

Pace University

DigitalCommons@Pace

Elisabeth Haub School of Law Faculty
Publications

School of Law

Spring 2022

Contextualizing Menopause in the Law

Bridget J. Crawford

Elisabeth Haub School of Law at Pace University

Emily Gold Waldman

Elisabeth Haub School of Law at Pace University

Naomi R. Cahn

University of Virginia School of Law

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Health Law and Policy Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Emily Gold Waldman, Naomi Cahn & Bridget J. Crawford, Contextualizing Menopause in the Law, 45 Harv. J. L. & Gender 1 (2022), <https://digitalcommons.pace.edu/lawfaculty/1230/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Elisabeth Haub School of Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

CONTEXTUALIZING MENOPAUSE IN THE LAW

EMILY GOLD WALDMAN,^{1*}
NAOMI R. CAHN,^{2‡}
AND BRIDGET J. CRAWFORD^{3†}

“It is horrendous, but then it’s magnificent,” says one character about menopause in an episode of the 2019 Netflix comedy Fleabag. Her younger interlocutor is incredulous at this proclamation. That younger character, and even the audience, may be somewhat taken aback by this frank discussion. After all, menopause is not a subject that is commonly discussed, let alone praised. Whether among friends, acquaintances, or colleagues (fictional or not), silence about menopause is more likely the norm. This is true in the law, too. The law mostly ignores menopause.

The law’s silence about menopause is linked to a broader cultural silence about the inevitable consequences of the aging process. It is also linked to longstanding silence and stigma around the menstrual cycle. A growing menstrual advocacy movement, however, has helped to reduce the stigma and shame surrounding menstruation, in the course of pursuing policy and legal changes that make menstrual products more affordable and available. This Article imagines a role for the law in addressing challenges faced by those transitioning to menopause, whether in the workplace or beyond. It considers why that has not yet occurred, and explores the possible contours of a future legal landscape.

To inform this analysis, the Article situates its discussion of menopause in a broader context: the socio-legal treatment of pregnancy, breastfeeding,

¹ *Professor of Law and Associate Dean for Faculty Development and Research, Elisabeth Haub School of Law at Pace University. B.A. Yale University, J.D. Harvard Law School.

² ‡Justice Anthony M. Kennedy Distinguished Professor of Law, Nancy L. Buc '69 Research Professor in Democracy and Equity, and Director, Family Law Center, University of Virginia College of Law. A.B. Princeton University, J.D. Columbia University School of Law, LL.M. Georgetown University Law Center.

³ †University Distinguished Professor and Professor of Law, Elisabeth Haub School of Law at Pace University. B.A. Yale University, J.D. University of Pennsylvania Law School, Ph.D. Griffith University.

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 *Washington University Law Review* and *The University of Chicago Legal Forum*.

For helpful comments and conversations, we thank Kerry Abrams, Noa Ben-Asher, Abigail Cahn-Gambino, 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.

and menstruation. By viewing the four reproduction-associated conditions or processes together, rather than in silos, it is possible to discern a hierarchy of favorable treatment, with breastfeeding and pregnancy at the top, trailed by menstruation, and with menopause at the bottom. The Article also highlights a connective thread across these processes: law’s abnormal/normal binary often maps uneasily onto them.

Ultimately, the Article argues that the law should move beyond individual one-off accommodations for “abnormal” manifestations of these conditions. The law should instead recognize and incorporate protections for the broad spectrum of what can be considered “normal” experiences. Such an approach challenges the abnormal/normal dichotomy and is necessarily part of a larger scholarly dialogue that challenges binary thinking about gender and disability. By chipping away at the stigma surrounding menopause, this Article seeks for menopause a socio-legal solicitude equal to the one that exists for breastfeeding and pregnancy and that is beginning to emerge for menstruation.

TABLE OF CONTENTS

INTRODUCTION 3

 I. Overview of Menopause..... 7

 A. Biology and Symptoms 7

 B. Silence and Stigma 9

 II. An Overview of the Legal Treatment of Menopause 12

 A. Reproductive Processes and the Law 13

 B. Glimpses from Caselaw 16

 C. Three Categories of Menopause-Related Employment
 Discrimination 18

 1. Harassment or Discrimination Based on
 Menopausal Status..... 18

 2. Punishment for Menopausal Symptoms 19

 3. Denial of Accommodations 20

 III. Menopause’s Connection to the Menstrual Advocacy
 Movement..... 23

 A. Overview of the Menstrual Advocacy Movement 24

 B. Menopause as a Component of Menstrual Advocacy ... 30

 C. Menopause as a Distinct Issue 33

 D. The Agenda for Menopausal Advocacy 40

 IV. Connections Across Menopause, Menstruation, Pregnancy,
 and Breastfeeding 42

 A. Common Social Attitudes..... 43

 B. Divergences in Social Attitudes 46

 1. Procreation versus Non-procreation 46

 2. Choice versus Involuntariness 48

3. Celebration versus Silence and Stigma	49
C. Shared Symptoms and Needs	53
V. Suggestions for Legal Change	56
A. Take Pregnancy and Breastfeeding Protections as a Baseline	56
B. Raise the Baseline: Providing Greater Protection for All Four Reproduction-associated Conditions or Processes .	58
CONCLUSION	61

INTRODUCTION

Pippa Marriot was in her mid-fifties and working long hours as a drama teacher when she started experiencing short-term memory loss and extreme fatigue.⁴ Marriot recounted that, when accompanying students on a field trip one day, “I noticed how heightened my anxiety was even though I was doing things I had done 100 times before.”⁵ These symptoms were part of her experience of perimenopause, and although the hormone therapy prescribed by her physician provided some relief, her symptoms did not go away completely.⁶ Marriot cited her physical and emotional symptoms as a large factor in her decision to take early retirement at age fifty-five.⁷ She later returned to teaching on a part-time basis, with far fewer responsibilities.⁸

Reflecting later on her experience of working full-time while experiencing menopausal symptoms, Marriot explained that an internalized sense of stigma prevented her from being more open with students or colleagues: “My main sense around it was of embarrassment, and also a deeper emotion than simply embarrassment: I felt shame.”⁹ Marriot recalled a workplace discussion when someone referenced the notion “that our staff room was full

⁴ Hilary Osborne & Caroline Bannock, “I Miss What I Used to be Like”: Women’s Stories of the Menopause, *GUARDIAN* (U.K.) (Aug. 25, 2019), <https://www.theguardian.com/society/2019/aug/25/i-miss-what-i-used-to-be-like-womens-stories-of-the-menopause> [<https://perma.cc/YM95-UCVM>] (quoting Pippa Marriot, age 57, of Devon, England). See also KAYE ADAMS & VICKY ALLAN, STILL HOT: 42 BRILLIANTLY HONEST MENOPAUSE STORES 74–75 (2020) (profiling Pippa Marriott, spelling the teacher’s surname differently than the *Guardian* article; for purposes of this article, we have adopted the *Guardian* spelling throughout).

⁵ *Id.*

⁶ Osborne & Bannock, *supra* note 4 (“After 18 months of this I started low-dose HRT on the advice of my GP, which definitely has helped but has made the symptoms milder rather than non-existent.”).

⁷ *Id.* (“For a number of reasons, but not least these [i.e., my experiences with menopause], I took early retirement at 55 and returned to work part time in a teaching role in another school without all the weight of other responsibilities.”); Adams & Allan, *supra* note 4, at 72 (“A mounting sense of low-level panic contributed to Marriot’s decision to quit her job and take early retirement.”).

⁸ Osborne & Bannock, *supra* note 4.

⁹ ADAMS & ALLAN, *supra* note 4, at 72 (quoting Marriot as saying that she later realized that, as a teacher at an all-girls school, “actually I had a responsibility to those students in terms of my own responses to ageing. Rather than hiding menopause and ageing, I should be honest and open about it.”).

of menopausal women, and me, shamefully, not really challenging that . . . There was a real element of not wanting to be associated with the menopause and the whole baggage of stuff attached to that comment, the careless mockery and the disrespect that went with it.”¹⁰

Marriot’s perception was not unfounded.¹¹ Menopause is usually treated as something private or hidden. If menopause is mentioned in public or the workplace, it might be in a self-deprecating or joking way.¹² More frequently, “menopausal” is a negative word used to put down or deride older women.¹³

Despite Marriot’s sense of isolation and shame in the workforce, she was far from alone. There are millions of employees who likely are experiencing symptoms of menopause at any given time.¹⁴ In 2021, *Bloomberg News* published a widely circulated article with the headline “Many Women Exit Workforce for a Little-Talked About Reason.”¹⁵ According to the research cited in the article, “menopause-related productivity losses can

¹⁰ *Id.*

¹¹ 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/R3H2-LS7V] (detailing the author’s feelings during menopause and reflecting, “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.”).

¹² For example, in accepting an award in 2014, British actor Emma Thompson said, “It’s such a cold night. You know, it’s the first time I’ve been actively grateful for the menopause.” 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/Q5VW-S8ZW] (quoting Emma Thompson’s speech as she accepted the National Board of Review’s award for best actress for her portrayal of author P.L. Travers in the film *Saving Mr. Banks*). But stereotypes about menopause are also played for laughs. For example, there is a stage comedy, *Menopause the Musical* (subtitle “The Hilarious Celebration of Women and The Change!”), premised on the so-called humorous aspects of menopause. See *Menopause The Musical*, G FOUR PRODUCTIONS (2003), <http://www.menopause-themusical.com> [https://perma.cc/M6TS-BW34].

¹³ See, e.g., Angela Sherman, Comment to *Why It Pays to Understand the Impact of Menopause at Work*, LINKEDIN (Nov. 19, 2019) <https://www.linkedin.com/pulse/why-pays-understand-impact-menopause-work-deborah> [https://perma.cc/XV6M-8ZGW] (“[M]any aspects of a woman’s health and body are still used in derogatory expressions (e.g., ‘oh she must be menopausal’). The workplace can be such a difficult place for women at this time of life.”).

¹⁴ See *Labor Force Statistics from the Current Population Survey 2020*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/cps/cpsaat03.htm> [https://perma.cc/G3PC-SBEH] (reporting that of 161,204,000 total persons sixteen years and older in the civilian labor force, women ages forty-five to fifty-four years represented 15,161,000 workers; women ages fifty-five to sixty-four years represented 12,833,000 workers, and women sixty-five years and older represented 4,694,000 workers).

