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WORKING THROUGH MENOPAUSE

BRIDGET J. CRAWFORD,[†] EMILY GOLD WALDMAN^{**} & NAOMI R. CAHN^{*}

ABSTRACT

There are over thirty million people ages forty-four to fifty-five in the civilian labor force in the United States, but the law and legal scholarship are largely silent about a health condition that approximately half of those workers will inevitably experience. Both in the United States and elsewhere, menopause remains mostly a taboo topic because of cultural stigmas and attitudes about aging and gender. Yet menopause raises critical issues at the intersections of gender equity, disability, aging, transgender rights, and reproductive justice. This Article imagines how the law would change if it accounted for menopause and the associated unequal burdens imposed.

This Article makes four contributions to legal scholarship. First, it identifies the intersections of menopause and the law in a way that counters the larger culture of silence, stigma, and shame. Second, it analyzes the uneasy fit between menopause and existing U.S. antidiscrimination doctrines. Third, the Article uses a comparative lens to explore how and why menopause is becoming a priority issue for the government, private employers, and workers in the United Kingdom. Finally, the Article situates menopause in U.S. equality jurisprudence broadly and suggests a place for menopause in employment law in particular. It sets out a normative vision

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The co-authors have written three articles exploring different aspects of menopause and the law. To reflect the collaborative effort, each article adopts a different position for the three coauthors' names. The other articles in the trio appear in the *Harvard Journal of Law & Gender* and *The University of Chicago Legal Forum*. See Emily Gold Waldman, Naomi Cahn & Bridget J. Crawford, *Contextualizing Menopause in the Law*, 45 HARV. J.L. & GENDER (forthcoming 2022), <https://ssrn.com/abstract=3986267>, and Naomi R. Cahn, Bridget J. Crawford & Emily Gold Waldman, *Managing and Monitoring the Menopausal Body*, 2021 CHI. LEGAL F. (forthcoming 2022), <https://ssrn.com/abstract=3988196>. For helpful comments and conversations, the authors thank Kerry Abrams, Noa Ben-Asher, Mary Anne Case, Jessica Clarke, Josephine Ross, Tracy Thomas, and Jennifer Weiss-Wolf, as well as participants in symposia, conferences, and workshops at Columbia Law School, The University of Chicago Law School, the Law and Society Association, and the Colloquium on Scholarship in Employment and Labor Law. We thank Leslie Ashbrook, Olivia Brenner, Kristin Glover, and Jolena Zabel for research assistance.

for menopause equity in the workplace and suggests possible pathways for achieving it.

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INTRODUCTION

Flexible work schedules. Desk fans. Access to a quiet and cold room. Paid leave when unable to work. These are not the practices of a fictional company or even a Silicon Valley start-up technology company firm.¹ They are features of a formal “menopause policy” adopted in October 2019 by the British television station Channel 4.² No formal law in the United Kingdom requires employers to address menopause,³ but tribunals there have taken a broad view of discrimination that includes treating a worker unfairly due to menopause.⁴ There is now national-level attention, especially in Scotland and England, directed toward menopause-related issues in the workplace.⁵

By contrast, U.S. legal discourse remains mostly silent about menopause, a stage of life that approximately half the population will experience.⁶ There have been relatively few U.S. cases involving alleged discrimination on the basis of menopause, and even fewer in which the plaintiff has prevailed; menopause fits uneasily into existing U.S. legal models for addressing discrimination.⁷ There has also been little attention to this issue by employers or human resources professionals in the United States, and menopause has only just begun to receive real attention in national popular publications.⁸

The legal silence surrounding menopause may initially seem surprising, given that menstruation itself has gained new prominence in popular and

1. See generally Mary Meisenzahl, *The Most Incredible Perks Silicon Valley Workers Can Take Advantage of, from Free Rental Cars to Travel Stipends*, BUS. INSIDER (Sept. 15, 2019, 8:36 AM), <https://www.businessinsider.com/perks-that-silicon-valley-workers-can-take-advantage-of-2019-9> [<https://perma.cc/U2FR-33Y7>] (listing some perks available to Silicon Valley employees including acupuncture, on-site dry cleaning, and laundry services).

2. See Channel 4, *Menopause Policy*, (Oct. 2020), <https://assets-corporate.channel4.com/flysystem/s3/2020-10/Channel%204%20Menopause%20Policy%202020.pdf> [<https://perma.cc/R3WY-US6Z>]; Anna Schaverien, *A ‘Menopause Champion’ at Work? Yes. You Also Get Paid Leave*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/world/europe/menopause-women-gender-gap.html> [<https://perma.cc/5R64-U6PX>] (calling Channel 4’s policy “the first known among British media companies” to implement a menopause policy).

3. *Postmenopause*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/15224-menopause-perimenopause-and-postmenopause> [<https://perma.cc/H3SP-U6G7>].

4. See *infra* Part III.

5. See *infra* Part III.

6. Throughout this Article, we attempt to use inclusive language that recognizes that not all women experience menopause. See, e.g., Chantal M. Wiepjes et al., *Fracture Risk in Trans Women and Trans Men Using Long-Term Gender-Affirming Hormonal Treatment: A Nationwide Cohort Study*, 35 J. BONE & MINERAL RES. 64, 68 (2020) (noting that some older trans women decrease hormone doses or discontinue to take estradiol supplements, but that because the researchers’ particular clinic continues estrogen therapy for trans women past age fifty, the trans women in their study did not experience age-related decline in bone mineral density, as compared to non-trans women in the control group). Likewise,

legal discourse. Grassroots organizing, legislative initiatives, and even class action litigation have taken aim at issues like the tampon tax;⁹ period poverty;¹⁰ and the lack of menstrual products in many schools,¹¹ jails,¹² and other public facilities.¹³ Moreover, reproductive issues appear frequently on the Supreme Court's docket and in the scholarly literature.¹⁴

But in other ways, the specific silence around menopause is not surprising at all. The continued absence of real discussion about (and scholarly attention to) menopause suggests its persistent status as a taboo topic, arising from not only discomfort with frank talk about bodily

not all who experience menopause are women. Some trans men, gender nonbinary, and genderqueer people experience it, as well. *See, e.g.*, Karen Baxter & Tom Heys, *Menopause and Work: Guidance for Employers in the U.K.*, LEXOLOGY (Sept. 21, 2020), <https://www.lexology.com/library/detail.aspx?g=c74f716f-9f6b-4d14-8fd4-bc58de24af0d> [<https://perma.cc/2UQ5-CDXN>] (“Transgender men and people who are intersex or identify as non-binary may also experience menopause and the symptoms that go with it.”); *see generally* *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/6W4Q-EX93>] (defining terms “trans,” “non-binary,” and “genderqueer”). Nevertheless, this Article occasionally uses the terms “woman” or “women” when the original source does or because the historical context requires. *See, e.g.*, *Postmenopause*, *supra* note 3.

7. *See infra* Part II.

8. *See, e.g.*, JENNIFER GUNTER, *THE MENOPAUSE MANIFESTO* (2021); HEATHER CORINNA, *WHAT FRESH HELL IS THIS? PERIMENOPAUSE, MENOPAUSE, OTHER INDIGNITIES, AND YOU* (2021); Jessica Grose, *Why Is Perimenopause Still Such a Mystery?*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/29/well/perimenopause-women.html> [<https://perma.cc/KF4Y-KQUJ>]; Lisa Selin Davis, *Why Modern Medicine Keeps Overlooking Menopause*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/menopause-perimenopause-symptoms.html> [<https://perma.cc/4E9U-VQNH>]; Sumathi Reddy, *The Surprising Good News on How Menopause Changes Your Brain*, WALL ST. J. (June 14, 2021, 3:13 PM), <https://www.wsj.com/articles/the-surprising-good-news-on-how-menopause-changes-your-brain-11623698003> [<https://perma.cc/U48E-WUG9>].

9. *See, e.g.*, TAX FREE PERIOD., <https://www.taxfreeperiod.com> [<https://perma.cc/TLB9-JP3X>] (aggregating sources and information relative to state-by-state campaign to repeal sales taxes imposed on menstrual products).

10. *See, e.g.*, Amy Smith, *The State of Period Poverty in the U.S.*, PENN NURSING, <https://www.nursing.upenn.edu/details/news.php?id=1545> [<https://perma.cc/32R3-RW5B>] (describing economic impediments poor women face in accessing menstrual products).

11. *See generally* Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J.L. & GENDER 225 (2020).

12. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115–391, § 611, 132 Stat. 5194 (requiring federal prisons to make menstrual products available to inmates at no charge); Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 45–47 (2019) (describing multiple “dignity harms” resulting from denying incarcerated individuals access to menstrual products).

13. *See, e.g.*, BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: MAKING LAW AND SOCIETY RESPONSIVE TO HUMAN NEEDS* (forthcoming June 2022) (on file with authors) (discussing in Chapter 4 efforts to make menstrual products available in public spaces).

14. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (challenge to Mississippi law that bans abortions after the fifteenth week of pregnancy, except in cases of medical emergency or severe fetal abnormality); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (ruling unconstitutional a Louisiana law that required physicians who perform abortions in the state to have admitting privileges at local hospitals within thirty miles of place where abortion was performed); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

functions, but also stigmas around aging. To the extent that menopause is even discussed in public, its most well-known symptoms, like hot flashes, usually are fodder for jokes, caricature, ridicule, or derision.

This Article assesses menopause as a unique site for intersectional discrimination on the basis of identity axes, including sex, gender, age, and disability.¹⁵ Accordingly, the Article counters the culture of silence, stigma, and shame that typically surrounds the subject, showing how that culture provides a partial explanation for the paucity of legal approaches. The Article also reveals gaps in U.S. antidiscrimination laws, showing how menopause illustrates long-running tensions in the scope of employment discrimination laws. But those tensions, and the lack of legal recourse for most menopausal employees, are not inevitable. The Article uses a comparative perspective to demonstrate how the United Kingdom's different legal approach not only has led to successful discrimination claims by individual menopausal employees but also has sparked broader attention to best workplace practices. Finally, the Article locates the discussion of menopause in the larger arc of U.S. equality jurisprudence and the continued debates about how to take account of biological differences. In concluding that the law has various options for addressing menopause-related inequities, the Article has broader implications for the shape and interpretation of antidiscrimination theories, too.

Part I of the Article provides a brief overview of menopause, discussing its biology and symptoms, as well as the stereotypes about it. Part II turns to existing U.S. employment law, demonstrating that even though sex, age, and disability are each legally protected characteristics, employees going through menopause—which implicates aspects of all three categories—often find themselves without recourse. In particular, while U.S. antidiscrimination law provides a relatively clear framework for analyzing cases stemming from negative *stereotypes* about menopause, cases involving menopausal *symptoms* have a less obvious trajectory. This is particularly true for cases involving “normal” menopausal symptoms that,

15. Beginning with the *Geduldig* decision in 1974, the Supreme Court began to use the words “sex” and “gender” interchangeably. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Craig v. Boren*, 429 U.S. 190 (1974). In 2020, the Supreme Court ruled that for purposes of Title VII, the word “sex” includes sexual orientation and transgender status. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In this Article, we use the term “sex” either because the applicable statute or jurisprudence does, or in relation to reproductive anatomy historically associated with female persons (e.g., uterus, ovaries), while acknowledging that sex is typically assigned by doctors based on visual inspection of external genitalia, that “sex marker[s] can sometimes be changed on legal documents . . . through a complex set of legal procedures,” and that sex “can be altered over time through the use of hormones and surgical interventions.” M.V. LEE BADGETT ET AL., GENIUSS GRP., UCLA SCH. L. WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS at x (2014), <https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey> [<https://perma.cc/8BHS-JWBP>].

without any workplace adjustments or accommodations, have the potential to interfere with workplace performance.

Part III provides a comparative perspective, looking to the United Kingdom. Although the (U.K.) Equality Act 2010 does not specifically address menopause, a growing body of U.K. case law applies that Act broadly in deciding what it means to treat menopausal employees equally.¹⁶ That case law, in turn, has prompted supervisors, human relations professionals, employment law practitioners, and even government entities to think more seriously about formulating policies that enable employees to work through menopause.

Part IV turns to a more theoretical consideration of how issues at the intersection of gender, menopause, aging, and disability fit into, challenge, or complicate existing legal theories. A focus on menopause at work raises familiar jurisprudential tensions between sameness and difference. In one sense, it seems axiomatic that all people should receive equal treatment under the law, without regard to biology. In another sense, though, this Article's discussion of menopause demonstrates how the failure to take into account biological differences can be an obstacle to success at work, and how the U.S. binary between "normal conditions" and "disabilities" is overly reductive, particularly as applied to menopause. Workplace policies that assume, often unconsciously, that the baseline employee is a cisgender man can end up putting other employees at a disadvantage by making the workplace inhospitable.

Part V suggests multiple ways the law might better address menopause and promote true workplace equity. The Article concludes by identifying related intersections of menopause and law that merit further inquiry.

I. AN OVERVIEW OF MENOPAUSE

In a 1972 episode of the popular television sitcom *All in the Family*, Edith Bunker experiences mood swings and hot flashes, to the bewilderment of the men in her family. Archie, her impatient and bullying husband, has no sympathy for Edith's condition, exhorting her, "If you're gonna have the change of life, you gotta do it right now! I'm gonna give you just 30 seconds. Now, c'mon and change!"¹⁷ Edith blithely responds, "Can I finish my soup first?"¹⁸ As one critic has remarked about this particular episode of the show, "It was a big deal to see the topic [of menopause] out in the open on television, as menopause was kept hush hush in the public eye. But *All in the Family* took a sledgehammer to that social barrier and the episode will

16. See Equality Act 2010 c. 1, §§ 4–12 (U.K.); *id.* at c. 15; *infra* Part III.

17. *All in the Family: Edith's Problem* (CBS television broadcast Jan. 8, 1972).

18. *Id.*

live on forever because of it.”¹⁹ That award-winning episode made visible to a wide audience the most stereotypical symptoms of menopause.²⁰

* * *

Beyond the symptoms that were played for laughs in the episode of *All in the Family* in 1972,²¹ menopause is a complex and highly variable process. To provide context for our later analysis, this Part begins with an overview of the basic biology and symptoms of perimenopause and menopause.²² For some people, “the change” comes and goes without much notice, but for others, the symptoms can be mentally and physically debilitating for a lengthy period of time—and, of course, there are many variations along that spectrum.²³ This Part then explores the culture of stigma and shame around menopause and considers the ways that negative stereotypes affect how menopause is both perceived and experienced. This sets up a discussion of what legal approaches might be appropriate.

Note at the outset that every person born with a uterus and at least one ovary will eventually lose the ability to reproduce. This cessation of reproductive function is an inevitable consequence of human aging for

19. David Mello, *All in the Family: 10 Things You Didn't Know About the Episode "Edith's Problem"*, SCREEN RANT (Mar. 17, 2020), <https://screenrant.com/all-family-ediths-problem-episode-facts-trivia> [<https://perma.cc/V2HM-3BSQ>].

20. That particular episode of *All in the Family* won an Emmy Award in 1972 for Outstanding Writing in Comedy. See *24th Emmy Awards Nominees and Winners: 1972*, TELEVISION ACADEMY, <https://www.emmys.com/awards/nominees-winners/1972/outstanding-writing-for-a-comedy-series> [<https://perma.cc/U3QR-B7N4>]. More than a decade later, when the character of Blanche Devereaux on *The Golden Girls* discovers that she is perimenopausal, she laments that her “life is over” and the laugh track kicks in. *The Golden Girls: End of the Curse* (NBC television broadcast Sept. 27, 1986).

21. See *supra* notes 17–20 and accompanying text.

22. See *A Guide to Perimenopause, Menopause, and Postmenopause*, GEO. UNIV. SCH. OF NURSING & HEALTH STUD. (Sept. 30, 2021), <https://online.nursing.georgetown.edu/blog/a-guide-to-perimenopause-menopause-and-postmenopause/> (“A natural part of aging, the menopausal transition marks the end of a menstruating person’s reproductive years. . . . Perimenopause is the first stage in this transition, during which the reproductive hormone levels rise and fall unevenly. . . . Menopause is confirmed after a person has 12 months without a period. . . . Postmenopause is the menopausal transition’s final phase, from 12 months after an individual’s last period to the end of their life.”). Although there is a formal medical distinction between perimenopause and menopause, the symptoms can be overlapping, as this Part explores. Intrapersonal, legal, and popular discourse typically elides the difference between “perimenopause” and “menopause,” with individuals most often using the latter term when they usually mean the former. See *infra* Section I.B. Thus, because of the widespread intelligibility of the term “menopause” as proxy for both perimenopause and menopause, this Article generally uses the word “menopause” to refer to both conditions, unless the context otherwise requires.

23. See Hannah Devlin, *Breaking the Menopause Taboo: 'There Are Vital Stories We Should Continue to Pursue'*, GUARDIAN (U.K.) (Sept. 21, 2019), <https://www.theguardian.com/membership/2019/sep/21/breaking-the-menopause-taboo-there-are-vital-stories-we-should-continue-to-pursue> [<https://perma.cc/2ET8-AU8C>] (“The menopause used to be ominously referred to as ‘the change’ - an entire life stage relegated to a euphemism.”); Lisa Cappelloni, *What Are the Symptoms and Signs of Menopause?*, HEALTHLINE (May 14, 2018) <https://www.healthline.com/health/menopause/symptoms-signs> [<https://perma.cc/RDX2-YMS7>] (noting that not all experience negative symptoms).

approximately half the world's population. Even so, many people lack basic information about just what menopause is.

A. *Biology and Terminology*

Perimenopause (literally “around menopause”) is the stage of transition to menopause.²⁴ The average age of perimenopause is the mid-to-late forties, with an average duration of approximately four years.²⁵ Biologically speaking, the cause of perimenopause is a change in ovarian function; the ovaries begin to produce less estrogen and progesterone, the key hormones for menstrual regulation.²⁶ During this stage, menstruation becomes increasingly unpredictable; cycles can become shorter or longer than in the past, with missed periods as well, and bleeding can become lighter or heavier.²⁷

In contrast to perimenopause, which cannot be measured precisely, menopause has a clear marker. A clinical diagnosis of menopause can be made after the complete cessation of menstruation for one year.²⁸ Menopause's beginning date is determined retrospectively, after twelve months have elapsed without a menstrual period.²⁹ The average age of menopause is around fifty-one or fifty-two.³⁰

24. See *Menopause Basics*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menopause/menopause-basics> [<https://perma.cc/PU9B-TE4B>].

25. See Deborah Grady, *Management of Menopausal Symptoms*, 355 NEW ENG. J. MED. 2338, 2338 (2006) (“The menopausal transition usually begins in the mid-to-late 40s and lasts about 4 years, with menopause occurring at a median age of 51 years.”). Smokers tend to experience menopause approximately two years earlier than nonsmokers. *Id.*

26. See Gail A. Greendale, Nancy P. Lee & Edgar R. Arriola, *The Menopause*, 353 LANCET 571, 571 (1999) (“Current theory holds that the perimenopause, a period of changing ovarian function, precedes the final menses by between 2 and 8 years. . . . [O]ne model proposes that it occurs in stages.”); *Menopause*, UCLA HEALTH, <https://www.uclahealth.org/obgyn/menopause> [<https://perma.cc/K66N-LRS9>] (“Since menopause is due to the depletion of ovarian follicles/oocytes and severely reduced functioning of the ovaries, it is associated with lower levels of reproductive hormones, especially estrogen.”).

27. See *Menopause Basics*, *supra* note 24. As Part II will discuss, there are at least two U.S. cases involving perimenopausal women who were terminated in connection with their unexpectedly heavy bleeding at the workplace. See *infra* Section II.C.

28. See Greendale et al., *supra* note 26, at 571 (“The menopause is the permanent cessation of menstruation due to loss of ovarian follicular function. Clinically, menopause is not diagnosed after 12 months of amenorrhea, so the time of the final menses is determined retrospectively.”).

