



Volume 15 (2018) | ISSN 1932-1821 (print) 1932-1996 (online)  
DOI 10.5195/taxreview.2018.72 | <http://taxreview.law.pitt.edu>

## NOTES

THANK HEFNER ERECTILE DYSFUNCTION IS A MEDICAL  
CONDITION: A PERIOD PIECE

*Gwenyth S. Gamble Jarvi*



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This journal is published by the [University Library System](#) of the [University of Pittsburgh](#) as part of its [D-Scribe Digital Publishing Program](#), and is cosponsored by the [University of Pittsburgh Press](#).

# NOTES

## THANK HEFNER ERECTILE DYSFUNCTION IS A MEDICAL CONDITION: A PERIOD PIECE

*Gwenyth S. Gamble Jarvi\**

You actually made it to the bathroom.

You finally had a chance to slip away from the memorandum you had been assigned by your managing partner to rush out of your shared office when you felt that tell-tale ache in the pit of your stomach. But it's not really in your stomach, that's just the polite word you would use in mixed company, and it's not so much an ache as what you can only imagine it would feel like if a velociraptor tried to hatch out of your body.

You try to hide the brightly wrapped tampon in your hand—because they're targeted to women you better believe that the amount of pink and purple packaging makes discretion impossible—as you run-walk past the receptionist, though she probably knows exactly what you're doing, since she's done the same run-walk before. In fact, almost every other woman in your firm has perfected the run-walk with the tampon or pad scrunched in their fist because pencil skirts don't have pockets. But heaven forbid you indicate anything is wrong, so you calmly push open the firm's door and when you notice the coast is clear in the hall your run-walk turns into a hustle as you burst into the bathroom.

You pass the vending machine dispensing, for a price, tampons and pads made with who knows what combination of materials and toxins encased in

---

\* Gwenyth S. Gamble Jarvi is a May 2018 JD graduate from the University of Pittsburgh School of Law. She would like to thank the women in her family who embody the definition of excellence, in particular Janice Gamble, PhD candidate; Professor Dr. Lindsey Gamble; Liesl Kail, Mother; Professor Dr. Whitney Gamble; and Hilary Gamble, MMus, AD, PD; and to Professor Danshera Cords for working with her to rein in the borders of this Note.

the rough cardboard applicators you're meant to shove up into your body but, hey, cardboard is cheap. Because of course it makes sense to hold inside of your body foreign objects with questionable sanitation, but then again a girl can get desperate, regardless that the skin in the nether regions of a body absorb toxins into the blood stream much faster than in other zones. You breathe in the blessed privacy of a stall—you made it in time—but you are the lucky one.

The discarded pair of underwear in the stall's neat and discreet bloody rags trashcan, with the handwritten sign—*Please discard products inside the bag not on top. Thanks, Management*—shows that someone else in your office wasn't so lucky. Soaked with blood, the abandoned garment is every assignment that made you ignore your body because you felt like you didn't have time; it's every moment you weren't so lucky as to have that brightly wrapped blood lollipop in the inner, inner pocket of your purse; it's each time you started a meeting with your male counterparts and realized you forgot the pain medicine you almost always have—if not for you, for a sister—but you switched out your briefcases this morning; it's every time you used thin, one-ply toilet paper as a makeshift pad and at the end of the day you blessed your lucky stars you didn't wear white that day.

If not for timing that would have been you.

#### INTRODUCTION

A majority of states in the United States levy some form of sales or use tax on tampons.<sup>1</sup> The tax may take the form of a luxury tax, it may simply be because tampons do not fall into any of the tax exemptions in the state's tax code, or it may be because the state explicitly rejected bills proposing the revocation or modification of taxes on tampons—which translates to an affirmative taxation of tampons.<sup>2</sup> More than half of the world's population will likely menstruate at some point in their lives and the majority of the population will likely care for someone who menstruates. And while tampons

---

<sup>1</sup> For purposes of consistency, I will be using the word *tampon* to refer to a host of menstrual hygiene items: tampons, sanitary napkins, pads, menstrual cups, reusable pads, washable period underwear, and so on.

<sup>2</sup> See *infra* notes 61–81 and accompanying text (discussing the actions of the Utah Legislature in regard to tampon taxation).

are not sought out for taxation by states, the tampon tax is nonetheless demeaning to women.

In Part I, this Note will look into the physiology of menstruation, to put the issue into context, and address the dynamic role menstruation plays in human biological life.<sup>3</sup> In Part II, this Note will, as a case study, compare recent legislation passed in New York that amended the state sales tax statutes to explicitly add tampons to the list of sales-tax-exempt products with the actions of the legislature in Utah where a similar series of bills were considered and rejected. Part III will argue that the continued taxation of tampons communicates to women that their menstrual, physical, and hygienic needs are subordinate to those of men, and will compare the taxation of tampons to products like Viagra. Part IV will conclude that to continue taxing tampons will stymie the progress toward gender equality for which the United States has striven.

This Note builds upon the foundation of tampon tax research begun by Bridget Crawford and Carla Spivack in their article published in the *Wisconsin Law Review*.<sup>4</sup> Professors Crawford and Spivack provide a valuable overview of the taxation of tampons both nationally and internationally and build an awareness of the issues surrounding the taxation of tampons that makes continued analysis possible. This Note furthers their research by comparing the processes through which New York and Utah addressed the issue of tampon taxation, by providing medical background on menstruation to place the issue of taxation in context, and by arguing that tax policy is public policy.

## I. A PRIMER ON MENSTRUATION AND THE HUMAN BODY

By 2020, it is expected that there will be almost four billion women in the world.<sup>5</sup> And in fewer than 50 years that number is estimated to increase

---

<sup>3</sup> I will be using the terms *period* and *menstruation* interchangeably. Alternatively, words or phrases such as *on the rag*, *being visited by Aunt Flow*, *hit by the red truck*, *time of the month*, and *shark week* are often used to talk about a woman's shedding her uterus.

<sup>4</sup> Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491.

<sup>5</sup> *World Population Prospects 2017*, UNITED NATIONS: DESA/POPULATION DIVISION, <https://esa.un.org/unpd/wpp/DataQuery/> (last visited Feb. 24, 2018) (select "total population by sex

to over five billion.<sup>6</sup> And of the billions of humans currently inhabiting our planet, more than a quarter of us are in the biological phase of life during which menstruation is possible.<sup>7</sup>

Barring early death, medical intervention, or disease and malnutrition, each of these almost four billion women will go through menstruation in some manner during the course of their lives.<sup>8</sup> Adjacent to menstruation is the need for proper menstrual hygiene and the inevitable taboo surrounding both actual menstruation and menstruation-centered discussion.<sup>9</sup> Improper hygiene during menstruation can cause various diseases, infections, and skin disorders as well as create an odor that perpetuates the stereotype of menstruation as unclean.<sup>10</sup> In many countries, access to safe and hygienic menstruation products is limited, which led the United Nations to focus in 2014 on access to menstrual products as a human rights issue.<sup>11</sup> However, even though the United Nations and other international organizations have called for greater access to tampons, the stigma that surrounds menstruation in so many cultures has continued to facilitate widespread discrimination against women because of this fundamental biological process.<sup>12</sup> For

---

(thousands)”; select “world”; select the years “2010” to “2020”; select “female”; select “by gender”; select “results”) [<http://web.archive.org/web/20180126155122/https://esa.un.org/unpd/wpp/DataQuery/>].

<sup>6</sup> *Id.* (selecting “2010” to “2070”).

<sup>7</sup> Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 *CARDOZO J.L. & GENDER* 1, 3 (2014).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 4, 7.

<sup>10</sup> *Id.* at 8–9.

<sup>11</sup> *Every Woman's Right to Water, Sanitation and Hygiene*, UNITED NATIONS HUM. RTS.: OFF. OF THE HIGH COMMISSIONER (Mar. 14, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrighttowatersanitationandhygiene.aspx> [<http://web.archive.org/web/20180206071802/http://www.ohchr.org/EN/NewsEvents/Pages/Everywomansrighttowatersanitationandhygiene.aspx>].

<sup>12</sup> The mindset of menstrual uncleanliness is so entrenched in Nepal that a certain group of women have started going around the countryside tearing down these shacks; and throughout the world girls miss school because of inadequate access to menstrual products and the stigma of showing up in public with visible signs of current menstruation, and because school facilities do not provide adequate facilities for cleanliness. Winkler & Roaf, *supra* note 7, at 32; *see also* Catarina de Albuquerque (Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation), *Rep. on Stigma and the Realization of the Human Rights to Water and Sanitation*, U.N. Doc. A/HRC/21/42 (July 2, 2012), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42_en.pdf) [<http://web.archive>

example, in Nepal, many menstruating women in the rural areas of the country are still forced to sleep outside in huts that provide little shelter against the elements or wild animals, even though such practices have been declared illegal.<sup>13</sup>

Looking at the biology of menstruation, menstruation begins with the onset of menarche in girls around the age of twelve; however, menarche can be delayed by malnutrition or other externalities and can conversely begin in girls much younger than eight. Menstruation can be divided into three stages: the follicular phase, characterized by follicular enlargement in the ovary; the ovulation phase, where the follicular wall ruptures and the ovum travels down the fallopian tubes toward the uterus where it will exit the body with the other menstrual fluids unless fertilized; and the luteal phase, where the follicular wall contracts and repairs itself before repeating the cycle again.<sup>14</sup>

In plain English, during a woman's period she is shedding the lining of her uterus because a fertilized embryo did not implant in her uterine wall.<sup>15</sup> During the first phase, the uterus naturally prepares itself to receive a fertilized embryo throughout the, roughly, first fourteen days of the menstrual cycle.<sup>16</sup> Then, during the second phase, if an egg is not fertilized during ovulation and does not implant on the uterine wall, the woman's body will automatically move on to the third phase.<sup>17</sup> During the third phase, the woman's body realizes whether or not an embryo has formed and attached to the uterine wall, which has thickened to prepare for implantation. If

---

[.org/web/20170712141240/http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42_en.pdf)].

