundation identifies hygiene as “fundamental” to health of female workers, citing as evidence of the need for better hygiene the fact that some female factory workers in India, for example, use cloth scraps from the factory floor to absorb their menstrual flow.<sup>243</sup>

It is not realistic for all governments to provide free menstrual hygiene products for girls and women. But in order to fulfill a commitment to human rights for girls and women, governments must improve access to basic sanitation facilities. Governments also should eliminate any sales tax on menstrual hygiene products as a crucial step in improving women’s health and access to education.

## *B. Challenges to the Tampon Tax in the United States*

### 1. EARLY CHALLENGE TO THE TAMPON TAX

State and local taxes on menstrual hygiene products were the subject of a legal challenge brought in the mid-1980s in Cook County, Illinois in the United States. In *Geary v. Dominick’s Finer Foods, Inc.*<sup>244</sup> three women brought suit on behalf of themselves and a class of similarly-situated individuals seeking an injunction against the Illinois state, city, and local taxes imposed on menstrual hygiene products.<sup>245</sup> The defendants in the case were individual retailers of menstrual hygiene products, the City of Chicago, and state, city, and local taxing authorities.<sup>246</sup> In addition to injunctive relief, the plaintiffs sought restitution for past taxes paid.<sup>247</sup> After the case had been filed, the State of Illinois subsequently altered its interpretation of the state sales tax

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ion\_Proceedings\_of\_Virtual\_MHM\_conference.pdf [https://perma.cc/9ACZ-LMRU]. It is also important that girls have a way of disposing of their used menstrual hygiene products. In Kenya, incineration is common, but in Mongolia, fire is considered sacred and incineration would not be appropriate. *Id.*

242. See, e.g., Marni Sommer, *World Bankers: Please Study Menstruation Costs*, WOMEN’S ENEWS (Apr. 16, 2015), <http://womensenews.org/2015/04/world-bankers-please-study-menstruation-costs/> [https://perma.cc/9MG4-FLMH].

243. BUS. FOR SOC. RESPONSIBILITY, WOMEN’S GENERAL & REPRODUCTIVE HEALTH IN GLOBAL SUPPLY CHAINS 20, 42 (2006), <https://herproject.org/downloads/BSR-Womens-Health-Report-2006.pdf> [https://perma.cc/5GDY-5W7D].

244. *Geary v. Dominick’s Finer Goods, Inc.*, 544 N.E.2d 344 (Ill. 1989).

245. *Id.* at 345.

246. *Geary v. Dominick’s Finer Goods, Inc.*, 520 N.W.2d 968, 968 (Ill. App. Ct. 1988).

247. *Id.* at 968–69.

law to make tampons and pads tax-exempt, and so the trial court dismissed as moot the plaintiffs' claim for injunctive relief against the State of Illinois' taxing authority.<sup>248</sup> The trial court also dismissed the claim against the Regional Transportation Authority.<sup>249</sup> The trial court allowed the claim for state and city sales tax restitution to go forward, but limited the restitution claim period to five years due to the applicable statute of limitations.<sup>250</sup>

Early in the proceedings, both the retail defendants and the city defendants argued that the plaintiffs could not recover past sales tax paid under the "voluntary payment doctrine."<sup>251</sup> This is the principle that, "[a]s a general matter, taxes paid voluntarily[,] though erroneously, may not be recovered without statutory authorization."<sup>252</sup> In other words, if the plaintiffs paid the tax voluntarily—even if the tax were illegal—then there could be no recovery of the tax unless the law specifically authorized recovery, which the law did not in this instance.<sup>253</sup> The taxpayers argued that they were not bound by the voluntary payment doctrine, saying that this rule applied only if the plaintiffs "had knowledge of the facts upon which to frame a protest and also that the payments were not made under duress or compulsion."<sup>254</sup> Insofar as the menstrual hygiene products were purchased under duress, the plaintiffs argued that they were free to sue for recovery of taxes paid.<sup>255</sup> The trial court denied the defendants' motion to strike and dismiss the plaintiffs' complaint.<sup>256</sup> The trial court also ruled that tampons and sanitary napkins constituted "medical appliances," and thus were exempt from the city sales tax.<sup>257</sup> The trial court then certified to the Appellate Court of Illinois two issues: (a) whether the plaintiffs sufficiently pleaded duress;<sup>258</sup> and (b) whether the

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248. *Id.* at 969.

249. *Id.*

250. *See generally id.*

251. *Geary*, 544 N.E.2d at 346; *see also Getto v. City of Chicago*, 426 N.E.2d 844, 849 (Ill. 1981) (describing voluntary payment doctrine).

252. *Freund v. Avis Rent-A-Car System*, 499 N.E.2d 473, 475 (Ill. 1986) (citing *Getto*, 426 N.E.2d 844).

253. *See Getto*, 426 N.E.2d at 849 ("This court has held that in the absence of a statute which allows recovery for the payment of those taxes or charges which have been improperly assessed by a municipality or utility, a taxpayer or customer may not recover taxes or fees which have been paid voluntarily." (citations omitted)).

254. *Geary*, 520 N.E.2d at 970 (quoting *Getto*, 426 N.E.2d at 849).

255. *Id.* at 968.

256. *Geary*, 544 N.E.2d at 345 (describing proceedings below). Technically the trial court certified to the Appellate Court three questions, but they were consolidated into these two issues. *Id.* at 345-46 (describing proceedings below).

257. *Id.* at 345, 353 (Ill. 1988) (describing proceedings below).

258. *Geary*, 520 N.E.2d at 969.

tampons and pads were exempt from city sales tax as a “medical appliance.”<sup>259</sup>

After the Appellate Court of Illinois, First District, Second Division reversed the trial court’s determination that the plaintiffs had paid the tax under duress, and thus the lawsuit could proceed, the taxpayers appealed their case to the Illinois Supreme Court.<sup>260</sup> The Illinois Supreme Court agreed with the trial court that the plaintiffs had paid the sales tax under duress (and thus the voluntary payment doctrine would not prevent their suit from going forward) and that Chicago sales tax law improperly classified menstrual hygiene products as taxable.<sup>261</sup>

In finding for the taxpayers in *Geary*, the Illinois Supreme Court also held that the City of Chicago should interpret its taxing ordinance to include menstrual hygiene products in the definition of “medical appliances,” and thus exempt them from taxation.<sup>262</sup> In fact, the Illinois Department of Revenue and its Chicago counterpart were working with virtually identical statutes, but the State of Illinois adopted a regulation under which it interpreted the phrase “medical appliances” in its sales tax statute to include menstrual hygiene products<sup>263</sup> (thus exempting tampons and sanitary napkins from taxation), but the City of Chicago did not interpret the phrase the same way.<sup>264</sup> The *Geary* court ruled that the Chicago City Council had a policy of administering and enforcing municipal tax statutes in a manner that was consistent with the State of Illinois’ interpretation of state tax statutes.<sup>265</sup> Thus, for purposes of the Chicago city sales tax, tampons and sanitary napkins should be classified as “medical appliances” and were exempt from taxation.<sup>266</sup> The Illinois Supreme Court reversed the judgment of the appellate

259. *Id.*

260. *See generally Geary*, 544 N.E.2d 344.