29. See *id.*

30. See *id.* (providing fifty-one as the mean age for menopause); *Menopause Basics*, *supra* note 24 (providing fifty-two as the mean age for menopause). Usually, a diagnosis of menopause does not require testing, but a doctor can confirm menopause by blood tests showing elevated levels of follicle-stimulating hormone and decreased levels of estradiol. See, e.g., *Menopause*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/menopause/diagnosis-treatment/drc-20353401> [<https://perma.cc/2836-YXMH>] (describing hormone testing that can confirm menopause or a differential diagnosis).

Not all instances of menopause occur as a result of the natural aging process. Surgery can induce menopause, such as when the uterus or both ovaries are removed, as part of treatment for cancer, endometriosis, or fibroids, for example.³¹ Chemicals, like cancer-fighting chemotherapy, can also induce menopause.³²

The irregular periods of perimenopause and the cessation of menstruation at menopause should be distinguished from other medical conditions and life stages. Indeed, not all absences of menstruation indicate a transition into menopause. Adolescents, for example, may experience irregular periods in the first few years after beginning to menstruate.³³ Perimenopause and menopause are also distinct from other manifestations of secondary amenorrhea—i.e., the cessation of menstruation for at least three months in someone who previously was having menstrual periods.³⁴

Scientific knowledge about the precise mechanisms of menopause is incomplete, so it is not surprising that effective treatments for its symptoms are problematic, too.³⁵ The next section surveys common symptoms of

31. See, e.g., *Induced Menopause in Women with Endometriosis – For Patients*, WOMEN'S HEALTH CONCERN (Aug. 2019), <https://www.womens-health-concern.org/help-and-advice/factsheets/induced-menopause-in-women-with-endometriosis> [<https://perma.cc/GD7U-XKKE>].

32. E.g., *Medical Definition of Menopause, Chemical*, MED. NET (Mar. 29, 2021), https://www.medicinenet.com/menopause_chemical/definition.htm [<https://perma.cc/65FB-ZA76>].

33. See, e.g., Paula J. Adams Hillard, *Menstruation in Adolescents: What's Normal, What's Not*, 1135 ANNALS N.Y. ACAD. SCIS. 29, 31 (2008) (explaining variations in number of days for adolescent menstrual cycles compared with adult cycles).

34. See *Amenorrhea*, HORMONE HEALTH NETWORK, <https://www.hormone.org/diseases-and-conditions/amenorrhea> [<https://perma.cc/5EZ7-LEPX>] (distinguishing primary amenorrhea, “when a girl has not started having menstrual periods by age 15,” from secondary amenorrhea, “when a girl or woman has been having menstrual periods but then stops having them for at least three months”). Secondary amenorrhea most commonly occurs during pregnancy and when breastfeeding. It may also occur in individuals who lose weight rapidly, have an eating disorder, have a low percentage of body fat, or who overexercise. See, e.g., Beatriz Vale, Sara Brito, Lígia Paulos & Pascoal Moleiro, *Menstruation Disorders in Adolescents with Eating Disorders – Target Body Mass Index Percentiles for their Resolution*, 12 EINSTEIN 175 (2014); Donna E. Stewart, G. Erlick Robinson, David S. Goldbloom & Charlene Wright, *Infertility and Eating Disorders*, 163 AM. J. OBSTETRICS & GYNECOLOGY 1196 (1990) (noting that 16.7% of infertility patients studied suffered from anorexia nervosa or bulimia nervosa); Nutsa Aladashvili-Chikvaidze, Jenara Kristesashvili & Manana Gegechkori, *Types of Reproductive Disorders in Underweight and Overweight Young Females and Correlations of Respective and Hormonal Changes with BMI*, 13 IRANIAN J. REPROD. MED. 135, 135 (2015) (hypothesizing that a person needs to maintain a certain weight and percentage of body fat in order to support menstruation); *5 Things You Need to Know About Exercise-Induced Amenorrhea*, USC FERTILITY BLOG, <https://uscfertility.org/5-things-need-know-exercise-induced-amenorrhea> [<https://perma.cc/9C9A-9E5W>] (explaining exercise-induced amenorrhea).

35. See Hannah Devlin, *The Menopause: Why So Little Research on the Middle-Aged Ovary?*, GUARDIAN (Aug. 26, 2019, 7:00 AM), <https://www.theguardian.com/society/2019/aug/26/the-menopause-why-so-little-research-on-the-middle-aged-ovary> [<https://perma.cc/9VGM-S7R4>] (describing dearth of scientific knowledge about the biomechanics of menopausal symptoms and lack of funding for related research); see generally Naomi R. Cahn, Bridget J. Crawford & Emily Gold Waldman, *Managing and Monitoring the Menopausal Body*, 2021 U. CHI. LEGAL F. (forthcoming 2022) (manuscript at 4–18) (discussing troubled history of menopausal hormone therapy), <https://ssrn.com/abstract=3988196>.

menopause, as well as medical and nonmedical interventions that attempt to address many symptoms.

B. Symptoms and Treatment

While many people have no negative menopausal symptoms, many others experience symptoms that can be incapacitating at times and that last for years (if they end at all). Of course, many people fall somewhere in between.³⁶ Hot flashes, like Edith Bunker's, are perhaps the most well-known symptom of menopause. People describe menopausal hot flashes as a sudden feeling of heat, sometimes accompanied by a red, flushed face as well as sweating.³⁷ Research suggests that up to 75% of North American women experience hot flashes as they transition into menopause, with nearly a quarter of them experiencing enough discomfort to discuss them with a clinician.³⁸ Most commonly, hot flashes persist for six months to two years, but approximately 15% of women experience the most severe form of hot flashes; these can continue for up to five years after the last menstrual period or even indefinitely.³⁹

Other physical symptoms of perimenopause and menopause can include night sweats (i.e., hot flashes at night), disturbed sleep, headaches, a feeling of electric shocks throughout the body, a sensation of burning in the mouth, tingling extremities, itchy skin, extreme fatigue, joint pain, muscular stiffness, panic attacks, dizziness, hair loss, weight gain, vaginal dryness, decreased libido, breast tenderness, increased risk of osteoporosis, and others.⁴⁰ Symptoms also vary by race, with Black women more likely to

36. See, e.g., Cappelloni, *supra* note 23. Scientists do not understand why some people experience few, if any, symptoms of menopause, while others have severe ones. See Devlin, *supra* note 35.

37. See *Menopause FAQs: Hot Flashes*, N. AM. MENOPAUSE SOC'Y, <https://www.menopause.org/for-women/menopause-faqs-hot-flashes> [<https://perma.cc/22TH-LWZZ>].

38. *Id.*

39. See *Dealing with the Symptoms of Menopause*, HARV. HEALTH PUB. (Mar. 21, 2017), <https://www.health.harvard.edu/womens-health/dealing-with-the-symptoms-of-menopause> [<https://perma.cc/VL4Q-NCWZ>] ("Also called vasomotor symptoms, hot flashes may begin in perimenopause For some women they go on *indefinitely*." (emphasis added). The precise mechanism of hot flashes is not well understood; they are likely connected to attempts by the hypothalamus to regulate the body's temperature. *Id.*

40. The precise number of symptoms of menopause vary, depending on the source consulted; scientific understanding of menopause has advanced and expanded over time. Compare 34 Symptoms of Menopause, ALVA, <https://withalva.com/menopause/list-of-symptoms> [<https://perma.cc/CVC9-62VZ>], and What are the 34 Symptoms of Menopause, UK MEDS, (Oct. 21, 2019), <https://www.ukmeds.co.uk/blog/what-are-the-34-symptoms-of-menopause> [<https://perma.cc/3QSD-G9XG>] ("[R]esearch has shown that menopause typically comes with a list of 34 different symptoms. Some may disrupt your life rather significantly, while others may go largely unnoticed."), with Janette M. Perz, *Development of the Menopause Symptom List: A Factor Analytic Study of Menopause Associated Symptoms*, 25 WOMEN & HEALTH 53, 64 (1997) (identifying fifty-six symptoms previously

experience hot flashes and less likely to be offered various forms of treatment.⁴¹ Based on a longitudinal study of a large cohort of women of different races, researchers have shown that Black women are more likely than women in other racial groups to undergo hysterectomies, which surgically induce menopause, to treat heavy bleeding.⁴² Black and Latina women may experience menopause earlier than white women.⁴³ They report experiencing more hot flashes and night sweats and for longer periods than do white women.⁴⁴ A separate study shows that indigenous American women are more likely than women in any other racial or ethnic group to experience symptomatic hot flashes and night sweats.⁴⁵

Perimenopause and menopause also have implications for the brain, including cognitive problems, sometimes colloquially referred to as “brain fog.”⁴⁶ A 2021 study found that while the transition into menopause “has

associated with menopause and narrowing that list to twenty-five “significant” symptoms arranged into three categories: “psychological, vaso-somatic, and general-somatic”).

41. See Kacey Y. Eichelberger, Kemi Doll, Geraldine E. Ekpo & Matthew L. Zerden, *Black Lives Matter: Claiming a Space for Evidence-Based Outrage in Obstetrics and Gynecology*, 106 AM. J. PUB. HEALTH 1771, 1772 (2016) (“Black women have a 1.6-fold risk of experiencing vasomotor symptoms”); Sarah Vander Schaaf, *Black Women’s Problems During Menopause Haven’t Been a Focus of Medicine. Experts and Activists Want to Change That.*, WASH. POST (Mar. 6, 2021, 1:00 PM), https://www.washingtonpost.com/health/black-women-menopause-hot-flashes/2021/03/05/97a02c44-7b8a-11eb-a976-c028a4215c78_story.html [https://perma.cc/V8C8-R4J8].

42. See Nanette Santoro, E. Stewart Taylor & Kim Sutton-Tyrrell, *The SWAN Song: Study of Women’s Health Across the Nation’s Recurring Themes*, 38 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 417, 418 (2011) (noting “African-American women are more likely to undergo hysterectomy and surgical menopause”); *About SWAN*, STUDY OF WOMEN’S HEALTH ACROSS THE NATION, <https://www.swanstudy.org/about/swan-history> [https://perma.cc/WH53-H2NW] (describing structure and operation of longitudinal study of 3,302 women).

43. Compare Joyce T. Bromberger et al., *Prospective Study of the Determinants of Age at Menopause*, 145 AM. J. EPIDEMIOLOGY 124, 130 (1997) (showing lower median age at menopause for African-American women than Caucasian women), with Ellen B. Gold et al., *Factors Associated with Age at Natural Menopause in a Multiethnic Sample of Midlife Women*, 153 AM. J. EPIDEMIOLOGY 865, 870 (2001) (reporting no difference in median age of menopause for African-American women or Latina women compared to white women). See also Adriana Velez, *Menopause Is Different for Women of Color*, ENDOCRINEWEB (Mar. 10, 2021), <https://www.endocrineweb.com/menopause-different-women-color> [https://perma.cc/FUN2-LEZ6] (A study showed that “Black women reach menopause at 49, two years earlier than the national median age. . . . Latina women reach menopause two years earlier than the median age as well.”).

44. See Velez, *supra* note 43 (“More Black and Latina women report experiencing vasomotor symptoms (hot flashes and night sweats) than white women do Among the women who report vasomotor symptoms, white women experience hot flashes for around 6.5 years, while for Latinas it’s 8.9 years, and for Black women it’s 10 years.”).

45. See Susan D. Reed et al., *Premenopausal Vasomotor Symptoms in an Ethnically Diverse Population*, 21 MENOPAUSE 153, 153 (2014) (reporting results of study of 1,513 women ages forty-five to fifty-five, showing that 66.7% of Native American women reported vasomotor symptoms compared to 61.4% of Black women, 58.3% of white women, 45.5% of Hawaiian/Pacific Island women and several other categories broken down by race).

46. Marlene Cimens, *As Menopause Approaches, Some Women Suffer ‘Brain Fog’ and Memory Loss. What’s Causing These Problems?*, WASH. POST (May 16, 2021, 9:00 AM), <https://www.washingtonpost.com/health/brain-fog-menopause-memory-loss/2021/05/14/0600c088->

pronounced effects on [the] human brain's structure, connectivity, and energy metabolism," menopause also offers "a neurological framework for both vulnerability and resilience."⁴⁷ That is, many people going through menopause are vulnerable to "neurological shifts" and may experience "bothersome symptoms as well as a higher risk of depression, anxiety, and [Alzheimer's disease]."⁴⁸ Nonetheless, the majority will not ultimately have adverse long-term effects because of the brain's ability to compensate for changing estrogen levels.⁴⁹ The *Wall Street Journal* summarized these findings with the optimistic headline "The Surprising Good News on How Menopause Changes Your Brain," quoting the study's lead author, Weill Cornell neurology professor Lisa Mosconi, as explaining, "Our study suggests that the brain has the ability to find a new normal after menopause in most women"⁵⁰ And the ultimate takeaway from the research is encouraging. That said, the researchers' finding that "many" people going through menopause are vulnerable to cognitive and psychological symptoms should not be minimized.⁵¹

Moreover, there is often no quick fix for most menopausal symptoms. Anecdotal evidence suggests that doctors frequently misdiagnose symptoms of menopause, so that alone can cause delays.⁵² Once they do correctly diagnose, doctors frequently prescribe forms of menopausal hormone therapy (MHT) to treat menopause-related hot flashes.⁵³ Doctors also

aea6-11eb-ab4c-986555a1c511_story.html [https://perma.cc/F48X-CNN2] (reporting that up to two-thirds of women may experience this problem).

47. Lisa Mosconi et al. *Menopause Impacts Human Brain Structure, Connectivity, Energy Metabolism, and Amyloid-Beta Deposition*, 11 SCI. REPS. (2021).

48. *Id.*

49. *See id.*

50. *See* Reddy, *supra* note 8 (quoting Lisa Mosconi).

51. Mosconi et al., *supra* note 47 ("[W]hile the majority of women undergo menopause without long-term adverse effects, *many* are vulnerable to the neurological shifts that can occur during this transition, experiencing bothersome symptoms as well as a higher risk of depression, anxiety, and [Alzheimer's disease].") (emphasis added).

52. *See, e.g.,* Louise R. Newson, *My Personal Experience of the Menopause*, 67 BRIT. J. GEN. PRAC. 125, 125 (2017) ("[M]any women . . . have been misdiagnosed as having depression and given antidepressants . . .").

53. *See, e.g.,* Jim King, *The Strange Case of Premarin*, 3 MOD. DRUG DISCOVERY 46, 46 (2000) (describing use of estrogen treatments since 1942 to treat hot flashes). Menopausal hormone therapy is another name for hormone replacement therapy. *See Menopausal Hormone Therapy and Cancer*, NAT'L CANCER INST., <https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/mht-fact-sheet> [https://perma.cc/FNK6-25LU]; *see also* Patrica Kelly Yeo, *The Doctor Behind 'The Vagina Bible' Wrote a New Book on Menopause, and She Says She's Skeptical of the Startups Targeting Middle-Aged Women*, BUS. INSIDER (May 4, 2021, 12:05 PM), <https://www.businessinsider.com/gynecologist-jen-gunter-on-startups-tackling-menopause-2021-4#:~:text=In%20her%20book%2C%20Gunter%20rejects,the%20puzzle%2C%22%20Gunter%20said> [https://perma.cc/86EC-GR3W] (explaining Dr. Jen Gunther's preference for the term "menopausal hormone therapy" as less stigmatizing than "hormone replacement therapy"). In 1988, the Food and Drug Administration (FDA) expanded its approval of MHT to include the treatment of osteoporosis. *See, e.g.,* Roger A. Lobo, *Hormone-*

prescribe MHT for patients experiencing mood swings, “brain fog,” and other symptoms.⁵⁴ MHT is not without risks, however. Estrogen supplements, either alone or in combination with progesterone, can increase the risk of blood clots and stroke.⁵⁵ Researchers also have raised important concerns about MHT and an increased risk of breast cancer.⁵⁶ To be sure, MHT is not the only treatment option; there are numerous alternatives, each with their own mix of benefits and drawbacks.⁵⁷

Given the limited scope of knowledge about the biology of menopause and lack of precise treatments, it is hardly surprising that many members of the public lack a detailed understanding of menopause. This lack of knowledge gets layered on top of negative stigmas about aging, which are heaped on top of centuries of shame associated with what historically have

Replacement Therapy: Current Thinking, 13 NATURE REV. ENDOCRINOLOGY 220, 220 (2017). Hormone replacement therapy was a common treatment for symptoms associated with menopause until approximately 2002; that year, a group calling itself the “Women’s Health Initiative Investigators” published a study suggesting a link between the use of the standard estrogen and progestin MHT for postmenopausal women was linked to increased risk for serious negative health outcomes. See Jacques E. Rossouw et al., *Risks and Benefits of Estrogen Plus Progestin in Healthy Postmenopausal Women: Principal Results from the Women’s Health Initiative Randomized Controlled Trial*, 288 J. AM. MED. ASS’N 321 (2002). This study has been sharply criticized, however. See, e.g., Judy L. Bolton, *Menopausal Hormone Therapy, Age, and Chronic Diseases: Perspectives on Statistical Trends*, 29 CHEM. RES. IN TOXICOLOGY 1583 (2016) (critiquing study for the 2002 study’s exclusion of younger subjects).

54. Current MHT practices typically involve estrogen or an estrogen-progesterone combination delivered in pill form or by a skin patch to replace the no-longer naturally-produced hormones. *Menopause Treatment*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menopause/menopause-treatment#2> [<https://perma.cc/Q5CH-WXKC>]. Apart from treatment of menopausal symptoms, other possible benefits associated with MHT include reductions in coronary disease in some populations and a decreased risk of colon cancer. See, e.g., Lobo, *supra* note 53, at 224, 226 (“A meta-analysis of randomized trials . . . showed that initiation of oestrogen <10 years from the onset of menopause resulted in a 32% reduction in coronary disease . . .”).

55. U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, *supra* note 54 (“Estrogen alone and estrogen plus progesterone raise the risk of stroke and blood clots in the legs and lungs. The risks are rare in women between 50 and 59.”).

56. See, e.g., Lobo, *supra* note 53, at 224 (noting concerns about increased risk of breast, ovarian and endometrial cancers). For a discussion of the flawed patent process, see Jacob S. Sherkow, *Patent Law’s Reproducibility Paradox*, 66 DUKE L.J. 845, 887 (2017) (addressing controversy over MHT patents).

57. Alternatives to MHT include cognitive behavior therapy, hypnosis, herbal treatments, dietary changes, acupuncture, and prescription drugs, including selective serotonin re-uptake inhibitors (SSRIs). Typically prescribed for depression and anxiety, SSRIs also can improve menopausal symptoms such as hot flashes, fatigue, and disrupted sleep. See *Complementary & Alternative Therapies: Non Hormonal Prescribed Treatments*, WOMEN’S HEALTH CONCERN FACT SHEET 2, <https://www.womens-health-concern.org/wp-content/uploads/2021/02/03-WHC-FACTSHEET-Complementary-And-Alternative-Therapies-FEB2021.pdf> [<https://perma.cc/J7JS-4JAS>] (emphasizing “relaxation techniques, sleep hygiene and learning to take [a] positive healthy attitude to a menopause challenge”). The United States Department of Health & Human Services Office of Women’s Health recommends relaxing exercises like yoga and tai chi to address joint pain, muscle aches, feelings of stress, mood swings, and disturbed sleep. *Id.*; see also Gary Elkins, William I. Fisher, Aimee K. Johnson, Janet S. Carpenter & Timothy Z. Keith, *Clinical Hypnosis in the Treatment of Postmenopausal Hot Flashes: A Randomized Controlled Trial*, 20 MENOPAUSE 296–97 (2013) (reporting that hypnosis reduced frequency and severity hot flashes and night sweats in menopausal women by more than fifty-seven percent).

been called “female” reproductive functions. That combination of ignorance and intersectional stigma renders menopause a particularly taboo topic. The next section explores subjective experiences of menopause before turning to a more detailed exposition of the stereotypes that surround this life stage.