<sup>13</sup> Winkler & Roaf, *supra* note 7, at 32. See generally the article by Professors Bridget J. Crawford and Carla Spivack, *supra* note 4, for a more in-depth discussion of the cultural implications accompanying menstruation. A memorable anecdote in that article notes that “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 could fit.’” Crawford & Spivack, *supra* note 4, at 506.

<sup>14</sup> John A. Owen, Jr., *Physiology of the Menstrual Cycle*, 28 AM. J. CLINICAL NUTRITION 333, 333 (1975).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

implantation has not occurred, the uterine wall will be shed out of her vagina along with the unfertilized eggs.<sup>18</sup>

The menstrual cycle, from the beginning of the follicular phase to the end of the luteal phase, usually takes place every 28 days but can range anywhere from 21 to 35 days in older women and 21 to 45 days in teens.<sup>19</sup> The luteal phase, or the phase during which the uterine lining is expelled, usually ranges between three and five days, but can last anywhere from two to seven days.<sup>20</sup> The average age of menarche in the United States is twelve, but it is also usual for the period to begin anytime between the ages of eight and fifteen.<sup>21</sup> Menopause, when a woman's body stops producing reproductive hormones, occurs in women from the ages of 45 to 55, but usually occurs around age 50 in the United States.<sup>22</sup> During and after menopause, a woman ceases to menstruate as her body is no longer producing the eggs and hormones needed to maintain fertility.<sup>23</sup>

Taking the average for the U.S. female population, a woman will live 38 years during which she will menstruate approximately once a month. This means that over the course of her life a woman will menstruate more than 450 times and will spend roughly 2,280 days in the externally apparent phase of menstruation. In other words, that means that, on average, a woman will spend almost *a decade* of her life shedding the lining of her uterus.

---

<sup>18</sup> *Id.*

<sup>19</sup> Office of Women's Health, U.S. Dep't of Health & Human Servs., *Frequently Asked Questions: Menstruation and the Menstrual Cycle 1* (2009), <https://www.womenshealth.gov/files/assets/docs/fact-sheets/menstruation.pdf> [<https://web.archive.org/web/20170209152428/https://www.womenshealth.gov/files/assets/docs/fact-sheets/menstruation.pdf>].

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3–4.

## II. A TALE OF TWO (CASE) STUDIES: NEW YORK, UTAH, AND HOUSE BILLS 202 AND 71

### A. Introduction

The taboo surrounding menstruation is deeply engrained in human society and internationally widespread.<sup>24</sup> A country-by-country analysis of the discriminatory practices menstruating women are burdened with—while a sad testimony of discrimination against women—is outside of the scope of this Note, and so a few, pointed examples of such discrimination have earlier been mentioned by way of illustration.<sup>25</sup> Instead, this Note will focus on the manner in which the continued taxation of tampons perpetuates discriminatory gender stereotypes and implies that menstruation is a luxury in the United States of America.<sup>26</sup>

More than three-quarters of states in the United States tax tampons, sanitary napkins, and other menstrual hygiene products.<sup>27</sup> These items usually do not fall into typical sales or use tax exemption categories as they are sometimes considered luxuries, often do not qualify as medical devices, and are not used to treat diseases—because a period is not a disease.<sup>28</sup> Tampons are subject to taxes at a national average rate of 6.25%, but the tax can run much higher, up to 10% or more in some places, due to the addition of city and county taxes.<sup>29</sup> And while taxes on such a hush-hush product like

<sup>24</sup> Winkler & Roaf, *supra* note 7, at 3–5.

<sup>25</sup> See generally Crawford & Spivack, *supra* note 4.

<sup>26</sup> Press Release, Linda B. Rosenthal, N.Y. State Assembly Member, Day One of Tax-Free Tampons, Other Feminine Hygiene Products in New York State (Sept. 1, 2016), <http://nyassembly.gov/mem/Linda-B-Rosenthal/story/71853/> [<http://web.archive.org/web/20180208182402/http://nyassembly.gov/mem/Linda-B-Rosenthal/story/71853/>].

<sup>27</sup> See *infra* note 60.

<sup>28</sup> See N.Y. TAX LAW § 1115(3) (McKinney 2017) (showing that prior to the addition of the explicit tampon sales and use tax exemption, tampons would not have fallen under any other medical-based exemption).

<sup>29</sup> Jennifer Weiss-Wolf, “The Year Period Policy Prevails”: A Look at Rising Momentum for Eliminating the Tampon Tax, TAX MGMT. WKLY. STATE TAX REP. (Apr. 8, 2016), at 6; *Why Is the US “Tampon Tax” so Hated?*, BBC NEWS (Sept. 14, 2016), <http://www.bbc.com/news/world-us-canada-37365286> [<http://web.archive.org/web/20180127070236/http://www.bbc.com/news/world-us-canada-37365286>].

tampons may seem insignificant, the tampon manufacturing and advertising industry is anything but. In 2015, period hygiene products and tampons raked in sales of \$3.1 billion and sales are estimated to grow in coming years as the population grows.<sup>30</sup>

To be clear, there are no specific taxes in the United States aimed directly at tampons; rather, any taxes on these products are usually levied under the general sales tax of a state.<sup>31</sup> And while the revocation of the tampon tax would end a discriminatory practice against women and aid us in purchasing tampons, it cannot be denied that there would be a loss to state budgets.<sup>32</sup> However, the elimination of a discriminatory practice and tax should not be disregarded just because states are too dependent on revenue derived from women's biological functions.

In addition, there are a number of ways in which that lost revenue can be made up. Solutions for filling the gap in state revenue left by repealing the tampon tax include: placing a tax on products used by both men and women (e.g., race horses)<sup>33</sup> or increasing the sales tax on items that can be considered pure luxuries. In a bill introduced in the California legislature in March 2017, Assemblywomen Cristina Garcia and Lorena Gonzalez Fletcher proposed

---

<sup>30</sup> *Sanitary Protection in the US*, EUROMONITOR INT'L (Feb. 2017), <http://www.euromonitor.com/sanitary-protection-in-the-us/report> [<http://web.archive.org/web/20170811120710/http://www.euromonitor.com/sanitary-protection-in-the-us/report>].

<sup>31</sup> Except in Utah, where the legislature explicitly refused to lift the tax on tampons, thus making an affirmative choice to tax tampons.

<sup>32</sup> Elimination of California's 7.5% sales tax on feminine hygiene products was predicted to result in a \$20 million loss to the state's general fund at the same time that California Governor Jerry Brown's proposed 2016–2017 state budget was more than \$170 billion—which means that eliminating the tampon tax would only reduce the state's budget by 0.012%. Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate "Tampon Tax,"* NPR POLITICS (Mar. 6, 2016, 1:00 PM), <http://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> [<http://web.archive.org/web/20171013095034/https://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax>].

<sup>33</sup> The State of New York exempts sales of thoroughbred horses from sales tax if the horse is (1) registered with the Jockey Club, the United States Trotting Association, the National Steeplechase and Hunt Association, or is no more than 24 months old and is eligible to be registered with one of these associations and (2) is purchased with the intent of entering the horse in a racing event on which parimutuel wagering is authorized by law. N.Y. Dep't of Taxation & Fin., Tax Bulletin TB-ST-755, Racehorses (2013), [https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b13\\_755s.pdf](https://www.tax.ny.gov/pdf/tg_bulletins/sales/b13_755s.pdf) [[http://web.archive.org/web/20170221103426/https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b13\\_755s.pdf](http://web.archive.org/web/20170221103426/https://www.tax.ny.gov/pdf/tg_bulletins/sales/b13_755s.pdf)]. New York also exempts from sales tax the sale of racehorse studs. *Id.* at 3.

that the modest losses to the California state budget caused by the revocation of the tampon tax could be recouped by increasing liquor taxes.<sup>34</sup> Assemblywomen Garcia and Gonzalez Fletcher proposed increasing the per-gallon tax on hard liquors that are under 100 proof by \$1.20.<sup>35</sup> On liquors that are more than 100 proof, which is less than one percent of the state's entire liquor sales, the proposed tax increase would be \$2.40. Taxes on sales of wine and beer would not be affected. Assemblywoman Garcia noted that "no one can claim liquor is a basic necessity of life, it's basics before booze and ladies over liquor."<sup>36</sup>

In Wisconsin, Representative Melissa Sargent argues that hanging your hat on the assumption that the elimination of the tampon tax would cripple state budgets is a "make believe issue."<sup>37</sup> According to Representative Sargent, eliminating the tampon tax would result in a \$2.7 million decrease in the state budget resulting in a budget decrease of only 0.003%.<sup>38</sup> Representative Sargent proposed filling the gap by reducing tax credits for the ultra rich and reducing the monies designated for the Wisconsin Economic Development Corporation due to allegations of corruption.<sup>39</sup> In addition, the argument can be made that because the tax is a form of discriminatory gender bias, filling the void left from the revocation of the tampon tax is a secondary consideration that comes after eliminating a practice that has forced women to suffer and bear a discriminatory tax. The following case studies will examine the process by which the New York state

---

<sup>34</sup> Press Release, Cristina Garcia, Cal. State Assembly Member, "Common Cents Tax Reform" Act Will End Diaper & Feminine Health Products Tax (Mar. 9, 2017), <https://a58.asmdc.org/press-releases/%E2%80%98common-cents-tax-reform%E2%80%99-act-will-end-diaper-feminine-health-products-tax> [<http://web.archive.org/web/20170321015759/https://a58.asmdc.org/press-releases/%E2%80%98common-cents-tax-reform%E2%80%99-act-will-end-diaper-feminine-health-products-tax>]; *see supra* note 32.

<sup>35</sup> Press Release, *supra* note 34.

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

<sup>37</sup> Telephone interview with Melissa Sargent, State Representative, 48th Assembly Dist., Wis. State Assembly (Mar. 16, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

legislature addressed the tampon tax issue and will compare that process to the manner in which the Utah state legislature confronted the same issue.