261. *Id.* at 344.

262. *Id.* at 353–57.

263. *Id.* at 354 (“Both parties point out that in 1985 the Illinois Department began construing ‘medical appliances’ in the Retailers’ Occupation Tax Act and the Use Tax Act as including tampons and sanitary napkins, thus effectively exempting those products from its sales taxes.”).

264. *Id.* at 354–55.

265. *Id.* at 356 (quoting Chicago Department of Revenue Ruling No. 3 that “for administrative convenience and uniformity in the enforcement of such [state and local] taxes, the Department of Revenue will allow persons who are subject to the State of Illinois Use Tax to follow the State rules and regulations with respect to that tax in complying with the City of Chicago Sales Tax” in cases where the city had not specifically ruled to the contrary) (emphasis removed).

266. *Id.* at 356–57 (“[T]he Chicago department’s interpretation (although not its definition) of medical appliances is contrary not only to its own intent but also the intent of the city council. . . . [W]e simply hold that the Chicago department’s action (not to exempt tampons and sanitary napkins) was contrary to the intent of the city council.”).

court, affirmed the judgment of the trial court, and remanded the case for further proceedings.<sup>267</sup>

Curiously, there is no reported decision on remand in *Geary v. Dominick's Finer Foods, Inc.* In 2016, Chicago taxed tampons and other menstrual hygiene products until the City Council voted to reclassify tampons and sanitary napkins as “medical necessities.”<sup>268</sup> The preamble to that bill recites that subsequent to the *Geary* decision, the State of Illinois had reclassified tampons and sanitary napkins as “grooming and hygiene products,” as opposed to “medical appliances,” and thus the items had become subject to state sales tax.<sup>269</sup> There is no evidence of a subsequent legal challenge to Illinois’ reclassification of menstrual hygiene products as taxable. Only in late 2016 did the State of Illinois and the City of Chicago repeal its tampon tax.<sup>270</sup>

## 2. TWENTY-FIRST CENTURY LEGAL CHALLENGES IN THE UNITED STATES

In the United States, there is no national sales tax, so the taxation of menstrual hygiene products is a matter left to each of the fifty states. As of December 1, 2016, thirteen states exempt menstrual hygiene products from sales tax. Five states—Alaska, Delaware, Oregon, Montana, and New Hampshire—impose no sales tax on any products at

267. *Id.* at 357.

268. CHI., ILL., MUNICIPAL CODE § 3-40-010 (amended 2016) (amended to exempt tampons and sanitary napkins from Chicago’s Home Rule Municipal Retailer’s Occupation Tax, sponsored by Edward M. Burke & Leslie A. Hairston); *see also* Nick Kotecki, *Tampon Tax Struck Down in Unanimous City Council Vote*, TIMEOUT CHI. (Mar. 16, 2016, 12:17 PM), <https://www.timeout.com/chicago/blog/tampon-tax-struck-down-in-unanimous-city-council-vote-031616> [https://perma.cc/FN6J-692K].

269. CHI. ILL., MUNICIPAL CODE § 3-40-010 (amended 2016) (noting that at the time of the *Geary* decision, the State of Illinois classified tampons and sanitary napkins as “medical appliances,” but “[t]he Illinois Department of Revenue currently classifies tampons and sanitary napkins as ‘grooming and hygiene’ products which are subject to the city’s current sales tax”).

270. Chi. City Council Res. 2016-149, 2016 City Council (Ill. 2016) (Edward M. Burke & Leslie A. Hairston, sponsors) (in light of the revised Chicago ordinance reclassifying feminine hygiene products as medical appliances and movement in several other states to exempt feminine hygiene products from sales tax, “we the Mayor and the [mem]bers of the City Council of the City of Chicago do hereby urge the General Assemb[ly] of the State of Illinois to adopt legislation which [w]ould qualify tampons a[n]d sanitary napkins the reduced state sales tax[ ]rate of 1%”); *see also* Elizabeth Greiwe, *Taking Down the ‘Tampon Tax’ in Chicago and Beyond*, CHI. TRIBUNE (Feb. 18, 2016, 5:42 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-tampon-tax-emanuel-chicago-illinois-edit-jm-20160218-story.html> [https://perma.cc/T3HM-SFWC]; Grace Perry, *Illinois Repeals ‘Tampon Tax’ and Reclassifies Products as Necessary*, TIMEOUT CHI. (Aug. 22, 2016, 1:19 PM), <https://www.timeout.com/chicago/blog/illinois-repeals-tampon-tax-and-reclassifies-products-as-necessary-082216> [https://perma.cc/F7ZA-R43B].

all.<sup>271</sup> Five states—Maryland, Massachusetts, Pennsylvania, Minnesota, and New Jersey—had repealed their sales tax on menstrual hygiene products prior to 2016.<sup>272</sup> Two states—New York and Illinois—lifted their sales tax on menstrual hygiene products only recently.<sup>273</sup> The District of Columbia has agreed to do so beginning in October 2017.<sup>274</sup> Connecticut’s repeal of the sales tax on menstrual hygiene products will take effect on July 1, 2018.<sup>275</sup> Several other states saw some legislation or debate on the tampon tax in 2016 or early 2017, but still have a tax in effect, with no sunset date on the horizon.<sup>276</sup> The majority of states in the United States treat menstrual hygiene products as taxable.<sup>277</sup>

In New York, a bill had been introduced in the New York State Assembly as early as February 2015 seeking to exempt “feminine hygiene products including sanitary napkins and tampons” from the retail sales tax and to authorize local governments to eliminate their portion of the tax.<sup>278</sup> A second bill to exempt menstrual hygiene products from sales tax was introduced in the New York State Senate on January 7, 2016.<sup>279</sup> New York State Assemblywoman Linda B. Rosenthal characterized the tax as a vestige of a time period in which women were excluded from most lawmaking.<sup>280</sup> This was an

271. Hillin, *supra* note 18.

272. *Id.*

273. See, e.g., Abigail Jones, *New York Terminates the Tampon Tax*, NEWSWEEK (July 21, 2016, 7:29 PM), <http://www.newsweek.com/new-york-tampon-tax-cuomo-periods-tampons-menstruation-donald-trump-482918> [<https://perma.cc/5YQ9-6S2P>] (reporting on New York’s repeal of the tax on feminine hygiene products).