¹⁵ See Lizzy Burden, *Millions of Women Exit Workforce for a Little-Talked About Reason*, BLOOMBERG NEWS (June 18, 2021), <https://www.bloomberg.com/news/articles/2021-06-18/women-are-leaving-the-workforce-for-a-little-talked-about-reason> [https://perma.cc/42HR-AYS8]; Helaine Olen, *Is Menopause Really Driving Women Out of the Workforce?*, WASH. POST (June 28, 2021), <https://www.washingtonpost.com/opinions/2021/06/28/is-menopause-really-driving-women-out-workforce/> [https://perma.cc/6S84-93AU] (“After Bloomberg News suggested recently that ‘millions of women’ are

amount to more than \$150 billion a year” globally and in 2019, 900,000 United Kingdom employees left their jobs because of menopausal symptoms.¹⁶

It is striking to consider how many people in Marriot’s school were likely also dealing with the physical, cognitive, or emotional aspects of a reproduction-associated condition or process. In addition to the “menopausal women” Marriot mentioned, there were almost certainly students who got a first or unexpected period at school, as well as teachers, staff members, and students dealing with severe menstrual cramps or leaks of menstrual blood onto their clothes.¹⁷ There also may well have been teachers, staff members, or even students navigating the challenges associated with pregnancy or breastfeeding.¹⁸ Indeed, it is quite common for a person, over the course of a lifetime, to experience each of menstruation,¹⁹ pregnancy,²⁰ breastfeeding,²¹ and menopause.²² And with each of these reproduction-associated conditions or processes, even “normal” experiences may present physical and psychological challenges.²³

This Article situates menopause among pregnancy, breastfeeding, and menstruation, analyzing its broader cultural and legal context, with an emphasis on the fact that menopause is an expected stage of life for approxi-

leaving the workforce because of menopause, a wave of fury rippled across social media.”).

¹⁶ *Id.*

¹⁷ See generally Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J.L. & GENDER 225 (2020) (discussing menstruation-related issues facing students in particular).

¹⁸ See, e.g., Michelle Mae Phillips, K-12 Teachers’ Experience “with or without” Breastfeeding/Pumping Policy in the Workplace (July 3, 2020) (Ph.D. dissertation, University of South Florida) (ProQuest); see Jane S. Grassley, *Adolescent Mothers’ Breastfeeding Social Support Needs*, 39 J. OF OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 713, 720–21 (2010) (describing adolescent mothers’ concerns about returning to school while breastfeeding).

¹⁹ See *Menstruation*, PLANNED PARENTHOOD, www.plannedparenthood.org/learn/health-and-wellness/menstruation [<https://perma.cc/5LB8-4Y4G>] (“Your menstrual cycle helps your body prepare for pregnancy every month. It also makes you have a period if you’re not pregnant. Your menstrual cycle and period are controlled by hormones like estrogen and progesterone.”).

²⁰ *Percentage of Childless Women in the United States in 2018, by Age*, STATISTA (Feb. 20, 2022) <https://www.statista.com/statistics/241535/percentage-of-childless-women-in-the-us-by-age/#:~:text=IN%202018%2C%2096.9%20percent%20of,44%20years%20old%20were%20childless> [<https://perma.cc/3RG4-P7YK>] (showing that by ages forty-five to fifty, almost eighty-five percent of women have had at least one child).

²¹ *Breastfeeding Report Card*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 24, 2021), <https://www.cdc.gov/breastfeeding/data/reportcard.htm> [<https://perma.cc/Z358-4BQ5>] (eighty-four percent of infants are ever breastfed).

²² Menopause is an expected part of the aging process for approximately one-half of the population. See *What is Menopause?*, NAT’L INST. ON AGING (Sept. 30, 2021), <https://www.nia.nih.gov/health/what-menopause> [<https://perma.cc/2LHK-KDP3>]; *Menopause*, U.S. DEP’T HEALTH & HUM. SERVICES, OFF. OF WOMEN’S HEALTH, <https://www.womenshealth.gov/menopause> [<https://perma.cc/99TK-VKSN>].

²³ Prominent gynecologist and columnist Dr. Jen Gunter has labeled these experiences the “unique reproductive gauntlet imposed by biology.” JEN GUNTER, *THE MENO-PAUSE MANIFESTO: OWN YOUR HEALTH WITH FACTS AND FEMINISM* 335 (2021).

mately half the population. The Article maps the existing but largely unarticulated socio-legal hierarchy among these conditions or processes, showing that menopause occupies the lowest tier, as a condition that is either legally ignored or culturally derided. Pregnancy and breastfeeding occupy the top tier and receive the most sympathetic and favorable treatment in law and culture. Menstruation is located somewhere between these two tiers, as both the law and cultural attitudes appear to be moving in the direction of recognizing the material needs of those who menstruate.²⁴

In considering these four reproduction-associated conditions or processes as a group, the Article identifies the recurring nature of what we call law's abnormal/normal binary, which plays out particularly in the context of the Americans with Disabilities Act (ADA). Even a "normal" pregnancy or perimenopause can often come with symptoms that require adjustments or accommodations in the workplace, such as bathroom access, temperature control, break times, and/or some flexibility in scheduling.²⁵ But the ADA, as currently interpreted and applied, requires reasonable accommodations only for "abnormal" or "atypical" pregnancies or perimenopause.²⁶

This abnormal/normal binary is an inappropriate fit in the case of reproduction-associated conditions or processes, as is true in many other contexts. It both stigmatizes less common experiences as "abnormal" and minimizes more common symptoms as "normal" and thus unworthy of accommodation. The sharp on/off nature of this binary also fails to recognize that symptoms associated with these processes often fall along a spectrum; there is not always a clear divide between "abnormal" and "normal."²⁷ Accordingly, if the law is to play a meaningful role in ensuring that all people have equal opportunities to participate in public life, then the processes of pregnancy, breastfeeding, menstruation, and menopause must all be taken into account in the formulation of policies for the workplace and beyond, regardless of how "normal" their manifestations can be.²⁸

This Article proceeds in five Parts. Part I provides an overview of menopause, with an emphasis on its physiological symptoms and the associated cultural stigma. Part II then provides an overview of the legal treatment of menopause, using multiple employment discrimination cases to illustrate how workplaces and the law are largely ill-equipped to address the needs of menopausal employees. Part III explores a conceptual place for menopause within the existing menstrual advocacy movement. From there, Part IV

²⁴ See *infra* Part IV.

²⁵ See *infra* Parts I and II.

²⁶ See *infra* Part II.C.3.

²⁷ Note that the "binary" concept in this context also has resonance in contemporary discussions of gender and challenges to an outmoded gender binary. *E.g.*, Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1638 (2019) (stating that "gender falls along a spectrum").

²⁸ See *infra* Part V.B.

widens the analytical lens to assess similarities and differences in societal attitudes and legal approaches to pregnancy, breastfeeding, menstruation, and menopause. Part V outlines broad ways that the law might evolve to ensure that none of these reproduction-associated conditions or processes impedes a person's full participation in public life. This Part is, by design, suggestive rather than prescriptive. The Article concludes that the law alone will not transform attitudes toward—or actual experiences of—menopause or any other reproduction-associated condition or process. Nevertheless, the law has an important role in chipping away at the stigma surrounding menopause, making it more legible to the general public and to the half of the population that inevitably will experience it. Moreover, the law can help effectuate the tangible accommodations needed by those who experience pregnancy, breastfeeding, menstruation, and menopause.

I. OVERVIEW OF MENOPAUSE

A. *Biology and Symptoms*

In physiological terms, menopause refers to the permanent end of one's menstrual cycles.²⁹ It is conclusively diagnosed after someone who previously menstruated has gone for twelve consecutive months without a menstrual period, usually as part of the aging process.³⁰ Biologically speaking, menopause results from a decline in ovarian production of estrogen and progesterone.³¹ This decrease in hormonal levels typically begins in one's mid-to-late forties; menopause itself most commonly occurs in the late forties or early fifties, with the average age being fifty-one.³² In addition to menopause that occurs inevitably as a part of the aging process, menopause can also be triggered by surgery, chemotherapy, or hormonal treatments.³³

²⁹ See, e.g., *supra* note 22.

³⁰ GUNTER, *supra* note 23, at 2–3.

³¹ See Gail A. Greendale, Nancy P. Lee & Edga R. Arriola, *The Menopause*, 353 LANCET 571, 571 (1999) (“The menopause is the permanent cessation of menstruation due to loss of ovarian follicular function.”); *Menopause*, UCLA HEALTH, <https://www.uclahealth.org/obgyn/menopause> [<https://perma.cc/6U2S-PRXK>] (“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.”); *Introduction to Menopause*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/introduction-to-menopause> [<https://perma.cc/2UHF-DX9M>] (“During this transition time before menopause, the supply of mature eggs in a woman's ovaries diminishes and ovulation becomes irregular. At the same time, the production of estrogen and progesterone decreases.”).

³² See Deborah Grady, *Management of Menopausal Symptoms*, 355 N. 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.”).

³³ See, e.g., *Induced Menopause in Women with Endometriosis*, 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/5ASE-FB8S>]; *Introduction to Menopause*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/introduction-to-menopause>.

The term perimenopause refers to the transition into menopause, although menopause can be—and is often—used (including by this Article) as an umbrella term for both perimenopause and menopause.³⁴ Perimenopause generally lasts for about four years, although it may be shorter or longer, and is frequently attended by numerous symptoms that can be physical, psychological, and/or cognitive.³⁵ A particularly common physical symptom of perimenopause is increasingly erratic menstrual cycles, which may include irregular periods, skipped periods, spotting, and heavy bleeding (also known as menorrhagia).³⁶ Another common physical symptom of perimenopause (which also can last into menopause) is hot flashes, sometimes also referred to as “hot flushes.”³⁷ Other common perimenopausal and menopausal symptoms include night sweats, vaginal dryness, headaches, vertigo, and sleep disturbances.³⁸

During the transition to menopause, or even afterwards, individuals may exhibit psychological and cognitive symptoms, including depression, anxiety, difficulty concentrating, and a sense of “brain fog.”³⁹ For example, Pippa Marriot, the drama teacher who took early retirement in part because of her perimenopausal symptoms, “found the perfect storm of menopausal

www.hopkinsmedicine.org/health/conditions-and-diseases/introduction-to-menopause [https://perma.cc/2UHF-DX9M]; see also Melissa Giannini, *The Change*, DAMN JOAN (Nov. 13, 2017), <https://damnjoan.com/change-menopause> [https://perma.cc/FR82-UEYE] (describing the experience of a trans man who underwent menopause as a result of his testosterone hormone therapy).

³⁴ See *Menopause Basics*, U.S. DEPT OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, (March 18, 2019) <https://www.womenshealth.gov/menopause/menopause-basics> [https://perma.cc/TG8S-FX7X] (defining “perimenopause” and “menopause,” but also using the term “menopause” to refer to perimenopause and menopause).

³⁵ *Id.*; Hallie Levine, *How Menopause Messes with Your Brain*, AARP BRAIN HEALTH & WELLNESS (Nov. 19, 2021) <https://www.aarp.org/health/brain-health/info-2021/menopause-brain-fog.html> [https://perma.cc/PD4W-GWER].