### *B. Case Study: New York State and Assembly Bill 7555*

Like most states, tampons had been taxed in New York since 1965 when the state sales tax was first implemented; even while other seemingly nonessential items remained tax-free.<sup>40</sup> However, in 2015, New York State Assembly Member Linda B. Rosenthal took part in a national wave of legislation centered around the unjust taxation of a woman's period. Assembly Member Rosenthal sponsored Assembly Bill 7555 in an attempt to, as she put it, "Axe the Tax"<sup>41</sup> on menstrual products. When her bill was presented, tampons did not fall into any of the sales tax exceptions in New York's state tax laws, and so were subject to the four percent state sales tax and any additional taxes levied by municipalities in the state.<sup>42</sup> It was estimated that the eradication of the tax would save women in New York ten million dollars per year.<sup>43</sup> With the introduction of the bill, New York waded into the stream of states that had eliminated sales tax altogether or that were currently introducing legislation aimed at eliminating the tampon tax.<sup>44</sup>

---

<sup>40</sup> New York exempts bandages, medicine, condoms, items from vending machines, and certain race horses and related training services from sales tax. N.Y. Dep't of Taxation & Fin., Tax Bulletin TB-ST-740, Quick Reference Guide for Taxable and Exempt Property and Services (2016), [https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/quick\\_reference\\_guide\\_for\\_taxable\\_and\\_exempt\\_property\\_and\\_services.htm](https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/quick_reference_guide_for_taxable_and_exempt_property_and_services.htm) [[http://web.archive.org/web/20180207004946/https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/quick\\_reference\\_guide\\_for\\_taxable\\_and\\_exempt\\_property\\_and\\_services.htm](http://web.archive.org/web/20180207004946/https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/quick_reference_guide_for_taxable_and_exempt_property_and_services.htm)].

<sup>41</sup> See Press Release, *supra* note 26.

<sup>42</sup> *Id.*

<sup>43</sup> Press Release, Andrew M. Cuomo, N.Y. Governor, Governor Cuomo Announces Sales 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> [<http://web.archive.org/web/20170411205644/https://www.governor.ny.gov/news/governor-cuomo-announces-sales-and-use-tax-exemption-feminine-hygiene-products-now-effect>].

<sup>44</sup> As of this writing, the following legislation had either been proposed or recently passed in various states:

CALIFORNIA: Assembly Member Cristina Garcia introduced Bill 9 that would exempt from taxes the gross receipts from the sale of and from the storage, use, or other consumption of tampons, sanitary napkins, menstrual sponges, and menstrual cups. The legislation died in committee. Assemb. B. 9, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

On May 19, 2015, Assembly Member Rosenthal introduced into the New York State Assembly her bill to exempt “certain basic necessities from sales and use tax.”<sup>45</sup> The justification for the bill was simple: to “correct the fundamental imbalance that currently existing [sic] in New York State by exempting certain feminine hygiene products, including but not limited to, sanitary napkins, tampons and panty liners from New York State sales and use tax.”<sup>46</sup> Assembly Member Rosenthal argued that it was imbalanced for items such as drugs and medicines and other medical devices to be tax-free, but for tampons, which are also an “undeniable necessity,” to still be subject

---

ILLINOIS: State Senator Melinda Bush introduced “Public Act 099-0855 on Feminine Hygiene” in the Illinois Senate in early February 2016 and this bill was signed into law by Governor Bruce Rauner on August 19, 2016. S.B. 2746, 99th Gen. Assemb. (Ill. 2016). It took effect on January 1, 2017. *Bill Status of SB 276*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/billstatus.asp?DocNum=2746&GAID=13&GA=99&DocTypeID=SB&LegID=96053&SessionID=88&SpecSess=> (last visited Apr. 26, 2017) [<https://web.archive.org/web/20180322191832/http://www.ilga.gov/legislation/billstatus.asp?DocNum=2746&GAID=13&GA=99&DocTypeID=SB&LegID=96053&SessionID=88&SpecSess=>].

OHIO: Representatives Johnson and Kelly introduced House Bill 61, which would “amend section 5739.02 of the Revised Code to exempt from sales tax the sale of tampons and other feminine hygiene products associated with menstruation.” The bill was referred to the Ways and Means Committee for consideration. H.B. 61, 132d Gen. Assemb. (Ohio 2017).

CONNECTICUT: Senators Martin M. Looney and Bob Duff introduced Senate Bill 502, “An Act Concerning Revenue and Other Items to Implement the Budget for the Biennium Ending June 30, 2017.” Governor Dannel Malloy signed the bill on June 2, 2016, and it goes into effect on July 1, 2018. S.B. 502, 2016 Sess., May Spec. Sess. (Conn. 2016) (to be codified at CONN. GEN. STAT. § 12-412(122), (123)).

WISCONSIN: Representative Melissa Sargent introduced Assembly Bill 949, “a sales and use tax exemption for feminine hygiene products.” The bill failed to pass due to assembly adjournment pursuant to Senate Joint Resolution 1. Assemb. B. 949, 2015–2016 Sess. (Wis. 2016).

VIRGINIA: Delegate Mark Keam introduced House Bill 952, “Retail Sales and Use Tax; Exemption for Tampons and Sanitary Napkins.” The bill was referred to the Committee on Finance where it has sat since early 2016. H.B. 952, 2016 Gen. Assemb. (Va. 2017). But since H.B. 952 was introduced, three other bills have been introduced into the Virginia legislature: State Delegate Kaye Kory introduced H.B. 152, 2017 Gen. Assemb. (Va. 2018); State Delegate Jennifer Boysko introduced H.B. 24, 2018 Gen. Assemb. (Va. 2018), dubbed “The Dignity Act”; and State Delegate Debra Rodman introduced H.B. 448, 2018 Gen. Assemb. (Va. 2018).

<sup>45</sup> Memorandum from Linda B. Rosenthal, Assembly Member, N.Y. State Assembly, to the N.Y. State Assembly (May 19, 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A07555&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A07555&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y) [[http://web.archive.org/web/20180208185258/http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A07555&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y](http://web.archive.org/web/20180208185258/http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A07555&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y)].

<sup>46</sup> *Id.*

to sales tax.<sup>47</sup> At the time the bill was introduced, bandages and condoms were tax-exempt, and Assembly Member Rosenthal equated the tax on tampons with New York dictating as luxurious products that address women's biological necessities.<sup>48</sup>

At the time of the bill's passage, the New York tax laws included sales and use tax exemptions for:

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, 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 or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings.<sup>49</sup>

While there were exemptions from sales and use taxes for products that "alleviate physical incapacity," tampons did not fall into any of the tax-exempt categories because a period was not an illness or disease.<sup>50</sup> Menstruation is a natural biological function and as such, rightly, did not fall into the context of disease, illness, or physical incapacity and was therefore not exempt under section 1115(a)(3) of the New York Tax Law (quoted above). Similarly, tampons would not be free from tax when considered under the exemptions listed in section 1115(a)(4) (also quoted above).<sup>51</sup> While tampons could be considered an artificial or "medical device," and the U.S. Food and Drug Administration does, in fact, consider tampons medical

---

<sup>47</sup> *Id.*

<sup>48</sup> Press Release, Linda B. Rosenthal, N.Y. State Assembly Member, Assemblymember Linda B. Rosenthal's Bill Axing the Tampon Tax Passes Assembly Today (Mar. 15, 2016), <http://nyassembly.gov/mem/Linda-B-Rosenthal/story/68858/> [<http://web.archive.org/web/20180208185715/http://nyassembly.gov/mem/Linda-B-Rosenthal/story/68858/>].

<sup>49</sup> N.Y. TAX LAW § 1115(a)(3), (4) (McKinney 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

devices, tampons still do not fall into the category of “correct[ing] or alleviat[ing] physical incapacity in human beings.”<sup>52</sup> Therefore, either tampons had to be statutorily redefined to be considered a “medical device” or a new subsection of the New York tax laws had to be created to explicitly exempt tampons from sales and uses taxes.

Assembly Bill 7555 was specifically created to introduce the very language needed to exempt tampons from sales and use taxes. The language in the bill explained that the following language would be inserted into section 1115(a) directly under paragraph (3) and directly before paragraph (4), to create a new paragraph (3-a) to read as follows:

Receipts from the following shall be exempt from the tax on retail sales imposed under subsection (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

....

(3-a) Feminine hygiene products, including, but not limited to, sanitary napkins, tampons and panty liners.<sup>53</sup>

On May 16, 2016, the New York State Assembly unanimously passed Assembly Bill 7555 and it was subsequently passed in the New York State Senate as Senate Bill 7838 on May 25, 2016.<sup>54</sup> The bill’s official title was: “An Act to Amend the Tax Law, in Relation to Exempting Certain Basic Necessities from Sales and Use Taxes,”<sup>55</sup> but Assembly Member Rosenthal more fondly phrased its passing as an “unburden[ing] [for New York women] from the gender-based tax on their normal, biological functions.”<sup>56</sup>

---

<sup>52</sup> 21 C.F.R. § 801.430 (2017); *see also* N.Y. TAX LAW § 1115(4) (McKinney 2017).

<sup>53</sup> N.Y. TAX LAW § 1115(3-a) (McKinney 2017).

<sup>54</sup> *See supra* note 43; *see also* S.B. 7838, 2015–2016 Leg., Reg. Sess. (N.Y. 2016), [http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=S07838&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S07838&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y) [[http://web.archive.org/web/20180208190720/http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=S07838&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y](http://web.archive.org/web/20180208190720/http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S07838&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y)].

<sup>55</sup> *See supra* note 54.

<sup>56</sup> Press Release, *supra* note 26.

On July 21, 2016, Governor Andrew Cuomo signed the unanimously passed bill into law.<sup>57</sup> Governor Cuomo commented during the signing ceremony that “this is a regressive tax on essential products that women have had to pay for far too long and lifting it is a matter of social and economic justice.”<sup>58</sup> After Governor Cuomo signed the bill, New York became one of eleven states to not tax menstrual hygiene products.<sup>59</sup> The law took effect on September 1, 2016, as the new sales and use tax quarter began.<sup>60</sup>

---

<sup>57</sup> Press Release, Andrew M. Coumo, N.Y. Governor, 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> [<http://web.archive.org/web/20170325223412/https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-exempt-sales-and-use-taxes-feminine-hygiene-products>].