274. See D.C. Official Code § 47-2005 (2016), *amended by* Feminine Hygiene and Diapers Sales Tax Exemption Amendment Act of 2016, <http://lims.dccouncil.us/Download/35554/B21-0696-Introduction.pdf> [<https://perma.cc/6NUY-5U3X>]; OFFICE OF THE SECRETARY, LEGISLATION DETAIL, COUNCIL OF THE D.C., [http://lims.dccouncil.us/\\_layouts/15/uploader/AdminProxy.aspx?LegislationId=B21-0696](http://lims.dccouncil.us/_layouts/15/uploader/AdminProxy.aspx?LegislationId=B21-0696) [<https://perma.cc/6ABN-Y5QG>]; see also Fenit Nirappil, *D.C. to Lift Sales Tax on Diapers, Tampons*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd\\_story.html?utm\\_term=.bf3824b1329c](https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd_story.html?utm_term=.bf3824b1329c) [<https://perma.cc/FCJ7-R32A>]. The District of Columbia legislation is awaiting congressional approval. See Qiu, *supra* note 24.

275. See Qiu, *supra* note 24 (describing effective date of Connecticut legislation).

276. Jones, *supra* note 273.

277. See *supra* Part I.A.

278. Assemb. B. 5216, 2015–2016 Assemb., Reg. Sess. § 2 (N.Y. 2015).

279. S.B. 6359, 2016 S. (N.Y. 2016).

280. Press Release, Linda B. Rosenthal, Assemblymember Linda B. Rosenthal’s Bill Axing the Tampon Tax Passes Assembly Today (Mar. 15, 2016),

explanation that she repeated when Governor Andrew Cuomo signed the repeal of the tampon tax into law on July 21, 2016.<sup>281</sup> Assemblywoman Rosenthal proclaimed that:

The signing of this bill into law represents a new dawn. Women statewide will no longer be burdened by a lingering tax that was levied at a time when women were not part of government and the decision-making process. The tampon tax is regressive, and lifting it will spare all women the extra monthly burden of paying taxes on products that are already unaffordable to many.<sup>282</sup>

In California, Assembly Bill 1561 provided only for a five-year hiatus of the sales tax on menstrual hygiene products.<sup>283</sup> The estimated lost revenue is approximately twenty million dollars.<sup>284</sup> The bill enjoyed bipartisan support, with Democratic lawmaker (and bill sponsor) Cristina Garcia saying of the bill, “Fundamentally this is about gender equity and leveling the field,” and Republican Ling-ling Chang saying that eliminating the tax would put “money back in the pockets of California women.”<sup>285</sup> Governor Jerry Brown vetoed the bill in September 2016.<sup>286</sup>

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<http://nyassembly.gov/mem/Linda-B-Rosenthal/story/68858/> [<https://perma.cc/D9UZ-7AR8>].

281. S.B. S07838, 2016 S. (N.Y. 2016) (exempting “[f]eminine hygiene products, including, but not limited to, sanitary napkins, tampons and panty liners” from sales tax); Assemb. B. A07555A, 2015–2016 Assemb., Reg. Sess. (N.Y. 2016) (taking effect as of September 1, 2016). For press coverage, see *Legislature Cuts Taxes on Tampons and Other Feminine Hygiene Products*, N.Y. TIMES, May 25, 2016, at A20.

282. Press Release, Governor’s Press Office, Governor Cuomo Signs Legislation to Exempt Sales and Use Taxes on Feminine Hygiene Products (July 21, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-exempt-sales-and-use-taxes-feminine-hygiene-products> [<https://perma.cc/P8AY-J5NK>].

283. Assemb. B. 1561 (Cal. 2016).

284. John Myers, *Tax-Free Tampons Plan Goes to Gov. Jerry Brown With Bipartisan Support*, L.A. TIMES (Sept. 1, 2016, 3:01 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-tax-free-tampons-plan-goes-to-gov-1471989678-htmlstory.html> [<https://perma.cc/G4RV-KTTL>].

285. *Id.*

286. See, e.g., Letter from Edmund G. Brown, Jr., California Governor, to Members of the California State Assembly (Sept. 13, 2016), [https://www.gov.ca.gov/docs/AB\\_717\\_Veto\\_Message.pdf](https://www.gov.ca.gov/docs/AB_717_Veto_Message.pdf) [<https://perma.cc/7A4E-AUKJ>] (explaining his refusal to sign various bills including the tampon tax repeal on the grounds that “tax breaks are the same as new spending . . . . As such, they must be considered during budget deliberations so that all spending proposals are weighed against each other at the same time. . . .”); see also Dillon, *supra* note 98 (estimating cost of tampon tax repeal at \$20 million per year and reporting on the governor’s veto). In response to Governor Brown’s actions, Democratic California Assemblywoman Cristina Garcia posted a tweet saying, “@JerryBrownGov please #mansplain why it’s

Recent repeal of the Illinois tampon tax has garnered praise from academics. One professor at Southern Illinois University called the repeal “an important step in creating a society in which women have less hurdles in our way of advancement . . . .”<sup>287</sup> The same academic, Diana Tigerlily, credited female lawmakers for the change: “A man didn’t say, ‘Hey, women are paying this tampon tax and that’s not right’, it was women . . . . Women are coming into positions of power where they have a voice, where they can advocate for change on behalf of everyone, and historically this hasn’t been the case.”<sup>288</sup> The sponsoring state senator, Democrat Melinda Bush, explained the logic of the bill as being grounded in women’s need for the product: “For young women, a period is anything but a luxury. There really is no escaping this monthly biological function.”<sup>289</sup>

Simultaneous to these legislative reform efforts, several women recently have brought class action litigations to challenge the sales tax imposed on menstrual hygiene products. These lawsuits have their origins in the work of Laura Strausfeld, a New York-based attorney who had developed a theory of the illegality of the sales tax imposed on menstrual hygiene products.<sup>290</sup> After seeing media coverage about the tax, Ms. Strausfeld consulted with Jennifer Weiss-Wolf, the organizer of the online petition *Stop Taxing Our Periods! Period*.<sup>291</sup> Together,

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ok to balance the budget on women's backs? The unfair #tampon tax continues.” Cristina Garcia, (@AsmGarcia), TWITTER (Sept. 13, 2016, 2:42 PM), [https://twitter.com/AsmGarcia/status/775766620245417984?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.foxnews.com%2Fpolitics%2F2016%2F09%2F14%2Fcalifornia-gov-preserves-tampon-tax-comes-under-fire-from-female-lawmakers.html](https://twitter.com/AsmGarcia/status/775766620245417984?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.foxnews.com%2Fpolitics%2F2016%2F09%2F14%2Fcalifornia-gov-preserves-tampon-tax-comes-under-fire-from-female-lawmakers.html) [<https://perma.cc/TF3P-5XGZ>].