C. Perceptions

Negative stereotypes about menopause abound.⁵⁸ As one survey found, up to 50% of U.K. women fifty years of age and older believe that the media portrays menopause inaccurately, and 74% believe that advertising is insensitive toward older women.⁵⁹ Survey participants identified the most common media stereotypes about older women as incompetent with modern technology, frumpy, and mean.⁶⁰ Moving beyond the media, in various surveys of Mexican and U.S. students, for instance, participants used words like “bitter,” “tense,” “old,” and “sensitive” to describe menopausal women.⁶¹ Students’ responses did not vary meaningfully by gender or location in Mexico versus the United States.⁶²

To be sure, not all individuals or societies have negative views of menopause. One study of Japanese women and physicians suggests that menstruation is “not a very potent symbol” in that country, and therefore attitudes about menopause are not appreciably negative.⁶³ In a survey of women in Taiwan ages thirty-five to fifty-five, most respondents reported that they viewed menopause positively, as a time for “wisdom and maturation,” “a symbol of achievement,” or “a time to start enjoying life.”⁶⁴

58. See, e.g., Linda Gannon & Jill Stevens, *Portraits of Menopause in the Mass Media*, 27 WOMEN & HEALTH 1, 2 (1998) (“[T]raditional scholars do agree that, for women in western, industrialized societies, the nature of menopause is essentially negative: the correlates, causes, changes, developments, and interventions have been studied within the context that menopause is a problem, a bad experience, and a cause for concern.”).

59. See *Older Women and Menopause Negatively Stereotyped by the Media, According to UM Research*, MKTG. COMM. NEWS (Sept. 13, 2018), <https://marcommnews.com/older-women-and-menopause-negatively-stereotyped-by-the-media-according-to-um-research> [https://perma.cc/XTH3-2PRQ] (reporting results of survey of U.K. women ages fifty and older).

60. *Id.*

61. Joan Chrisler, Jennifer A. Gorman, Maria Luisa Marván & Ingrid Johnston-Robledo, *Ambivalent Sexism and Attitudes Toward Women in Different Stages of Reproductive Life: A Semantic, Cross-Cultural Approach*, 35 HEALTH CARE FOR WOMEN INT’L 634, 648 (2013); Maria Luisa Marván, Martha Islas, Laura Vela, Joan C. Chrisler & Elyse A. Warren, *Stereotypes of Women in Different Stages of their Reproductive Life: Data from Mexico and the United States*, 29 HEALTH CARE FOR WOMEN INT’L 673, 676–77 (2008). Students in both countries also used words like “old,” “irritable,” “angry,” “depressed,” and “having hot flashes.” *Id.*

62. Chrisler et al., *supra* note 61, at 648.

63. See, e.g., Margaret Lock & Patricia Kaufert, *Menopause, Local Biologies, and Cultures of Aging*, 13 AM. J. HUM. BIOLOGY 494 (2001), <https://onlinelibrary.wiley.com/doi/pdfdirect/10.1002/ajh.b.1081>.

64. Yeou-Lan Duh Chen, Ann M. Voda & Phyllis Kernoff Mansfield, *Chinese Midlife Women’s Perceptions and Attitudes About Menopause*, 5 MENOPAUSE 28–34 (1998) (91.7% held this opinion).

Similar results were obtained when researchers in India conducted qualitative surveys of all women ages forty to sixty living in the Dhanas colony in the city of Chandigarh.⁶⁵ Although merely a snapshot, these surveys of women in Japan, Taiwan, and India suggest that attitudes about menopause are far from monolithic.

Cultural approaches to menopause can play a role in how menopause is subjectively experienced. A study of over four thousand women from the United States, Canada, Great Britain, France, Italy, Sweden, Norway, Denmark, and Finland found that “many postmenopausal symptoms had the greatest prevalence in women from the United Kingdom, United States, and Canada.”⁶⁶ The researchers concluded that “there is a core set of symptoms experienced by postmenopausal women in which variations may be influenced by culture.”⁶⁷ The lead author later reflected that, “In societies where age is more revered and the older woman is the wiser and better woman, menopausal symptoms are significantly less bothersome.”⁶⁸ Indeed, where there are socio-cultural anxieties about aging and gender, menopause clearly lies right at their intersection.

Negative cultural and personal perceptions of menopause can be mutually reinforcing. First, individuals’ own negative stereotypes of menopause can cause them to perceive their own symptoms as more intense than others who do not hold those views.⁶⁹ Second, these stereotypes can influence how people—including employers—deal with others whom they suspect or know are menopausal. At the extreme, such stereotypes can prompt overt harassment or discrimination. Stereotypes may also cause employers to worry that menopausal employees will be less productive or will seek accommodations. Such concerns, in turn, may consciously or unconsciously influence hiring and promotion decisions. Stereotypes further have the potential to create a feedback loop. To the extent that

65. S Kaur, I Walia & A Singh, *How Menopause Affects the Lives of Women in Suburban Chandigarh, India*, 7 CLIMACTERIC 175–180 (2004). Almost all (over 94%) of respondents said they welcomed menopause for a variety of reasons, including less worry or bother, fewer restrictions in the clothes they could wear, a feeling of being clean, and the end of concerns about unwanted pregnancies. *Id.* at 178.

66. See Mary Jane Minkin, Suzanne Reiter & Ricardo Maamari, *Prevalence of Postmenopausal Symptoms in North America and Europe*, 22 MENOPAUSE: J. N. AM. MENOPAUSE SOC’Y 1231, 1235 (2015).

67. *Id.* at 1237.

68. Lisa Rapaport, *Culture May Influence How Women Experience Menopause*, REUTERS (June 5, 2015, 12:08 PM), <https://www.reuters.com/article/us-health-menopause-perceptions/culture-may-influence-how-women-experience-menopause-idUSKBN0OL1XH20150605> [<https://perma.cc/E3ZV-KF9N>] (quoting Dr. Mary Jane Minkin of Yale Medical School).

69. *Id.* (Dr. Sandra Thompson, a professor in rural health at the University of Western Australia explained, “The social context in which a woman lives is important to her understanding and experience of the menopausal transition. When looking at different countries, variations in symptom reporting can be attributed to language differences, culturally shaped expectations about menopause, culturally influenced gender roles and socioeconomic status.”).

employers hold these stereotypes, menopausal employees may respond by altering their attitudes or behavior, whether by conforming to that expectation or trying to disguise their menopausal symptoms.⁷⁰

D. Subjective Experiences

Through an examination of individuals' first-person descriptions of their subjective experiences with menopause, an additional theme emerges. Remarkably common experiences of menopause include unpreparedness and surprise. Consider Oprah Winfrey, who reports that when she was approximately forty-eight or fifty years old, she experienced two years of heart palpitations and sleep disruptions.⁷¹ After consulting a cardiologist, taking medication, and wearing a heart monitor, she finally self-diagnosed her symptoms as menopause when she encountered a book about the topic.⁷² Up until that point, Winfrey says, "I don't recall one serious conversation with another woman about what to expect" in menopause.⁷³ This anecdotal evidence suggests that silence about this part of the aging process is often the norm, even among friends and family.

Relatedly, Bates College Professor Erica Rand has described her experience with menopause as a time of discordant self-image. She writes that her menopause-related weight gain triggered "mourning the departure of my curvy hips within the queer erotics of butch/femme."⁷⁴ The fat redistribution Rand experienced in menopause made her feel "like my body was stealing my queer gender," something she did not appreciate as she came to look more like her butch girlfriend.⁷⁵ Yet even as she experienced "deep loss," menopause ultimately helped her realize that she could "remake or reinterpret [her] relationship between [her] body and [her] gender."⁷⁶ Even when one intellectually interrogates the cause of bodily changes, their manifestations can still be unexpected and lead to new understandings, as Rand's reflections demonstrate.

70. Marván et al., *supra* note 61, at 674; see also Lee Jussim & Christopher Fleming, *Self-Fulfilling Prophecies and the Maintenance of Social Stereotypes: The Role of Dyadic Interactions and Social Forces*, in *STEREOTYPES & STEREOTYPING* 161–192 (C. Neil Macrae et al. eds., 1996).

71. 10 *Celebrities Who Have Spoken Out About Menopause*, GLAMOUR (Oct. 5, 2020), <https://www.glamour.com/gallery/celebrities-who-have-spoken-out-about-menopause> [<https://perma.cc/2DFW-RZDB>] (quoting Oprah Winfrey as saying, "For two years I didn't sleep well. Never a full night. No peace. Restlessness and heart palpitations were my steady companions at nightfall. . . . I went to see a cardiologist. Took medication. Wore a heart monitor for weeks.").

72. *Id.* (quoting Oprah Winfrey).

73. *Id.* (quoting Oprah Winfrey).

74. ERICA RAND, *THE SMALL BOOK OF HIP CHECKS: ON QUEER GENDER, RACE, AND WRITING* 112 (2021).

75. *Id.*

76. *Id.* at 113.

That said, another aspect of menopause, at least for some, is more positive: a new sense of freedom and liberation. Oprah Winfrey, who had lamented her own lack of knowledge about menopause, has also described menopause as a “blessing,” saying, “I’ve discovered that this is your moment to reinvent yourself after years of focusing on the needs of everyone else.”⁷⁷

For Mike Funk, age twenty-seven, the cessation of menstruation marked a different kind of turning point.⁷⁸ Funk explained that the testosterone-induced cessation of menstruation has been life-enhancing and community-building: “I’m glad I get to live the life that I get to live. . . . Now I have a ton of trans friends, and any time I have a medical problem I’m just texting them about it.”⁷⁹ Instead of menopause causing distress, for Funk it marked the beginning point for new networks of support.

The idea that menopause ultimately can inaugurate a new, more liberated stage of life is not just a contemporary one. Nineteenth-century women’s rights advocate Elizabeth Cady Stanton opined that “the hey-day of woman’s life is on the shady side of fifty, when the vital forces heretofore expended in other ways are garnered in the brain.”⁸⁰ Stanton knew well of what she spoke. Stanton bore her seventh and last child in 1859, when she was forty-three years old.⁸¹ Once on the “shady side of fifty,” Stanton was finally able to devote herself fully to writing and organizing on behalf of women’s rights.⁸²

Taken together, these reflections on menopause suggest some commonalities, even though individual responses to menopause can be as diverse as its symptoms. In particular, they point to the particularly fraught nature of the *transition* into menopause. Note also that, for many people, the transition to menopause occurs roughly around the same time that they are preparing to enter management roles, given that the average CEO is

77. 10 *Celebrities Who Have Spoken Out About Menopause*, *supra* note 71 (quoting Oprah Winfrey). Belinda, a character on the television series *Fleabag*, similarly raves about menopause’s liberatory effect. *Fleabag: Series 2, Episode 3* (BBC Three television broadcast Mar. 18, 2019) (in which character of 58-year-old Belinda calls menopause “the most wonderful f-cking thing in the world. . . . [Y]ou’re free, no longer a slave, no longer a machine with parts. You’re just a person.”).

78. See Melissa Giannini, *The Change*, DAMN JOAN (Nov. 13, 2017), <https://damnjoan.com/change-menopause> [<https://perma.cc/K7BS-KXNY>] (profiling Mike Funk, age twenty-seven, a “Graphic Artist/Copyrighter/Barista”).

79. *Id.*

80. ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE (1815-1897) REMINISCENCES 447 (1898).

81. See TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 7 (2016).

82. See generally *id.* (describing Stanton’s long career advocating for women’s rights).

53.46 years old.⁸³ More broadly, women comprised more than 45% of the country's total labor force in 2020.⁸⁴ Women between the ages of forty-five to fifty-four constitute close to 10% of the workforce.⁸⁵ Thus, there are millions of people in the workforce who either are or soon will be menopausal. This Part has shown that many of them will have to contend simultaneously with negative stereotypes *and* with genuinely challenging symptoms. Part II considers the extent to which U.S. employment discrimination law is equipped to respond to these issues.

II. MENOPAUSE'S UNEASY FIT WITHIN U.S. ANTIDISCRIMINATION LAW

Consider the following three situations, all based on actual employment discrimination cases in the United States, to which this Part later returns in depth:

- Jackie Dault, a nurse in a urology clinic, repeatedly worked long shifts with a doctor who began mocking her appearance and age. He made fun of her for “going through menopause,” claimed that she needed to “get off her feet for frequent breaks” because she was over fifty years old and asked her who cut her hair because “it ain’t working for you,” contrasting her to another younger nurse whom he described as a “MILF.” On one occasion, the urologist even turned the operating room thermostat up to eighty degrees to try to make Dault sweat, as a way of further mocking her for allegedly being menopausal, even though she actually was not going through menopause. Dault was later terminated and brought numerous claims, including claims for sex discrimination under Title VII, age discrimination under the Age Discrimination in Employment Act, and intentional infliction of emotional distress under Georgia state law.⁸⁶

83. Jeneva Patterson, *It's Time to Start Talking About Menopause at Work*, HARV. BUS. REV. (Feb. 24, 2020), <https://hbr.org/2020/02/its-time-to-start-talking-about-menopause-at-work> [<https://perma.cc/PF7U-Z2XR>] (ensuring that women reach more leadership positions requires being “more open about what menopause is and how it affects both individuals and organizations”).

84. See *Household Data Annual Averages, Employed Persons by Occupation*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/cps/cpsaat09.pdf> [<https://perma.cc/2QSR-Q69R>] (showing 147,795,000 total employed persons sixteen years and older, of which 69,234,000 were women).

85. See *Labor Force Statistics from the Current Population Survey 2020*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/cps/cpsaat03.htm> [<https://perma.cc/MQ57-K4XF>] (showing 160,742,000 total persons sixteen years and older in the civilian labor force, of whom 15,737,000 were women ages thirty-five to forty-four years; 15,220,000 were women ages forty-five to fifty-four years; 12,911,000 were women ages fifty-five to sixty-four years, and 4,742,000 were women sixty-five years and older).

86. See *Dault v. Georgia Urology, P.A.*, 2020 WL 10139416 (N.D. Ga. Dec. 18, 2020) (containing magistrate judge's report and recommendation), *adopted by* 2021 WL 2517373 (N.D. Ga. Feb. 1, 2021).

- Alisha Coleman, a call center employee, entered perimenopause, which caused her to experience uncontrollably heavy menstrual bleeding. On one occasion, she accidentally bled onto an office chair, at which point she was disciplined and warned that if this ever happened again, she would be terminated. She took numerous precautions to avoid a second accident, but eight months later, some of her menstrual blood got onto the carpet. Although she quickly and fully cleaned the carpet with bleach and disinfectant, Coleman was terminated for “failing to maintain high standards of personal hygiene.” She then sued, alleging that her termination amounted to impermissible sex discrimination under Title VII.⁸⁷

- Georgia Sipple, a product demonstrator for a food company, began to experience menopausal symptoms including hot flashes, dizziness, migraines, and a general sense of physical weakness. She obtained a note from her physician, who explained that Sipple needed “allowances” to the dress code, such as being able to wear short sleeve shirts, shorts, or knee-high skirts, and not being made to wear hats or clothing with collars or straps on the neck. Sipple’s supervisor, upon becoming aware of the situation, offered her some other alternatives, such as wearing calf-length pants or a lab coat with a short sleeve shift underneath or working in a refrigerated section. But the supervisor refused to grant the specific accommodations described by the physician, and Sipple—feeling that she was being forced out of her job—quit. She then brought suit alleging disability discrimination under the California Fair Employment and Housing Act, which generally tracks the Americans with Disabilities Act.⁸⁸

These three cases suggest the range of challenges that employees going through menopause—or perceived to be menopausal—can face. They may experience outright harassment or discrimination based on their actual or perceived menopausal status. They may suffer a “tangible employment action” for their actual menopausal symptoms.⁸⁹ Or they may affirmatively request, and then be denied, accommodations for some of those symptoms. These issues, individually or in combination, can limit employees’ potential for workplace success or even drive employees out of their jobs entirely. And, of course, for every published case involving a menopausal employee,

87. See *Coleman v. Bobby Dodd Institute, Inc.*, 2017 WL 2486080 (M.D. Ga. June 8, 2017).

88. See *Sipple v. Crossmark, Inc.*, 2012 WL 2798791 (E.D. Cal. July 9, 2012).

89. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

there are countless other similarly situated menopausal employees who leave the workplace due to harassment, symptoms, or both, without ever pursuing legal recourse.⁹⁰

Given menopause's location at the intersection of age, disability, and sex, one might think that U.S. employment law provides a clear framework for evaluating these cases and determining when actionable discrimination has occurred. The reality is more complicated, as the next section shows.

A. Overview of Applicable Antidiscrimination Laws

It is helpful to begin by briefly summarizing the three key federal employment discrimination statutes, all of which have relevance for menopause. First, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."⁹¹ Moreover, the Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to clarify that Title VII's prohibition of discrimination "because of . . . sex" includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."⁹² The PDA's reference to "related medical conditions," some have argued, should include conditions related to the menstrual cycle, such as menopause.⁹³

Second, the Age Discrimination in Employment Act (ADEA) of 1967 makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."⁹⁴ The ADEA covers only employees who are age forty or older.⁹⁵

90. See, e.g., Lizzy Burden, *Many of Women Exit Workforce for a Little-Talked About Reason*, BLOOMBERG EQUAL (June 17, 2021, 11:00 PM), <https://www.bloomberg.com/news/articles/2021-06-18/women-are-leaving-the-workforce-for-a-little-talked-about-reason> [<https://perma.cc/2GVG-G9PF>] (noting that "A 2019 survey . . . conducted by BUPA and cited by the Chartered Institute of Personnel and Development, or CIPD, a London-based association for human resource management professionals, reckoned almost 900,000 women in the U.K. left their jobs over an undefined period of time because of menopausal symptoms").

91. 42 U.S.C. § 2000e-2(a)(1). For purposes of Title VII, the term "sex" includes transgender status and sexual orientation. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

92. 42 U.S.C. § 2000e-2(k).

93. See *infra* Section II.C. (discussing *Flores*).

94. 29 U.S.C. § 623(a)(1).

95. *Id.* § 631(a).

Finally, the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Amendments Act of 2008 (together the ADA),⁹⁶ is designed to combat disability discrimination in numerous contexts, including the workplace. It defines a disability as a “physical or mental impairment that substantially limits one or more major life activities,” and prohibits discrimination “against a qualified individual on the basis of disability.”⁹⁷ Importantly, the ADA provides that discrimination is the failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless making such accommodations would cause an “undue hardship” to the employer.⁹⁸

Notwithstanding the obvious connection between aging and menopause, most employment discrimination cases involving menopause rest on either sex discrimination or disability discrimination theories. There are three basic categories of these cases: (1) claims of discrimination based on menopausal stereotypes, (2) claims of discrimination based on menopausal symptoms (such as unexpected bleeding) that are not affecting workplace performance, and (3) claims challenging the failure to provide reasonable accommodations for menopausal symptoms that *are* affecting workplace performance. Cases falling into the first two categories are usually framed as sex discrimination cases, sometimes with a supporting age discrimination argument as well. By contrast, cases in the third category are brought as disability discrimination cases.

B. Discrimination/Harassment Based on Menopausal Stereotypes

Since 1986, the Supreme Court has recognized that sexual harassment is a form of sex discrimination because it subjects employees to different terms and conditions of employment due to their sex.⁹⁹ The Supreme Court has further differentiated between two types of actionable sexual harassment: quid pro quo harassment, in which an employee experiences adverse employment consequences as a result of failure to submit to unwelcome sexual advances,¹⁰⁰ and hostile work environment claims, in

96. Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

97. See 42 U.S.C. §§ 12102(1)(A), 12(a).

98. *Id.* § 12112(b)(5)(A).

99. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that a claim of sexual harassment on the basis of a hostile environment is actionable under Title VII, which prohibits discrimination against any individual in the terms or conditions of employment on the basis of sex, among other factors).

100. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998); see Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 131 (2014) (pointing out that *Ellerth* requires that the threat of adverse action be carried out); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 703 (1997) (identifying Catharine MacKinnon as the original framer of the quid pro quo claim of sexual harassment).

which the harassment is “sufficiently severe or pervasive as to alter the conditions of a victim’s employment.”¹⁰¹ For cases involving menopause, the hostile work environment type of sexual harassment is the critical one.

Negative statements about an employee’s actual or perceived menopause, typically stemming from stereotypes about (and hostility to) menopause, can fit into Title VII’s sex discrimination framework in two ways. First, such statements can be evidence of an employer’s discriminatory motive for taking an adverse job action against the employee.¹⁰² Second, such comments—if sufficiently severe or pervasive to create a hostile work environment for the employee—can give rise to a viable legal claim standing alone, even if not accompanied by an adverse job action like demotion or termination.

1. *Discriminatory Motives*

*White v. Twin Falls County*¹⁰³ is a good example of the first type of case. There, investigator Becky White, an employee of the Twin Falls County Sheriff’s Office in Idaho, brought suit to challenge her termination. White had been a sex crimes investigator for numerous years before being terminated, purportedly for making untruthful statements on her time cards for two pay periods.¹⁰⁴ White argued that this was a pretext for discrimination, alleging that she had merely underreported her time because her overtime had not been approved in advance by her supervisor, and that male employees’ time cards were not monitored to the same extent.¹⁰⁵ She also alleged that she had been subjected to harassing comments from the sheriff, including “How’s the hot flash queen?” and “How’s the menopause today?”¹⁰⁶ Although White conceded that she had not filed a harassment complaint at the time, and thus could not proceed with a separate hostile work environment claim, she sought to “have the Court take note of the work environment in determining whether the reasons certain employment

101. *Meritor Sav. Bank*, 477 U.S. at 67.

102. In the early days of Title VII, airlines imposed an age limit of thirty-two for flight attendants on the basis that “changes of body, personality and emotional reactions” associated with aging would interfere with flight attendants’ enthusiasm. Naomi Cahn, *Justice for the Menopause: A Research Agenda*, 41 COLUM. J. GENDER & L. 27, 32 (2021). Those restrictions were struck down. *Id.* A 1999 law review article observed that menopausal stereotypes had been invoked in another type of employment case to limit damages: worker’s compensation. See Phyllis T. Bookspan & Maxine Kline, *On Mirrors and Gavels: A Chronicle of How Menopause Was Used as a Legal Defense Against Women*, 32 IND. L. REV. 1267, 1306–07 (1999).

103. *White v. Twin Falls County*, 2016 WL 1275594 (D. Ida. Mar. 31, 2016). The claim later settled out of court. See Order of Dismissal (No. 1:14-cv-00102) (June 28, 2016).

104. *White*, 2016 WL 1275594, at *1.

105. *Id.*

106. *Id.* at *2.

actions were taken were pretext for the real reason of sex discrimination.”¹⁰⁷ The court agreed, and White’s discrimination claim survived summary judgment.¹⁰⁸

Similarly, in the earlier case of *Owens v. New York City Housing Authority*, a supervisor’s negative comment to an employee, Catherine Owens, about her transition into menopause was used as circumstantial evidence that a termination had been motivated by age discrimination; this enabled the employee’s claim to survive a summary judgment challenge.¹⁰⁹ As was true for Becky White, the negative comments referring to menopause served as a proverbial smoking gun for establishing the employer’s discriminatory motive in taking an adverse job action.

2. Hostile Work Environments

Hostile work environment claims based on negative comments about menopause are harder to win, given the high standard for what counts as “severe or pervasive.”¹¹⁰ This is not an issue limited to menopause-related comments; it is one of the most notorious and widely critiqued aspects of Title VII doctrine.¹¹¹

Burkhart v. American Railcar Industries exemplifies this phenomenon.¹¹² There, manufacturing plant employee Cathy Burkhart brought a sexual harassment claim after being subjected to numerous instances of harassment by her boss, who forwarded her graphic photos, commented to her that “she ‘looked good on her knees’” when she was on the floor taping up a box for mailing, and—most notably—sent her an email entitled “Why Women Are Crabby” that crudely discussed various stages in a woman’s reproductive development, culminating in “‘The Menopause’ where women either take hormone replacement drugs ‘and chance cancer in those now seasoned ‘buds’ or the aforementioned Nether Regions, or,

107. *Id.* at *6.

108. *Id.* at *9.

109. *Owens v. N.Y.C. Housing Authority*, 1987 WL 15582, at *2 (S.D.N.Y. July 31, 1987) (noting that plaintiff’s allegation that supervisor had told her that her “‘problems had to do with my age and entering menopause’” was sufficient evidence of discriminatory intent to entitle plaintiff to a trial). Although Owens brought claims under both Title VII and the ADEA, only the ADEA claim moved forward. *See id.* A jury later found for the defendant and the employee’s appeal was denied. *See Judgment* (No. 1:84-cv-04932) (Dec. 12, 1997), *appeal dismissed* (No. 98-7070) (Jan. 5, 2000).

110. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

111. *See, e.g., SANDRA SPERINO & SUJA THOMAS, UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 31 (2017) (“Cases are dismissed where women allege that their bosses or their coworkers repeatedly touched their breasts or buttocks, supervisors regularly asked employees on dates or for sexual favors, or employees were continually the victim of unwanted sexualized comments and gestures. Federal courts have ruled that this conduct is not serious enough to be called sexual harassment.”).

112. *See Burkhart v. Am. Railcar*, 2009 WL 10695340 (E.D. Ark. Apr. 28, 2009).

sweat like a hog in July, wash your sheets and pillowcases daily and bite the head off anything that moves.”¹¹³ The court dismissed Burkhart’s claim on summary judgment, ruling that these incidents, in the aggregate, did not rise to the level of severe or pervasive conduct.¹¹⁴

That said, in other egregious cases of harassment connected to menopause, courts have been willing to let harassment-based claims go forward under both federal and state law. For example, in *Dault v. Georgia Urology*—the case where a doctor’s harassment of a nurse involved turning the temperature up to eighty degrees in the operating room to try to make her sweat, providing him with more fodder to mock her perceived menopause—not only did the sex and age discrimination claims go forward, but the court also agreed that the acts were so extreme and outrageous that they created a valid claim for intentional infliction of emotional distress.¹¹⁵

Similarly, in *Bailey v. Henderson*, an African-American employee in the Postal Service was subjected to extreme verbal harassment by two female colleagues, who referred to her as “bitch,” “bitch in the cage,” “toilet-paper wipe,” and “toilet-paper tongue,” as well as accusing her of “giving it up out of both drawer legs,” i.e., being sexually promiscuous, thus playing on racial stereotypes.¹¹⁶ When she complained to her supervisors, one supervisor told the other not to intervene because the problems were attributable to “just some [B]lack women going through menopause.”¹¹⁷ In allowing the plaintiff’s Title VII claim to go forward, the court specifically pointed to the menopause comment, noting that the supervisor’s decision not to intervene in a dispute between “female employees ‘going through menopause’” differed from the supervisor’s standard protocol when addressing conflicts between male colleagues.¹¹⁸

* * *

As this discussion shows, claims of discrimination and harassment based on menopausal stereotypes fit fairly comfortably into the existing U.S. employment discrimination framework. If the employee can prove that such stereotypes motivated the employer to take an adverse job action, or that the

113. *Id.* at *2–3.

114. *Id.* at *6.

115. *Dault v. Georgia Urology, P.A.*, 2020 WL 10139416, at *2–3 (containing magistrate judge’s report and recommendation), *adopted by* 2021 WL 2517373 (N.D. Ga. Feb. 1, 2021).

116. *Bailey v. Henderson*, 94 F. Supp. 2d 68, 70 (D.D.C. 2000); *see* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (describing multiple negative stereotypes about Black women).

117. *Bailey*, 94 F. Supp. 2d at 71.

118. *Id.* at 72. The case settled during jury selection. *See Bailey v. Potter*, 498 F. Supp. 2d 320 (D.D.C. 2007).

expression of those stereotypes created a hostile work environment, the plaintiff has a recognizable path to victory. To be sure, not all such claims will succeed. In particular, the standard for what counts as “severe or pervasive” weeds out some meritorious harassment claims, menopause-based and otherwise. But the basic framework provides a relatively clear and consistent mode of analysis. Things become somewhat murkier, by contrast, when the alleged discrimination stems from the employer’s response to menopausal *symptoms* rather than *stereotypes*, discussed in the next section.

C. Discrimination Based on Menopausal Symptoms

So far, there is little judicial consensus about how to analyze cases in which an employer takes some type of adverse action arising from, or related to, the employee’s menopausal symptoms. The two key cases, *Coleman v. Bobby Dodd Institute*,¹¹⁹ decided in 2017, and *Flores v. Virginia Department of Corrections*,¹²⁰ decided in 2021, exemplify approaches on opposite ends of the spectrum.

In *Coleman*, discussed above, a perimenopausal employee was terminated after some of her menstrual blood leaked onto the office carpet.¹²¹ She brought suit, alleging that her termination violated Title VII because it amounted to sex discrimination and specifically violated the PDA.¹²² The district court dismissed Coleman’s complaint. The court did not consider whether the termination amounted to sex discrimination generally; it moved straight to the PDA argument. The court recognized that the PDA, in referring to medical conditions related to pregnancy, might cover “uniquely feminine conditions . . . such as pre-menopausal menstruation.”¹²³ The court suggested, however, that the only way for an employee like Coleman to prevail would be to show that her “uniquely feminine condition” was treated “less favorably than similar conditions affecting both sexes, such as incontinence.”¹²⁴ The court noted that Coleman had not even attempted to make this showing, but instead had argued that “the fact that her termination would not have occurred but for a uniquely feminine condition is alone sufficient”¹²⁵ The court rejected this contention, concluding: “Coleman was terminated for being unable to control the heavy menstruation and soiling herself and company property.

119. *Coleman v. Bobby Dodd Inst.*, 2017 WL 2486080 (M.D. Ga. June 8, 2017).

120. *Flores v. Va. Dep’t of Corr.*, 2021 WL 668802 (W.D. Va. Feb. 22, 2021).

121. *Id.* at *1.

122. *Id.* at *1–2.

123. *Id.* at *2.

124. *Id.*

125. *Id.*

There is no allegation that male employees who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably.”¹²⁶ Coleman appealed, with the ACLU as counsel, arguing that perimenopause was a sex-linked characteristic.¹²⁷ The parties later settled the appeal.¹²⁸

While *Coleman* rests on an application of purported gender neutrality, the *Flores* court took a different analytical approach. The plaintiff, Joyce Flores, was—like Coleman—perimenopausal and experiencing heavy bleeding.¹²⁹ She was wearing a tampon when she reported to work at the correctional facility where she served as a dental hygienist, and she passed through the required body scanner while wearing a tampon.¹³⁰ Later that morning, Flores went to the bathroom. Having forgotten to bring a new tampon with her, she placed toilet paper in her underwear as a temporary measure.¹³¹ This meant that when she passed through the body scanner on the way back to her office, the image was different from the one taken earlier that day (when the tampon had been in place).¹³² Flores was suspended and then terminated for “suspicion of contraband,” even though she did everything possible to show that the “suspicious item in her vagina” that had appeared on the first body scan was just a tampon.¹³³

Flores argued that her termination violated both Title VII’s general prohibition of sex discrimination and the specific terms of the PDA. And, unlike in *Coleman*, the *Flores* court let the case go forward, despite the plaintiff’s lack of a comparator. The *Flores* court first noted that “there is a strong argument that menstruation is a ‘related medical condition’ to pregnancy and childbirth under the PDA.”¹³⁴ The court then concluded that it did not even need to decide the PDA issue because Flores’ treatment amounted to basic sex discrimination: “*but for* Flores’s menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing—she would not have been discharged,” reasoned the court.¹³⁵ The court also explained that there was no need for Flores to identify a non-menstruating comparator. It approvingly described the explanation of

126. *Id.*

127. Initial Brief for Plaintiff-Appellant, *Coleman v. Bobby Dodd Inst.* (No. 17-13023), 2017 WL 2486080 (M.D. Ga. June 8, 2017).

128. See Brooks Land, Note, *Battle of the Sexes: Title VII’s Failure to Protect Women from Discrimination Against Sex-Linked Conditions*, 53 GA. L. REV. 1185, 1187 (2019).

129. *Flores*, 2021 WL 668802, at *1–3 (noting that she was experiencing “perimenopausal menstruation”).

130. *Id.* at *2.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at *4.

135. *Id.* at *6.

Flores's attorney at oral argument that Flores "was not trying to bring a 'comparator' claim, because the fact that menstruation is inapplicable to men demonstrates that Flores was . . . treated differently because of an inherently female characteristic."¹³⁶ Moreover, the *Flores* court pointed out that imposing a comparator requirement in the case would be an illogical and almost insurmountable hurdle, since there is no true analogue to menstruation.¹³⁷

The *Flores* court had the better approach, and its reasoning should be the model for subsequent menopause-related decisions. There is no reason to require a comparator in cases involving employees who are treated adversely for menopausal symptoms like unexpected bleeding. This is true whether such cases are viewed through the general sex discrimination lens based on the theory that negative treatment of menopause is a form of sex discrimination, or through the more specific PDA lens based on the theory that menopause is a "related medical condition" to pregnancy. To be sure, the PDA uses a comparative frame in its *second* clause, which states that pregnant employees, including employees with related conditions, cannot be treated worse than "other persons not so affected but similar in their ability or inability to work." But that second clause applies in the context of pregnant employees' requests for benefits or accommodations, to ensure that they are not being disfavored. It is not relevant to cases like *Coleman* and *Flores*, where no accommodations were sought, and where the argument is that there was a violation of PDA's *first* clause prohibiting discrimination on the basis of sex. The statute is clear on its face that "sex" under Title VII includes pregnancy "and related medical conditions."¹³⁸

Similarly, comparators are sometimes used in sex discrimination cases when there is no direct evidence of discrimination. In those cases, the differential treatment of a comparator can serve as key circumstantial evidence. But this, too, is irrelevant in cases where an employee is overtly fired for her menopausal symptoms. In cases like *Coleman* and *Flores*, there is no factual dispute about what happened, and no need for circumstantial evidence. The only question is a legal one: whether adverse action based on menopausal symptoms should be viewed as adverse action because of sex.

136. *Id.* at *5.

137. *Id.* at n.6 ("The court notes that comparing menstruating females to men and non-menstruating females in this context is an awkward fit; reality and common sense demonstrate that most males and non-menstruating females typically do not have any *legitimate* reason to have any objects in their body cavities prior to entering a prison facility. The best comparison that courts have discussed is fecal incontinence But fecal incontinence is a medical condition that is treatable and hopefully short-lived for those that suffer from it. Menstruation, on the other hand, is a normal physiological cycle that women, in their reproductive years, experience approximately one quarter of the time.").

138. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (quoting the PDA at 42 U.S.C. § 2000(k)).

That question is easiest to answer when, as in *Coleman* and *Flores*, the menopausal symptoms do not actually affect job performance. In both cases, the perimenopausal bleeding in no way harmed the employer. Coleman cleaned up the blood that had stained the office carpet.¹³⁹ Flores immediately provided proof that the object showing on her first body scan had been a tampon rather than contraband, even going into the restroom with a female security officer to demonstrate that she was bleeding.¹⁴⁰ Given that these employees' menopausal symptoms never affected the workplace in any meaningful way—and given the link between those symptoms and the “female” reproductive system—adverse treatment of these employees should be viewed as a form of sex discrimination. (In neither of these cases was an age discrimination claim brought.) Coleman's case should have been allowed to proceed, just as Flores's later did.

In contrast to *Coleman* and *Flores*, there are situations in which menopausal symptoms can be relevant to job performance, as the previous Part detailed. For some, the transition to menopause can also bring sleep disturbances, anxiety, depression, mood swings, brain fog, and related symptoms.¹⁴¹ And those symptoms may, at least temporarily, affect their ability to work in exactly the same way that they used to. (Part III provides even more examples of these cases in the U.K. context.) If a menopausal employee's symptoms mean the ability to perform the job itself is compromised, then it becomes overly reductive to view the case through a pure sex discrimination lens. Indeed, the way that U.S. law generally deals with these sorts of issues is instead through a disability framework. But that, of course, begs the question of whether and when menopause counts as a disability at all, to which the next section now turns.

139. *Coleman v. Bobby Dodd Inst.*, 2017 WL 2486080, at *1 (M.D. Ga. June 8, 2017).

140. *Flores*, 2021 WL 668802, at *2.

141. See *supra* Section I.A.

D. Discrimination Based on Disability/Failure to Provide Accommodations

In several important ways, the Americans with Disabilities Act Amendments Act (ADAAA) expanded the scope of protection against discrimination based on disability.¹⁴² The ADAAA, which was enacted in response to numerous Supreme Court decisions that had narrowly construed the ADA, had the purpose of “reinstating a broad scope of protection to be available under the ADA.”¹⁴³ In particular, although the ADAAA retained the basic definition of disability as something that “substantially limits” a “major life activit[y],” it clarified that major life activities could include a wide range of activities, including lifting, bending, concentrating, thinking, and working, and could also include the operation of a major bodily function, “including but not limited to . . . [the] endocrine, and reproductive functions.”¹⁴⁴

But one thing that the ADAAA did *not* do was specify how “normal” conditions that can come with symptoms that affect the workplace—such as pregnancy and menopause—fit into the mix. While typical menopausal symptoms might be covered through this expansion of ADA coverage because they might substantially limit, for example, concentration, the somewhat analogous situation of pregnancy suggests the complexities of treating those symptoms as disabilities.¹⁴⁵ In 2015, the Equal Employment Opportunity Commission (EEOC) issued guidance specifically concerning pregnancy accommodations, stating that while pregnancy does not qualify as an impairment, “and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended.”¹⁴⁶ The EEOC guidance further explained that “a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary,” giving examples such as pregnancy-related anemia,

142. ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705 (2006 & Supp. V 2011) and scattered sections of 42 U.S.C. (2006 & Supp. V 2011)).

143. Pub. L. 110-325 at § 2(b)(1).

144. *Id.* § 4(a)(2)(A)–(B).

145. See generally Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 450 (2012) (analyzing pregnancy through a social model of disability in a way that “aims to reshape workplace architecture and culture to achieve the inclusiveness that would have naturally occurred had human culture historically viewed physically variant persons as legitimate workforce participants”).

146. U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENF’T GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [<https://perma.cc/M2UX-SWWB>].

pregnancy-related carpal tunnel syndrome, nausea that causes severe dehydration, and depression.¹⁴⁷

Courts, in turn, have generally held that the symptoms arising from a “normal” pregnancy are not covered under the ADA, but that more severe symptoms can trigger ADA protection. As a federal court put it, “[i]n making this determination, courts first consider whether the complications were normal or abnormal in the context of pregnancy; only abnormal complications may qualify as impairments under the ADA.”¹⁴⁸

A similar dynamic of distinguishing between “normal” and “abnormal” has occurred in cases involving menopause. In cases of symptoms caused by *atypical* menopause, courts are receptive to the idea that the ADA might apply. For example, in *Mullen v. New Balance Athletics*,¹⁴⁹ Jessica Mullen was hired as a stitcher at New Balance Athletics, an athletic footwear manufacturer, shortly after having undergone surgery for ovarian cysts that put her into early menopause at age thirty-five.¹⁵⁰ She began experiencing menopausal symptoms that affected her work, including hot flashes, feeling emotionally overwhelmed, and crying.¹⁵¹ When Mullen had difficulty mastering one of the stitching machines, she had an “abrupt exchange” with the training supervisor, became upset, and started to cry.¹⁵² The human resources managers then met with Mullen to discuss the situation, at which point Mullen disclosed that she “had undergone a hysterectomy, . . . was having hot flashes, and . . . was working with her doctor on medications because her emotions were ‘all over the place.’”¹⁵³ The human resources manager responded that “maybe this isn’t the right time for you at New Balance because . . . instructions from your trainer should not have set you

147. *Id.*; see also Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt.1630 app. § 1630.2(h) (2016) (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability . . .”).