<sup>58</sup> *Id.*

<sup>59</sup> N.Y. TAX LAW § 1115(3-a) (McKinney 2017).

<sup>60</sup> Five of the states banning taxes on menstrual hygiene products have no sales tax in the first place:

ALASKA: *Alaska Sales Tax Information*, DEP’T OF COM., COMMUNITY, & ECON. DEV., <https://www.commerce.alaska.gov/web/dcra/OfficeoftheStateAssessor/AlaskaSalesTaxInformation.aspx> (last visited Feb. 8, 2018) [<http://web.archive.org/web/20171230013835/https://www.commerce.alaska.gov/web/dcra/OfficeoftheStateAssessor/AlaskaSalesTaxInformation.aspx>].

DELAWARE: *Gross Receipts Taxes*, DEP’T OF FIN.: DIVISION OF REVENUE, [https://revenue.delaware.gov/services/Business\\_Tax/Step4.shtml](https://revenue.delaware.gov/services/Business_Tax/Step4.shtml) (last visited Feb. 8, 2018) [[http://web.archive.org/web/20180202062153/https://revenue.delaware.gov/services/Business\\_Tax/Step4.shtml](http://web.archive.org/web/20180202062153/https://revenue.delaware.gov/services/Business_Tax/Step4.shtml)].

MONTANA: *Tax Assistance and Education*, MONT. DEP’T OF REVENUE, <https://mtrevenue.gov/taxes/general-sales-tax/> (last visited Feb. 8, 2018) [<http://web.archive.org/web/20180208193510/https://mtrevenue.gov/taxes/general-sales-tax/>].

NEW HAMPSHIRE: *Taxpayer Assistance: Requests for Resale & Exempt Certificates*, N.H. DEP’T OF REVENUE ADMIN., <https://www.revenue.nh.gov/assistance/resale-exempt-certs.htm> (last visited Feb. 8, 2018) [<https://www.revenue.nh.gov/assistance/resale-exempt-certs.htm>].

OREGON: *Sales Tax*, DEP’T OF REVENUE, <http://www.oregon.gov/DOR/Pages/sales-tax.aspx> (last visited Feb. 8, 2018) [<http://web.archive.org/web/20170801123024/http://www.oregon.gov/DOR/Pages/sales-tax.aspx>].

Five of the states explicitly exempt menstrual products:

MARYLAND: *Medicine and Medical Equipment*, COMPTROLLER OF MD., [http://taxes.marylandtaxes.com/Business\\_Taxes/Business\\_Tax\\_Types/Sales\\_and\\_Use\\_Tax/Tax\\_Information/Special\\_Situations/Medicine\\_and\\_Medical\\_Equipment.shtml](http://taxes.marylandtaxes.com/Business_Taxes/Business_Tax_Types/Sales_and_Use_Tax/Tax_Information/Special_Situations/Medicine_and_Medical_Equipment.shtml) (last visited Feb. 8, 2018) [[http://web.archive.org/web/20171228180913/http://taxes.marylandtaxes.com/Business\\_Taxes/Business\\_Tax\\_Types/Sales\\_and\\_Use\\_Tax/Tax\\_Information/Special\\_Situations/Medicine\\_and\\_Medical\\_Equipment.shtml](http://web.archive.org/web/20171228180913/http://taxes.marylandtaxes.com/Business_Taxes/Business_Tax_Types/Sales_and_Use_Tax/Tax_Information/Special_Situations/Medicine_and_Medical_Equipment.shtml)].

### C. Case Study: Utah House Bills 202 and 71

In January 2016, Representative Susan Duckworth introduced into the Utah State Legislature House Bill 202, titled the “Hygiene Tax Act.”<sup>61</sup> The bill was aimed at eliminating the sales tax levied on tampons as well as other items used for personal hygiene such as youth or adult diapers and incontinence pads.<sup>62</sup>

In Utah, there are three categories under which an item may be exempt from the state sales tax: entity-based exemptions, which depend on who buys or sells the product; use-based exemptions, which depend on how the consumer is intended to use the product; and product-based exemptions, which depend on what the product actually is.<sup>63</sup> Examples of entity-based exemptions include sales to U.S. government agencies; sales to entities exempt from state taxes by federal law; sale to commercial farms of feed, baling ties, and other items; and sales to charitable institutions of food or alcoholic beverages if the items are not available to the general public.<sup>64</sup> Examples of use-based exemptions include sales of nonreturnable containers, labels, bags, shipping cases and casing to a manufacturer, processor, wholesaler or retailer for use in packaging tangible personal property for resale, as well as purchases of lists or databases used to address direct mail.<sup>65</sup>

---

MASSACHUSETTS: *Guide: Sales and Use Tax*, COMMONWEALTH OF MASS., <https://www.mass.gov/guides/sales-and-use-tax> (last visited Feb. 8, 2018) [<http://web.archive.org/web/20180206060242/https://www.mass.gov/guides/sales-and-use-tax>].

MINNESOTA: MINN. STAT. § 297A.67(17) (2017).

NEW JERSEY: *Grocery, Drug, and Household Items*, N.J. SALES TAX GUIDE 1, 4, 9, <http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/su4.pdf> (last visited Feb. 8, 2018) [<http://web.archive.org/web/20171215202329/http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/su4.pdf>];

PENNSYLVANIA: 61 PA. CODE § 9.2(4) (2018).

<sup>61</sup> H.B. 202, 2016 Gen. Sess. (Utah 2016).

<sup>62</sup> *Id.*

<sup>63</sup> UTAH CODE ANN. § 59-12-104 (West 2018); *see also* Utah State Tax Comm’n, Pub. No. 25: Sales and Use Tax General Information 1, 8–18 (2017), <http://www.tax.utah.gov/forms/pubs/pub-25.pdf> [<http://web.archive.org/web/20171025200956/http://www.tax.utah.gov/forms/pubs/pub-25.pdf>].

<sup>64</sup> Utah State Tax Comm’n, *supra* note 63, at 9.

<sup>65</sup> *Id.* at 10.

Most salient to the Hygiene Tax Act are the product-based exemptions. Products that fall under this category are exempt from sales and use taxes because of what kind of item they are—for example, items such as hay and fuel cells.<sup>66</sup> But more along the lines of hygiene, the following sales are all exempt from state sales tax due to their intrinsic nature:

- Purchases of prescription drugs. A drug is defined as a compound, substance or preparation that is used to diagnose, cure, mitigate, treat or prevent disease, or to affect the structure or function of the human body. Food, dietary supplements, alcoholic beverages and prosthetic devices are not considered drugs. Sales of drugs are exempt from sales and use tax only if the buyer presents a prescription.<sup>67</sup>
- Sales or rentals of durable medical equipment, including replacement and repair parts. Sales or rentals of durable medical equipment are exempt from sales and use tax only if the buyer presents a prescription for the equipment.<sup>68</sup>
- Sales or rentals of mobility-enhancing equipment to help a person with limited mobility move from one place to another. Sales or rentals of mobility-enhancing equipment are exempt from sales and use tax only if the buyer presents a prescription for the equipment.
- Sales of prosthetic devices, including repair and replacement parts. Eyeglasses and contact lenses are not prosthetic devices. Sales or rentals of prosthetic devices are exempt from sales and use tax only if a prescription is required for the device or it is purchased by a hospital or medical facility.<sup>69</sup>
- Sales of disposable home medical equipment or supplies that cannot withstand repeated use. Sales of disposable home medical equipment or supplies are exempt from sales and use tax only if the buyer presents a prescription for the equipment or supplies. The equipment and supplies must be eligible for payment under Title XVIII, federal Social Security Act or the state plan for medical assistance under Title XIX, federal Social Security Act.<sup>70</sup>

---

<sup>66</sup> *Id.* at 11.

<sup>67</sup> *Id.*; see UTAH CODE ANN. § 59-12-104(10).

<sup>68</sup> Utah State Tax Comm'n, *supra* note 63, at 11; see UTAH CODE ANN. § 59-12-104(36).

<sup>69</sup> Utah State Tax Comm'n, *supra* note 63, at 11; see UTAH CODE ANN. § 59-12-104(48).

<sup>70</sup> Utah State Tax Comm'n, *supra* note 63, at 11; see UTAH CODE ANN. § 59-12-104(64).

The Hygiene Tax Act would have added various personal hygiene items to this list of explicitly exempted products.<sup>71</sup> According to the bill's supporters, personal hygiene items are clearly synonymous with many of the medical devices that are already exempt, and thus it would not have been a great logical leap to exempt tampons and adult diapers alongside disposable medical equipment meant to be used in the home.<sup>72</sup>

The Hygiene Tax Act went before the legislature's House Revenue and Taxation Standing Committee on February 10, 2016.<sup>73</sup> Representative Duckworth presented her bill, and the committee voted on a motion to move the bill out of committee. That motion failed when Representatives Rich Cunningham, Gage Froerer, Ken Ivory, John Knotwell, Daniel McCay, Mike K. McKell, Jeremy A. Peterson, and Douglas V. Sagers—members of the then all-male taxation committee—voted against the bill and killed the bill before it had a chance to be considered by the full House.<sup>74</sup> One of the main concerns expressed by the committee members as to why they were reluctant to allow the bill to proceed was the fiscal loss to the state, which was estimated to be in the millions.<sup>75</sup> Conversely, according to the fiscal note that accompanied the bill, “enactment of this bill could save individuals that purchase the products defined in the legislation approximately \$1,930,000 in FY 2017 and \$2,410,000 in FY 2018 in sales and use tax in the aggregate.” The committee's hesitance to allow the bill through shows a deeply ingrained bias against lifting a discriminatory tax, even though the taxpayer's

---

<sup>71</sup> H.B. 202, 2016 Gen. Sess. (Utah 2016).

<sup>72</sup> UTAH CODE ANN. § 59-12-104(64).