287. Marnie Leonard, *SIU Community Reacts to Lifting of Illinois Tampon Tax*, DAILY EGYPTIAN, (Aug. 23, 2016), <http://dailyegyptian.com/57388/news/campus/illinois-repeals-tampon-tax-categorizes-products-as-non-luxury-goods/> [<https://perma.cc/VUD3-UR9Z>] (quoting Professor Diana Tigerlily).

288. *Id.*

289. *IL Senate Passes Tampon Tax Repeal*, WTAX, <http://wtax.com/news/101101-il-senate-passes-tampon-tax-repeal/> [<https://perma.cc/B8CU-HR3D>] (last visited Apr. 2, 2017).

290. Bridget Crawford, *Interview with Laura Strausfeld, New York Attorney Challenging the “Tampon Tax,”* FEMINIST LAW PROFESSORS (Nov. 15, 2016), <http://www.feministlawprofessors.com/2016/11/interview-laura-strausfeld-new-york-attorney-challenging-tampon-tax/#more-24388> [<https://perma.cc/VLG9-P37P>].

291. Bridget Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST LAW PROFESSORS (Nov. 22, 2016), <https://www.feministlawprofessors.com/2016/11/interview-jennifer-weiss-wolf-new-york-attorney-menstrual-equity-advocate/> [<https://perma.cc/4RN8-2CR5>]. For the online petition, see *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/WC2E-CPQK>] (last visited Apr. 2, 2017) (example from United States).



they agreed that a class action challenging the tampon tax could help the cause of what Ms. Weiss-Wolf calls the “menstrual equity” movement, an effort to address access, affordability, and safety of menstrual hygiene products in order to ensure that women can be “fully equal players in society . . . .”<sup>292</sup>

In New York, the State Legislature had been considering the legislation that ultimately led to the repeal of the tampon tax. A law firm identified by Ms. Strausfeld agreed to take on the case of five women in a class action law suit seeking to invalidate New York’s sales tax, permanently enjoining the State of New York from collecting sales tax on tampons and sanitary napkins, seeking a refund of an estimated fourteen million dollars in sales tax collected in each of the last three years, and seeking attorneys’ fees.<sup>293</sup> Zoe Salzman, the attorney for the plaintiffs in the case, has described the lawsuit as a spur to the state legislature. She explains:

New York women were tired of waiting and so we turned to litigation—and, lo and behold, after we filed our case, the legislature and the governor got motivated enough to finally end the tampon tax. There’s no question that the lawsuit brought a lot of attention to this issue and was a powerful catalyst for change.<sup>294</sup>

The first named plaintiff, Margo Seibert, is identified in the Complaint as a thirty-one-year old actor and the co-founder of Racket, “a new organization with the mission of providing all women with a shame-free period, which raises awareness of inequities in access to feminine hygiene products and collects and donates tampons and pads to homeless women in New York City.”<sup>295</sup> The Complaint alleges equal protection violations of both the United States and New York State Constitutions.<sup>296</sup> The plaintiffs’ argument is both that the tax serves no

292. Crawford, *supra* note 291.

293. Crawford, *supra* note 290.

294. Bridget Crawford, *Interview with Zoe Salzman, New York Attorney Challenging the “Tampon Tax,”* FEMINIST LAW PROFESSORS (July 28, 2016), <http://www.feministlawprofessors.com/2016/07/interview-zoe-salzman-new-york-attorney-challenging-tampon-tax/> [https://perma.cc/5DDC-3WAB].

295. Complaint, *Seibert v. N.Y. State Dep’t of Taxation and Fin.*, No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016); see RACKET, *supra* note 236; see also Alex Strycula, *Racket. – Periods Without Shame*, INTERVAL (Nov. 30, 2015), <http://theintervalny.com/featurettes/2015/11/racket-periods-without-shame/> [https://perma.cc/93W3-F6J7] (describing over 10,000 feminine hygiene products donated in a drive at a local Manhattan church).

296. Complaint, *supra* note 295, at 1.

important state interest and that the classification of menstrual hygiene products is not substantially related to that interest.<sup>297</sup>

After the suit was filed, New York changed its law prospectively, so the injunctive claims became moot. Several months later, in late 2016, the plaintiffs agreed to a voluntary dismissal of their case, but a new case can be filed.<sup>298</sup> There is at least some evidence to suggest that the plaintiffs were not certain that they were going to win, and that the cost of continuing the suit was an obstacle.<sup>299</sup>

A class action challenging the state sales tax on menstrual hygiene products has been filed in Florida. Like the now-dismissed New York case, the Florida class action seeks both declaratory and injunctive relief, and a tax refund.<sup>300</sup> The defendants in the case are the Florida Department of Revenue, the Executive Director of the Florida Department of Revenue, both individually and in his official capacity, the Florida Department of Health, the Secretary of the Florida Department of Health, both individually and in her official capacity, and five named retailers.<sup>301</sup>

Like the New York case, the Florida case alleges a violation of the Equal Protection Clause of both the federal and state Constitutions.<sup>302</sup> The Florida case specifically takes on the failure of Florida law to exempt menstrual hygiene products from the sales tax, when it exempts “most medical items, including common household remedies recommended and generally sold for internal or external use in the cure, mitigation, treatment, or prevention of illness or disease in human beings,”<sup>303</sup> such as adhesive tape, Epsom salts, athlete’s foot treatment, Rogaine, and petroleum jelly.<sup>304</sup> Dana Brooks Cooper, the attorney for the Florida plaintiff, has explained that she is not arguing that menstruation is a disease, but rather that menstrual hygiene products are crucial to human health:

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297. See Crawford, *supra* note 294 (quoting Zoe Salzman explaining both prongs of the equal protection argument, adding that, “I think there is no way the State can defend this discriminatory tax and that’s why they ended up having to repeal it after we filed our case”).