³⁶ One longitudinal study of “bleeding patterns during the menopausal transition,” which followed a cohort of 1320 “midlife” women for ten years, found that “the cumulative percent of women with at least 3 occurrences of menses with three or more days of heavy bleeding was 34.5%, with 30.7% and 34.7% having at least 3 such occurrences during the early MT [menopausal transition] and the late MT, respectively.” Pangaja Paramsothy et al., *Bleeding Patterns During Menopausal Transition in the Multi-ethnic Study of Women's Health Across the Nation (SWAN): A Prospective Cohort Study*, 121 BJOG: AN INT'L J. OF OBSTETRICS & GYNECOLOGY 1564, 1570–71 (2014).

³⁷ *Hot Flushes*, NAT'L HEALTH SERVICES (2019), <https://www.nhs.uk/conditions/menopause/hot-flushes> (on file with Harvard Journal of Law and Gender).

³⁸ See, e.g., Burden, *supra* note 15 (describing multiple symptoms of perimenopause and massive “menopause-related productivity losses” in the workforce given that approximately eleven percent of the workforce in the so-called G7 economies—Canada, France, Germany, Italy, the United Kingdom, the United States, and the European Union – are between forty-five and fifty-five years of age).

³⁹ See, e.g., GUNTER, *supra* note 23, at 2–3; Levine, *supra* note 35; see also Lisa Mosconi et al., *Menopause Impacts Human Brain Structure, Connectivity, Energy Metabolism, and Amyloid beta Deposition*, 11 SCI. REP. 10867, (2021) (explaining that “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 AD [Alzheimer's Disease].”).

insomnia, anxiety and brain fog made her question her abilities at work.”⁴⁰ New scientific studies suggest a neurological basis for these symptoms.⁴¹ Researchers have found that the menopausal transition “has pronounced effects on human brain’s structure, connectivity, and energy metabolism, and provide a neurological framework for both vulnerability and resilience.”⁴² Ultimately, most individuals do not suffer long-term adverse cognitive effects from these common symptoms, because the brain has the ability to adapt and “reset” in response to the hormonal changes that accompany menopause.⁴³ Even so, symptoms of perimenopause can be profoundly disruptive, or even the source of bewilderment, because menopause is not a topic that is openly discussed, as explained in the next section.

B. Silence and Stigma

Compounding the physical, psychological, and cognitive challenges associated with many individuals’ experiences of perimenopause is the intense silence and stigma surrounding menopause generally. “The culture of silence about menopause in our patriarchal society is something to behold,” observes gynecologist Dr. Jen Gunter, who has spent many years speaking with her patients and others about menopause.⁴⁴ “The absence of menopause from our discourse leaves women uninformed, which can be disempowering, frightening, and makes it difficult to self-advocate,” Gunter explains.⁴⁵ In other words, the lack of frank talk about the menopausal transition means that its symptoms frequently go unrecognized. Accounts of others who have spoken publicly about their personal experiences with menopause bear out Gunter’s insights.

Consider first the example of media personality and entrepreneur Oprah Winfrey. Winfrey has revealed: “For two years I didn’t sleep well. Never a full night. No peace. Restlessness and heart palpitations were my steady companions at nightfall. This was back when I was 48 to 50.”⁴⁶ She consulted a heart specialist: “I went to see a cardiologist. Took medication. Wore a heart monitor for weeks.”⁴⁷ Only when she happened to pick up a copy of *The Wisdom of Menopause* by Dr. Christiane Northrup did Winfrey find “the answer I’d been going doctor to doctor trying to figure out. Until

⁴⁰ ADAMS & ALLAN, *supra* note 4.

⁴¹ See, e.g., Mosconi, *supra* note 39.

⁴² *Id.* at p. 9 [of pdf] The researchers explained that “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 AD [Alzheimer’s Disease].” *Id.*

⁴³ *Id.* (“Present neuroimaging results provide novel neurophysiological evidence for post-menopausal brain adaptation in humans, encompassing brain structure, connectivity and bioenergetics, and preservation of cognitive function.”).

⁴⁴ GUNTER, *supra* note 23, at x.

⁴⁵ *Id.*

⁴⁶ 10 *Celebrities Who Have Spoken Out About Menopause*, *supra* note 12 (quoting Oprah Winfrey).

⁴⁷ *Id.*

that point in my adult life, I don't recall one serious conversation with another woman about what to expect."⁴⁸ The general cultural silence about menopause meant that even those who are as well-informed and well-connected as Winfrey (and her doctors, presumably) may not be prepared to recognize menopause's symptoms when they arrive.

Sophistication in other realms does not necessarily mean an individual has more than a basic understanding of menopause. Meg Mathews, formerly a figure in the British pop music scene, has publicly commented, "I consider myself a woman of the world and I didn't know what being perimenopausal was."⁴⁹ Starting at age forty-nine, Mathews began experiencing severe joint pain ("I was walking to the bathroom like an old lady"), as well as multiple other symptoms of menopause, including night sweats, anxiety, fatigue, a burning mouth, hair loss, and mood swings.⁵⁰ Mathews had no idea what was happening to her until another woman finally suggested that she consult a menopause clinic, at which point "a light switched on. I was like, 'Oh God, I have had all those years feeling like this – why isn't it talked about?'"⁵¹

A key reason that menopause is not typically part of public discourse, or even found in conversation among friends, is because it is so stigmatized. As Part IV describes in more detail, menopause, pregnancy, breastfeeding, and menstruation all trigger related negative perceptions about being hormonal and irrational, along with distaste toward physical manifestations of these conditions like uterine bleeding, hot flashes, leaking breastmilk, and the like.⁵² On top of this sexism, menopause implicates both disability stigma and ageism. And, as Professor Jasmine Harris has observed, those two biases are particularly sticky.⁵³

It is not surprising, then, that studies indicate that the majority of young people in North America, for example, hold negative attitudes toward meno-

⁴⁸ *Id.*

⁴⁹ See Amelia Hill, *Meg Mathews: We Need to Talk About the Menopause as Loudly as We Can*, THE GUARDIAN (Aug. 28, 2019), <https://www.theguardian.com/society/2019/aug/28/we-need-to-talk-about-the-menopause-as-loudly-as-we-can-says-campaigner> [<https://perma.cc/7TFN-QB5B>] (quoting Meg Mathews, who refers to herself as having a "rock and roll lifestyle," in part because of her marriage to Oasis band member Noel Gallagher).

⁵⁰ *See id.*

⁵¹ *Id.* (quoting Meg Mathews who received advice after a meeting of Alcoholics Anonymous at which she had said to the group that she "thought she was going mad").

⁵² *See infra* Part IV.A.

⁵³ Jasmine Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1685 (2021) (citing Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability from 2007 to 2016*, 30 PSYCH. SCI. 174 (2019)). As Harris notes, in the case of disability, part of that stickiness may stem from the idea that disabilities should be kept private; to counter this, she advocates "publicity," meaning "a strategic communications approach to systematically change problematic social norms" about disability as a private matter. *Id.* at 1738.

pause.⁵⁴ The media, in turn, frequently reinforce negative messages about menopausal women.⁵⁵

Negative views about menopause create a culture of silence and stigma, which can have acute consequences, especially at work. Indeed, Pippa Marriot, the teacher quoted at beginning of this Article, spoke about the “‘baggage of stuff attached’” to menopause in the workplace.⁵⁶ Marriot’s response is both revealing (as an explanation for why she did not speak openly at the time about her symptoms) and relatively common among workers of menopausal age. The authors of a 2020 *Harvard Business Review* article wrote that in surveying over 5,000 employees, “the most common fear that prevents speaking up is the fear of being perceived negatively.”⁵⁷ And, indeed, some women report being ridiculed, harassed, or stereotyped for being menopausal.⁵⁸ Therein lies the challenge: it often takes someone affirmatively speaking up for workplace misconduct to be remedied, but many people who experience severe symptoms of perimenopause or menopause feel pressure to remain silent.⁵⁹

⁵⁴ In various surveys of Mexican and U.S. students, for instance, participants used words like “bitter,” “tense,” “old,” and “sensitive” to describe menopausal women. Joan Chrisler et al., *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); Ma. Luisa Marván et al., *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). These attitudes can comprise a sort of feedback loop with menopausal symptoms. A study of over 4,000 women from the United States, Canada, Great Britain, France, Italy, Sweden, Norway, Denmark, and Finland revealed that “many postmenopausal symptoms had the greatest prevalence in women from the United Kingdom, United States, and Canada.” See Mary Jane Minkin, Suzanne Reiter, & Ricardo Maamari, *Prevalence of Postmenopausal Symptoms in North America and Europe*, 22 MENOPAUSE: J OF THE N. AM. MENOPAUSE SOC’Y JOURNALISM 1231, 1235 (2015). According to the researchers, “there is a core set of symptoms experienced by postmenopausal women in which variations may be influenced by culture.” *Id.* at 1237. The lead author subsequently opined that, “In societies where age is more revered and the older woman is the wiser and better woman, menopausal symptoms are significantly less bothersome.” Lisa Rapaport, *Culture May Influence How Women Experience Menopause*, REUTERS (June 5, 2015), <https://www.reuters.com/article/us-health-menopause-perceptions/culture-may-influence-how-women-experience-menopause-idUSKBN0OL1XH20150605>, [https://perma.cc/3Y8N-TNA6] (quoting Dr. Mary Jane Minkin of Yale Medical School).

⁵⁵ See, e.g., Marlene Cimon, *Menopause: Milestone or Misery? A Look at Media Messages to Our Mothers and Grandmothers*, 23 AM. JOURNALISM 63 (2006) (analyzing issues of three popular women’s magazines and one newspaper over several decades and observing that the “media landscape has been riddled with the diminution of women over the years, even in subtle ways, and from the most well-intentioned of sources”).

⁵⁶ Vicky Allan, “There is Still a Silence Around the Menopause . . . We Need to Get Rid of That,” THE HERALD (Dec. 7, 2020), <https://www.heraldsotland.com/news/18913026.still-silence-around-menopause-need-get-rid/> [https://perma.cc/A8TL-229R].

⁵⁷ See Megan Reitz, Marinta Bolton & Kira Emslie, *Is Menopause a Taboo in Your Organization?*, HARV. BUS. REV. (Feb. 4, 2020), <https://hbr.org/2020/02/is-menopause-a-taboo-in-your-organization> [https://perma.cc/WDM3-QBQ6].