<sup>73</sup> *Minutes of the H. Revenue & Tax'n Standing Comm.*, 61st Gen. Sess. 2 (Utah 2016), <http://www.le.utah.gov/Interim/2016/pdf/00001510.pdf> [<http://web.archive.org/web/20161221110632/http://www.le.utah.gov/Interim/2016/pdf/00001510.pdf>].

<sup>74</sup> Representative King found that the tax was an undue burden and that women bear a disproportionate tax burden. *See Motion to Recommend of H. Revenue and Tax'n Standing Comm.*, 61st Gen. Sess. (2016), <https://le.utah.gov/asp/votes/comvotes.asp?sessionid=2016GS&voteid=5458&sequence=10312> [<https://web.archive.org/web/20180208201640/https://le.utah.gov/asp/votes/comvotes.asp?sessionid=2016GS&voteid=5458&sequence=10312>].

<sup>75</sup> Utah State Leg., Fiscal Note: H.B. 202 (2016), <https://le.utah.gov/lfa/fnotes/2016/HB0202.fn.pdf> [<http://web.archive.org/web/20170213002727/https://le.utah.gov/lfa/fnotes/2016/HB0202.fn.pdf>].

combined monetary gains (i.e., tax savings) and nonmonetary gains (i.e., dignity savings) would equal, if not outweigh, the costs to the state.<sup>76</sup>

The following year, in January 2017, Representative Duckworth brought yet another bill to the House.<sup>77</sup> House Bill 71 was also titled the “Hygiene Tax Act” and was fundamentally the same as House Bill 202 in that House Bill 71 added a sales and use tax exemption for tampons and incontinence items.<sup>78</sup> Again, House Bill 71 made it to consideration before the House Revenue and Taxation Committee, and again the Hygiene Tax Act did not emerge unscathed.<sup>79</sup> Representative Karianne Lisonbee had to “take one for the team as [she was] the only woman” on the House Revenue and Taxation Committee, and argued that the Act would lead to an increase in the contents of Utah’s landfills as most of the items up for tax exemption were one-use, disposable items.<sup>80</sup> Naturally, the House Revenue and Taxation Committee failed to recommend the bill, and the Hygiene Tax Act was put on the shelf until the next legislative cycle began.<sup>81</sup>

### III. POLICY IMPLICATIONS OF THE TAXATION OF TAMPONS

#### *A. Taxation and Public Policy Are Not Uncommon Bedfellows*

What we tax—or choose not to tax—tells us something about what we value. The use of taxation as a form of social engineering is nothing new to

---

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

<sup>77</sup> H.B. 71, 62d Gen. Sess. (Utah 2017), <https://le.utah.gov/~2017/bills/static/HB0071.html> [<http://web.archive.org/web/20170309031038/https://le.utah.gov/~2017/bills/static/HB0071.html>].

<sup>78</sup> *Id.*

<sup>79</sup> Utah H. Reps., Notice of Bill Returned to Rules Committee (2017), <https://le.utah.gov/~2017/comreport/HB071H10.pdf> [<http://web.archive.org/web/20180208202042/https://le.utah.gov/~2017/comreport/HB071H10.pdf>].

<sup>80</sup> *Hearing of the H. Revenue and Tax’n Standing Comm.*, 62d Gen. Sess. (2017) (statement of Karianne Lisonbee, Member, H. Revenue and Tax’n Standing Comm.), [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=21049&meta\\_id=668715](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=21049&meta_id=668715).

<sup>81</sup> At the beginning of 2018, Representative Duckworth reintroduced the Hygiene Tax Act as House Bill 262. H.B. 262, 63d Gen. Sess. (Utah 2018), <https://le.utah.gov/~2018/bills/static/HB0262.html> [<https://web.archive.org/web/20180501180203/https://le.utah.gov/~2018/bills/static/HB0262.html>]. The House Taxation and Revenue Committee once again failed to recommend the bill and returned it to the House Rules Committee.

this country or to our courts. For decades, states have attempted to control commerce and behavior through the passage of tax incentives and disincentives.<sup>82</sup> These tax programs have proven to be so controversial that many states have found themselves before the U.S. Supreme Court being asked to show why such incentives or disincentives are valid under the Commerce Clause of the U.S. Constitution—for example, having to prove why locally brewed alcoholic beverages should be exempted from a local excise tax while those brewed out of state should not be.<sup>83</sup>

In addition, as an obvious picture of the intimate relationship that politics and taxation share, cities throughout the nation have attempted to tax sugary beverages in order to cut back on calorie consumption and childhood obesity.<sup>84</sup> While taxation of the production and retailing of sweetened and carbonated beverages is nothing new, many of these more recent efforts are aimed at deterring consumption of the taxed products.<sup>85</sup> For example, four municipalities in California have enacted soda sales taxes with the stated

---

<sup>82</sup> See, e.g., *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 322–23 (1977) (holding that a New York tax on securities transactions was unconstitutional because transactions involving an out-of-state sale were taxed more heavily than transactions involving a sale within the state); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 367 (1976) (holding that a Mississippi regulation dictating that out-of-state milk could be sold in Mississippi only if the producing state would accept Mississippi milk on a reciprocal basis was unconstitutional); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143–44 (1970) (holding that a state order prohibiting the shipping of cantaloupes outside the state unless they were packed in containers approved by the state was an unconstitutional burden on interstate commerce).

<sup>83</sup> See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277–78 (1984); see also U.S. CONST. art. I, § 8, cl. 3.

<sup>84</sup> Berkeley, California and Philadelphia, Pennsylvania became some of the first cities to pass a tax specifically aimed at sugary beverages. See Tricia L. Nadolny, *Soda Tax Passes: Philadelphia Is First Big City in Nation to Enact One*, PHILA. INQUIRER (June 16, 2016), [http://www.philly.com/philly/news/politics/20160617\\_Philadelphia\\_City\\_Council\\_to\\_vote\\_on\\_soda\\_tax.html](http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html) [[http://web.archive.org/web/20180131213109/http://www.philly.com/philly/news/politics/20160617\\_Philadelphia\\_City\\_Council\\_to\\_vote\\_on\\_soda\\_tax.html](http://web.archive.org/web/20180131213109/http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html)].

<sup>85</sup> See Christian Sorensen et al., *Soda Taxes: Old and New*, TAX ADVISOR (June 2017), <https://www.thetaxadviser.com/issues/2017/jun/soda-taxes> (providing a more in-depth comparison of newly passed soda taxes aimed at limiting soda consumption and older taxes more generally aimed at raising state revenue) [<http://web.archive.org/web/20171107165858/https://www.thetaxadviser.com/issues/2017/jun/soda-taxes.html>].

purpose of providing a disincentive for sugary beverage consumption, with just the added bonus of adding revenue to the state or municipal budget.<sup>86</sup>

In Albany, California, the 2016 ordinance establishing the soda tax began with the following statements of public policy:

WHEREAS, although there is no single cause for the rise in diabetes, obesity, and tooth decay, there is overwhelming evidence of the link between the consumption of sugary drinks and the incidence of diabetes, obesity, and tooth decay; and

....

WHEREAS, at the same time, hundreds of millions of dollars have been spent in an ongoing massive marketing campaign, which particularly targets children and people of color. In 2006 alone, nearly \$600 million was spent in advertising to children under 18. African American and Latino children are also aggressively targeted with advertisements to promote sugar-laden drinks; and

WHEREAS, the resulting impact on consumption should not be surprising. The average American now drinks nearly 50 gallons of sugary drinks a year. The problem is especially acute with children in California. From 1989 to 2008, the percentage of children consuming sugary drinks increased from 79% to 91% and the percentage of total calories obtained from sugary drinks increased by 60% in children ages 6 to 11; and

....

*WHEREAS, based on the findings set forth above, the purpose of this Ordinance is to diminish the human and economic costs of diseases associated with the consumption of sugary drinks by discouraging their distribution and consumption in Albany through a tax. Specifically, the purpose of this ordinance is to tax the distribution of sugary drinks and the products used to make them . . .*<sup>87</sup>

In June 2016, Philadelphia Mayor Jim Kenney signed Bill 160176 and enacted a 1.5 cent tax on every ounce of sugary beverages.<sup>88</sup> The stated purpose of the tax was to cut back on the consumption of sugary beverages,

---

<sup>86</sup> ALBANY, CAL., CODE ch. 4–13 (2016); BERKELEY, CAL., MUNICIPAL CODE ch. 7.72 (2015); OAKLAND CITY COUNCIL, RES. NO. 86161 C.M.S. (2016); S.F., CAL., BUS. & TAX REG. CODE art. 8 (2016).

<sup>87</sup> ALBANY, CAL., ORDINANCE 2016-02 (Dec. 5, 2016) (emphasis added), <http://www.albanyca.org/home/showdocument?id=28928> [<http://web.archive.org/web/20180208203451/http://www.albanyca.org/home/showdocument?id=28928>].

<sup>88</sup> PHILADELPHIA, PA., ORDINANCE 160, 176 (June 16, 2016), <https://beta.phila.gov/media/20170209150802/CertifiedCopy16017601-1.pdf> [<https://web.archive.org/web/20180326141723/https://beta.phila.gov/media/20170209150802/CertifiedCopy16017601-1.pdf>].

and to reroute monies that would normally go toward sodas to the city's prekindergarten programs.<sup>89</sup> After the tax was passed, the American Beverage Association (ABA) and other retailers and businesses sued the City of Philadelphia over the tax, claiming it violated state laws and the requirements of the federally funded SNAP program.<sup>90</sup> The suit was dismissed by the Philadelphia Court of Common Pleas after the city's preliminary objections were sustained, and upon appeal the Commonwealth Court of Pennsylvania affirmed.<sup>91</sup>

However, taxing tampons is unlike taxing items such as candy and soda pop. Access to tampons is a fundamental issue of human hygiene. More than three billion humans in the world are women and, at some point in their lives, these women will either menstruate or come in contact with or care for a woman who is menstruating. In light of the staggering number of human beings who have this biological function, the United Nations has focused on access to menstrual products as a human rights issue.<sup>92</sup> Professors Bridget Crawford and Carla Spivack go into detail concerning the human rights implications of tampons and legislation affecting them and break the issue down into the right to be free from discrimination, the right to health, the right to education, the right to work, and the right to dignity.<sup>93</sup>

---

<sup>89</sup> Press Release, Jim Kenney, Phila. Mayor, Mayor Kenney Congratulates Four Cities on Passing Soda Tax (Nov. 10, 2016), <https://beta.phila.gov/press-releases/mayor/mayor-kenney-congratulates-four-cities-on-passing-soda-taxes/> [<http://web.archive.org/web/20180111052202/https://beta.phila.gov/press-releases/mayor/mayor-kenney-congratulates-four-cities-on-passing-soda-taxes/>].