148. *Kande v. Dimensions Health Corp.*, 2020 WL 7054771, at *5 (D. Md. Dec. 2, 2020). A pregnant employee is covered by the ADA when “her doctor is recommending preemptive accommodations”; nonetheless, “although the legal landscape has improved,” “pregnant plaintiffs are still struggling to get the simple accommodations they need to continue working through their pregnancies.” Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After Young v. UPS: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y 73, 108, 113 (2020); see also, e.g., Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1134 (2016); Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97 (2013).

149. *Mullen v. New Balance Athletics*, 2019 WL 958370 (D. Me. Feb. 27, 2019).

150. *Id.* at *1–2, *6.

151. *Id.* at *1.

152. *Id.* at *2.

153. *Id.*

off as it did.”¹⁵⁴ The conversation ended with Mullen resigning, indicating on the resignation form that she was doing so for “emotional reasons.”¹⁵⁵

Mullen subsequently sued under the ADA, and the court concluded that her case could go forward, finding that “an impairment to the endocrine system sufficient to place the plaintiff abruptly into menopause at the age of 35 constituted a substantial limitation on that system when compared to an average person in the population.”¹⁵⁶ The *Mullen* court further found that a reasonable jury could find that New Balance had failed to open a conversation about how to accommodate her disability.¹⁵⁷

Similarly, in *Hubbard v. Day & Zimmermann Hawthorne Corp.*, the court ruled that an ADA claim brought by an employee who had undergone a complete hysterectomy and was suffering from extreme mood swings, insomnia, and difficulty concentrating could survive summary judgment and go to trial.¹⁵⁸ The court reasoned that there was a genuine issue of material fact as to whether the employee had a disability under the ADA, and that a reasonable jury might conclude that she could have performed the essential functions of her job had she received the reasonable accommodation of a leave.¹⁵⁹

However, courts have been unwilling to call “normal” menopause a disability. In *Sipple v. Crossmark*, described above, Jackie Sipple sued under the California Fair Employment and Housing Act, which tracks the ADA, when her employer refused to grant her the dress code accommodations her doctor had explicitly recommended due to her hot flashes and other menopausal symptoms.¹⁶⁰ In fact, Sipple’s employer specifically refused to do so because the employer researched “whether menopause is considered a legal disability and whether other employers have accommodated it,” and concluded that the answer was no.¹⁶¹ The court agreed, stating:

[T]his Court is not willing to recognize menopause as a disability per se. Menopause is a natural progression over time, like gradually losing one’s keen sense of vision or hearing. It is an inevitable part of the human condition for women. While the effects of menopause

154. *Id.*

155. *Id.* at *3.

156. *Id.* at *6.

157. *Id.* at *7.

158. *Hubbard v. Day & Zimmermann Hawthorne Corp.*, 2015 WL 1281629, at *1–6 (D. Nev. Mar. 20, 2015).

159. *See id.* at *5–6. The case settled out of court, so there is no final decision in the case. *See* Stipulation and Order for Dismissal with Prejudice, *Hubbard v. Day & Zimmermann Hawthorne Corp.*, No. 3:12-cv-00681, 2015 WL 1714569 (D. Nev. Jan. 29, 2016).

160. *Sipple v. Crossmark*, 2012 WL 2798791, at *1–2 (July 9, 2012).

161. *Id.* at *2.

may constitute a disability . . . if shown to sufficiently limit a major life activity, menopause is not recognized by this Court to be a disability per se¹⁶²

The court added that Sipple had not provided sufficient evidence that she could not work or conduct any other major life activities; “[r]ather, she only contends that she cannot work as a product demonstrator at Crossmark given the dress code.”¹⁶³ Of course, in one sense, Sipple was lucky that her menopausal symptoms were not extreme enough to preclude her from working. But in another sense, she was unlucky: she had no legal entitlement to the relatively minor, doctor-prescribed accommodations that would have enabled her to work through menopause and stay at her current job.

The *Sipple* court’s ruling echoed earlier sentiments expressed by a Southern District of New York decision, *Saks v. Franklin Covey Co.*¹⁶⁴ There, in reflecting on whether infertility was a disability, the court approvingly cited a case holding that “menopause was not a disability,” describing that as “a proposition that enlightened women have been espousing for centuries.”¹⁶⁵ Once again, the proposition is a double-edged sword. While it may be empowering to label menopause as the inevitable biological process that it is, and to suggest that it should not be viewed as negative or limiting, this formulation seemingly cuts off the only current path to workplace accommodations under U.S. law. Likewise, this posture fails to engage with the reality that even “normal” menopause frequently comes with symptoms that have workplace implications.

By contrast, the United Kingdom’s approach, discussed in the next Part, points toward alternative—and potentially more effective—ways that antidiscrimination law and cultural attitudes might be adjusted to help menopausal employees to remain and succeed at work.

III. LESSONS FROM THE UNITED KINGDOM

This Article’s Introduction began with a list of some of the features of U.K. Channel 4’s official workplace menopause policy.¹⁶⁶ Menopause is estimated to cost United Kingdom employers up to fourteen million workdays each year.¹⁶⁷ By providing multiple accommodations, Channel 4

162. *Id.* at *5.

163. *Id.* at *6.

164. *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

165. *Id.* at 326.

166. *See supra* notes 1–2 and accompanying text.

167. *See* Aphrodite Papadatou, *Menopause Costs UK Economy 14 Million Working Days Per Year*, HR REV. (Apr. 11, 2019), <https://www.hrreview.co.uk/hr-news/menopause-costs-uk-economy-14-million-working-days-per-year/115754> [<https://perma.cc/8ZFT-CVNK>].

and similar companies may be seeking to reduce costs by retaining employees who experience symptoms of menopause that make it difficult for them to continue working. Companies may also be taking proactive steps to try to avoid a potential discrimination lawsuit by a menopausal employee—which, in the United Kingdom, likely has a better chance of succeeding than in the United States. Although there are other countries, such as Japan, where employers are taking steps to address the economic impact of menopause in the workplace,¹⁶⁸ the U.K. approach is presently the most developed and sophisticated. The developments in the U.K.—both within and outside of legal tribunals—have brought new salience to the issue of menopause at work.

A. Applicable U.K. Law and Cases

In the United Kingdom, the key law applicable to menopause-related discrimination in the workplace is the Equality Act 2010.¹⁶⁹ The purpose of the Equality Act is to “harmonise discrimination law, and to strengthen the law to support progress on equality.”¹⁷⁰ It brought together numerous previous pieces of antidiscrimination legislation in the United Kingdom into a single, overarching law.¹⁷¹ The Equality Act first enumerates eight categories of legally “protected characteristics”: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation.¹⁷² Thus, for employment discrimination purposes, the Equality Act fulfills a role somewhat akin to the combination of Title VII, the ADEA, and the ADA in the United States.¹⁷³ As to these characteristics, the Equality Act prohibits discrimination, harassment, and victimization (defined similarly to “retaliation”).¹⁷⁴ Procedurally speaking, Employment Tribunals have jurisdiction over a wide range of employment-related disputes in England, Scotland, and Wales; they play a key role in interpreting the Equality Act in the workplace context.¹⁷⁵

168. See, e.g., Hiromi Ariyoshi, *Evaluation of Menopausal Interventions at a Japanese Company*, 57 AM. ASS'N OCCUPATIONAL HEALTH NURSING J. 106 (2009) (providing an overview and evaluation of one Japanese newspaper company's menopause-related health support for employees).

169. Equality Act 2010, c. 15.

170. Equality Act 2010 Explanatory Notes, c. 15, ¶ 10.

171. See *id.* ¶ 11.

172. Equality Act 2010 c. 15, pt. 2, c. 1, §§ 4–12.

173. See *supra* Part II.

174. See Equality Act 2010, c. 15, pt. 2 c. 2, §§ 13–27.

175. Generally speaking, an Employment Tribunal is an “independent public tribunal which makes legally binding decisions in legal disputes around employment law.” *Employment Tribunals*, PEARSON SOLICS. & FIN. ADVISORS, <https://www.pearsonlegal.co.uk/business/employment-law-business/defending-employment-claims/employment-tribunals> [<https://perma.cc/9D4M-9ZN8>]. In Northern Ireland, there are two independent judicial bodies for

Two particularly notable features emerge in the Equality Act's definitions of harassment and disability. First, the Act describes harassment as "unwanted conduct related to a relevant protected characteristic" that has the "purpose or effect of (i) violating B's [the recipient's] dignity; or (ii) creating an intimidating, hostile, degrading, or offensive environment for B."¹⁷⁶ Through these provisions, the Act not only explicitly prohibits harassment (whereas in the United States, that prohibition is merely inferred from the general prohibition of discrimination), but also sets the bar lower for what counts as actionable harassment.¹⁷⁷ The harassment does not have to be so severe or pervasive that it alters the working environment, as in the United States, but simply must violate the recipient's dignity or create an offensive environment.¹⁷⁸

Second, the Equality Act defines disability as "a physical or mental impairment . . . [that] has a substantial and long-term adverse effect on P's [a person's] ability to carry out normal day-to-day activities."¹⁷⁹ Unlike the U.S. law, the Act does not require that the activity be a "major life activity," nor is there an implicit carve-out for "normal" conditions.¹⁸⁰ The Act goes on to require employers to make "reasonable adjustments" for disabled persons.¹⁸¹

The U.K. approach to harassment and disability has important ramifications for cases involving menopausal employees. Cases from tribunals in England and Scotland suggest a nascent jurisprudence of menopause that, in comparison to the U.S. approach, is broader and more protective of menopausal employees.

1. Harassment/Discrimination

A particularly striking example of the difference between the U.S. approach and the U.K. approach can be seen in *A v. Bonmarche Limited*, decided in 2019, which involved claims of sexual harassment, as well as

employment-related matters. See INDUS. TRIBUNALS AND THE FAIR EMP. TRIBUNAL N. IR., <https://www.employmenttribunalsni.co.uk> [<https://perma.cc/V39W-P3NZ>]; see also David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 566 (2009) (briefly describing the employment tribunal process).

176. Equality Act 2010, c. 15, pt. 2 c. 2 § 26(1)(b).

177. See *id.*

178. See *id.*

179. Equality Act 2010, c. 15, pt. 2 c. 2 § 6(1).

180. See *id.*

181. See EQUALITY ACT 2010 CODE OF PRACTICE, EMP. STATUTORY CODE OF PRAC. 78 (2011), <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> [<https://perma.cc/6N2P-255T>].

discrimination on the basis of sex and age.¹⁸² The employee, referred to in the decision as “A,” was an experienced retail worker.¹⁸³ When A began to experience menopausal symptoms in May 2017, her manager started to “demean [A] and humiliate her in front of other staff. Other members of staff were younger and would laugh” at the manager’s remarks.¹⁸⁴ The manager described A as a “dinosaur” in front of customers; on one occasion, the manager attributed A’s failure to staple together two pieces of paper to A’s being menopausal.¹⁸⁵ The manager told A to seek a part-time job and continued to refer to her as “menopausal.”¹⁸⁶ A felt humiliated and upset by these remarks.¹⁸⁷ After the manager refused to accommodate A’s request to adjust the temperature in the store, A complained to management, but no adjustment occurred.¹⁸⁸

In November 2018, A had a severe panic attack requiring intervention by paramedics.¹⁸⁹ The store’s human relations department agreed that A could return to work with a reduced schedule of no more than four hours per day, but within one week, A’s manager said this would not be acceptable.¹⁹⁰ The manager also warned A that she was “pushing her luck” when she asked for time away from the retail floor in order to take her medications with a drink.¹⁹¹ Within one month, A resigned her position, after more than thirty-seven years of working in retail.¹⁹²

In finding in favor of A on all three claims—harassment based on sex, discrimination based on sex, and discrimination based on age—the tribunal ruled that the manager had treated A “less favourably than he would treat someone who was not a female of menopausal age.”¹⁹³ The tribunal ordered financial compensation, including damages for “injury to feelings.”¹⁹⁴

Would A have similarly prevailed in a U.S. court? It seems unlikely. She might have brought a hostile work environment claim based on her manager’s negative comments about her menopause, but—as discussed in

182. *A v. Bonmarche Ltd.* [2019] E.T. Z4 (WR) 4107766/2019 (Scot.), https://assets.publishing.service.gov.uk/media/5e21b7a1e5274a6c3f52a4e1/A_v_Bonmarche_in_Administration_4107766.19-Final.pdf [<https://perma.cc/7CTN-KUWB>].

183. *See id.* ¶ 4.

184. *Id.*

185. *Id.* ¶ 5.

186. *See id.* ¶ 4.

187. *See id.* ¶ 4.

188. *See id.* ¶¶ 6–7.

189. *See id.* ¶ 8.

190. *See id.* ¶ 9.

191. *See id.*

192. *See id.* ¶¶ 4, 9.

193. *See id.* ¶¶ 12–14 (citing Equality Act 2010 § 13’s definition of direct discrimination and § 26’s definition of harassment).

194. *See id.* ¶¶ 16, 19. The Tribunal ordered an award of £9,995 (about \$14,000 US) as well as almost double that amount in damages for “injury to feelings” of £18,000 (about \$39,000). *Id.*

Part II—verbal comments alone are unlikely to be seen by U.S. courts as sufficiently “severe or pervasive” to constitute actionable harassment.¹⁹⁵ In the United Kingdom, by contrast, it was enough for A to show that she was subjected to menopause-based verbal harassment that other employees did not face.¹⁹⁶ The *Bonmarche* decision stands in stark contrast to *Burkhart*, discussed above, where the combination of sending an employee numerous graphic photos and emails, commenting to her that “she looked good on her knees,” and even sending her an email mocking menopausal women who “sweat like a hog in July, wash their sheets and pillowcases daily and bite the head off anything that moves” did not rise to the level of actionable harassment under U.S. law.¹⁹⁷

Relatedly, although A prevailed in the United Kingdom on her sex and age discrimination claims in addition to her harassment claim, a U.S. court likely would have rejected those claims on grounds that she did not suffer an adverse job action other than the harassment itself. The U.K. tribunal’s greater willingness to find sex discrimination echoed an earlier decision, *Merchant v. British Telecommunications*, in which the tribunal concluded that an employer’s decision to terminate a menopausal employee whose job performance had worsened amounted to sex discrimination.¹⁹⁸ The tribunal emphasized the manager’s testimony that ordinarily, he would seek “as much information as possible to understand that condition and what it’s [sic] prognosis was” before making a decision to dismiss an employee for poor performance,¹⁹⁹ but he had not done so in this case because he believed he knew enough about menopause from the experiences of his wife and his (female) human relations advisor.²⁰⁰ The tribunal found that the manager discriminated against Merchant on the basis of sex, reasoning that she was “suffering from a health condition specific to women” and the manager had treated her condition differently from health conditions that were not specific to women.²⁰¹

Once again, it is not at all clear that an analogous employee in the United States would have prevailed, given Merchant’s manager’s testimony that

195. See *Burkhart v. American Railcar*, 2009 WL 10695340 (E.D. Ark. Apr. 28, 2009).

196. See *A v. Bonmarche Ltd.*, 4107766/2019 (Scot.).

197. *Burkhart*, 2009 WL 10695340, at 2.

198. *Merchant v. British Telecom. Plc.*, [2012] 1 WLUK 683 ¶¶ 3, 23.

199. See *id.* ¶ 57.

200. *Id.* ¶ 56. According to the published decision, the manager’s reliance on his wife’s experience of menopause and what the other manager told him “is strongly suggestive of him not taking this condition seriously – nor the possibility that it could be part of the explanation for the claimant’s poor performance after 24 years of service.” *Id.* ¶¶ 100–111. Thus, the tribunal found, the manager “was making improper generalised assumptions about menopause without any focus on the particular problems that the claimant was suffering from.” *Id.* ¶ 110. These assumptions constituted “less favourable treatment than the hypothetical male comparator would have experienced as it left [the manager] not properly informed about the condition.” *Id.* ¶ 111.

201. See *id.* ¶ 91.

the employee had become “disorganized in her work, atrocious at completing her monthly reports, [and] slow in submitting her expense claims.”²⁰² A U.S. court likely would have been quicker to assume that this poor job performance constituted a legitimate, nondiscriminatory reason for her termination.

2. Disability

In addition to taking a broader approach to cases involving adverse treatment connected to menopausal stereotypes and symptoms, U.K. decisions also take an expansive view of what counts as a disability, with direct implications for menopause. Here, the decision in *Donnachie v. Telent Technology Service* is particularly illustrative.²⁰³

In 2018, Donnachie began to experience up to twelve times a day hot flashes, palpitations, and severe anxiety, along with other symptoms, including memory lapses and difficulty concentrating.²⁰⁴ Donnachie’s doctor prescribed hormone replacement therapy patches, which helped alleviate her symptoms but did not completely eliminate them, especially during periods of stress.²⁰⁵

In connection with her onboarding as an employee of a multinational digital infrastructure company, Donnachie disclosed her menopausal symptoms and labeled them on employment forms as a “disability.”²⁰⁶ Approximately two months after beginning work, Donnachie consulted her doctor again.²⁰⁷ The doctor determined that Donnachie was having menopausal symptoms, including difficulties concentrating that were exacerbated by noisy conditions, and extreme fatigue, anxiety, and distress.²⁰⁸ Donnachie’s anxiety impacted her ability to use a computer and certain software programs at work.²⁰⁹

202. *Id.* ¶ 26.

203. *Donnachie v. Telent Tech. Serv. Ltd* [2020] UKEAT (preliminary hearing). This was a procedural ruling, antecedent to a full tribunal hearing, on the question of whether the plaintiff was a “disabled person” within the meaning of the Equality Act, due to symptoms related to menopause. *Id.* The tribunal also allowed claims to proceed concerning Raynaud’s syndrome, which is a disorder that can cause redness and feelings of numbness, burning, throbbing, or tingling in the extremities or other body parts. *Raynaud’s*, NAT’L. HEART LUNG & BLOOD INST., <https://www.nhlbi.nih.gov/health-topics/raynauds> [<https://perma.cc/K79T-79M3>] (providing overview of Raynaud’s and its symptoms).

204. *Donnachie*, [2020] UKEAT, at ¶ 9.

205. *Id.* ¶ 1.

206. *Id.* ¶ 15.

207. *Id.* ¶ 11.

208. *Id.* Although she had also disclosed the need for accommodation for Raynaud’s, including the need not to work near an air draft, her Raynaud’s symptoms had worsened because of the location of her workstation under an air vent. *Id.* ¶ 15.

209. *Id.* ¶ 13.

The tribunal determined that Donnachie was “disabled” for purposes of the Equality Act by virtue of her “menopause or symptoms of menopause.”²¹⁰ The tribunal judge referred to the definition of “disability” in the Equality Act 2010 and the nonbinding Equality and Human Rights Commission’s Code of Practice on Employment.²¹¹ Under that guidance, in determining whether an impairment is substantial, “[a]ccount should . . . be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.”²¹² Notably, the judge reasoned: “I see no reason why, in principle, ‘typical’ menopausal symptoms cannot have the relevant disabling effect on an individual.”²¹³ Once again, this result is in stark contrast with U.S. law, which suggests that “typical” symptoms from “normal” menopause would not amount to a disability under the ADA.²¹⁴

Another U.K. tribunal likewise recognized menopause as a disability.²¹⁵ Mandy Davies, an employee of the Scottish court system, informed her supervisors that she was being treated for menopausal symptoms including heavy bleeding and related anemia, lack of mental concentration, and mood swings.²¹⁶ They adjusted her responsibilities and agreed that when her bleeding was very severe, she would work in a court with easy access to a toilet.²¹⁷ There was an incident in which Davies reported to her supervisors that she believed members of the public had consumed water from a jug on her desk into which Davies had put her medication, although a later investigation revealed there was no medication in the water.²¹⁸ A few months later, Davies faced an internal disciplinary hearing for gross misconduct, based on allegations that she had “failed to manage [her] personal medication . . . with sufficient care and attention”²¹⁹ At the disciplinary hearing, she explained how her medical condition impacted her mental state and presented educational materials about menopause and her

210. *Id.* ¶ 27.