⁵⁸ *Id.*

⁵⁹ *Id.*; see also Megan Reitz et al., *Speaking Truth to Power at Work: How We Silence Ourselves and Others-Interim Survey Results*, HULT RESEARCH (2019), <https://static1.squarespace.com/static/597729cbcf81e0f87c7f6c61/1>

To be sure, although the cultural stigma surrounding menopause is profound, not all people personally experience menopause as uniformly negative. For some, menopause means relief from menstrual periods, birth control, and family planning decisions. Oprah Winfrey has described being on the other side of the transition as a “blessing.”⁶⁰ Menopause can also intersect with gender identity in complex ways. Not all cis women menstruate (and thus go through menopause), and not all people who go through menopause are cis women.⁶¹ For writer and editor Deb Schwartz, menopause accentuated a difference between certain physical aspects of the body and a sense of self: “I identify as butch, or masculine,” Schwartz explained.⁶² With menopause, “all of a sudden, it’s like, ‘Holy shit, I’m a woman,’ although it’s not just about gender or sexuality or identity.”⁶³ Mike Funk, a trans man, experienced menopause as a result of his testosterone hormone therapy; his voice lowered and he grew a beard, too.⁶⁴ For Funk, menopause was an intentional choice as part of his gender affirmation.⁶⁵ Relatedly, author Darcy Steinke, a cis woman, writes that she has experienced menopause as a kind of “defeminization,” describing the transition as “disorienting, thrilling, and freeing.”⁶⁶

II. AN OVERVIEW OF THE LEGAL TREATMENT OF MENOPAUSE

Menopause—unlike pregnancy, breastfeeding, and increasingly menstruation—remains largely unaddressed in U.S. law. This Part traces key legal developments concerning the other reproduction-associated conditions or processes, and then turns to menopause’s limited appearance in the law.

5d09071aff3d870001a13ce3/1560872755660/Speaking_Truth_to_Power_Report_2019_Final+1.pdf [https://perma.cc/RX6Y-RMKH] (“Encouraging employees to speak up has become an organizational imperative in order to identify misconduct and malpractice at an early point and to garner innovative ideas in a competitive marketplace.”).

⁶⁰ 10 *Celebrities Who Have Spoken Out About Menopause*, *supra* note 12 (quoting Oprah Winfrey).

⁶¹ See, e.g., *Mayer-Rokitansky-Küster-Hauser Syndrome*, MEDLINEPLUS, <https://medlineplus.gov/genetics/condition/mayer-rokitansky-kuster-hauser-syndrome> [https://perma.cc/Y4RZ-C9BK] (describing condition in those born with female chromosomes, functioning ovaries, and external genitalia “typically” associated with females who have an undeveloped or absent uterus and thus do not menstruate); Sarah E. Frank, *Queering Menstruation: Trans and Non-Binary Identity and Body Politics*, SOC. INQUIRY 1 (2020), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/soin.12355> [https://perma.cc/EPS8-SNKP] (reporting results of a small survey of trans and gender non-binary individuals’ experiences of menstruation).

⁶² Giannini, *supra* note 33 (quoting Deb Schwartz, age fifty-one).

⁶³ *Id.*

⁶⁴ *Id.* (quoting Mike Funk, age twenty-seven).

⁶⁵ *Id.*

⁶⁶ Darcy Steinke, *Going Through Menopause Changed the Way I Think About Gender*, BUZZFEED NEWS (2019), <https://www.buzzfeednews.com/article/darceysteinke/i-felt-confined-by-femininity-for-most-of-my-life-menopause>, [https://perma.cc/J3YY-FTVG] (“While a few of the women I interviewed felt, in and after menopause, even more like women, most felt a gender shift.”).

A. Reproductive Processes and the Law

Notwithstanding commonalities across the four reproduction-associated conditions or processes of pregnancy, breastfeeding, menstruation, and menopause, the legal treatment of each has largely developed separately in the United States. Pregnancy came first. In 1974, the Supreme Court found unconstitutional a school district policy that required pregnant schoolteachers to take maternity leave beginning at the fifth month of pregnancy.⁶⁷ But later that same year, the Supreme Court held in *Geduldig v. Aiello* that a state's disability insurance system did not violate the Constitution by excluding "normal" pregnancies from the conditions covered by a short-term disability plan (infamously drawing a distinction between "pregnant persons and non-pregnant persons").⁶⁸ The Supreme Court echoed that holding two years later, deciding in the 1976 case of *General Electric Co. v. Gilbert* that treating pregnancy *worse* than other disabilities that cause a similar inability to work did not violate Title VII's prohibition against sex discrimination.⁶⁹ One week after *Gilbert*, the ACLU convened a meeting on how to overturn it, and several groups began working on federal legislation in response to the Supreme Court's decision.⁷⁰ Two years after *Gilbert*, Congress enacted the 1978 Pregnancy Discrimination Act (PDA), which made clear that Title VII's prohibition of discrimination "because of sex" or "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions," and that "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."⁷¹

Many years later, on May 14, 2021, the U.S. House of Representatives passed the Pregnant Workers Fairness Act (PWFA), which would provide even greater protection for pregnant employees.⁷² Although the PDA re-

⁶⁷ See *Cleveland B. of Educ. v. LaFleur*, 414 U.S. 632, 632 (1974).

⁶⁸ See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."). Ironically, the gender neutrality of the *Geduldig* court that seemed outrageous at the time has found surprising new resonance in contemporary discourse about gender. See, e.g., Emma Green, *The Culture War Over 'Pregnant People'*, THE ATLANTIC (2021), <https://www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/>, [https://perma.cc/NAW7-8L9M] (quoting Louise Melling of the ACLU as saying, "if we're talking about 'pregnant people,' that language says to people—to transgender men and to nonbinary people—'we see you.'").

⁶⁹ See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

⁷⁰ See Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 1 (2009); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 469–70 (2011).

⁷¹ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2000)).

⁷² See Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021) ("An act to eliminate discrimination and promote women's health and economic security by ensuring

quires employers to accommodate pregnancy to the extent that they accommodate analogous conditions,⁷³ the PWFA would require employers to make “reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee.”⁷⁴ The PWFA thus creates a stand-alone, rather than contingent, legal entitlement. Numerous states have already taken this step.⁷⁵

The next reproduction-associated condition or process to receive legal attention was breastfeeding. In 1984, New York State passed first-of-its kind legislation exempting breastfeeding public indecency offenses.⁷⁶ In 1993, Florida and North Carolina passed laws expressly permitting women to breastfeed in any public or private location.⁷⁷ In 1994, Iowa passed a law providing breastfeeding exemptions from jury duty.⁷⁸ And starting in the late 1990s, states increasingly began passing laws to protect breastfeeding in the workplace, both in terms of prohibiting discrimination against lactating employees and also requiring employers to give them breaks and private spaces to express milk.⁷⁹ In 2010, the federal government followed suit with an amendment to the Fair Labor Standards Act under the banner headline of “Break Time for Nursing Mothers.”⁸⁰ This law requires employers to provide lactating employees with reasonable break times to express breast milk for one year after a child’s birth, and also to provide the employees with a

reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”).

⁷³ See *supra* note 71.

⁷⁴ *Id.* at §2 (1).

⁷⁵ *Reasonable Accommodations for Pregnant Workers: State and Local Laws*, Nat’l Partnership for Women & Families, (Sept. 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<https://perma.cc/KE6K-99LK>] (“Thirty-one states, including the District of Columbia, and four cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers.”). See also *infra* Part IV.B.1.

⁷⁶ See N.Y. PENAL LAW §§ 245.01, 245.02 (McKinney 1985, 2021) (providing that crime “exposure” shall not apply to breastfeeding).

⁷⁷ See FLA. STAT. § 800.02 (1994, 2021) (providing that “a mother’s breastfeeding her baby” does not constitute an “unnatural and lascivious act”); N.C. GEN. STAT. § 14-190.9 (1994) (providing that “a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to the breast feeding”).

⁷⁸ See IOWA CODE § 135.30A (2000). See also KAREN M. KEDROWSKI & MICHAEL E. LIPSCOMB, BREASTFEEDING RIGHTS IN THE UNITED STATES 100 (Judith Baer ed., 2008) (calling lactation-based exemptions from jury duty a “mixed blessing,” in that it allows some individuals the option to postpone jury service, but that the law must also be understood in light of the history of women’s exclusion from juries).

⁷⁹ See generally Thu T. Nguyen & Summer Sherburne Hawkins, *Current State of US Breastfeeding Laws*, 9 MATERNAL & CHILD NUTRITION 350, 352 (2013) (“From 1993 to 2004, breastfeeding laws steadily increased at a rate of approximately five laws per year. From 2005 to 2011, the rate increased to approximately eight laws annually.”); Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1837-40 (2019) (describing workplace accommodations for lactating individuals); Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW & INEQ. 179 (1995).

⁸⁰ 29 U.S.C. §207(r).

private place (other than a bathroom) to do so.⁸¹ Almost a decade later, Congress also passed the Fairness for Breastfeeding Mothers Act of 2019, which requires certain public buildings to provide a shielded, hygienic space (other than a bathroom) that contains a chair, working surface, and electrical outlet so that members of the public may express breastmilk.⁸²

As legal protections for pregnancy and breastfeeding continue to develop, a third reproduction-associated condition or process has recently come into legal view: menstruation.⁸³ Around 2015, a broad-based menstrual advocacy movement began emerging in the United States.⁸⁴ This movement, discussed further in Part III, is behind ongoing successful efforts to repeal the “tampon tax” (the shorthand term for state sales taxes imposed on menstrual products); provide free menstrual products for vulnerable individuals such as students, incarcerated persons, unhoused persons, and disaster victims; and improve the state of menstruation-related education.⁸⁵

But what about menopause, the fourth reproduction-associated condition or process? So far, at least in the United States, no parallel “menopause advocacy” movement has developed to push for legal reform. During the past year, there has been increased coverage in prominent media outlets about menopause and its effects on the body and brain.⁸⁶ This coverage has

⁸¹ *Id.*

⁸² See 40 U.S.C. § 3318. See also Mathilde Cohen, *The Right to Express Milk*, 33 YALE J. L. & FEMINISM 47, 47 (2021) (arguing that the right to express breast milk “should be recognized as part of a reproductive justice-based right to breastfeed through a combination of civil rights, FDA law, insurance law, health law, tax law, and work law.”).

⁸³ See, e.g., Bridget J. Crawford & Carla Spivack, *Human Rights and the Taxation of Menstrual Hygiene Products in an Unequal World*, in TAX, INEQUALITY, AND HUMAN RIGHTS 449 (Philip G. Alston & Nikki Reisch eds., 2019); Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic, Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569, 1569 (2021); Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICHMOND L. REV. 439, 448-49 (2019); Bridget J. Crawford et al., *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341, 343 (2019); Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 493, 494 (2019); Michael O’Shea Carney, Note, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2544 (2020); Suzanne Herman, Note, *A Blood-Red-Herring: Why Revenue Concerns Are Overestimated in the Fight to End the “Tampon Tax,”* 48 FORDHAM URB. L.J. 595, 597 (2021).

⁸⁴ See *infra* Part III.A. The menstrual movement of the twenty-first century has its origins in the women’s health movement of the 1970s and in particular the work of the Boston Women’s Health Collective. See, e.g., Chris Bobel, *From Convenience to Hazard: A Short History of the Emergence of the Menstrual Activism Movement, 1971–1992*, 29 HEALTH CARE FOR WOMEN INT’L 738, 740–41 (2008).