298. See Crawford, *supra* note 290.

299. *Id.* (Laura Strausfeld has said, “The *Seibert* plaintiffs dropped the claim for past tax paid, but a new case can be filed and we are considering that option. Pursuing a case of this sort, on a contingency fee basis and with an uncertain result, is expensive for the attorneys.”).

300. Complaint, *Wendell v. Fla. Dep’t of Revenue*, 2016 CA 001526 (Fla. Leon County Ct. July 6, 2016).

301. *Id.*

302. *Id.* at 1.

303. *Id.* at 2.

304. *Id.* at 41.

[S]anitary products play an essential role in reducing and preventing the spread of blood borne illnesses. If you think about it, if an athlete gets injured and starts bleeding in a basketball game, s/he must leave the game specifically to avoid the potential spread of disease. In Florida, the absorbent products used for that active bleeding – gauze, tape, band-aids, etc. – would be tax exempt for both male and female athletes. Women use sanitary products for the same reason – to keep from bleeding all over the place – yet they are taxed for similar absorbent products. Women don't use these products for fear of their own blood – it's for the protection of everybody else. Simply put, it's a public health safety issue, the costs of which are solely borne by women. These products are not luxuries – women can't just stay home until they stop bleeding.<sup>305</sup>

Thus, Ms. Cooper explains, menstrual hygiene products are medical necessities whose affordability is crucial to the full participation of women in the public sphere. Ms. Cooper does not necessarily see malice on the part of the Florida taxing authorities, however, saying that “they simply did not give it sufficient thought.”<sup>306</sup> Florida legislators have vowed to take up the sales tax exemption for menstrual hygiene products in the next legislative session.<sup>307</sup> State Senator Wilton Simpson claims to have received hundreds of emails on the subject of the tampon tax from his constituents, and that he was unaware of the issue until receiving these emails.<sup>308</sup> Senator Simpson's legislative aide has said of the class action that “there have been many situations in which what very easily could have been a simple legislative fix became difficult as a result of ongoing litigation,” it is likely that the class action has gotten the attention of Florida legislators.<sup>309</sup> Far from making legislative reform “difficult,” the lawsuit likely will spur the Florida legislature to act, just as it did in New York.

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305. Bridget Crawford, *Interview with Dana Brooks Cooper, Florida Attorney Challenging the “Tampon Tax,”* FEMINIST LAW PROFESSORS (July 28, 2016), <http://www.feministlawprofessors.com/2016/07/interview-dana-brooks-cooper-florida-attorney-challenging-tampon-tax-2/> [<https://perma.cc/W58E-TZSU>].

306. *Id.*

307. See Jeff Burlew, *Sen. Simpson Seeks Repeal of ‘Tampon Tax,’* TALLAHASSEE DEMOCRAT (July 14, 2016, 5:13 PM), <http://www.tallahassee.com/story/news/2016/07/13/sen-simpson-seeks-repeal-tampon-tax/87049694/> [<https://perma.cc/M3NQ-JAFN>].

308. *Id.*

309. *Id.*

In terms of the case itself, as of February 2017, however, the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida has granted the motion to dismiss of the Florida Department of Revenue and the Executive Director of the Florida Department of Revenue.<sup>310</sup> The defendants had argued that the statute was facially neutral, and the court agreed.<sup>311</sup> The court also agreed that the plaintiffs had failed to exhaust the administrative remedies available to them under the Florida statute, and thus the court would not rule on the plaintiff's argument that the statute was unconstitutional as applied.<sup>312</sup> The court has allowed the case to go forward against the named retailers.<sup>313</sup>

Apart from New York and Florida, similar class actions have been filed in Ohio<sup>314</sup> and California.<sup>315</sup> The outcome of those cases is unclear. To date, there is no evidence of any national involvement or coordination of litigation efforts by any organization like Legal Momentum (formerly known as the NOW Legal Defense and Education Fund), for example.<sup>316</sup> Instead, these cases have been pursued by individual women who have found sympathetic attorneys in their local jurisdictions. There are some similarities among the plaintiffs' complaints; this suggests that even though the attorneys are not working in concert, they are highly aware of and building on each other's work.<sup>317</sup> If any of the plaintiffs are successful in recovering back taxes

310. Order Denying Plaintiff's Amended Motion for Partial Summary Judgment and Granting Florida Department of Revenue's Motion to Dismiss Second Amended Complaint and Granting Defendants' Florida Department of Revenue and Leon M. Biegalski's Motion for Summary Judgment, *Wendell v. Florida Dep't. of Revenue*, No. 51988245 (Fla. Leon County Ct., Feb. 2, 2017).

311. *Id.*

312. *Id.*

313. *Id.*

314. See Class Action Complaint, *Rowitz v. Ohio Dep't of Taxation*, 2016-00197 (Ohio Ct. Claims, Apr. 11, 2016) [hereinafter Complaint, *Rowitz*] (dismissed without prejudice). Refiled as Class Action Complaint, *Rowitz v. State of Ohio et al.*, 2016-CV-003518 (Ohio Ct. Common Pleas Franklin Co., Apr. 11, 2016) [hereinafter Complaint, *Rowitz* refiled]. The trial in that case is scheduled for April 10, 2017.

315. See Crawford, *supra* note 294.

316. See Legal Momentum's History, LEGAL MOMENTUM, <https://www.legalmomentum.org/history> [<https://perma.cc/LD7F-P498>] (last visited Apr. 2, 2017).

317. Compare, e.g., Complaint, *Rowitz*, *supra* note 314, at 9 (using the following heading for its second cause of action: "Inapplicable Tax and Arbitrary, Capricious, Legally Deficient Determination Against All Defendants"), with Complaint, *Seibert*, *supra* note 295, at 12 (using the following heading for its second cause of action: "Inapplicable Tax and Arbitrary, Capricious, Legally Deficient Determination Against All Defendants"). In their motion to dismiss, the defendants in the Ohio case note the similarities between the Complaints in the Ohio and New York cases. Defense Motion to Dismiss Defendants State of Ohio, Ohio Department of Tax,

and attorney fees, it is highly likely that similar cases would be filed in other states nation-wide.<sup>318</sup>

## V. THE BIG PICTURE OF THE TAMPON TAX

The issue of the tampon tax has gained traction relatively quickly and across national borders. A discriminatory sales tax on menstrual hygiene products might seem to be an unlikely rallying cry for legal reform and activism. But the “tampon tax” has attracted maximum attention. In one compact, alliterative phrase, activists have been able to communicate the crux of the issue: there is a sales tax on a product used mainly or exclusively by women, but there are no products that men must use by virtue of an involuntary biological process. The closest analogous products that are used by men are not subject to taxation.