211. *Id.* ¶ 6 (citing Equality Act 2010 § 6); *id.* ¶ 21 (citing Equality Act 2010 Code of Practice, EMP. STATUTORY CODE OF PRAC., app. 1 ¶ 9 (2011); see *supra* note 179 and accompanying text (defining “disability” under the Act).

212. Equality Act 2010 Code of Practice, EMP. STATUTORY CODE OF PRAC., 287 (2011), <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> [<https://perma.cc/JR3R-BALD>].

213. *Donnachie*, [2020] UKEAT, at ¶ 22.

214. See *supra* notes 140–144 and accompanying text.

215. *Davies v. Scottish Cts. & Tribunals Serv.*, [2018] 5 WLUK 156.

216. *Id.* ¶¶ 7–9.

217. *Id.* ¶ 9.

218. *Id.* ¶¶ 18–19, 21.

219. *Id.* ¶ 33; *id.* ¶ 40 (describing that the Sheriff Clerks Manager found Mandy’s actions to be “such a serious breach of trust that the damage was irretrievable” and thus dismissed Mandy from employment for “gross misconduct”).

medical records.²²⁰ Nevertheless, the employer dismissed Davies, despite her twenty years of otherwise “unblemished service.”²²¹

The tribunal found that the employer had dismissed Davies “because of something arising in consequences of her disability,” and such action constituted discrimination prohibited under the Equality Act.²²² The Tribunal ordered Davies’s reinstatement, back pay, and damages of £5,000 (about \$7,000 U.S.) for “injury to feelings.”²²³ Thus, once again, symptoms of “normal” or “typical” menopause (such as “brain fog” and mood swings) were viewed as a disability.

Not all menopausal employees have prevailed in their disability claims in the United Kingdom. That said, their losses have not stemmed from rulings that menopause is not a disability. In *Gallacher v. Abellio Scotrail Ltd.*, for instance, an employee’s menopausal symptoms were not treated as a disability for purposes of the Equality Act, but that was because the employer lacked awareness of the employee’s disability.²²⁴ Similarly, in *Lee v. Chief Constable of Essex Police*, the employee failed to show a connection between menopause and the claimed adverse treatment; the tribunal did not reject the possibility that menopause might constitute a disability.²²⁵ Overall, the case law points toward a growing sense within the United Kingdom that even typical menopausal symptoms can be sufficiently disabling that they warrant reasonable adjustments (or, as U.S. law would put it, reasonable accommodations). This clearly differs from the U.S. courts’ current approach of refusing to view “normal” menopause as covered by the Americans with Disability Act.

B. Government Initiatives

In addition to this nascent body of case law, the United Kingdom has taken other proactive steps regarding menopause. In 2017, the U.K. Government Equalities Office published a landmark research report that

220. See *id.* ¶ 38.

221. *Id.* ¶¶ 40, 131.

222. *Id.* at 2; *id.* ¶ 138 (citing Equality Act 2010 § 15’s prohibition against discrimination based on disability where the employer “treats the disabled person unfavourably because of something arising in consequence of the disabled person’s disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim”).

223. *Id.* ¶¶ 159–62.

224. E.g., *Gallacher v Abellio Scotrail Ltd.* (2020) (Scot) (employer did not have notice of claimant’s disability prior to claimed adverse employment action).

225. *Lee v. Chief Constable* [2020] UKEAT, https://assets.publishing.service.gov.uk/media/5fbfb99e8fa8f559e21539fe/Mrs_H_Lee_-v-_The_Chief_Constable_of_Essex_Police_-_3201274_2019_-_Judgment.pdf.

emphasized the need for employers to consider menopause-related issues.²²⁶ The report noted the growing number of women ages fifty and over in the workplace.²²⁷ It also framed menopause in terms of economic consequences for individuals, families, and society: the “extensive” margin costs of employees who voluntarily leave the workforce or are dismissed from employment and the “intensive” margin costs for those who attempt to manage their symptoms at work.²²⁸ Examples of menopause’s economic impacts include lost wages, lost promotion opportunities, or even lowered self-esteem associated with leaving the work force.²²⁹

In May 2019, the Scottish Government issued a Gender Pay Action Plan aimed at “reducing the gender pay gap” and reducing “labour market inequalities faced by women.”²³⁰ The Gender Pay Action Plan specifically identified menopause in the employment context as a topic for further study and possible guidance.²³¹ Later that month, the Scottish Parliament held a formal debate on the subject of menopause, with the Minister for Older People and Equalities noting that this was “the first ever Government debate held in the UK on the menopause.”²³² Generally speaking, the Scottish government provides funding for a variety of domestic initiatives; this list now includes supporting women who experience menopausal symptoms as well as enhancing public and professional knowledge about menopause through education.²³³ Scotland’s government has even adopted its own menopause policy, in its role as an employer.²³⁴

226. JOANNA BREWIS, VANESSA BECK, ANDREA DAVIES & JESSE MATHESON, DEP’T FOR EDUC., THE EFFECTS OF MENOPAUSE ON WOMEN’S ECONOMIC PARTICIPATION IN THE UK (2017), <https://www.gov.uk/government/publications/menopause-transition-effects-on-womens-economic-participation>.

227. *Id.* at 11–13.

228. *Id.* at 9–10.

229. *Id.* at 10.

230. SCOTTISH GOV’T, A FAIRER SCOTLAND FOR WOMEN: GENDER PAY GAP ACTION PLAN (2019), <https://www.gov.scot/publications/fairer-scotland-women-gender-pay-gap-action-plan> [<https://perma.cc/XF3A-L4GB>].

231. *Id.* at 25.

232. SCOTTISH PARLIAMENT, OFFICIAL REPORT MEETING OF THE PARLIAMENT 21 MAY 2019, https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12115&mode=html#iob_109_573 [<https://perma.cc/QVQ6-6ACT>]; see *Menopause – in the Scottish Parliament on 21st May 2019*, THEY WORK FOR YOU, <https://www.theyworkforyou.com/sp/?id=2019-05-21.29.0> [<https://perma.cc/NXV3-3UTE>] (transcript); Nan Spowart, *Why We’re Now Talking Menopause – and How We Can Support Women*, NAT’L (Scot.) (July 6, 2019), <https://www.thenational.scot/news/17754246.now-talking-menopause---can-support-women/> [<https://perma.cc/STE5-FXVR>] (reporting on the Scottish Parliament’s menopause debate in May 2019 as “the first time the stigma and taboo around the menopause has been discussed by a government in the UK”).

233. See, e.g., SCOTTISH GOV’T, A FAIRER SCOTLAND FOR WOMEN: GENDER PAY GAP ACTION PLAN ANNUAL REPORT 16–17 (2021), <https://www.gov.scot/publications/gender-pay-gap-action-plan-annual-report/pages/4> [<https://perma.cc/S6LU-JQCC>].

234. See *id.* at 17.

Although the U.K. government has not taken a similar step, the winning candidate in London's 2021 mayoral election campaigned on a promise that the municipality would adopt a "menopause policy" for itself as an employer.²³⁵ In June 2021, menopause-related legislation was introduced in Parliament to provide "menopause support and services" to the public and to minimize the cost to consumers for MHT treatments.²³⁶ The bill was withdrawn in October 2021, after the government agreed to reduce dramatically the cost of MHT.²³⁷ Whether menopause will become a more significant area of legislative interest remains to be seen.

In the United Kingdom itself, the Advisory, Conciliation, and Arbitration Service (Acas)—an independent public body that receives funding from the government and provides conciliation services before cases are brought to an employment tribunal—promulgates a variety of "best practices" policies, including guidelines for how employers can best support employees experiencing symptoms of menopause.²³⁸ This guidance is detailed and proactive, advising employers that they should "ensur[e] menopausal symptoms are not made worse by the workplace"; "mak[e] changes to help a worker manage their symptoms when doing their job"; "train all managers, supervisors and team leaders to make sure they understand how to have a conversation with a worker raising a perimenopause or menopause concern"; and "raise awareness among all staff that [they] will handle menopause in the workplace sensitively, and with dignity and respect."²³⁹ The guidance warns employers that "unwanted comments, jokes, banter or ridicule about a woman's menopause or perimenopause symptoms could amount to harassment."²⁴⁰

235. See, e.g., Ella Glover, *Menopause Policy to Be Introduced at City Hall, Says Sadiq Khan*, INDEPEND. (U.K.) (Apr. 28, 2021, 2:31 PM), <https://www.independent.co.uk/news/uk/home-news/menopause-policy-sadiq-khan-mayor-b1838742.html> [<https://perma.cc/UGS9-XJPQ>]. The mayor's campaign platform received international press attention. See, e.g., Lizzy Burden, *Many of Women Exit Workforce for a Little-Talked About Reason*, BLOOMBERG (June 17, 2021, 11:00 PM), <https://www.bloomberg.com/news/articles/2021-06-18/women-are-leaving-the-workforce-for-a-little-talked-about-reason> [<https://perma.cc/Q93V-QWP6>].

236. Menopause (Support and Services) Bill 2021-22, HC Bill [16] ("A Bill to make provision about menopause support and services; to exempt hormone replacement therapy from National Health Service prescription charges; and for connected purposes.").

237. See, e.g., Sienna Rodgers, *Carolyn Harris Secures Victories in Menopause Support Campaign*, LABOUR LIST (Oct. 29, 2021, 12:40 PM), <https://labourlist.org/2021/10/carolyn-harris-secures-victories-in-menopause-support-campaign> [<https://perma.cc/C4PC-4ERF>] (noting that the government agreed to reduce the price of a two-hormone prescription from £224 per year to £18.70 and to appoint a "menopause task force" to be co-chaired by the bill's original sponsor, Labour MP Carolyn Harris).

238. See *Menopause at Work*, ACAS, <https://www.acas.org.uk/archive/menopause-at-work> [<https://perma.cc/S9SH-669T>].

239. *Id.*

240. *Menopause and the Law*, EQUITY, <https://www.equity.org.uk/at-work/discrimination-at-work/menopause-and-the-law> (last visited Mar. 3, 2022).

C. Developments Outside of Government

Given the above discussion, it is notable, but not surprising, that the U.K. litigation has achieved success on two levels: first in achieving justice in individual cases, and second in raising general workplace awareness about menopause. Numerous websites of U.K. solicitors who specialize in employment law now broadcast their ability to provide menopause-related guidance to employers.²⁴¹ Such websites provide clients and prospective clients with informational articles and tips about addressing menopause in the workplace.²⁴² Some law firms also support their own employees experiencing menopausal symptoms, albeit in a minimal way, by providing access to a well-being app, for example.²⁴³

Many large employers and human relations consultants, as well as labor unions, have similar public-facing webpages that draw attention to the importance of menopause as an employment-related issue.²⁴⁴ For example, the Wales Trade Union Council has developed toolkits, trainings, and

241. See, e.g., *United Kingdom: Menopause – A Business Issue*, BAKER MCKENZIE (Sept. 30, 2020), <https://www.bakermckenzie.com/en/insight/publications/2020/09/uk-menopause-business-issue> [<https://perma.cc/TK53-YADH>]; *Menopause in the Workplace*, MCCABE AND CO., <https://www.mccabeandco.com/news/menopause-in-the-workplace> [<https://perma.cc/YNX8-9SA4>]; Susan Mayall, *Menopause Discrimination – What it Could Mean for Employers*, PEARSON SOLICS. & FIN. ADVISORS (Aug. 29, 2019), <https://www.pearsonlegal.co.uk/blog/news/menopause-discrimination-what-it-could-mean-for-employers> [<https://perma.cc/NLD9-9JC7>]; *Why Is Menopause a Workplace Issue?*, DOYLE CLAYTON (June 2, 2021), <https://www.doyleclayton.co.uk/resources/news/Menopause-workplace-issue/> [<https://perma.cc/J3DZ-HLXX>]. Doyle Clayton is one of the leading U.K. workplace firms. See Dan Teuton, *South: Law Firm Doyle Clayton Creates Employee Ownership Trust*, BUS. MAG. (Oct. 15, 2019), <https://businessmag.co.uk/south-law-firm-doyle-clayton-creates-employee-ownership-trust>.

242. See *Menopause and the Law*, *supra* note 240.

243. Hannah Roberts, *Clifford Chance Latest Law Firm to Recognise Menopause Pressures, Partnering with Support App*, LAW.COM (Mar. 1, 2021), <https://www.law.com/international-edition/2021/03/01/clifford-chance-latest-law-firm-to-recognise-menopause-pressures-partnering-with-support-app/>. In comparison, a recent article about U.S. law firms, *Is Menopause the Last Taboo for Women in the Law?*, notes that, “[d]espite the challenges it presents to many senior women in Big Law, firms largely lack a plan to tackle the issue.” Rose Walker, *Is Menopause the Last Taboo for Women in the Law?*, LAW.COM (Feb. 28, 2020), <https://www.law.com/americanlawyer/2020/02/28/is-menopause-the-last-taboo-for-women-in-the-law> [<https://perma.cc/QD6L-CRPV>].

244. See, e.g., *Menopause at Work*, TRADE UNION CONG., <https://www.tuc.org.uk/menopause-work> [<https://perma.cc/YG5D-BVSA>] (“There is still much to be done to tackle the taboo around menopause, particularly in workplaces, where often women do not feel able to talk about the menopause at all.”); Alex Christen, *Managing the Menopause at Work*, PEOPLE MGMT. (Nov. 19, 2020), <https://www.peoplemanagement.co.uk/experts/legal/managing-the-menopause-at-work#ref> [<https://perma.cc/ZKL5-8R3P>] (“Businesses should effectively educate their staff, particularly those in management positions, and provide the necessary training to help employees to understand what the menopause is, how it presents and how to deal with the symptoms.”); *Menopause and the Workplace*, NHS EMPS. (Oct. 14, 2021), <https://www.nhsemployers.org/retention-and-staff-experience/health-and-wellbeing/taking-a-targeted-approach/taking-a-targeted-approach/menopause-in-the-workplace> [<https://perma.cc/WY3C-KYFU>] (“With our population now living longer, working longer, and with so many women working in the NHS, it’s vital that staff are supported to stay well and thrive in the workplace.”).

policies on how to improve menopause management at work.²⁴⁵ A few nonprofit organizations provide menopause-related training and guidance for professionals and employers, as well.²⁴⁶

There also is a robust private market for U.K. business consulting services in this area. For example, an organization called Henpicked provides fee-based advising, conducts workplace trainings, and helps employers to develop internal communication packages about menopause.²⁴⁷ The emphasis appears to be on steps employers can take to make the workplace more flexible and limit their exposure to possible claims of discrimination.

This emerging U.K. jurisprudence of menopause—from employment tribunals, government initiatives, independent public bodies like Acas, and the private sector—suggests approaches that might inform U.S. law and policy. Multiple theoretical insights and lessons from contemporary justice movements also provide many reasons to take menopause seriously as a legal issue. These viewpoints and commitments may sometimes be in tension, but the next Part identifies the ways that they converge at the intersection of menopause and the workplace, and the approaches that they suggest.

IV. THEORIZING MENOPAUSE EQUITY

This Part moves to a normative assessment of how the law should address menopause at work. The analysis proceeds from two foundational principles. First, menopause is a stage of life, not a “problem.” Second, the

245. See *Menopause in the Workplace*, WALES TUC CYMRU (Jan. 14, 2020), <https://www.tuc.org.uk/news/menopause-workplace> [<https://perma.cc/NT4B-E3AW>]. The public service union also has suggestions on appropriate policies: *Menopause*, UNISON, <https://www.unison.org.uk/about/what-we-do/fairness-equality/women/key-issues/menopause> [<https://perma.cc/QHS6-WA23>] (calling for specific workplace policies, such as sick leave, to protect menopausal workers). As anecdotal evidence of the extent to which unions in the United States have not registered menopause as a relevant workplace concern, a recent Google search for “unions US menopause” shows only unions in the United Kingdom in the first ten entries. Search on file with authors (June 21, 2021).

246. See, e.g., *About*, MENOPAUSE SUPPORT, https://menopausesupport.co.uk/?page_id=2 (last visited June 21, 2021); *About Us*, TALKING MENOPAUSE, <https://www.talkingmenopause.co.uk/about> [<https://perma.cc/2EBS-XP5A>].

247. *Menopause in the Workplace*, HENPICKED, <https://menopauseintheworkplace.co.uk/> (last visited Jan. 10, 2021). The organization also appears to support an online community. See *About Us*, HENPICKED, <https://henpicked.net/about-us/> [<https://perma.cc/KJD4-A7C7>] (a website “for women who weren’t born yesterday”). On its website, Henpicked makes available free content, including advice that employers have an “accessible, well-publicised policy or guidance documents for colleagues and line managers,” give “consideration to menopause related symptoms in the workplace environment e.g. facilities and uniforms,” and approach any formal employment processes “on the assumption that the employee is disabled, to help you deal with issues in a fair and reasonable way.” *Menopause Tribunals: What Can Employers Learn?*, HENPICKED, <https://menopauseintheworkplace.co.uk/employment-law/tribunals-employers-best-practice> (last visited June 23, 2021).

law should facilitate menopausal employees' ability to work through menopause, if at all possible. This is a normative vision for what we call "menopause equity" in the workplace. While grounded in these two antecedent commitments, this Part does not prescribe any particular legal intervention but rather explores multiple jurisprudential theories and methods, as well as ideas originating in social movements that have yet to find full expression in the law. It shows that menopause at work is a topic worthy of consideration from multiple perspectives, and it provides the theoretical frameworks for that consideration.

To date, advocates for menopause-related rights in the workforce, notably in the United Kingdom, tend to offer two rationales: (1) the need for equal opportunities for employment and (2) the negative economic consequences of, and for, employees with menopausal symptoms leaving their jobs.²⁴⁸ But these represent only the tip of a theoretical iceberg. A comprehensive approach to menopause at work also will draw on feminist and critical race theory; the menstrual equity movement; and aging, disability, and queer and trans theory.

Situating menopause more broadly in the overall justice project, as well as equality jurisprudence, uncovers a variety of theoretical intersections. Future scholarship in this area can be informed by questions and methods drawn from feminist legal theory, such as sameness and difference, equality versus equity, reasoning from the body, and the challenge of comparators.²⁴⁹ From disability and aging jurisprudence, there are concerns about how to define and theorize "impairments," "disability," accommodations, and structural designs.²⁵⁰ From queer and trans theory and movements, there are commitments to challenging norms, especially those related to identity and language, and methods that include both reclamation of identity categories and recognition that identities can be fluid and self-determined.²⁵¹

The goal of exploring these theories is to show how they might provide guidance for moving forward toward menopause equity. Theoretical approaches also reveal the interests at stake in the various, sometimes dichotomous, characterizations of menopause: menopause is (sometimes

248. See *supra* notes 226–234 and accompanying text (discussing the U.K. Government Equalities Office research study published in 2017 and Scotland's Gender Pay Gap Action Plan published in 2019).

249. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3d ed. 2012).

250. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 401 (2000) (arguing for viewing disability as subordination).

251. See generally Gayle Salamon, *Queer Theory*, in THE OXFORD HANDBOOK OF FEMINIST PHILOSOPHY (Kim Q. Hall & Åsta eds., 2021); Julie L. Nagoshi & Stephanie Brzuzy, *Transgender Theory: Embodying Research and Practice*, 25 AFFILIA 431 (2010) ("Transgender theory encompasses and transcends feminist and queer theory by explicitly incorporating ideas of the fluidly embodied, socially constructed, and self-constructed aspects of social identity, along with the dynamic interaction and integration of these aspects of identity within the narratives of lived experiences.").

simultaneously) described as unpleasant but liberating; limiting but typical; stigmatized and secret, but universal and inevitable.