⁸⁵ See *infra* Part III.A. See generally Bridget J. Crawford & Emily Gold Waldman, *MENSTRUATION MATTERS: CHALLENGING LAW’S SILENCE ON PERIODS* (2022) (discussing the various achievements of the menstrual movement in the United States).

⁸⁶ Kim Tingley, *We Need to Know How Menopause Changes Women’s Brains*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/magazine/menopause-brains.html> [https://perma.cc/3NF6-MCAZ] (last updated Oct. 20, 2021); Jessica Grose, *Why is Perimenopause Still Such a Mystery?*, N.Y. TIMES (April 29, 2021), <https://www.nytimes.com/2021/04/29/well/perimenopause-women.html> [https://perma.cc/

been spurred in part by new scientific research about menopause,⁸⁷ as well as an incipient willingness by some to speak more openly about the topic. But the legal implications—and possibilities—for menopause have largely gone unexplored in this country. By contrast, in the United Kingdom, there is a growing emphasis on menopause as a legal issue.⁸⁸

B. *Glimpses from Caselaw*

The failure of U.S. law to take full account of menopause is particularly clear in the employment context. The caselaw reveals how difficult, and even hostile, workplaces can be for those experiencing menopausal symptoms. Indeed, symptoms associated with perimenopause played a central role in several employment discrimination cases over the past decade. For example, in *Coleman v. Bobby Dodd Institute*, Alisha Coleman, a call center employee, had begun perimenopause and was experiencing unpredictable heavy menstrual bleeding.⁸⁹ She was terminated from employment after accidentally bleeding onto the carpet at work, even though she immediately cleaned up the blood.⁹⁰ In another case, *Flores v. Virginia Department of Corrections*, Joyce Flores, a perimenopausal dental hygienist at a prison facility, was terminated after a body scanner picked up an image of a “suspicious item in her vagina” (which turned out to be toilet paper that she had placed into her underwear as a stop-gap measure to absorb heavy menstrual bleeding).⁹¹ In *Sipple v. Crossmark*, Georgia Sipple, a retail product demonstrator, requested and was denied a medically-recommended modification to the workplace’s strict dress code after she began experiencing menopausal symptoms that included hot flashes, dizziness, migraines, and a sense of physical weakness.⁹²

Even for employees whose symptoms of perimenopause or menopause do not become visible at work, this stage of life may generate unwelcome

6HQV-ARNB] (last updated April 30, 2021); Lisa Selin Davis, *Why Modern Medicine Keeps Overlooking Menopause*, N.Y. TIMES (April 6, 2021), <https://www.nytimes.com/2021/04/06/us/menopause-perimenopause-symptoms.html> [<https://perma.cc/K82H-UDHE>]; Sumathi Reddy, *The Surprising Good News on How Menopause Changes Your Brain*, WALL ST. J. (June 14, 2021), <https://www.wsj.com/articles/the-surprising-good-news-on-how-menopause-changes-your-brain-11623698003> [<https://perma.cc/RX4J-9DTU>].

⁸⁷ See *supra* notes 35–36 and accompanying text.

⁸⁸ A growing body of case law in the U.K. has interpreted the U.K. Equality Act 2010, see Equality Act 2010, c. 15 (UK), to provide fairly robust protections for menopausal employees. See, e.g., Bridget J. Crawford, Emily Gold Waldman & Naomi R. Cahn, *Working Through Menopause*, WASH. U. L. REV. (forthcoming 2022).

⁸⁹ *Coleman v. Bobby Dodd Inst., Inc.*, No. 4:17-CV-29, 2017 WL 2486080, at *1 (M.D. Ga. June 8, 2017).

⁹⁰ *Id.*

⁹¹ *Flores v. Virginia Dep’t of Corr.*, No. 5:20-cv-00087, 2021 WL 668802, at *3 (W.D. Va. Feb. 22, 2021).

⁹² *Sipple v. Crossmark*, No. 2:10-cv-00570-MCE-KJM, 2012 WL 2798791, at *3–7 (E.D. Ca. July 9, 2012).

comments or actions in the workplace. In *Burkhart v. American Railcar Industries*,⁹³ for example, manufacturing plant employee Cathy Burkhart brought a sexual harassment claim after experiencing persistent harassment by her boss, who—among other things—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, sweat like a hog in July, wash your sheets and pillowcases daily and bite the head off anything that moves.”⁹⁴ Similarly, in *White v. Twin Falls County*, investigator Becky White was terminated after being subjected to her supervisor’s repeated harassing comments, such as “How’s the hot flash queen?” and “How’s the menopause today?”⁹⁵

A disturbing theme that emerges from the case law is the weaponization of the very *concept* of menopause as a tool for denigrating and dehumanizing older employees. The “hot flash queen” comments provide a sense of this, but the deployment of menopause-as-insult is illustrated most strikingly in the case of *Jackie Dault v. Georgia Urology*.⁹⁶ Although nurse Jackie Dault was not even going through menopause, the doctor with whom she worked used menopause as a sort of shorthand to mock Dault’s appearance and age.⁹⁷ In front of other colleagues and patients, the doctor would deride Dault “for allegedly going through menopause and needing frequent breaks due to her age”; he even turned up the operating room temperature to 80 degrees “so that it would cause [her] to sweat so he could ridicule her for allegedly being in menopause.”⁹⁸ Thus Dault’s *potential* for menopause, simply because she was a woman of a particular age, was used to degrade and harass her.

In addition to intersecting with age and gender, menopause harassment can also intersect with race. In *Bailey v. Henderson*, for instance, two female employees engaged in significant verbal harassment of a third female employee, commenting “Here comes the bitch!” when she walked by, referring to her as “toilet-paper tongue” and as someone who was “giving it up out of both drawer legs,” and even following her into the women’s room to curse at her while she used the facilities.⁹⁹ When the employee who was being

⁹³ *Burkhart v. American Railcar Industries, Inc.*, No. 3:07-CV-000199, 2009 WL 10695340, at *2 (E.D. Ark., 2009).

⁹⁴ *Id.*

⁹⁵ *White v. Twin Falls Cty.*, No. 1:14-CV-00102-EJL-REB, 2016 WL 1275594, at *2 (D. Idaho Mar. 31, 2016). The plaintiff’s claim was settled out of court. *See* Order of Dismissal, No. 1:14-cv-00102 (June 28, 2016).

⁹⁶ *See* *Dault v. Georgia Urology, P.A.*, No. 1:20-cv-00828-LMM-RDC, 2020 WL 10139416 at *1 (N.D. Ga. Dec. 18, 2020) (containing magistrate judge’s report and recommendation), *adopted by* 2021 WL 2517373 (N.D. Ga. Feb. 1, 2021).

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *Bailey v. Henderson*, 94 F. Supp. 2d 68, 70–71 (D.D.C. 2000).

harassed complained to her supervisors, one supervisor (who himself was Black) told the other supervisor not to take action because the problem was “just some black women going through menopause.”¹⁰⁰

C. *Three Categories of Menopause-Related Employment Discrimination*

The path to legal relief in menopause-related employment discrimination cases is not always clear. Broadly speaking, this Article groups these cases into three different categories.¹⁰¹ The first category includes instances when employees are subjected to harassment or discrimination based on their actual or perceived menopausal *status*, such as in *Dault*,¹⁰² *Bailey*,¹⁰³ and *Burkhart*.¹⁰⁴ The second category includes cases where an adverse job action is taken against an employee for menopausal symptoms, such as the unexpected heavy perimenopausal bleeding at issue in *Coleman*¹⁰⁵ and *Flores*.¹⁰⁶ And the third category includes cases like *Sipple*,¹⁰⁷ where an employee requests, but does not receive, accommodations for menopausal symptoms, and the court relies on the abnormal/normal binary to decide whether the employee is entitled to accommodations.

1. *Harassment or Discrimination*

Cases involving harassment or discrimination based on actual or perceived menopausal status map straightforwardly onto the existing U.S. employment discrimination framework. Negative statements about an employee's actual or perceived menopause can fit into Title VII's sex discrimination framework in two ways. First, such derogatory statements can be evidence of an employer's discriminatory motive for taking an adverse job action against the employee, as in *White*, where the court found that comments like “How's the hot flash queen?” provided circumstantial evidence that sex discrimination had played a role in the plaintiff's termination.¹⁰⁸ Second, depending on how severe and pervasive the harassing behavior is, it can potentially create a legally actionable hostile work environment, even if not accompanied by an adverse job action like demotion or termination.¹⁰⁹

¹⁰⁰ *Id.*

¹⁰¹ Although the Article's discussion here focuses on these categories in terms of menopause discrimination cases, the categories are also relevant to cases involving pregnancy, breastfeeding, and menstruation, as discussed further in Part V.A.

¹⁰² *Dault*, 2020 WL 10139416.

¹⁰³ *Bailey*, 94 F. Supp. 2d 68.

¹⁰⁴ *Burkhart*, 2009 WL 10695340.

¹⁰⁵ *Coleman*, 2017 WL 2486080.

¹⁰⁶ *Flores*, 2021 WL 668802.

¹⁰⁷ *Sipple*, 2012 WL 2798791.

¹⁰⁸ *White*, 2016 WL 1275594, at *3.

¹⁰⁹ See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 57 (1986).

To be sure, courts have generally set a very high bar for how bad sexual harassment has to be before it creates a hostile work environment.¹¹⁰ This includes sexual harassment that takes the form of menopause-based harassment; it must rise to an extremely severe level.¹¹¹ For example, although the courts permitted the *Dault*¹¹² and *Bailey*¹¹³ cases to proceed, the court did not allow the *Burkhart*¹¹⁴ case to go forward. The legal framework for analysis of these cases is at least clear, though the outcome in *Burkhart* is troubling.¹¹⁵

2. Punishment for Menopausal Symptoms

In cases where employees are punished for their menopausal symptoms, such as heavy bleeding, the applicable legal framework is less clear. There is little case law in the area, and the existing case law tends to be murky or contradictory. Cases involving alleged discrimination on the basis of menopausal symptoms *should* be recognized as sex discrimination under Title VII, since the facts essentially involve punishing an employee for a sex-related condition.¹¹⁶ In *Flores*, the case involving the dental hygienist at a prison facility, the court convincingly articulated this point.¹¹⁷ The court allowed Flores' Title VII action to go forward, reasoning that "*but for* Flores's menstruation and use of a tampon [earlier in the day when she had first passed through the body scanner]—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged."¹¹⁸

By contrast, the *Coleman* court oddly concluded that the call-center employee-plaintiff had not been terminated for being "pre-menopausal" but for being "unable to control the heavy menstruation."¹¹⁹ The court acknowledged that "a non-frivolous argument can be made that it is unlawful for an employer to treat a uniquely feminine condition, such as excessive menstrua-

¹¹⁰ As Sandra Sperino and Suja Thomas have explained, "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." SANDRA SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 30 (2017).