Four factors combine to bring international attention to this issue: (1) a generational embrace of openness in discussing women’s bodily functions; (2) fast and powerful communication facilitated by the Internet; (3) the ability to describe the effects of gender discrimination in simple financial terms that every woman (and man) can understand; (4) the relative ease of finding a solution for discriminatory tax regimes (compared to other forms of gender discrimination).<sup>319</sup>

### A. *Open Discussion of Women’s Bodily Functions*

At least in the United States, women’s bodily functions made front-page news in the 2016 presidential campaign. Fox News host Megyn Kelly dared to question Donald Trump in a Republican primary

Joseph W. Testa, Tax Commissioner of Ohio, and Joseph W. Testa Individually, *Rowitz v. Ohio*, 2016-CV-3518 at n.1 (Cir. Ct. Ohio, June 6, 2016).

318. Ms. Strausfeld and Ms. Weiss-Wolf have formed Period Equity, a “law and policy institute dedicated to advancing menstrual access, equity and safety in the U.S.” See <https://periodequity.org> [<https://perma.cc/X5UQ-HQXJ>]; see also Crawford, *supra* note 290 (describing origins and goals of Period Equity). It may be that this organization takes on a role in coordinating litigation nation-wide.

319. The comments of Zoe Salzman, plaintiffs’ attorney in the New York class action challenging the tampon tax, suggest another reason for interest in the tampon tax:

Maybe the fact that a lot of people still think ‘tampon’ is a dirty word and it’s scandalous to see it in print? But all joking aside, I think people are drawn to this issue because the tampon tax is so obviously wrong, discriminatory, and unjustifiable. It’s not often that an issue is this clear-cut. Women and men alike are shocked and I think that leads them to be inspired by this campaign.

Crawford, *supra* note 294.

debate about comments he has made about women in the past.<sup>320</sup> Trump retaliated against her, saying:

Certainly, I don't have a lot of respect for Megyn Kelly. She's a lightweight and y'know, she came out there reading her little script and trying to be tough and be sharp. And when you meet her you realize she's not very tough and she's not very sharp. . . . She gets out there and she starts asking me all sorts of ridiculous questions, and you could see there was blood coming out of her eyes, blood coming out of her . . . wherever.<sup>321</sup>

Many women, including Donald Trump supporters, were angry at what seemed to be Mr. Trump's not-thinly-veiled reference to menstruation as a possible "explanation" for a style of questioning he did not like.<sup>322</sup> And when Hillary Clinton was briefly absent from the stage during a Democratic candidates' debate after a commercial break, Trump said at a rally of his own supporters, "I know where she went—it's disgusting, I don't want to talk about it. . . . No, it's too disgusting. Don't say it, it's disgusting."<sup>323</sup> Women's bodily functions, it would seem, are "disgusting" to this candidate in a way that men's are not. The sexism inherent in these comments has angered and alienated many women voters.<sup>324</sup>

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320. See generally Aaron Blake, *Here are the Megyn Kelly Questions that Donald Trump is Still Sore About*, WASH. POST (Jan. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/here-are-the-megyn-kelly-questions-that-donald-trump-is-still-sore-about/> [<https://perma.cc/Y5HR-H7N9>].

321. See, e.g., Laura Bennett, *What Trump Really Meant When He Said That Megyn Kelly Had "Blood Coming Out of Her Wherever,"* SLATE (Aug. 10, 2015, 7:33 PM), [http://www.slate.com/blogs/the\\_slatest/2015/08/10/megyn\\_kelly\\_blood\\_coming\\_out\\_of\\_her\\_wherever\\_comment\\_in\\_cnn\\_don\\_lemon\\_interview.html](http://www.slate.com/blogs/the_slatest/2015/08/10/megyn_kelly_blood_coming_out_of_her_wherever_comment_in_cnn_don_lemon_interview.html) [<https://perma.cc/L6T4-SMXU>].

322. Celeste Katz et al., *Donald Trump Makes Bloody Remark Against Megyn Kelly*, N.Y. DAILY NEWS (Aug. 10, 2015, 12:12 PM), <http://www.nydailynews.com/news/politics/donald-trump-bloody-remark-megyn-kelly-article-1.2318882> [<https://perma.cc/2NT5-4A24>].

323. Jenna Johnson, *Donald Trump Says Clinton's Bathroom Break During the Debate is 'Too Disgusting' to Talk About*, WASH. POST (Dec. 21, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/21/donald-trump-calls-hillary-clinton-disgusting-for-using-the-restroom-during-a-debate/> [<https://perma.cc/M8WG-XKR5>].

324. See, e.g., Jenna Johnson & Karen Tumulty, *Republican Women Increasingly Fear Party is Alienating Female Voters*, WASH. POST (Oct. 26, 2016), [https://www.washingtonpost.com/politics/a-new-war-on-women-breaks-out--this-time-inside-the-republican-party/2016/10/26/9c8f8fa4-9b94-11e6-b3c9-f662adaa0048\\_story.html?utm\\_term=.006ba0f26887](https://www.washingtonpost.com/politics/a-new-war-on-women-breaks-out--this-time-inside-the-republican-party/2016/10/26/9c8f8fa4-9b94-11e6-b3c9-f662adaa0048_story.html?utm_term=.006ba0f26887) [<https://perma.cc/XY3s-69E8>].

This language may be especially discordant to members of the generation of Western women currently in their twenties and thirties who have been raised with a body-positivity that is uncharacteristic of previous generations. In the United States, at least, these young women are the daughters of women who themselves read *Our Bodies, Ourselves*.<sup>325</sup> The younger generation has absorbed the message that their bodies should not be the source of shame. For example, a “free bleeding” British woman ran the London Marathon without a tampon and happily posed for pictures and blogged about it afterwards.<sup>326</sup> The athlete, Kiran Gandhi, explained that she did so as an act of rebellion, saying “I ran with blood dripping down my legs for sisters who don’t have access to tampons and sisters who, despite cramping and pain, hide it away and pretend like it doesn’t exist.”<sup>327</sup> Ms. Gandhi’s “free bleed” marathon run was covered by a variety of media outlets including *Cosmopolitan* magazine, which wrote about it as a celebratory act of rebellion.<sup>328</sup>

Even greater publicity erupted when Instagram censored Rupi Kaur’s picture of a fully clothed woman laying on a bed and bleeding through her trousers; critics reacted swiftly, claiming that Instagram was “policing” women’s bodies.<sup>329</sup> Ultimately, Instagram allowed the photo.<sup>330</sup> Body-positive young women like Kiran Gandhi and Rupi Kaur used social media in order to publicize and marshal support for their positions. To be sure, young women are not the only ones proclaiming

325. *Women and Their Bodies* was originally published in 1970 as a stapled newsprint copy and circulated by hand by members of the Boston Women’s Health Collective. The first printed book of *Our Bodies, Ourselves* was published in 1971 by the New England Free Press. See History, OUR BODIES OURSELVES, <http://www.ourbodiesourselves.org/history/> [<https://perma.cc/74US-MVL5>].