A. *Feminism*

The study of the intersection of menopause and the workplace can draw on multiple feminist legal theory traditions, both methodological and substantive. Three feminist methods are particularly relevant to the consideration of menopause at work: valuing subjective personal experience, reasoning from the particulars, and challenging dominant norms.²⁵²

1. *Methods*

Feminist methodology, as well as critical race theory, values personal experience as a starting point for the analysis of systemic obstacles to equality.²⁵³ This suggests that legal and policy responses to issues of menopause at work must be grounded in subjective accounts of physical and psychological experiences by those with lived experience.²⁵⁴ Similarly, a study of the intersection of menopause and employment requires what Professor Katharine Bartlett has called “feminist practical reasoning,”²⁵⁵ an approach that draws “from the specifics of the situation itself, rather than from some foreordained definition or prescription.”²⁵⁶ To put it more simply, facts matter. In the context of menopause, because there is no monolithic experience, there can be no one-size-fits-all approach.²⁵⁷ Any one employee’s experience of menopausal symptoms might give rise to a specific need, such as an altered work schedule or duties, breaks, a change in the physical location of a workstation, allowable leave time, or any combination of these.

Feminist legal methodology also asks what Bartlett has called the “woman question,” meaning an examination of whose experiences are privileged by the law.²⁵⁸ Similarly, feminist legal methods invite scrutiny of

252. See generally CHAMALLAS, *supra* note 249, at 4–15.

253. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83–84 (1989); CRITICAL RACE THEORY: AN INTRODUCTION 43–56 (Richard Delgado & Jean Stefanic eds., 2d ed. 2012) (describing centrality of personal narrative and legal storytelling to critical race theory).

254. See *supra* Section II.C.

255. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849–50 (1990).

256. *Id.* at 850–51.

257. See *supra* Section II.B (describing range of menopausal symptoms); Bartlett, *supra* note 255, at 851.

258. Bartlett, *supra* note 255, at 837.

bias and assumptions in defining workplace norms.²⁵⁹ Traditionally framed in terms of the male/female binary and the commitment to uncovering “[r]ules designed to fit male needs, male social biographies, or male life experiences,” the feminist methodological interest in male norms and implicit bias takes on a new shape in the study of menopause.²⁶⁰ For purposes of this inquiry of the workplace, the focus moves beyond the gender binary and examines the assumption built into the law of employment—expressed by employment law’s silence on this issue—that most workers will not experience symptoms of menopause. Any deviation for an employee experiencing severe symptoms of menopause thus becomes defined as special treatment. Feminist legal methods would reframe menopause at work as *expected* instead of exceptional, such that workplace policies would incorporate it.

2. Goals

From a substantive perspective, two jurisprudential axes undergird much of feminist jurisprudence: sameness-difference and domination-subordination.²⁶¹ Historically speaking, feminist legal theory developed in a male/female binary context; it typically targets “overtly sex-based legislation as problematic because it limits how we may define ourselves and how we can unfold over time.”²⁶² But the inquiry applies with equal vitality beyond the gender binary. Reframed for purposes of this Article, the question is whether and how menopause—and certain menopausal symptoms in particular—should be taken into account in the workplace.

259. See CHAMALLAS, *supra* note 249, at 4, 8 (describing as an “opening move” of feminist legal theory “seeking to uncover male bias and male norms in rules, standards, and concepts that appear neutral or objective on their face”).

260. *Id.* at 8.

261. See, e.g., Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1412 (1992) (discussing sameness-difference and the concept of reasonableness).

262. Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 108; see also Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) (endorsing equal treatment as the preferred approach); Keith Cunningham-Parmeter, *(Un)equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 20–21 (2014) (applying the two approaches); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 966 nn.13–14 (2013) (listing multiple foundational law articles from the 1980s articulating these two different positions); Mary Ann Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER, SOC. POL’Y & L. 549, 560 (2011) (“Through a consistent line of Supreme Court cases over my lifetime, we in the United States have developed an orthodoxy with respect to sex equality. Central to this orthodoxy is that ‘fixed notions concerning the roles and abilities of males and females’ are anathema when embodied in law.”) (internal citations omitted).

Should those who experience particular menopausal symptoms be treated equally to other employees? Or should they be treated differently?

Formal equality has intuitive appeal: everyone is treated the same, without regard to biological differences or gender identity.²⁶³ The focus is on equality of opportunity, with the goal of increasing individual choice.²⁶⁴ The problem with formal equality, though, is that it fails to address built-in assumptions. This failure may be especially salient in the workplace context if the design of the physical space does not include lactation room, if those who need frequent access to restrooms have workstations located at a considerable distance, if workers who need breaks from heat cannot easily cool off, and more.²⁶⁵ If approximately half of the population may experience symptoms of menopause at some point but the workplace is not designed with that in mind, treating all employees the same way will disadvantage those who experience symptoms that may affect work.²⁶⁶

In contrast to formal equality, “difference” theories acknowledge that people are not situated equally.²⁶⁷ In the context of menopause at work, a difference approach requires consideration of biology-based distinctions, such as menopause.

Along the second axis, antisubordination theory focuses on the ways that “social deprivation of one sex because of sex” is a mechanism for “the maintenance of an underclass or a deprived position because of gender

263. See Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2226 (2021) (illustrating how the sameness/difference debate plays out in the context of pregnancy and employment law). Drawing on guidance from the Williams Institute, we use the phrase “gender identity” to refer to categories nominated on demographic surveys as “male,” “female,” “trans male/trans man,” “trans female/trans woman,” “genderqueer/gender non-conforming,” and “different identity (please state).” See, e.g., BADGETT ET AL., *supra* note 15, at 5. From this point in the Article and forward, we use the term “gender identity” where possible. As before, occasional uses of gender binary terms are carried over from the original source. See *supra* note 6; cf. *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/6W4Q-EX93>] (defining gender identity as an individual’s “internal, deeply held sense of their gender”).

264. CYNTHIA GRANT BOWMAN, LAURA A. ROSENBURY, DEBORAH TUEKHEIMER & KIMBERLY A. YURACKO, *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 117 (4th ed.) (“Formal equality starts from the assumption that individuals are separate atoms and, for the most part, self-interested and rational. . . . A goal, therefore, is to maximize the choices available to each individual, regardless of gender. . . . Individuals should not be treated according to stereotypes . . . and each should be given an opportunity to compete . . .”).

265. See, e.g., Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1867 (2018) (encouraging employers to assume that some employees will lactate and ensuring that employees are able to do so).

266. Cf. *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, slip op. at 18, 22 (July 1, 2021) (describing inequality of opportunity as a form of discrimination and ways that disparate impact analysis necessarily invites consideration of race, for example).

267. Williams, *Notes from a First Generation*, *supra* note 262, at 108.

status.”²⁶⁸ This approach—also known as “dominance feminism”—is most closely associated with Professor Catharine MacKinnon, although the ideas have been adopted widely (but not universally) throughout the legal academy.²⁶⁹ Under an antisubordination analysis, MacKinnon explains that biology cannot “justify the institutionalized disadvantage of women.”²⁷⁰ Accordingly, MacKinnon rejects both sameness feminism and certain strands of difference feminism, arguing that these theories do not address the experiences of women who live under conditions of sex inequality;²⁷¹ both theories use a male standard to evaluate issues of sameness or difference.²⁷² In fact, MacKinnon says, biological differences should be the “first to trigger suspicion or scrutiny. . . . [I]s not the structure of the job market, which accommodates the physical needs, life cycle, and family expectations of men but not of women, integral to women’s inferior employment status?”²⁷³ Antisubordination theory recognizes that power differentials based on gender identity are baked into both the law and interpersonal relations.²⁷⁴ Note further that MacKinnon objects to reifying these differences, as doing only affirms as “feminine” what a male-dominated society has permitted women to be, for example.²⁷⁵ To take note of physical differences between roughly two halves of the population, without ascribing them to any one gender identity, then, is consistent with antisubordination principles.

B. Menstrual Equity

268. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 117 (1979) [hereinafter *SEXUAL HARASSMENT OF WORKING WOMEN*]. Professor MacKinnon herself described this as the “dominance approach” in early writings, but recently reflected that “it’s as much about subordination as dominance.” Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAG., Sept. 13, 2015, at 56, <https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html> [<https://perma.cc/U859-ZPQG>].

269. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 45 (1987) (referring to the “dominance approach”) [hereinafter *FEMINISM UNMODIFIED*]. On the widespread influence of antisubordination theory, see Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 18–19 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (identifying multiple rewritten opinions that draw on antisubordination theory).

270. *Id.*

271. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 51 (1989) (“When difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness.”).

272. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1296–99 (1991).

273. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 268, at 118.

274. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 269, at 8–9.

275. *Id.* at 39.

Informed by the antisubordination approach that takes into account biological differences related to sex and gender identity, a menstrual advocacy movement has gained momentum in the last five years.²⁷⁶ With antecedents in the women's health movement of the 1970s,²⁷⁷ menstrual equity as a concept is beginning to find both a policy home within the law and a theoretical place in legal scholarship.²⁷⁸ From community groups to the United States Congress, there are thousands of individuals of all ages and walks of life mobilized around menstruation-related issues.²⁷⁹ Projects range from grassroots campaigns run by middle-schoolers to make menstrual products available in schools²⁸⁰ to federal legislation spearheaded by United States Representatives Grace Meng, Carolyn Maloney, and others to make menstrual products available in prisons, schools, and workplaces, and to fund research on the safety of menstrual products.²⁸¹ Because of this collective work, taboos around menstruation are beginning to erode.

By contrast, a culture of stigma, shame, and silence persists around menopause.²⁸² To date, menopause is largely absent from most advocates' discussions of menstrual equity; the growing body of menstruation-related legal scholarship mostly ignores menopause as well.²⁸³ Although menstruation and menopause represent two different stages in the life cycle, the two have synchronicities when it comes to legal and cultural approaches

276. See, e.g., Jennifer Weiss-Wolf, *The Fight for Menstrual Equity Continues in 2021*, MARIE CLAIRE (Jan. 28, 2021), <https://www.marieclaire.com/politics/a35280718/menstrual-equity-2021-goals> [<https://perma.cc/QR8P-NPGL>].

277. See, e.g., CRAWFORD & WALDMAN, MENSTRUATION MATTERS, *supra* note 13 (discussing in Introduction the link between the second-wave feminist health movement and the twenty-first century menstrual equity movement).

278. See *id.*

279. Jennifer Weiss-Wolf has defined menstrual equity this way: "In order to have a fully equitable and participatory society, we must have laws and policies to ensure menstrual products are safe and affordable for all who need them." JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY xvi (2017).

280. See, e.g., Johnson et al., *supra* note 11, at 226–27 (describing a "cookie protest" by middle school girls whose principal denied their request to make menstrual products available for free in school bathrooms).

281. See, e.g., Press Release, Congresswoman Grace Meng, Meng Renews Effort to Make Menstrual Hygiene Products More Accessible and Affordable to Women (Feb. 13, 2017), <https://meng.house.gov/media-center/press-releases/meng-renews-effort-to-make-menstrual-hygiene-products-more-accessible> [<https://perma.cc/8NXA-XW7L>] (describing Representative Meng's Menstrual Equity For All Act of 2017); Tampon Safety and Research Act of 1997, H.R. 2900, 105th Cong. (1997) (sponsored by Representative Maloney); Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. § 2 (2017) (the act introduced by Democratic Senators Cory Booker, Richard Durbin, and Elizabeth Warren, along with Senator (now Vice President) Kamala Harris, sought, among other things, to make menstrual products available in federal prisons).

282. See, e.g., Julie Howard, *Menopause—A Dirty Word?*, COUNSELLING DIRECTORY (Nov 6, 2019), <https://www.counselling-directory.org.uk/memberarticles/menopause-a-dirty-word> [<https://perma.cc/48SM-LTAL>] ("You'd like to think not in the modern world we now live in, and yet . . . there were times [during menopause] when I felt damaged in some way, broken . . . Shame would wash over me with waves of inferiority; the words 'washed up' and 'old' come to mind.").

283. Cf. Cahn, *Justice for the Menopause*, *supra* note 102.

to their symptoms. They diverge, however, in that menstruation is a sign of fertility and menopause is associated with disability and aging, thus introducing a different set of jurisprudential concerns.

C. Disability

In addition to feminist legal theory and the menstrual equity movement, disability jurisprudence provides another helpful lens for considering the intersection of menopause and the workplace. This is not because menopause qualifies as a legal disability for all who experience it, or even because all symptoms of menopause are impairments, but because disability jurisprudence offers a different model for framing menopause.²⁸⁴

It is clear from the cases described in Parts II and III, as well as the firsthand accounts of menopause discussed earlier in Part I, that there are people for whom menopause is, in fact, an impairment to aspects of day-to-day living for a significant length of time.²⁸⁵ But does an employer have to make accommodations for an employee experiencing “typical,” less severely disabling symptoms of menopause? If so, what kinds of accommodations? Might the occasional hot flash justify a request for dress-code accommodation or a uniform made from a potentially more expensive fabric, for example? Does an employee’s occasional excessive bleeding justify moving a workstation closer to the bathroom? These questions find resonance in the jurisprudence of pregnancy accommodations, where complications of atypical pregnancies can qualify as disabilities for ADA purposes, but the typical symptoms and concerns associated with “normal” pregnancies generally do not.²⁸⁶ In the same way that this approach leaves some pregnant employees without recourse, so too does this approach fail to sufficiently protect menopausal employees.

Disability theory provides two models for framing difference. First, and most traditionally, is the medical model, pursuant to which disability is an

284. See *supra* note 23 and accompanying text (noting wide range of individual experiences of menopause). There is an extensive analogous jurisprudence on pregnancy as a disability; see, e.g., Williams et al., *supra* note 146, at 102 (explaining that the ADA had been interpreted to exclude pregnancy-related conditions for a number of reasons, including because of the temporary nature of the impairment, narrow interpretations of disability, and the “normalcy” of pregnancy); Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 773 (2018) (addressing the broadening of the EEOC’s approach to pregnancy as a disability).

285. See *supra* Sections II.B–C, III.A (containing discussions of cases and personal accounts of debilitating symptoms of menopause).

286. See, e.g., Areheart, *supra* note 148, at 1134. As Areheart explains, pregnancy may cause discrete physiological conditions such as gestational diabetes or carpal tunnel syndrome, which may constitute a disability under the ADA . . . [b]ut limitations intrinsically associated with a typical pregnancy, such as the need for more rest or more frequent bathroom breaks, would not generally entitle one to accommodations under the ADA.

Id.

individual deficit that needs not just diagnosis and treatment, but also remediation; disability is an inherently limiting condition to be accommodated in the workplace, for example, as long as the accommodation is not an undue hardship for the employer.²⁸⁷ The second is a social model that conceptualizes disability as constructed in the environment itself, not the individual.²⁸⁸ Pursuant to the social model, the goal of disability policies is not necessarily “accommodation,” but rather the redesign of the surrounding environment to ensure integration of all, without the need for special accommodation.²⁸⁹ In this way, disability theory echoes the feminist legal method of challenging certain norms (e.g., able-bodies, male bodies) as default expectations for all.²⁹⁰

Applying the social model of disability to the intersection of menopause and employment reveals the workplace itself as a contributor to the challenges of menopause.²⁹¹ In other words, menopause at work becomes a “problem” because an employer either will not or cannot make allowances for a menopausal employee who is experiencing symptoms that interfere with workplace performance. In other words, the challenges of menopause can be exacerbated precisely because workplaces and policies presume that employees do *not* experience certain symptoms of menopause.

D. *Queer and Trans Theory*

A similar objection to default norms runs through queer and trans theory, as well. In recent years, there is increased visibility, both inside and outside of the law, of efforts to recognize the rights of trans, gender nonbinary, and

287. See 42 U.S.C. §§ 12112(a), 12112(b)(5)(a); see also Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1256–57 (2007) (suggesting that few scholars adhere to the strict medical model of disability); Andrew Gerst & Tara Schwitzman-Gerst, *Disabling Inequity: How the Social Model of Disability Resists Barriers to Social Security Disability Benefits*, 44 N.Y.U. REV. L. & SOC. CHANGE 145, 150 (2020) (explaining the medical model of disability).

288. See *id.*; Bagenstos, *supra* note 250, at 428 (explaining that the social model does not treat “existing social arrangements as a neutral baseline”). Gerst and Schwitzman-Gerst note that within the social model, “disability identity is rooted in repeated experiences with inaccessible rules, policies, and structures,” not the biological or health distinctions. Gerst & Schwitzman-Gerst, *supra* note 287, at 151.

289. See Samaha, *supra* note 287, at 1251–52. In 1990, the social model emphasizes the surrounding environment’s role, not a person’s physical or mental characteristics, as a primary factor in the construction of a “disability.” See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990).

290. See *supra* notes 258–259 and accompanying text.

291. Under this view, for example, it is a design flaw that presumes universality to set temperatures unilaterally in an office or factory at a level that is comfortable for people of one gender-identity only. See Hannah Devlin, *Why Women Secretly Turn Up the Heating*, GUARDIAN (Oct. 17, 2017), <https://www.theguardian.com/science/shortcuts/2017/oct/11/why-women-sewcretly-turn-up-the-heating> (explaining that women’s skin temperatures are lower than men’s, perhaps because of estrogen levels). Ironically, perhaps, temperatures set for a cis male-gendered body might better accord with menopausal bodies. 12:02 PM,

genderqueer people.²⁹² Rights to self-determination in particular “sound in universal rights to human flourishing and respect.”²⁹³ The contemporary movement is undoubtedly boosted by a sea change in demographics and popular opinion along generational lines: over half of Gen Z and millennials agree that the gender binary concept is outdated, approximately 12% of U.S. millennials identify as transgender or gender nonconforming, one in six members of Gen Z identifies as queer or transgender, and one quarter of them anticipate that they will change gender identities.²⁹⁴ Contemporary advocacy in this area often highlights “discrimination, oppression, and violence visited upon nonbinary people and transgender men and women,”²⁹⁵ while recognizing that some trans people do embrace the gender binary.²⁹⁶

Regardless of one’s gender identity, the experience of menopause is undoubtedly complex. There may be additional intricacies for trans, gender nonbinary, and genderqueer people. For example, transgender women who decide to decrease or discontinue estrogen therapy may not be prepared for the consequences.²⁹⁷ Some trans men, gender nonbinary, and genderqueer individuals with at least one ovary and a uterus may hope that they will not experience menopause and yet, if they do, they may (or may not) find the experience to be disruptive to their gender identities.²⁹⁸ As menopause equity efforts overlap with many jurisprudential movements, queer and trans theory suggest the importance of taking into account the lived

292. E.g., Sonia K. Katyal & Jessica Y. Jung, *The Gender Panopticon: Gender and Design Justice*, 68 UCLA L. REV. 692, 699 (2021) (challenging overly restrictive gender detection technologies); Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 184 (2011) (arguing that binary classifications are “inherently suspect”).

293. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 922 (2019).

294. See, e.g., Leah Fessler, *His, Hers, Everyone’s: Gender-Equal Underwear Goes (Slightly More) Mainstream*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/gender-equal-underwear.html> [<https://perma.cc/SM2L-AEHK>] (“A new generation of underwear brands hopes to serve this growing demand” by Gen Z buyers “shopping outside of their gender assigned at birth.”).

295. Clarke, *supra* note 293, at 921.

296. As Clarke has explained, some transgender people “may sometimes agree that the law should not classify people by sex or gender at all.” *Id.* Still others “may want legal recognition of their male or female gender identities, rather than elimination of those categories.” *Id.* at 922; see also *Understanding Non-Binary People: How to be Respectful and Supportive*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/8BJD-FZ9T>] (“Most people—including most transgender people—are either male or female.”).

297. See Wiepjes et al., *supra* note 6, at 68.

298. In the related, but not identical context, trans menstrual activist Cass Clemmer explained: “I want cisgender people to understand that being trans while having your period can be absolutely terrifying.” Brittney McNamara, *Period Activist Cass Clemmer Responds to Hate After Posting Period Photo*, TEEN VOGUE (Aug. 2, 2017), <https://www.teenvogue.com/story/period-activist-cass-clemmer-what-its-like-to-get-periods-while-transgender> [<https://perma.cc/8BJD-FZ9T>].

experiences of trans, gender nonbinary, and genderqueer individuals experiencing menopause.