¹¹¹ *See id.*

¹¹² *Dault*, 2021 WL 2517373, at *1.

¹¹³ *Bailey*, 94 F. Supp. 2d 68, 77.

¹¹⁴ *Burkhart v. American Railcar Industries, Inc.*, 603 F.3d 472, 473 (8th Cir. 2010).

¹¹⁵ *See id.*

¹¹⁶ *See generally* Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2000)) (outlining equal employment opportunities and sex-based discrimination).

¹¹⁷ *Flores*, 2021 WL 668802, at *4–7.

¹¹⁸ *Id.* at *6.

¹¹⁹ *Coleman*, 2017 WL 2486080, at *2. *See also* Marcy L. Karin, *Periods at Work*, 16 HARV. L. & POL'Y REV. (forthcoming 2021-2022) (discussing *Coleman* case) (manuscript at 47–49).

tion, less favorably than similar conditions affecting both sexes, such as incontinence.”¹²⁰ Yet the court attributed Coleman’s firing not to her perimenopause but rather to her “failure to control the heavy menstruation and soiling herself and company property.”¹²¹ This is a specious distinction, given that unexpected heavy bleeding is a common, unavoidable symptom of perimenopause.¹²² Indeed, the court’s reasoning in *Coleman* is somewhat akin to saying that a pregnant employee was not terminated because she was pregnant, but simply because she went into labor at work.

Note further that the *Coleman* court incorrectly suggested that in order to prevail, the plaintiff would need to point to a comparator.¹²³ Although a comparator can be useful in cases where the employer’s true motive needs to be determined, here the motive was clear: the employer *told* Coleman that she was being terminated for “for failing to maintain high standards of personal hygiene,” i.e., her bleeding.¹²⁴ And, given that Coleman immediately cleaned up the blood and no permanent property damage or other harm occurred, it is difficult to read the employer’s reaction as stemming from anything other than repulsion toward menstrual blood and/or menopause. Indeed, had a comparison been needed, the most fitting one would be an employee who accidentally cut himself, bled onto office furniture, and cleaned up the mess. It is hard to imagine that blood from a non-uterine source would have disgusted the employer so much.

To the extent that plaintiffs bring future cases involving discipline for excessive menstrual/menopausal bleeding, the *Flores* decision—which came after *Coleman*—provides the better path for courts to follow. Nevertheless, because there is not much case law in this area, it is difficult to anticipate how a future court might address similar facts.

3. *Denial of Accommodations*

The most complex category of menopause-related cases involves the denial of requests for accommodations of menstrual, perimenopausal, or menopausal symptoms. And it provides a compelling demonstration of the problems with courts’ reliance on the abnormal/normal binary in determining who is entitled to legal protection. In 2008, Congress passed the Americans with Disabilities Amendments Act (ADAA) to expand the scope of protec-

¹²⁰ *Id.* at *4–5.

¹²¹ *Id.* at *6.

¹²² See *supra* text accompanying note 36.

¹²³ *Coleman*, 2017 WL 2486080, at *6. (“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”). See also Emily Gold Waldman, *Compared to What? Menstruation, Pregnancy and the Complexities of Comparison*, 41 COLUM. J. GENDER & L. 218, 224–25 (2021) (discussing the challenges of requiring comparators in cases alleging sex discrimination based on biological conditions for which there are no obvious comparators).

¹²⁴ *Coleman*, 2017 WL 2486080, at *3.

tion available under the Americans with Disabilities Act (ADA).¹²⁵ Specifically, in reference to the definition of disability as something that “substantially limits” a “major life activity,” the ADAA clarified that major life activities could include a wide range of activities, including lifting, bending, concentrating, thinking, and working, as well as the operation of a major bodily function, “including but not limited to . . . [the] endocrine, and reproductive functions.”¹²⁶ The ADAA did not, however, explicitly specify whether reproduction-associated conditions or processes such as pregnancy, menstruation, or menopause must be accommodated in the workplace.¹²⁷

In 2015, the United States Equal Employment Opportunity Commission issued guidance regarding pregnancy accommodations, stating that while pregnancy does not qualify as an impairment, “and is thus 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.”¹²⁸ Courts generally have responded to this guidance by holding that the symptoms arising from a “normal” pregnancy are not covered under the ADA, but that more severe symptoms can trigger ADA protection.¹²⁹

A similar dynamic of making “abnormality” the threshold for ADA protection has played out with menopause. Here, the abnormal/normal divide usually centers not on the severity of the symptoms, but on their origin. In cases of symptoms caused by “abnormal” menopause not related to aging, such as menopause induced by surgical treatments for cancer, courts seem receptive to the idea that the ADA might apply, provided the plaintiff presents sufficient evidence of symptoms that the court recognizes as debilitating.¹³⁰ In “normal” cases of menopause, however, courts have been

¹²⁵ See generally Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

¹²⁶ *Id.* at § 3(A)-(B).

¹²⁷ See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1496 (2011) (“the term ‘impairment’ is not defined in the statute”); see generally Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (arguing that the ADAA’s expanded scope should be interpreted to include pregnancy as well).

¹²⁸ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, PART II (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [https://perma.cc/76KQ-964U].

¹²⁹ See, e.g., *Love v. First Transit, Inc.*, No. 16-cv-2208, 2017 WL 1022191, at *9 (E.D. Ill. Mar. 16, 2017) (collecting cases and observing that “[a]lthough the 2008 amendments broadened the ADA’s definition of disability, these changes have had only a modest impact when applied to pregnancy-related conditions”); *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (“Pregnancy, absent unusual circumstances, is not considered a disability under the ADA.”).

¹³⁰ See, e.g., *Mullen v. New Balance Athletics*, No. 1:17-cv-194-NT, 2019 WL 958370, at *4-5 (D. Me. Feb. 27, 2019) (denying the employer’s motion for summary judgment where the plaintiff alleged discrimination under the ADA on the basis of the hot flashes, moodiness, and tearfulness after a hysterectomy and two oophorectomies to remove ovarian cysts); *Hubbard v. Day & Zimmermann Hawthorne Corp.*, No. 3:12-cv-00681-MMD-VPC, 2015 WL 1281629, at *1-6 (D. Nev. Mar. 20, 2015) (denying the employer’s motion for summary judgment where the plaintiff alleged discrimi-

unwilling to find that employees are entitled to accommodations under the ADA.¹³¹

Consider the case of Georgia Sipple, the retail food-products demonstrator who consulted her doctor after experiencing hot flashes and dizziness, among other symptoms.¹³² The doctor confirmed that Sipple was transitioning to menopause and wrote a note explaining that Sipple needed “allowances” in the dress code, such as being able to wear short sleeve shirts and shorts or knee-high skirts.¹³³ But her employer denied Sipple’s request (though it did offer alternatives such as working in the refrigerated section of the store or wearing a short-sleeved shirt with a lab coat over it).¹³⁴ Sipple then quit and filed suit, alleging that she had been forced to leave her job because she had not received the accommodations to which she was legally entitled.¹³⁵ The court, however, rejected her claims, on grounds that menopause “is an inevitable part of the human condition for women. While the effects of menopause 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 se.”¹³⁶ In other words, it was not that Sipple could not work at all, but rather that she could not work for this employer, given its dress code.¹³⁷

Note that the *Sipple* court presented itself as taking an enlightened approach, as compared to the alternative of viewing all menopausal people as disabled. But in reality, the distinction between “abnormal” and “normal” cases of menopause leaves many individuals who experience common symptoms of menopause without any recourse, even though these symptoms may substantially interfere with work unless an accommodation is provided. The employee experiencing “normal” symptoms associated with age-related menopause is not entitled to any accommodation, at least under current law.¹³⁸

nation under the ADA on account of her difficulty in concentrating, sleeplessness, and anger after a hysterectomy to treat uterine cancer).

¹³¹ See, e.g., *Klein v. Florida Dept. Of Children and Families Serv.*, 34 F.Supp.2d 1367, 1369, 1372 (S.D. Fla. 1998) (granting an employer’s motion for summary judgment in a case alleging discrimination on the basis of inability to begin work at 8:00 a.m. because of symptoms associated with a hysterectomy precipitated by age-related menopause, because “[m]enopause, generally, is not a handicap or disability”); *McGraw v. Sears, Roebuck & Co.*, 21 F.Supp.2d 1017, 1021 (D. Minn. 1998) (“The Court takes judicial notice of menopause as an entirely normal consequence of human aging,” and absent additional information, menopause alone is not a disability).

¹³² *Sipple*, 2012 WL 2798791, at *3.

¹³³ *Id.*

¹³⁴ *Id.* at *5.

¹³⁵ *Id.* at *7.

¹³⁶ *Id.* at *13.

¹³⁷ *Id.* at *21–23.

¹³⁸ This rhetoric and result parallels what Jeannette Cox has observed regarding pregnancy: “Many feminist legal scholars have objected to ADA pregnancy coverage . . . reason[ing] that characterizing pregnancy as disability risks resurrecting the view that male bodies are typical and normal whereas pregnant bodies (which are exclusively female) are aberrant and defective. This reluctance to associate pregnancy with disability,

Thus, for the most part, U.S. law treats individuals who have symptoms of “normal” perimenopause or menopause, or who are subjected to low-level menopausal stigma or harassment, as having *medical* or *social* issues, but not *legal* issues. Consider, for instance, an employee experiencing normal symptoms of menopause (such as hot flashes) who wishes to remain at work but needs a dress code adjustment to do so, as compared to a person with mobility impairments who wishes to access a public building with a single entrance at the top of a staircase that lacks any sort of ramp or lift. In the case of the building, the issue has increasingly come to be understood within the law as a problem inherent in the architecture and building design, rather than as purely residing in the intended user who relies on a wheelchair, for example. The path to making the building accessible has a clear (if long, frustrating, and even unfairly burdensome) legal trajectory.¹³⁹ Yet for the employee with normal but symptomatic menopause, the issue is currently understood as residing in the body of the worker, not in the workplace itself. And thus, an inability to adhere to a dress code, to the point where a menopausal employee leaves her job (as in Georgia Sipple’s case), is understood as a personal choice. This stands in contrast to the emerging approach in the United Kingdom, where even “normal” menopause cases are increasingly being viewed as raising not only medical or social issues, but legal issues—ones that require stronger accommodation and anti-discrimination protections.¹⁴⁰

Given the failure of U.S. law to adequately address the needs of employees experiencing menopause, it is worthwhile to consider the multiple successes of advocates for a closely related issue: menstruation. The next Part considers whether and how the current U.S. menstrual advocacy movement might (or should) expand to encompass menopause advocacy as well.