<sup>90</sup> Kelly Phillips Erb, *Judge Dismisses Soda Tax Lawsuit Against City of Philadelphia*, FORBES (Dec. 19, 2016, 3:14 PM), <https://www.forbes.com/sites/kellyphillipserb/2016/12/19/judge-dismisses-soda-tax-lawsuit-against-city-of-philadelphia/#1a77cd816209> [<https://web.archive.org/web/20180126105907/https://www.forbes.com/sites/kellyphillipserb/2016/12/19/judge-dismisses-soda-tax-lawsuit-against-city-of-philadelphia/>].

<sup>91</sup> *Williams v. Philadelphia*, 164 A.3d 576 (Pa. Commw. Ct. 2017). Coming on the heels of the sugary beverage tax suit against Philadelphia, Coca-Cola and the ABA have been sued in a California court by a nonprofit claiming that the marketing strategies big soda practices are reminiscent of the practices of big tobacco during the cigarette heyday. See Amended Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial, *Praxis Project v. Coca-Cola Co.*, No. 3:17-cv-00016-JSC (N.D. Cal. Jan. 17, 2017), <https://cspinet.org/sites/default/files/attachment/coca%20cola%20complaint.pdf> [<http://web.archive.org/web/20171223092616/https://cspinet.org/sites/default/files/attachment/coca%20cola%20complaint.pdf>].

<sup>92</sup> See *supra* note 11 and accompanying text; see generally Crawford & Spivack, *supra* note 4.

<sup>93</sup> Crawford & Spivack, *supra* note 4, at 513–27.

In addition, Canada banned taxation of tampons in 2015 and the United Kingdom is, as of this writing, in the midst of negotiating a revocation of their tampon tax upon the finalization of the United Kingdom's exit from the European Union.<sup>94</sup> Seeing the difference in the attitudes of the legislatures in Utah and New York reveal that—regardless of the amount of state revenue involved—whether or not a state revokes its taxation of tampons is fundamentally an issue of its attitude towards the rights of women. Because tampons ensure proper hygiene for a basic biological function, New York realized that a price tag could not be placed on doing the right thing and revoking the tampon tax. Contrast that to Utah, where the dichotomy between the political capital of men and women in legislatures is such that a woman had to “take one for the [male] team”—we can read between the lines—and ensure that Utah continues to tax tampons.

---

<sup>94</sup> The following are instances of the international movement toward eliminating the taxation of tampons:

CANADA: Parliament voted in 2015 to remove the tax on tampons at the federal level. The tampon tax debate had been raging in Canada for more than two decades leading up to the Parliament's unanimous vote, and it is estimated that petitions signed by thousands of Canadian women helped prompt the passage of the tax exemption. According to Mylène Freeman, cosponsor of the movement, “Feminine hygiene products are not a luxury for women and girls.” Press Release, Irene Mathyssen, Member of Parliament, Let's End the Unfair Tax on Women (May 7, 2015, 11:48 AM), <http://irenemathyssen.ndp.ca/end-unfair-tax-on-women> [<http://web.archive.org/web/20171004151710/http://irenemathyssen.ndp.ca/end-unfair-tax-on-women>]. In addition, the more than 72,000 women who signed petitions calling for the revocation of the tax acknowledged that the sales tax on tampons was a burden on their households as it was estimated that the tax cost Canadian women more than C\$36 million per year. Press Release, Irene Mathyssen, Member of Parliament, Tampon Tax to Be Abolished Thanks to NDP Efforts (May 28, 2015, 5:19 PM), <http://irenemathyssen.ndp.ca/tampon-tax-abolished-thanks-to-ndp> [<http://web.archive.org/web/20171004151525/http://irenemathyssen.ndp.ca/tampon-tax-abolished-thanks-to-ndp>].

UNITED KINGDOM: An agreement was reached in 2016 to reduce the Value Added Tax (VAT) rate applied to tampons to zero percent. Currently, the VAT placed on tampons in the United Kingdom is at a rate of five percent. However, implementing the decision to remove the tax on tampons has proved difficult as the United Kingdom is still working through the aftershocks of the referendum to leave the European Union. It was estimated that the plan would be able to go into effect in April 2018; however, recent transition negotiations between the UK and the EU might extend that deadline as far as 2021. *VAT Notice 701/18: Women's Sanitary Protection Products*, HM REVENUE & CUSTOMS (July 4, 2011), <https://www.gov.uk/government/publications/vat-notice-70118-womens-sanitary-protection-products/vat-notice-70118-womens-sanitary-protection-products#products-and-rates> [<http://web.archive.org/web/20170728222240/https://www.gov.uk/government/publications/vat-notice-70118-womens-sanitary-protection-products/vat-notice-70118-womens-sanitary-protection-products>]; James Crisp, *EU Rules Forcing Britain to Keep Tampon Tax Will Apply for Years After Brexit*, TELEGRAPH (Jan. 18, 2018, 1:06 PM), <https://www.telegraph.co.uk/politics/2018/01/18/eu-rules-forcing-britain-keep-tampon-tax-will-apply-years-brexite/> [<https://web.archive.org/web/20180122163729/https://www.telegraph.co.uk/politics/2018/01/18/eu-rules-forcing-britain-keep-tampon-tax-will-apply-years-brexite/>].

## B. Ditching the Tampon Tax Is a Matter of Gender Equality

### 1. The Tampon Tax Uniquely Targets Women

For generations feminine health has been misunderstood.<sup>95</sup> Women experiencing their periods have been considered incompetent and unclean for centuries, and much of that stigma has remained into the modern day.<sup>96</sup> This stigma has led legislators to neglect the ongoing discrimination against women and has stifled legislation that would minimize the costs a woman has to bear simply because of her biological makeup.<sup>97</sup> Because tax policy is public policy, when tampons are taxed women are charged extra by society to attain basic hygiene. Tampons are a necessity for one-half of the American population, and women in legislatures across the country—sometimes with male counterparts to punch through the glass wall separating male and female legislators—have introduced bills to combat, and provide fiscal solutions to the elimination of, this discriminatory tax.<sup>98</sup>

The tampon tax is uncommon because it is one of the few tax policies that so blatantly discriminates against one class of individuals. Legislators and commentators have tried to find an analogy in the various state tax codes where another class of individuals is so clearly called out to bear the burden of a tax policy simply because of their biology—without success.<sup>99</sup> New York recognized the discrimination inherent in the tampon tax and though it led to drastic revenue reductions—estimated at multiple millions of dollars—proved that when the issue is deemed to be important enough, the state would find a way to make ends meet.

---

<sup>95</sup> Tomi-Ann Roberts et al., “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCHOL. WOMEN Q. 131, 131 (2002).

<sup>96</sup> *Id.* at 136.

<sup>97</sup> *See supra* note 32.

<sup>98</sup> Representative Melissa Sargent from Madison, Wisconsin, after having her first tampon tax bill defeated, communicated her intent to bring a follow-up bill with the joint sponsorship of a male legislator from across the aisle. Telephone interview with Melissa Sargent, State Representative, 48th Assembly Dist., Wis. State Assembly (Mar. 16, 2017).

<sup>99</sup> Of course, the opposite of this sentence is true as well. As will be explored below, as much as the tampon tax specifically targets women to shoulder the burden of providing the state with revenues, there are tax breaks specifically targeted to ease and increase men’s sexual pleasure.

California Assemblywoman Cristina Garcia introduced Assembly Bill 1561 to eliminate the tampon tax in her state. Assemblywoman Garcia framed the fundamental point of her legislation by saying, “basically we are being taxed for being women.”<sup>100</sup> Representative Melissa Sargent from Madison, Wisconsin, was instrumental in bringing before the Wisconsin Legislature Assembly Bill 949. According to Representative Sargent, “some women are ashamed of their period” and that shame has made state legislators hesitant to bring forward bills aimed at eliminating the tax.<sup>101</sup>

Eliminating the tampon tax would remove financial penalties currently imposed on women. The current tampon tax policies communicate to the female population that having a period is something from which the state should be able to profit. Because women have no other choice but to buy tampons, the state government corners women who have periods every month into being the object of state-endorsed gender bias. The basic lack of choice in making these expenditures puts tampons in a fundamentally different category from racehorses and vending machines and should thus be treated fundamentally differently in their taxation.<sup>102</sup>

## 2. Male Sex Enhancement Drugs Take Tax Policy Precedence over Women’s Basic Biological Needs

In addition, and as a ridiculous comparison to the taxation of tampons, Viagra is tax-free in every state but Illinois.<sup>103</sup> Viagra is the name brand for Sildenafil, a drug used to combat erectile dysfunction, which is technically designated as a medical condition. Viagra is a prescription medication and so

---

<sup>100</sup> Press Release, Cristina Garcia, Cal. State Assembly Member, Assemblymember Garcia Introduces “No Tax” on Feminine Hygiene Products Measure on the First Day of Session (Oct. 18, 2017, 3:04 PM), <https://a58.asmdc.org/press-release/assemblymember-garcia-introduces-%E2%80%9Cno-tax%E2%80%9D-feminine-hygiene-products-measure-first-day> [<http://web.archive.org/web/20170617021842/https://a58.asmdc.org/press-release/assemblymember-garcia-introduces-%E2%80%9Cno-tax%E2%80%9D-feminine-hygiene-products-measure-first-day>].

<sup>101</sup> See *supra* note 32.

<sup>102</sup> See *supra* note 33.