326. Madame Gandhi, *Sisterhood, Blood and Boobs at the London Marathon* 2015, MADAME GHANDI (Apr. 26, 2015), <https://madamegandhi.blog/2015/04/26/sisterhood-blood-and-boobs-at-the-london-marathon-2015/> [<https://perma.cc/UH9G-K69R>] (“On the marathon course, sexism can be beaten. Where the stigma of a woman’s period is irrelevant, and we can re-write the rules as we choose. Where a woman’s comfort supersedes that of the observer.”).

327. *Id.*

328. See Helin Jung, *26-Year-Old Woman Free Bleeds Proudly Through Her First Marathon*, COSMOPOLITAN (Aug. 6, 2015), <http://www.cosmopolitan.com/health-fitness/q-and-a/a44392/free-bleeding-marathoner-kiran-gandhi/> [<https://perma.cc/4C9T-UX29>].

329. Katie Dupree, *8 Times Instagram Policed Women’s Bodies*, MASHABLE (July 5, 2015, 12:03 PM), <http://mashable.com/2015/07/05/instagram-banned-photos-women/#qd2INIfhogqi> [<https://perma.cc/5G6Y-8SY3>].

330. Rebecca Zamon, *Rupi Kaur’s Period Photo on Instagram Sparks Change*, HUFFINGTON POST: CAN. (Mar. 30, 2015, 5:59 PM), [http://www.huffingtonpost.ca/2015/03/27/rupi-kaur-instagram-photo\\_n\\_6953770.html](http://www.huffingtonpost.ca/2015/03/27/rupi-kaur-instagram-photo_n_6953770.html) [<https://perma.cc/A7C9-9KZH>].

body-positivity,<sup>331</sup> but their willingness to bring widespread public attention to their own (and all women's) menstruation is unique.

### B. *The Power of the Internet*

The Internet plays a significant role in increasing awareness of the tampon tax and building support for legal reform. Activists around the world spread their message through websites like *Bloody Disgrace!*<sup>332</sup> They use online petitions on platforms, such as change.org in order to mobilize large numbers of people and to make it easy for constituents to communicate their message—encapsulated succinctly by the *Stop Taxing Our Periods! Period.* petition<sup>333</sup>—via simultaneous emails sent to elected representatives. With a few mouse clicks, one can communicate with multiple elected representatives. Although members of the younger generation have been criticized at times for their so-called “slactivism,”<sup>334</sup> young women in particular have uniquely and effectively harnessed the Internet to communicate on issues of the tampon tax. Media outlets covering Canada's repeal of the tampon tax, for example, regularly referred to the number of signatories to an online petition, indicating the importance that digital information-sharing played in marshalling support for reform.<sup>335</sup>

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331. For example, Walt Whitman famously praised “lung-sponges, the stomach-sac, the bowels sweet and clean . . . . The thin red jellies within you or within me . . . . O I say these are not the parts and poems of the body only, but of the soul . . . .” WALT WHITMAN, *I Sing the Body Electric*, in *LEAVES OF GRASS* (1855). More recently, Martha Nussbaum has written about undergoing a routine colonoscopy without anesthesia. Martha C. Nussbaum, *It's Time to Take Back Our Aging, Smelly Bodies*, *NEW REPUBLIC* (Oct. 6, 2014), <https://newrepublic.com/article/119581/against-sedation-and-general-anesthesia-time-take-back-our-bodies> [<https://perma.cc/W5NW-XNUM>]. Nussbaum writes specifically from the perspective of an aging body. *Id.*; see also Rachel Aviv, *The Philosopher of Feelings*, *NEW YORKER* (July 15, 2016), <http://www.newyorker.com/magazine/2016/07/25/martha-nussbaums-moral-philosophies> [<https://perma.cc/ZS8F-MANH>] (profiling Martha Nussbaum and referring to current book project, *Aging Wisely*).

332. See *BLOODY DISGRACE*, *supra* note 10.

333. *No Tax on Tampons: Stop Taxing Our Periods! Period.*, *supra* note 291 (example from United States); see also Coryton, *supra* note 40 (example from United Kingdom); *Government of Canada — No Tax on Tampons: A Campaign to Remove the GST Charged on Menstruation Products*, CHANGE.ORG <https://www.change.org/p/no-tax-on-tampons-a-campaign-to-remove-the-gst-charged-on-menstruation-products-sign-the-petition> [<https://perma.cc/22BA-VUS3>] (last visited Apr. 12, 2017) (example from Canada); Vimalarajah, *supra* note 9 (example from Australia).

334. See ‘Slactivism’ That Works: ‘Small Changes’ Matter, CONVERSATION (Dec. 15, 2016, 10:19 PM), <https://theconversation.com/slacktivism-that-works-small-changes-matter-69271> [<https://perma.cc/MXK3-9FTF>] (describing critics who characterize online engagement in political issues as “slactivism” and a “waste”).

335. Tara Culp-Ressler, *After Years of Backlash, Canada Ditches the ‘Tampon Tax,’* THINK PROGRESS (May 29, 2015), <https://thinkprogress.org/after-years-of->



### C. Quantifiable Taxes

Another reason that the movement to repeal the tampon tax has garnered so much support is that the issue is both concrete and easy to understand. Women know how much they pay per month for menstrual hygiene products and are outraged when they find out that similar products used primarily by men are not subject to taxation. Thus, the issue of gender discrimination is reduced to dollars and cents. The consequences are felt each month by every menstruating woman. This tax is money that women must pay out-of-pocket to the government, but men do not. There is nothing complicated to understand about tax brackets, rates, or timing. The tampon tax is easily understood; it has a quantifiable impact. Many women react with anger when they become aware of this issue for the first time.