III. MENOPAUSE’S CONNECTION TO THE MENSTRUAL ADVOCACY MOVEMENT

Although menopause occupies the bottom rung of the hierarchy of reproduction-associated conditions or processes, it is, nonetheless, integrally related to contemporary menstrual advocacy. Indeed, menopause and men-

however, has resulted in a legal regime in which many pregnant workers currently have less legal standing to workplace accommodations than other persons with comparable physical limitations.” Cox, *supra* note 127, at 448–49.

¹³⁹ See, e.g., Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 88 (2003) (describing building alterations such as a ramp in place of stairs as one form of accommodation that the ADA requires with respect to public buildings). Disability activist and scholar Simi Linton has asked: “If I want to vote or use the library, and those places are inaccessible, do I need a doctor or a lawyer?” SIMI LINTON, *MY BODY POLITIC: A MEMOIR* 120 (2006). While she correctly laments that compliance costs are largely borne by disabled individuals themselves, there is at least a clear path for legal recourse in those cases.

¹⁴⁰ See Crawford, Waldman & Cahn, *supra* note 88, at 39–45 (exploring the applicability of the U.K. Equality Act 2010 to cases involving menopause).

struation are biologically intertwined; from a socio-legal perspective, menstruation occupies the rung above menopause. This Part thus discusses the contemporary menstrual advocacy movement and explores where menopause fits in. In particular, useful lessons from the menstrual advocacy movement include the importance of making visible both the tangible and intangible challenges associated with menstruation (from the tampon tax to shame and stigma) and the potential reach of advocacy in addressing them.

A. *Overview of the Menstrual Advocacy Movement*

In May 2014, United Kingdom college student Laura Coryton launched a Change.org petition calling upon the U.K. government to stop taxing menstrual products as luxuries, particularly when items like helicopters were being classified as tax-exempt necessities.¹⁴¹ “While we can live without flying our own private helicopters, we cannot live without the public participation of those who menstruate, which is dependent upon the accessibility of sanitary products,” the petition stated, with the headline “Stop taxing periods. Period. #EndTamponTax.”¹⁴² The petition thus linked the unfavorable tax treatment of menstrual products to a more general silencing of those who menstruate. In just a few weeks, over 25,000 people signed the petition, and the movement to end the tampon tax quickly spread around the world.¹⁴³ The petition ultimately received hundreds of thousands of signatures, and similar petitions were soon launched in early 2015 in both Canada¹⁴⁴ and Australia.¹⁴⁵

Meanwhile, also at the start of 2015, the U.S. menstrual advocacy movement got a major kickstart when New York lawyer Jennifer Weiss-Wolf saw a Facebook post seeking donations of menstrual products for a nearby community food pantry.¹⁴⁶ Weiss-Wolf began writing op-eds and meeting with organizers and lawmakers about the lack of widespread access to menstrual products and how that prevents many people from participating in

¹⁴¹ Laura Coryton, *Stop Taxing Periods. Period. #EndTamponTax*, CHANGE.ORG, <https://www.change.org/p/george-osborne-stop-taxing-periods-period> [<https://perma.cc/FAC4-4TMP>].

¹⁴² *Id.*

¹⁴³ See, e.g., Alice Hearing, *Tampon Tax: How Laura Coryton Started the “Stop Taxing Periods” Campaign While Still a Student*, INDEPENDENT (Feb. 23, 2016), <https://www.independent.co.uk/student/student-life/tampon-tax-how-laura-coryton-started-the-stop-taxing-periods-campaign-while-still-a-student-a6891336.html> [<https://perma.cc/UAV4-2KJF>].

¹⁴⁴ See Jill Piebiak, *Government of Canada—No Tax on Tampons: A Campaign to Remove the GST Charged on Menstruation Products*, CHANGE.ORG, <https://www.change.org/p/no-tax-on-tampons-a-campaign-to-remove-the-gst-charged-on-menstruation-products-sign-the-petition> [<https://perma.cc/G6XZ-578A>].

¹⁴⁵ See Subeta Vimalarajah, *Stop Taxing My Period!*, CAMPAIGNS BY ME, <https://me.getup.org.au/petitions/stop-taxing-my-period> [<https://perma.cc/CGH7-LNYG>].

¹⁴⁶ See JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY xi (2017) (describing Weiss-Wolf’s movement-building efforts).

public life.¹⁴⁷ One early fruit of these activities was Weiss-Wolf's joining *Cosmopolitan* magazine to launch the October 2015 Change.org petition to "Stop Taxing Our Periods. Period" in the United States.¹⁴⁸ This petition explicitly drew on and referenced those that had already been brought in the United Kingdom, Australia, and Canada (by the time the U.S. petition launched, Canada had already voted to eliminate its tampon tax).¹⁴⁹ At the time, forty states still imposed state sales tax on the sale of menstrual products, even though many of those states exempted numerous other products of equal or lesser necessity.¹⁵⁰ Soon after the U.S. petition's launch, Weiss-Wolf and New York attorney Laura Strausfeld co-founded Period Equity, the nation's first menstruation-focused legal advocacy and policy organization.¹⁵¹

¹⁴⁷ See *id.* at xiv ("Before long, I began to connect with journalists, lawmakers, activists, and entrepreneurs, and found myself entrenched in a growing global network of people who were equally intrigued and motivated by the power of periods.").

¹⁴⁸ See, e.g., Jennifer Weiss-Wolf, *Helping Women and Girls. Period.*, N.Y. TIMES (Jan. 28, 2015), <https://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period> [<https://perma.cc/68YJ-D5JR>] ("Here in the United States, where the economic and opportunity costs of menstruation for poor women have gone relatively undocumented, the problem hides in plain sight."); Weiss-Wolf, *supra* note 146, at xiv-xv (describing Weiss-Wolf's movement-building efforts); Coryton, *supra* note 141 (taking aim at the imposed taxes on the sales of menstrual products).

¹⁴⁹ See Haydn Watters, *'Tampon Tax' Will end July 1*, CBC News (May 28, 2015), <https://www.cbc.ca/news/politics/tampon-tax-will-end-july-1-1.3091533> [<https://perma.cc/J57K-3DCM>].

¹⁵⁰ As of 2015, forty states imposed a tax on menstrual products. See Jessica Phelan, *Tampon Tax is Real. Women Everywhere Pay the Government Extra to Have Periods*, THE WORLD (Aug. 15, 2015), <https://theworld.org/stories/2015-08-15/tampon-tax-real-women-everywhere-pay-their-governments-extra-have-periods> [<https://perma.cc/JV6K-GAMS>] ("Sales tax varies from state to state and of the 50 in the union, only five waive it on sanitary goods: Maryland, Massachusetts, Minnesota, New Jersey and Pennsylvania. Five others [Alaska, New Hampshire, Oregon, Delaware, Montana] don't have a sales tax. The rest do, and don't exempt tampons from it."). Since then, thirteen states and the District of Columbia have repealed their tampon taxes: California, Connecticut, Florida, Illinois, Louisiana, Michigan, Minnesota, New York, Ohio, Nevada, Pennsylvania, Rhode Island, and Washington. See, e.g., Crawford & Waldman, *supra* note 83, at 450–451 ("Finally, the District of Columbia and four states—Connecticut, Florida, Illinois, and New York—repealed their tampon tax statutes in 2016 or 2017. In 2018, voters repealed Nevada's tampon tax by ballot referendum; the repeal takes effect on January 1, 2019."); Rachel Epstein, *The Current State of the Tampon Tax and How We're Going to Eliminate It*, MARIE CLAIRE (May 3, 2021), <https://www.marieclaire.com/politics/a29490059/tampon-tax-state-guide/> [<https://perma.cc/6B73-PFXL>] (showing the states that, as of that date, imposed a sales tax on menstrual products). Another two other states have since repealed their tampon taxes. See Craig Mauger, *Gov. Gretchen Whitmer Signs "Tampon Tax" Repeal*, DETROIT NEWS (Nov. 4, 2021), <https://www.detroitnews.com/story/news/politics/2021/11/04/michigan-tampon-tax-repeal-feminine-hygiene-products-governor-gretchen-whitmer-signs-new-law/6285702001/> [<https://perma.cc/P6UG-FMFT>] (reporting that the Michigan governor signed into law repeal of the state's tampon taxes); *Louisiana to Exempt Diapers, Tampons from All Sales Taxes*, ASSOCIATED PRESS (June 28, 2021), <https://apnews.com/article/la-state-wire-louisiana-business-sales-taxes-health-9273fc281edc963525d7e26ef128d495> [<https://perma.cc/MGU8-WVWH>] (reporting that the Louisiana governor signed into law repeal of the state's sales tax on menstrual products and diapers).

¹⁵¹ See *Mission and History*, PERIOD EQUITY, <https://www.periodequity.org/mission-and-history> [<https://perma.cc/75QG-GJHL>] ("We believe that in order to have a fully

In addition to organized efforts to reduce the economic costs of menstruation, 2015 also ushered in an era of more explicit challenges to menstrual stigma and silence. After Instagram twice removed an artistic photograph of a woman lying on a bed with menstrual stains on her clothing and bedding, news of the company's censorship quickly spread via social media, and Instagram reinstated the photo.¹⁵² That same year, Apple's iPhone Health app began to allow users to track their periods,¹⁵³ and Kiran Gandhi purposely ran the London Marathon while "free bleeding."¹⁵⁴ Citing all of these instances, as well as Canada's mid-2015 vote to repeal its tampon tax, *Cosmopolitan* magazine ultimately proclaimed 2015 as "the year the period went public."¹⁵⁵

To be sure, menstrual advocacy in the United States and elsewhere did not begin in 2015.¹⁵⁶ And the underlying problems to which it responded had been present for centuries. But the multiple social media-fueled petitions to eliminate the tampon tax, as well as the growing cultural awareness around period poverty and menstrual stigma, worked together to effectuate legal and cultural change.

Since 2015, the movement's efforts have pursued a broad vision of "menstrual equity."¹⁵⁷ The success of the tampon tax effort has been striking: as of this Article's writing, only twenty-seven states (down from forty in 2015) still impose state sales tax on menstrual products.¹⁵⁸ And, in addition to tampon tax reform, advocates have also pushed to make menstrual products available for free in homeless shelters, schools, prisons, and for people

participatory society, we must have laws and policies that acknowledge and consider menstruation. This necessarily includes ensuring that menstrual products are safe, accessible, and affordable for all who need them."). The organization's focus is on three primary issues: access to products for vulnerable people, such as students and prisoners; and menstrual product safety.

¹⁵² See Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN, (Oct. 13, 2015), <https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public/> [<https://perma.cc/H2FB-4T3N>] (noting the censorship of these artistic photos).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Bobel, *supra* note 84 at 740 (detailing the start of American menstrual advocacy in the 1970s); Crawford & Gold Waldman, *supra* note 85, at 2–3, 36–37 (discussing advocacy in the United States in the 1970s by the Boston Women's Health Book Collective and advocacy in Canada in the early 1980s by women who sought the end of provincial sales tax on menstrual products).