<sup>103</sup> It can be commented that because Viagra is a prescription drug it is wholly entitled to the same tax-free status as other prescription drugs. I do not disagree. Comparing the monies spent on Viagra and tampons in this article is solely to highlight how products specifically aimed at improving men’s lifestyle are tax-free while tampons, items that are necessary to maintain women’s health and hygiene, remain taxed at exorbitant rates. I am not arguing whether Viagra should or should not be taxed.

falls into sales and use tax exemptions in most states' tax codes.<sup>104</sup> Approximately five percent of men over 40 are impacted by erectile dysfunction and that number increases to fifteen percent after the age of 70.<sup>105</sup> While the frustrations of erectile dysfunction must not be denied or given short shrift, it can be estimated that fewer than 8,000 men suffered erectile dysfunction at any given time in 2015.<sup>106</sup> And though the market for erectile dysfunction products remains minuscule when compared to the number of women who are currently menstruating or are almost guaranteed to do so at some point in their lives, Viagra is conveniently tax-free under most state tax laws.<sup>107</sup>

In 2015, Viagra brought in revenue of almost two billion dollars.<sup>108</sup> If that revenue had been taxed at even the low rate of four percent, various states could have collected a total of almost \$80 million to add to their state budgets. It is reprehensible that a product designed to improve the sexuality and lifestyle of a small fraction of the U.S. population, whether due to age or other medical reasons, remains tax-free while items that are an absolute necessity for half of the U.S. population remain taxed.

“Women have no choice but to buy these products, so the economic effect is only felt by woman [sic] . . . . You can't just ignore your period, it's not like you can just ignore the constant flow,” Assembly Member Garcia stresses.<sup>109</sup> Even if a person other than a female is purchasing period hygiene products, the ultimate consumer of such products is almost exclusively

<sup>104</sup> E.g., N.Y. TAX LAW § 1115(3) (McKinney 2017); UTAH CODE ANN. § 59-12-104(10) (West 2018).

<sup>105</sup> *Urology: Erectile Dysfunction*, UW HEALTH, <http://www.uwhealth.org/urology/erectile-dysfunction-ed/20537> (last updated Apr. 5, 2017) [<http://web.archive.org/web/20180105145928/https://www.uwhealth.org/urology/erectile-dysfunction-ed/20537>].

<sup>106</sup> *World Population Prospects 2017*, UNITED NATIONS: DESA/POPULATION DIVISION, <https://esa.un.org/unpd/wpp/DataQuery/> (select “population by age and sex (thousands)”; select “world”; select “2010” to “2020”; select “male”; select age ranges; select “by gender”; select “results”) [<http://web.archive.org/web/20180126155122/https://esa.un.org/unpd/wpp/DataQuery/>].

<sup>107</sup> See *supra* note 104.

<sup>108</sup> *Appendix A: 2015 Financial Report*, PFIZER, INC. (Feb. 29, 2016), [http://www.pfizer.com/system/files/presentation/2015\\_Pfizer\\_Financial\\_Report.pdf](http://www.pfizer.com/system/files/presentation/2015_Pfizer_Financial_Report.pdf) [[http://web.archive.org/web/20161223085416/http://www.pfizer.com/system/files/presentation/2015\\_Pfizer\\_Financial\\_Report.pdf](http://web.archive.org/web/20161223085416/http://www.pfizer.com/system/files/presentation/2015_Pfizer_Financial_Report.pdf)].

<sup>109</sup> See Press Release, *supra* note 100.

female or anyone who has a regular period. These products are packaged, marketed, and produced solely for the period-experiencing community.

When items such as Viagra are not taxed, it communicates to women that their biological functions, menstrual health, and hygiene are either not important enough to warrant their own tax exemption, or that no one in the state legislature cares enough to find a way to make tampons fit into preexisting exemptions. Exemptions for necessities are often buried in state sales tax codes, and imposing a tax on tampons says that tampons are in fact not a necessity and are instead a luxury. In addition, when the tampon tax brings in so much money for the state budget that legislators become unwilling to consider creating a new—or fitting tampons into an existing—tax exemption, the state effectively has declared that the fundamental right to accessible menstrual hygiene products is subordinate to the state’s need to repeal taxes on arcade games.<sup>110</sup> Such a stark contrast between what state legislators considers worthy of continued taxation and not is a marked denial of the hygienic needs and biological functions of a key portion of our country. When products that are so specifically aimed at men and life enhancement, like Viagra, instead of life necessities, like tampons, are tax-free, it says that the broader society has little care to spare for menstrual health.

Allowing such a tax to stand will perpetuate the stigma that a period is something that indicates a woman’s inherent weakness and will continue to keep necessary tampons out of the hands of those of us who need them for fundamental menstrual hygiene. Therefore, the tampon taxes still in effect across the country should be repealed.

### *C. Tampons Are a Necessity for Half of Our Nation*

“Taxpayers usually accept those tax consequences that they anticipate and abhor those tax consequences that they consider unanticipated.”<sup>111</sup>

---

<sup>110</sup> See *supra* Part II.C. It was estimated that the repeal would have cost Utah some one million dollars. However, Utah prides itself on its national recognition for “prudent fiscal management” and the 2017 Governor’s Budget report revealed that the state has amassed more than \$527 million in a rainy-day fund. GARY R. HERBERT, BUDGET RECOMMENDATIONS, FISCAL YEAR 2017–FISCAL YEAR 2016 SUPPLEMENTALS, at 2, 7, 25 (2015), <https://site.secure.utah.gov/gomb/wp-content/uploads/sites/7/2015/12/FY-2017-Governors-Budget-Recommendations.pdf> [<http://web.archive.org/web/20170125025957/https://site.secure.utah.gov/gomb/wp-content/uploads/sites/7/2015/12/FY-2017-Governors-Budget-Recommendations.pdf>].

<sup>111</sup> Jay A. Soled & Mitchell Gans, *The Public Policy Doctrine: Drawing the Line Between Permissible and Impermissible Tax-Savings Clauses*, 80 TENN. L. REV. 655, 656 (2013).

Tampons simply cannot be classified as anything other than a necessity. I will address the following issues while making the positive case as to why the various state codes allowing for the taxation of tampons should be amended: tampons as necessity and not luxury; menstruating is a basic, fundamental part of a healthy woman's life; tampons are necessary for basic menstrual hygiene; tampons assist in creating greater participation in the commercial market; elimination of the tampon tax will communicate to the United States that periods are not something off of which the state ought to profit; tampons are necessary to maintain the privacy of reproductive statuses; tampons provide the freedom and confidence, that free-bleeding does not, needed to participate in the political process; tampons facilitate engagement in education; and many women cannot control when their period will begin.

Tampons are a necessity for women and are not a luxury item. Women can lose up to a cup of blood a month during menstruation.<sup>112</sup> If a woman begins menarche around age ten and begins menopause around age 55, both of which are perfectly normal ages to begin these stages in a woman's life, a woman can bleed up to a cup of blood a month, or every 28 days, for 45 years.<sup>113</sup> Doing the math, this means that a woman bleeds around 540 cups of blood in her lifetime—which is more than 33 gallons. The human body contains roughly five to six quarts of blood, and so over the course of her life one woman will bleed through menstruation enough blood to fill approximately 165 human bodies. There is no substitute for the products that absorb menstrual blood.<sup>114</sup>

---

<sup>112</sup> *FAQs: Menstruation*, KOTEX, <http://www.kotexfits.com/faqs/menstruation/> (last visited Apr. 10, 2018) [<http://web.archive.org/web/20170609084403/http://origin.kotexfits.com/faqs/menstruation/>].

<sup>113</sup> *Menstruation and the Menstrual Cycle*, U.S. DEP'T OF HEALTH & HUM. SERVICES, OFF. OF WOMEN'S HEALTH, <https://www.womenshealth.gov/files/assets/docs/fact-sheets/menstruation.pdf> (last updated Oct. 21, 2009), [<https://web.archive.org/web/20170829224808/https://www.womenshealth.gov/files/assets/docs/fact-sheets/menstruation.pdf>].

<sup>114</sup> Weiss-Wolf, *supra* note 29, at 6.

Menstruating is a fundamental, biological part of almost every woman's life.<sup>115</sup> Menstruating is not something to be ashamed about, embarrassed by, or subjected to discriminatory tax practices because of. But while it may seem a no-brainer that women should not be subject to the millions of dollars' worth of discriminatory taxes that are levied against us simply for the fact that we are women, such is not the case: half of the population's basic hygienic needs are penalized by a discriminatory tax.

Tampons are necessary for basic menstrual hygiene.<sup>116</sup> Without tampons, women would have to construct ad hoc tampons that would be uncomfortable, in most cases unsanitary, and inefficient.<sup>117</sup> Menstrual hygiene is a basic human right, and the fact that it only directly affects one-half of the population does nothing to diminish its importance. It is not a healthy or sanitary option for a woman to be forced to bleed down her leg for five days every month for decades because she is unable to access the basic items of hygiene needed to manage her flow. Therefore, removing the tax from tampons would free women from one of the financial impediments that can hinder access to the basic human right of menstrual hygiene.

Tampons assist in facilitating a greater participation in the commercial market place.<sup>118</sup> Because of the stigma surrounding it, menstruation places a disadvantage on women in the workplace.<sup>119</sup> The stereotype that women who are currently menstruating are meaner, bitchier, or less capable is so deeply engrained in American culture that women themselves have come to believe the stereotype.<sup>120</sup> Tampons help women walk into a meeting without the fear that we will be ridiculed because we are obviously menstruating. However, the existence of tampons themselves does not magically grant women equal

---

<sup>115</sup> Please speak to your mothers, sisters, mothers-in-law, sisters-in-law, grandmothers, aunts, nieces, wives, and daughters if you do not believe this statement stands on its own and you need additional sources to convince you on this ground.

<sup>116</sup> See Winkler & Roaf, *supra* note 7, at 3.

<sup>117</sup> *Id.* at 7.

<sup>118</sup> *Id.* at 19.

<sup>119</sup> See Roberts et al., *supra* note 95.