Menopause advocacy is poised to occur at a curious inflection point in jurisprudential development: gender identity is increasingly becoming “the new legal sex,” according to Professor Noa Ben-Asher.²⁹⁹ Although the argument is multi-faceted and complex, one of Professor Ben-Asher’s main points is that the intellectual legacy of *Bostock v. Clayton County* is the theoretical collapse of sex, gender-identity, and sexual orientation into a single protected class.³⁰⁰ If that is correct, then menopause advocacy may be one site for bridging the traditional dichotomy between formal equality and antisubordination theory. Advocacy for menopause equity also presents the opportunity to deploy feminist legal theory in its most capacious form as a tool for justice for people of all gender identities.³⁰¹

E. Aging

Legal theories from the field of aging studies provide an additional lens for analyzing menopause. Age is a distinct classification and legally protected characteristic.³⁰² At the same time, age-related needs constantly change (i.e., the concerns of a ninety-five-year-old are different from those of a fifty-five-year-old). When viewed from the perspective of age, identity is both a fixed and a fluid concept; as the field recognizes, terms such as “older person” are simultaneously simple and complex. There is no agreed upon definition of “old age.”³⁰³ Notwithstanding age’s mutability, legal theorists do agree on the universal prevalence of age-based discrimination in western cultures.³⁰⁴ Ageism, defined in 1969 by Dr. Robert Butler as “a deep-seated uneasiness on the part of the young and middle-aged—a personal revulsion to and distaste for growing old,” is on full display in multiple manifestations of systematic stereotyping and discrimination

299. Noa Ben-Asher, Gender Identity, The New Legal Sex (Jan. 27, 2022) (unpublished manuscript) (on file with the authors).

300. See *id.*

301. See Stanchi, Berger & Crawford, *supra* note 269 (calling feminism “a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through the law”).

302. See *supra* Section III.A (discussing ADEA).

303. See, e.g., Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 858–60 (2019) (noting that age “is inevitably mutable,” and “it is certain that we will all become older as time passes”); Alexander A. Boni-Saenz, *Age Diversity*, 94 S. CAL. L. REV. 303, 321 (2021).

304. See Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 201–02 (2020). Age-based distinctions are drawn throughout the lifespan. On youth-based classifications, see Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1175 (2020).

against people just because they are old,³⁰⁵ negative perceptions of menopause, in turn, are closely intertwined with that phenomenon.

F. Intersectionality

As this overview of jurisprudential theories and social movements indicates, fully taking account of menopause-based discrimination requires a distinctly intersectional approach. Professor Kimberlé Crenshaw uses the metaphor of a traffic intersection to explain that discrimination can occur along multiple identity axes, all of which meet at one point.³⁰⁶ Crenshaw has explained that constitutional jurisprudence is equipped to address claims of race *or* sex (or gender identity), but not cases involving simultaneous and intertwined discrimination on the basis of race *and* sex *and* gender identity. Furthermore, intersectional discrimination is not merely additive, but synergistic.³⁰⁷ Intersectionality is now well-trodden scholarly territory; it is a familiar tool for most equality scholars.³⁰⁸

Menopause policy requires an intersectional approach along axes of sex and age, and other factors such as disability, race, gender identity, and gender expression.³⁰⁹ To discriminate on the basis of menopause is to discriminate on the basis of sex, age, and often disability (and possibly gender identity and other factors) simultaneously.³¹⁰ Current U.S. antidiscrimination law still requires the disaggregation of claims,³¹¹ while the U.K. “Equality Act” points the way toward a more intersectional approach.

305. Robert N. Butler, *Age-Is: Another Form of Bigotry*, 9 GERONTOLOGIST 243, 243 (1969).

306. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 148–50; see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991).

307. See, e.g., Kimberlé Crenshaw (@sandylocks), TWITTER (June 26, 2020, 1:41 PM), <https://twitter.com/sandylocks/status/1276571389911154688?lang=en> [<https://perma.cc/YA2V-UXSA>] (“Intersectionality is not additive. It’s fundamentally reconstitutive. Pass it on.”); see also Boni-Saenz, *Age, Time and Discrimination*, *supra* note 303, at 860. Professor Boni-Saenz provides the useful example of the intersectionality of sex and age for actors in Hollywood, noting that older “male actors . . . continue to find work and roles, [but] older women lack such opportunities. This is directly related both to the sexist judgment of women by their appearance, but also by the ageist judgment that youthfulness is attractive and agedness is not.” *Id.*

308. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019) (exploring the interpretations and uses of three interrelated ideas in legal scholarship).

309. See *Glossary of Terms - Transgender*, *supra* note 6 (providing media reference guide to facilitate accurate reporting on trans people). Gender expression is “[e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics” that society then “identifies . . . as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture.” *Id.*

310. See discussion *supra* notes 298–299.

311. See *supra* Part II (discussing Title VII, the ADEA, and the ADA).

Given evidence of racialized differences in the experience of menopause (while acknowledging that any individual's experience is unique),³¹² menopause advocacy should take race into account. Labor force data suggest the wisdom of this approach.³¹³ First, while women between the ages of forty-five and fifty-four, the age range that includes those likely at the start of perimenopause, constitute just over 10 percent of the workforce people who will eventually experience menopause or already have constitute approximately half of the workforce.³¹⁴ Second, the likelihood of having workplace flexibility to address menopause may depend on the type of job one has, which in turn may be correlated to race. For example, Asian and white women are more likely than Black and Hispanic women to be employed in management, professional, or related occupations.³¹⁵ By contrast, Black and Hispanic women are more likely than Asian and white women to work in lower-wage service industries.³¹⁶ Thus, Black and Hispanic women are more likely than Asian or white women to be in roles that require uniforms and limit breaks or lack health care insurance and paid leave.³¹⁷ Because of these racialized labor-force differentials, laws or

312. See Cappelloni, *supra* note 23 and accompanying text (indicating that some people have no experience of negative symptoms of menopause).

313. See, e.g., U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK 7–8 tbl.1 (2019), <https://www.bls.gov/opub/reports/womens-databook/2019/home.htm> [https://perma.cc/GJB2-8ZDE] (providing data based on race, occupation, and industry).

314. See *Labor Force Statistics from the Current Population Survey 2020*, *supra* note 85.

315. See U.S. BUREAU OF LAB. STAT., *supra* note 313, at 2 (reporting that while women are fifty-two percent of all employees in management, professional and related occupations, their representation varies dramatically based on race, with fifty-three percent of all Asian women and forty-five percent of white women in the work force compared to thirty-six percent of Black women and twenty-seven percent of Hispanic women in these occupations); *id.* at tbl.11. We use the terms “women,” “Asian,” and “Hispanic” here because the U.S. Bureau of Labor Statistics employs this terminology. Such managerial and professional occupations include software development, chief executive roles, attorneys, accountants, nurses, and teachers. See *id.*

316. See *id.* at tbl.12; Occupational Definitions, OES Occupational Classification System: Service Occupations, U.S. BUREAU OF LAB. STAT., https://stats.bls.gov/oes/1998/oes_def6.htm (twenty-eight percent of Black women, thirty-one percent of Hispanic women, twenty-one percent of Asian women, and twenty percent of white women). Such occupations include food and beverage preparation and service (e.g., wait staff, food servers, cafeteria attendants), health and service-related occupations (e.g., nursing aides, home health aides), cleaning and building service occupations (e.g., housekeeping and cleaners), personal service occupations (e.g., hairdressers, manicurists, amusement and recreation attendants, child-care workers). See *id.*

317. E.g., Usha Ranji, Brittni Frederiksen, Alina Salganicoff & Michelle Long, *Difficult Tradeoffs: Key Findings on Workplace Benefits and Family Health Care Responsibilities from the 2020 KFF Women's Health Survey*, KFF (Apr. 21, 2021), <https://www.kff.org/report-section/difficult-tradeoffs-key-findings-on-workplace-benefits-and-family-health-care-responsibilities-from-the-2020-kff-womens-health-survey-appendix/> [https://perma.cc/7JGB-33ZL] (finding that Asian women are most likely to have access to paid family and medical leave and health insurance); Diana Boesch, *Quick Facts on Paid Family and Medical Leave*, AM. PROGRESS (Feb. 5, 2021), <https://www.americanprogress.org/issues/women/news/2021/02/05/495504/quick-facts-paid-family-medical-leave> [https://perma.cc/XY7Y-38QB] (showing that Black and Hispanic workers are less likely to have access to paid family leave than white, non-Hispanic workers).

policies designed to achieve menopause equity should take into account the different needs of employees across the employment spectrum. A partner at a large law firm likely will have different needs than, say, an employee in a fast-food restaurant, to give one example.

Menopause advocacy needs to be sensitive to differences in gender identity and gender expression, too.³¹⁸ Trans, gender nonbinary, and genderqueer employees are especially vulnerable to numerous kinds of discrimination at work; statistics show that trans people, for example, have high rates of unemployment, under-employment, and poverty compared to non-trans people.³¹⁹ For all of these reasons, intersectional concerns can inform the most robust workplace laws and policies.

* * *

Menopause equity, as we have articulated it, contemplates continued employment opportunities for *all* employees who experience menopausal symptoms that interfere with work, if they can do the job either with reasonable accommodations or, even better, adjusted workplace policies that provide more flexibility for all. Moreover, by linking the need for workplace changes to biological functions, without regard to gender identity, menopause equity also bridges the gap within feminist legal theory and among feminist, queer, and trans theories to level the playing field for all employees. This approach is further informed by a social model that understands that the environment helps to determine what functions as a “disability”—and what is *experienced* as disabling. So, too, does aging jurisprudence and trans theory inform an understanding of “menopausal employee” as a fluid identity. A worker may experience symptoms of menopause that interfere with employment at one time, but not another. Workplace adjustments for menopausal symptoms are not a forever-or-never proposition.

V. DIRECTIONS FOR UNITED STATES LAW

This Part briefly sketches how U.S. law might develop a menopause-equity informed approach to the workplace. Drawing on a range of jurisprudential theories and methods, ideas from contemporary social movements, and the U.K.’s growing example, there are multiple

318. See *supra* note 308 and accompanying text.

319. See, e.g., *Transgender Workers at Greater Risk for Unemployment and Poverty*, NAT’L LGBTQ TASK FORCE, <https://www.thetaskforce.org/transgender-workers-at-greater-risk-for-unemployment-and-poverty/> [<https://perma.cc/3A64-S6RP>] (providing that trans workers are unemployed at fourteen percent compared to seven percent for the whole population, and forty-four percent of trans people are underemployed).

overlapping potential legal and regulatory approaches available to achieve menopause equity.

As discussed above, Title VII is already reasonably well-equipped to deal with claims of discrimination and harassment based on menopausal stereotypes.³²⁰ That said, lowering the threshold for what counts as a legally actionable hostile work environment would be a welcome development, for both menopause-based claims and beyond. Similarly, courts should recognize sex discrimination in cases involving adverse treatment against employees based on menopausal symptoms that do not affect actual workplace performance (such as unexpected perimenopausal bleeding).

With regard to menopausal symptoms that have the potential to interfere with work performance without adjustments on the employer's part, several possibilities exist. First, as discussed above, general workplace modifications that make the workplace more amenable to *everyone*, such as flexible schedules, opportunities for breaks, the relaxation of rigid dress codes, and the like, should always be considered.³²¹ Such approaches, informed by the social model of disability, not only normalize menopausal symptoms but also promote workplace equity more generally.

More specifically, as to menopause itself, the current U.S. approach of only requiring accommodations for "abnormal" menopause is untenable. It fails to grapple with the reality that even "normal" menopause can often bring symptoms that may interfere with work, at least temporarily. And current law presents many employees with the Hobson's choice of framing their menopause as problematic and abnormal, or disclaiming any right to workplace adjustments that will enable them to work through menopause. Given that menopause is an inevitable prospect for roughly half the population, it is striking that U.S. antidiscrimination law has not progressed beyond this primitive dichotomy.

For that reason, advocates might want to consider proposing a Menopause in Employment Fairness Act, modeled after the Pregnant Workers Fairness Act (PWFA).³²² The PWFA, which has repeatedly been proposed in Congress,³²³ would give *all* pregnant employees an entitlement to reasonable accommodations for the "known limitations" of their pregnancies. Significantly, "known limitation" is defined to include conditions that might not otherwise qualify as disabilities under the ADA. Such menopause-focused legislation would take a case-by-case approach

320. See *supra* Section II.B.

321. See *supra* Section IV.C; see generally Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

322. See Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021–2022).

323. See, e.g., Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 488–89 (2020) (noting that the PWFA would support women's equal citizenship).

and provide for reasonable accommodations, unless doing so would cause an undue hardship to the employer.³²⁴ Moreover, it would remove any requirement that menopausal symptoms be framed as “disabling” in order to warrant relief; instead, menopausal employees would simply need to show that their symptoms are “related to, affected by, or arising out of” menopause.

A related option would be to explicitly incorporate menstruation and menopause into the text of the Pregnant Workers Fairness Act itself. In other words, the PWFA could state that “it shall be an unlawful employment practice for a covered entity” not to “make reasonable accommodations to the known limitations related to the pregnancy, childbirth, menstruation, menopause, or related medical conditions of a qualified employee.” In fact, since menopause is a medical condition related to menstruation, even adding menstruation alone would be sufficient (although explicitly mentioning menopause would be a useful counter to the silence surrounding the topic). To be sure, there is an argument that the PWFA *already* covers menstruation and menopause, since those conditions are “related medical conditions” to pregnancy. However, explicitly mentioning them in the PWFA’s text, or in a parallel law, would provide clearer and more obvious protections for employees.

Another, broad alternative would be to shift the Americans with Disabilities Act’s approach to be more like that of the U.K.’s Equality Act. This would mean moving the basic inquiry from whether the disability substantially limits *a major life activity* to whether it substantially limits the ability to carry out *normal day-to-day activities*. Although these formulations are not radically different, especially given the ADAAA’s expansion of what counts as a major life activity, the latter approach shifts the focus to more quotidian concerns rather than setting “important” activity as the threshold.³²⁵

Independent from any legislative change, the United States EEOC could decide to issue “best practice” guidelines for employers and employees to follow as they navigate menopause at work, similar to the Acas guidance in the United Kingdom.³²⁶ The EEOC issues this type of guidance in other areas; and there is no reason that it could not do so for menopause.³²⁷ Likewise, labor unions, industry groups, voluntary business associations, or even individual companies could adopt best practice guidance or policies,

324. See Pregnant Workers Fairness Act, H.R. 1065 § 2(1).

325. See *supra* notes 97–98 and accompanying text.

326. See *supra* note 238 and accompanying text.

327. See, e.g., *Best Practices for Employers and Human Resources/EEO Professionals*, U.S. EQUAL EMP. OPPORTUNITY COMM’N., <https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resources/eo-professionals> [<https://perma.cc/3ZXR-ZY43>] (providing guidance on “How to Prevent Race and Color Discrimination”).

although they are unlikely to do so without pressure from stakeholders. The more common such policies become, the less exceptional they—and by extension, menopause—will seem. In explicitly recognizing menopause and encouraging employers to address it, workplace menopause policies can both challenge the stigma and silence surrounding this stage of life and enable more menopausal employees to remain at work. Over time, such policies may challenge the very idea of “accommodation,” which locates the “problem” primarily in the employee experiencing disruptive menopausal symptoms, instead of in the workplace itself.

CONCLUSION

This Article has asked what it would mean to take seriously the legal intersections of menopause and work. It has argued that existing U.S. law is equipped to deal with some, but not all, forms of menopause-related discrimination in employment. The United Kingdom provides useful examples for how to begin addressing menopause-related injustices at work. Theoretical perspectives, drawn from feminist, disability, and aging jurisprudence, along with lessons of the menstrual equity movement and queer and trans theory, illuminate the importance of questioning workplace design and default assumptions about what workers likely need. We have articulated menopause equity as a goal for the U.S. workforce: menopausal workers should be able to stay in the labor force, if able to perform the basic job requirements.³²⁸ There are multiple and overlapping ways to achieve menopause equity; a preliminary first step is bringing menopause into the mainstream of popular discourse, as well as advocacy work and legal scholarship. This Article represents the beginning of a longer jurisprudential arc.

Menopause is a sprawling legal topic that goes well beyond the employment law considerations addressed here. Multiple and potential overlapping legal disciplines and insights can be brought to bear on other menopause-related issues. There are questions about regulatory oversight of the long-term safety of medical treatments for menopause, including hormone replacement therapy,³²⁹ historic denials of insurance coverage for menopausal women,³³⁰ and the relative paucity of government funding for scientific research about menopause and other uterine, ovarian, and

328. See *supra* Part IV.

329. See *supra* Section I.B.

330. See, e.g., Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL'Y & L. 287, 296–97 (1993) (citing to a 1931 insurance underwriting guide providing that “health insurance should not be encouraged” for women who are menopausal, because “there are disturbed physical functions of many kinds, nervousness being particularly common”).

reproductive hormonal conditions.³³¹ At the same time, the largely unregulated contemporary market for menopause-related products is ever-expanding, as entrepreneurs and investors seek to profit from stereotypes about aging bodies (especially those of cis women) as undesirable and malfunctioning.³³² Relatedly, television and social media ads for menopause-related products are often censored, even though ads for erectile dysfunction treatments are ubiquitous.³³³ Undergirding all of these concerns is a notable lack of social support for those experiencing menopause-related symptoms while juggling other responsibilities caring for children or for aging parents, for example.³³⁴

As other legal scholars take up these and other issues, we welcome an expanded definition of menopause equity well beyond the workplace. With better education for people of all gender identities about menopause's symptoms and treatments, it is possible to imagine a future in which menopause loses its associations of stigma and shame and leads to broader challenges to the neutrality of legal approaches to "normal" conditions. Menopause is a life stage with some commonalities across individuals, although each person's experience of menopause is unique. Working through menopause can become ordinary and expected.

331. See Devlin, *supra* note 35 (describing dearth of scientific knowledge about the biomechanics of menopausal symptoms and lack of funding for related research).

332. The Female Founders Fund, a venture fund that invests in female-founded businesses, takes note of the aging population, the "lack of adequate healthcare support" for menopause, and the fact that of all the investment in "femtech" (e.g., technology such as apps that track menstruation or offer fertility suggestions or assistance), only five percent is devoted to menopause-related startups. See *About Us*, FEMALE FOUNDERS FUND, <https://femalefoundersfund.com/about> [<https://perma.cc/S8E3-QNMV>]; *Suffering in Silence: The Biases of Data Gaps of Menopause*, FEMALE FOUNDERS FUND (Oct. 26, 2020), <https://blog.femalefoundersfund.com/suffering-in-silence-the-biases-and-data-gaps-of-menopause-e5f131b4b581> [<https://perma.cc/9S87-NSSC>] [hereinafter *Suffering in Silence*] ("[M]enopause is a \$600B+ opportunity that is still largely untapped. Women during this phase are looking for solutions that fall into the four key areas listed above that represent an enormous market opportunity.").

333. See *Suffering in Silence*, *supra* note 332 (describing Facebook's rejection of advertisement of menopause-related products as "adult," but permitting ads for condoms, erectile dysfunction, and enhancement of male libido).

334. See, e.g., Gavin Jack et al., *Women, Work and the Menopause: Releasing the Potential of Older Professional Women*, AUSTRALIAN RSCH. CTR. SEX, HEALTH AND SOC'Y 1, 28 (Sept. 2014), <https://apo.org.au/sites/default/files/resource-files/2014-09/apo-nid41511.pdf> (reporting in study of 839 Australian women ages forty to seventy-five, that the experience of menopausal symptoms often coincided with other "time of life" events including "relationship breakdown and divorce," other illnesses, and responsibilities for young children).