Taxation provides a unique vehicle for understanding and communicating about discrimination. It is perhaps not a coincidence that in the United States, the road to same-sex marriage was paved with a tax case, *United States v. Windsor*,<sup>336</sup> in which the surviving member of a same-sex couple challenged the ineligibility of her deceased spouse's estate for the estate tax marital deduction—and won.<sup>337</sup> When confronted with a situation in which same-sex couples must pay taxes when opposite-sex couples do not, or in which women pay tax on “their” products when men do not, most people can easily spot the discrimination. It does not require any special training in law or economics to understand that taxes on menstrual products mean less money left in the female consumer's pocket. Once widespread differences in treatment have been identified and named, if enough girls and women (and their supporters) become activated, reform efforts should follow.

### D. Clear Legal Remedies

To the ordinary consumer, the solution to a discriminatory tax is straightforward: repeal it. In another article, one of us has attempted to explain why, in the United States at least, one has not seen significant and overt third-wave feminist engagement with legal reform.<sup>338</sup> Explanations include a lack of understanding of how the law can be

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backlash-canada-ditches-the-tampon-tax-ed5cd867fbf4#.6cn0yfign  
[<https://perma.cc/6UKY-KTBQ>].

336. 133 S. Ct. 2675 (2013).

337. *Id.* at 2675, 2695–96.

338. Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 102–03 (2007) (“Third-wave feminists writers focus on social change, not on legal issues, strategies or theories.”).

used to achieve feminist goals,<sup>339</sup> an active rejection of the law as a means for achieving gender justice,<sup>340</sup> dissatisfaction with early reform efforts,<sup>341</sup> and greater engagement with culture as a locus of social transformation.<sup>342</sup> Tampon tax activism challenges these explanations. Young feminists are in fact engaged with the law on multiple levels in order to reform the tax law.<sup>343</sup> With the assistance of like-minded legislators, as well as attorneys willing to file class actions, young women are indeed engaging with the law in a way familiar to their foremothers—*i.e.*, state legislative campaigns and litigation in the courts. Young women use social media to drum up support and publicity for their legal engagements. The rate of information dissemination and magnitude of support for the repeal of the tampon tax makes the work *seem* different than prior generations' engagement with the law, but the engagement is, at its core, traditional legal reform work.

To be sure, part of the appeal of the tampon tax issue is the seemingly relative ease with which it can be “solved,” at least on the surface. The tampon tax is an injustice and it can be eliminated through legislative change. Class actions that result in massive refunds of back sales tax paid would be welcome relief for many women. Yet the tampon tax is only a smaller (and mostly Westernized) part of a larger problem of menstrual hygiene. In parts of the world where most women do not have access to or cannot afford any commercial menstrual hygiene products,<sup>344</sup> the tampon tax is not a pressing issue. In those countries, improving menstrual hygiene will require increased access to water and sanitation facilities first, or in conjunction with increased affordability of menstrual hygiene products. With both, girls will be able to access education and all aspects of public life, realizing the human rights ideal of freedom from discrimination. Changes in access to water and sanitation are far more difficult to achieve than a repeal of a state sales tax, and will require a great deal more than Internet petitions, legal action, and public pressure.

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339. *Id.* at 158.

340. *Id.* at 160.

341. *Id.* at 161.

342. *Id.* at 162–63.

343. Recall that the lead plaintiff in the New York class action challenge to the tampon tax is a thirty-one-year-old woman. See Complaint, *supra* note 295. The plaintiff in the Florida class action is a twenty-three-year old woman. See Crawford, *supra* note 305.

344. See *supra* notes 147–160 and accompanying text.

## CONCLUSION

Gendered tax policies breed in a culture of silence and secrecy. Meaningful tax reform and gender justice will occur only when accurate information is visible to all citizens and when legislators commit to non-discrimination in fiscal policies. For many years, the sales tax on menstrual hygiene products was a non-issue because no one was aware of it or paid attention to it. Change only came about when female consumers started to question why they were being taxed on a product that is essential for their health, when other elective items or products relating primarily to men's health escaped taxation entirely. It is not that this tax was imposed in secrecy, but rather that historic and contemporary cultural attitudes about women's menstruation contributed to either disengagement or silence about the tax. An early challenge to the tampon tax in Chicago in the mid-1980s brought about a symbolic victory, but did not in fact lead to lasting change in the local sales tax practices.<sup>345</sup> Only in the latter half of 2016 did Chicago and the State of Illinois change their laws to exempt menstrual hygiene products from taxation.<sup>346</sup> Reforms in Illinois and other states have come only after legislative reform and pressure, and a similar pressure has been felt in countries around the world.<sup>347</sup>

One way of bringing more clarity to the issue of gender equity in taxation would be to require all local and national governments to engage in gender-based budgeting, or at least issue a statement to accompany any new legislation that evaluates any expected gender differential impact of the law.<sup>348</sup> Understanding how a fiscal policy

345. See *supra* Part V.A.

346. See *supra* note 273 and accompanying text.

347. Drawing attention to the gender inequity of the tampon tax has not necessarily caused all governments to take the issue seriously. One news outlet reports that when a member of the Malaysian Parliament raised the issue, his remarks drew laughter. See *GST on Sanitary Napkins Gets Chuckles in Parliament*, FREE MALAYSIA TODAY NEWS (Mar. 19, 2015), <http://www.freemalaysiatoday.com/category/nation/2015/03/19/gst-on-sanitary-napkins-provokes-laughter-in-parliament/> [<https://perma.cc/DE7M-6GAW>].

348. For a discussion of gender-based budgeting generally, see, DEBBIE BUDLENDER ET AL., GENDER BUDGETS MAKE CENTS: UNDERSTANDING GENDER RESPONSIVE BUDGETS (2002); DEBBIE BUDLENDER ET AL., HOW TO DO A GENDER-SENSITIVE BUDGET ANALYSIS: CONTEMPORARY RESEARCH AND PRACTICE (1998); Kathleen A. Lahey, *Women, Substantive Equality, and Fiscal Policy: Gender-Based Analysis of Taxes, Benefits, and Budgets*, 22 CANADIAN J. OF WOMEN & L. 27, 29-30 (2010). Complete “[g]ender-based budgeting has three significant components: (1) an empirical description of gender-specific outcomes; (2) analyzing the contribution of women not only in the market economy, but also in the unpaid care economy[;] and (3) analyzing budgets for the gender differential impacts of public expenditure.” Lekha Chakraborty, *Integrating Time in Public Policy: Empirical Description of Gender-Specific Outcomes and Budgeting* 3 (Jan. 21, 2014) (working paper) (on file with Levy

might impact men and women differently is a pre-condition for creating non-discriminatory tax laws. This type of systemic change may garner less public support—and generate fewer catchy slogans—than the tampon tax, but it is just as important.

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