<sup>120</sup> See *id.* at 137.

standing with their male counterparts.<sup>121</sup> Women are still subject to derogatory comments in the workplace; for example, Donald Trump made the comment about Megan Kelly that she had “blood coming out of her wherever” after she moderated one of the debates leading up to the 2016 presidential election. Tampons will simply not be able to eradicate such discrimination overnight.

The elimination of the tampon tax will communicate to both men and women that a period is not grounds on which to discriminate against and shame half of the American population. Therefore, the tampon tax should be eliminated to continue the increase of gender equality and diversity in the American workplace. The taxation of tampons exacerbates the wage differential between men and women as purchasing these basic necessities usually falls on women. While the tax might not be something that prevents women from entering the workplace or participating socially, it is an unnecessary additional cost imposed on women that is not imposed on men and leaves us with even less money at the end of the workday.

Tampons are necessary to maintain the privacy of reproductive statuses. Having women’s reproductive and biological statuses kept private through the use of tampons aids our freedom and confidence to engage with society politically and socially.<sup>122</sup> According to various studies, women are viewed as less capable and less clean when we are known to be on our periods.<sup>123</sup> Tampons allow a woman to go about a normal social life without the visible

---

<sup>121</sup> Trump also claimed that Kelly was unusually aggressive and had “blood coming out of her eyes.” This statement perfectly sums up the workplace assumption that women on their periods are unnaturally aggressive and incapable. Holly Yan, *Donald Trump’s “Blood” Comment About Megyn Kelly Draws Outrage*, CNN POLITICS (Aug. 8, 2015, 1:57 PM), <http://www.cnn.com/2015/08/08/politics/donald-trump-cnn-megyn-kelly-comment> [<http://web.archive.org/web/20180205143834/http://www.cnn.com/2015/08/08/politics/donald-trump-cnn-megyn-kelly-comment/>].

<sup>122</sup> It might be argued that the prevalence of tampons serves to cover up the issue of the stigma surrounding menstruation instead of addressing it. The advertisements surrounding tampons usually use words like “secret” and “free” to indicate that a woman cannot feel free without that particular brand of tampons and that her period is something she should keep secret. This communicates to both the male and female audience that a period is a shameful event. These are extremely valid arguments. However, the scope of this Note is to address the taxation of tampons and the need for elimination of that tax. For many women, they simply do not have the option to free-bleed, either because of their job responsibilities or simply because they find it uncomfortable. The eradication of the tax on tampons will be one small step toward giving women equal financial rights.

<sup>123</sup> Roberts et al., *supra* note 95, at 137.

manifestations of a period, such as spotting, potentially subjecting her to discriminatory statements or treatment.

In addition, tampons assist women as we engage in the political process. If women in Congress, in the White House, or in any form of legislative function were forced to miss as many as seven days of work each month due to their periods, the equality for all women for which we are fighting would take a dramatic hit. These women would also be subject to ridicule and would reinforce the stigma that women are unreliable and incompetent because of their periods.<sup>124</sup> And while of course, as stated earlier, tampons are not the magic bullet by which all discrimination against women can be rectified, eliminating the tax on these essential items of personal necessity and hygiene will remove from women another overly burdensome cost as we struggle to reach gender equality.<sup>125</sup>

Tampons can be instrumental in a young girls' ability to pursue educational opportunities.<sup>126</sup> If a girl begins menstruation at the average age of twelve, she will spend approximately ten more years in school if she continues through a four-year college program. That means that for 120 periods she will have to manage the fact that she's on her period while completing required class attendance and homework. Because of the stigma surrounding menstruation, she cannot simply free bleed and allow her period to show on her clothes.<sup>127</sup> She would be subject to unbearable teasing and may simply decide to skip school on those days during which she is having her period.<sup>128</sup> Tampons allow women greater control over their periods during their schooling years and reduce the chances that a woman or girl will miss school. Tampons also reduce the chances that prying eyes will find a dreaded period spot and often spare girls teasing, bullying, and derogatory name-calling. Therefore, the tampon tax should be eliminated to increase

---

<sup>124</sup> *Id.* at 135.

<sup>125</sup> While the tampon tax might not be something that prevents women from entering the workplace or participating socially, it is an unnecessary additional cost imposed on women that is not imposed on men and leaves women with less money at the end of the workday.

<sup>126</sup> Winkler & Roaf, *supra* note 7, at 8.

<sup>127</sup> Jennifer Bennett, *The Tampon Tax, Menstrual Hygiene Products, and Necessity Exemptions*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 183, 195 (2017).

<sup>128</sup> Winkler & Roaf, *supra* note 7, at 8.

tampon access to school-aged women and girls and ensure the equal education of women in our country.

A period is an unpredictable and natural thing. Women cannot schedule their periods for a time when it would be convenient. It could be in the middle of board meetings, when working twelve-hour days as a first-year associate, or when working from home. Unlike the modicum of control many have over when they take restroom breaks, a period can be predicted with only so much accuracy.

As a “solution” to periods, some have looked to contraceptives. One of the means by which women have tried to gain control over our periods is the use of various contraceptives because many forms of contraception limit, reduce, or allow a woman to choose which weeks she will have her period.<sup>129</sup> However, not all menstruating women take birth control for a variety of reasons—for instance, age, religious conviction, or medical conditions.<sup>130</sup> In addition, a period is a sign that a woman’s body is functioning healthily, and the lack of a period can often indicate that something in her biology is not working correctly.<sup>131</sup> Therefore, prescribed contraceptives cannot and do not take the place of a tampon.

---

<sup>129</sup> There is a debate among doctors as to whether it is healthy in the long run for a woman to manipulate her period with contraceptives to the point where she is only menstruating every few months or every other month or only once a year. Some doctors claim that it is perfectly harmless for a woman to take control of her period in this manner and that such use of contraceptives gives women greater control over their bodies and greater independence. However, other doctors have warned that extended delay of a period and forcing a woman’s body to have a “fake” period because of placebo pills irreparably damages the menstrual cycle. In addition, some doctors warn that the widespread use of contraceptives as a form of period delay will cause menstruation to leave the public mind and will only serve to increase the stigma and misinformation surrounding menstruation. *Birth Control*, MAYO CLINIC (Feb. 10, 2015, 9:15 AM), <http://www.mayoclinic.org/healthy-lifestyle/birth-control/in-depth/womens-health/art-20044044> [http://web.archive.org/web/20171222120139/https://www.mayoclinic.org/healthy-lifestyle/birth-control/in-depth/womens-health/art-20044044?reDate=22122017]. “Menstrual suppression is unnatural; a drug chronically overrides the physiological changes associated with the menstrual cycle, thereby creating an underlying hormonal environment that is not found in nature.” Paula S. Derry, *Is Menstruation Obsolete?*, 334 BRIT. MED. J. 955 (2007).

<sup>130</sup> Also, equating reducing the number of periods a woman has through contraceptive use with proper menstrual justice for women is logically unsound. A period is not something to be eliminated, reduced, or reasoned away.

<sup>131</sup> The U.S. Department of Health and Human Services Office of Women’s Health has stated that if a girl does not begin her period by the age of fifteen, she should consult a doctor to ensure her biological functions are acting properly. *Menstruation and the Menstrual Cycle*, *supra* note 113. In addition, the

Also, arguing that the answer to the tampon tax problem can be found in oral contraceptives because oral contraceptives are tax-free in many states and can control when we menstruate is logically unsound.<sup>132</sup> While it may be a valid option for some women to manage their periods through contraceptive use, that does not mean that the rest of the women who decide not to do so should still be required to pay the tampon tax.<sup>133</sup> Use of contraceptives as menstrual control requires a woman to see a physician, undergo medical treatment she might not desire and that may contradict her religious beliefs, and will most likely cost her money. Following this route simply changes the form and the amount of the tampon tax she pays, as opposed to truly eliminating it.

The better view would be that the same outcome, control over menstruation, should not have both taxable and sales tax-free paths. Because if one method used to control or monitor the effects of periods and the impact it has on our lives—contraceptives—can be tax-free then another method to achieve the same results—the tampon—should be tax free as well.

#### IV. CONCLUSION

The tampon tax should be axed. Eliminating the tampon tax would send the clear message that menstruation is not something that can be exploited to raise tax revenue. The removal of the tampon tax would help those who struggle to afford tampons and would be a welcome step toward requiring

---

guidelines also encourage women who have particularly painful, irregular, or heavy periods to consult their physicians.

<sup>132</sup> Family planning drugs and items of all different types are tax exempt in New York. N.Y. TAX LAW § 1115 (McKinney 2017); N.Y. Dep't of Taxation & Fin., Tax Bulletin ST-193, Drugstores and Pharmacies (2014), [https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b14\\_193s.pdf](https://www.tax.ny.gov/pdf/tg_bulletins/sales/b14_193s.pdf) [[http://web.archive.org/web/20170925050337/https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b14\\_193s.pdf](http://web.archive.org/web/20170925050337/https://www.tax.ny.gov/pdf/tg_bulletins/sales/b14_193s.pdf)].

<sup>133</sup> In addition, access to period hygiene products is not any more a luxury than it is to have access to soap and toilet paper in a restroom. The argument that tampons should not be tax-free because items such as soap and bathroom paper, which are also necessary for fundamental human hygiene, are often taxed is comparing apples with oranges. Each restroom able to be accessed by the public and all restrooms in a workplace are required by the Occupational Safety and Health Administration (OSHA) to be stocked with hand soap or another cleansing agent and some form of bathroom paper. 29 C.F.R. § 1910.141 (2017). Therefore, even if these items are taxed, which maybe they should not be, you can still gain easy access to them through a public restroom. Note that New York taxes nonprescribed soaps. N.Y. TAX LAW § 1115(3) (McKinney 2017). However, access to tampons in restrooms is still limited. There may be a tampon distributor in the restroom, but a woman would most likely have to pay for them as OSHA has not required that tampons be provided in restrooms free of charge. 29 C.F.R. § 1926.51.

tampons to be stocked in restrooms in the same way as bathroom paper and soap. Having a period every few weeks is not an option, a matter of choice, or voluntary for half of the U.S. population and we should not be fined, in the form of excessive taxation, solely for our biology.