¹⁵⁷ See Weiss-Wolf, *supra* note 146, at xvi. See also *supra* note 151 ("Our focus is on three core issues—simply stated, 'the tax, access, and safety.' . . . [W]e must have laws and policies that acknowledge and consider menstruation. This necessarily includes ensuring that menstrual products are safe, accessible, and affordable for all who need them.").

¹⁵⁸ See PERIOD EQUITY, <https://www.periodequity.org/> [<https://perma.cc/RB9Q-QRW2>] (detailing which states still have tampon taxes).

in poverty.¹⁵⁹ Between 2015 and 2020, states including New York, New Hampshire, Illinois, California, Virginia, and Washington began requiring their public secondary schools to provide free menstrual products.¹⁶⁰ A growing number of public and private schools and universities now provide free menstrual products in their bathrooms, due both to grassroots campaigns run by secondary school and university students themselves, as well as to formal legal change at the state and municipal levels.¹⁶¹

Prisons, too, have been an important locus of menstrual activism. In response to growing awareness that many menstruating incarcerated persons were not being provided with a sufficient number of menstrual products, the First Step Act of 2018—a sweeping criminal justice reform act passed with bipartisan support in Congress—included, as one of its provisions, the requirement that federal prisons provide inmates with free menstrual products, “in a quantity that is appropriate to the healthcare needs of each prisoner.”¹⁶² Numerous states, including Alabama, California, Colorado, Connecticut, Florida, Kentucky, Louisiana, Maryland, New York, Tennessee, Texas, and Virginia then passed laws requiring the provision of free menstrual products

¹⁵⁹ See, e.g., Johnson, Waldman & Crawford, *supra* note 17 at 226–27, 250 n.129, 254–55 (describing involvement of middle-schoolers, high school students, and college students in initiatives to make menstrual products available for free at their schools).

¹⁶⁰ See, e.g., *id.* at 255–56.

¹⁶¹ See, e.g., *Newsom Signs Bill Requiring Free Menstrual Products in California Public Schools, Colleges*, ASSOCIATED PRESS (Oct. 8, 2021), <https://ktla.com/news/california/newsom-signs-bill-requiring-free-menstrual-products-in-california-public-schools-colleges> [<https://perma.cc/EC8V-2W2N>] (reporting that the California governor signed into law legislation that provides all schools serving grades 6 to 12, as well as community colleges, the California State University system and the University of California system to provide free menstrual products for all students); WIFR Newsroom, *Illinois Public Colleges to Provide Free Feminine Hygiene Products on Campus*, 23 WIFR (Aug. 5, 2021), <https://www.wifr.com/2021/08/05/public-colleges-provide-free-feminine-hygiene-products-campus> [<https://perma.cc/TKJ5-TWZC>] (reporting that the Illinois governor signed into law a trio of bills that all public universities and community colleges in the state provide free menstrual products to students); 105 ILL. COMP. STAT. 5/10-20.63 (2018) (West) (requiring the provision of free menstrual products in schools serving students in grades 6 through 12). When Brookline, Massachusetts became the first U.S. municipality to offer free menstrual products in all of its town-owned restrooms in 2019, such as the restrooms in the town hall, library, and recreation center, the inspiration came from a column written by a high school senior and published in the Brookline High School newspaper. See Ally Jarmaning, *Student Spurs Brookline, Mass., To Offer Free Tampons and Pads in Public Buildings*, NPR (June 9, 2019), <https://www.npr.org/2019/06/09/730885382/student-spurs-brookline-mass-to-offer-free-tampons-and-pads-in-public-buildings> [<https://perma.cc/M239-GP82>] (describing how a member of the local legislative body became inspired after reading high school senior Sarah Groustra’s article and invited several high school students to work with her on drafting a successful proposal to make menstrual products available at all restrooms in town-owned buildings).

¹⁶² First Step Act of 2018, P.L. 115-391 (codified as 18 USC §§ 3631–3635). See also Crawford & Waldman, *supra* note 83 at 1596 (discussing federal and state laws regarding provision of free menstrual products to prisoners). Other federal legislative changes include the addition of menstrual products to the list of items that individuals can purchase with tax-advantaged health savings accounts and that homeless shelters, for example, can purchase with federal grant funds from FEMA. See Crawford & Gold Waldman, *supra* note 85, at 88–92 (discussing these other federal changes).

in their state correctional facilities as well.¹⁶³ Former and current incarcerated persons have themselves spoken out about the importance of this issue. Kimberly Haven, who was previously incarcerated and later advocated for providing free menstrual products in prison, has observed that “There is no dignity, no humanity, no compassion in a system that makes a person have to beg, borrow, or even make her own basic hygiene items.”¹⁶⁴

Drawing on the goals of affordability and accessibility that undergird these developments, United States Representative Grace Meng (D-NY) has repeatedly proposed various versions of a Menstrual Equity for All Act, which would give states the option to use federal grant funds to provide students with free menstrual products in schools, require Medicaid to cover the cost of menstrual products, direct large employers to provide free menstrual products in the workplace, and take other steps to promote menstrual equity.¹⁶⁵ Meanwhile, states have taken different approaches to issues of period poverty with respect to the distribution of federal benefits. Although the federal government’s Supplemental Nutrition Assistance Program (SNAP) does not directly cover period products, some states have sought waivers.¹⁶⁶ Other states are considering proposals to distribute menstrual products directly to low-income households.¹⁶⁷

¹⁶³ See ALA. CODE §§ 14-3-44, 14-6-19 (2019); CAL. PENAL CODE § 3409 (West 2021); COLO. REV. STAT. ANN. § 26-1-136.5 (West 2019); CONN. GEN. STAT. ANN. § 18-69e (West 2018); FLA. STAT. § 944.242 (2019); KY. REV. STAT. ANN. § 441.055 (West 2018); LA. STAT. ANN. § 15:892.1 (2018); MD. CODE ANN., CORR. SERVS. §§ 9-616, 4-214 (West 2018); N.Y. CORRECT. LAW § 625 (McKinney 2019); TENN. CODE ANN. § 41-21-206 (West 2019); TEX. GOV’T CODE ANN. § 501.0675 (West 2019); VA. ADMIN. CODE § 14-40-770 (2018).

¹⁶⁴ Taylor Walker, *The Dehumanizing Effects of Inadequate Access to Menstrual Products in Prisons and Jails*, WITNESS LA (Nov. 17, 2019), <https://witnessla.com/dueto-inadequate-access-to-menstrual-products-periods-in-prison-can-be-stigmatizing/> [<https://perma.cc/J7EW-TTAT>]; see also Kimberly Haven, *Why I’m Fighting for Menstrual Equity in Prison*, ACLU (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison/> [<https://perma.cc/E4SF-5WV9>] (elaborating on the quote she gave in the interview with Walker).

¹⁶⁵ Press Release, Congresswoman Grace Meng, Meng Introduces Bold Plan to Improve Access to Menstrual Products (May 28, 2021), <https://meng.house.gov/media-center/press-releases/meng-introduces-bold-plan-to-improve-access-to-menstrual-products> [<https://perma.cc/UA5E-AT7V>]. Representative Meng has proposed versions of this bill in the past. See, e.g., Press Release, Congresswoman Grace Meng, Meng Unveils Proposal to Provide Menstrual Equity for All (Mar. 26, 2019), <https://meng.house.gov/media-center/press-releases/meng-unveils-bold-proposal-to-provide-menstrual-equity-to-all> [<https://perma.cc/9JMW-DR2B>] (proposing the Menstrual Equity for All Act); Press Release, Congresswoman Grace Meng, Meng Renews Effort to Make Menstrual Hygiene Products More Accessible and Affordable to Women (Feb. 13, 2017), [<https://perma.cc/8NXA-XW7L>] (proposing the Menstrual Equity for All Act of 2017 Act).

¹⁶⁶ See, e.g., *Menstrual Hygiene Products Can be Purchased with SNAP and WIC benefits Under Villa Law*, ILLINOIS SENATE DEMOCRATS (Aug. 5, 2021), <https://www.illinoisenedemocrats.com/caucus-news/72-senator-karina-villa-news/2886-menstrual-hygiene-products-can-be-purchased-with-snap-and-wic-benefits-under-villa-law> [<https://perma.cc/NK9S-L8ZU>].

¹⁶⁷ Madison Hunt, *Maryland Bill Would Combat Menstrual Inequities*, AP NEWS (Feb. 26, 2021), <https://apnews.com/article/legislature-menstruation-health-social-ser>

In addition to effectuating legal change, the collective menstrual advocacy work has further eroded the silence and stigma that has historically surrounded menstruation. Indeed, what began as a movement to make menstrual products safe, affordable, and more widely available has expanded to encompass related issues such as eliminating menstrual stigmas, improving menstruation-related education, and eliminating all barriers to full participation in public life, without regard to one's menstrual status.¹⁶⁸ The legal and social aspects of menstrual advocacy are mutually reinforcing: the greater willingness to talk about menstruation has helped prompt discussions that result in legal advocacy and change. These legal successes in turn, have validated and energized frank social and cultural conversations. Indeed, some advocates and scholars have expanded the menstrual equity concept even further, emphasizing related issues such as the need to reduce menstrual

vices-coronavirus-pandemic-4df16dda0e76cc5e08d0a61e6e7af827 [https://perma.cc/H3DL-ZQKM].

¹⁶⁸ See Crawford & Gold Waldman, *supra* note 85, at 1–2, 16–17 (discussing evolution of concept of “menstrual equity”). In the United Kingdom, similar initiatives tend to fall under the umbrella of combatting “period poverty.” See, e.g., Diane Taylor, *Period Poverty Has Surged in UK During Covid Pandemic*, GUARDIAN (U.K.) (Nov. 16, 2020), <https://www.theguardian.com/society/2020/nov/16/period-poverty-covid-pandemic-uk-crisis-charity-menstrual-products> [https://perma.cc/Z2Q2-D8ZZ] (describing charitable efforts to address lack of access to menstrual products and increased demand during the coronavirus pandemic). Scholars in the public health field tend to talk in terms of “menstrual health.” See, e.g., Julie Hennegan et al., *Menstrual Health: A Definition for Policy, Practice, and Research*, 29 SEXUAL & REPROD. HEALTH MATTERS 1, 2 (2021) (providing a lengthy definition of menstrual health). One of us has commented on these differences in terminology:

[M]y guess is that if one inquired of anyone involved in menstruation-related activism, organizing, or scholarship if they support the substantive goals associated with “menstrual equity,” “menstrual justice,” “menstrual health,” and ending “period poverty,” the answer would be a resounding “yes,” by whatever name. This isn’t to say there aren’t differences among the definitions; it’s just that the differences don’t do much work, or at least not yet.

(emphasis in the original). Bridget J. Crawford, *Period Poverty, Menstrual Equity, Menstrual Justice, or Menstrual Health: Naming the Norms That Legal Scholars Seek*, FEMINIST L. PROFESSORS (May 26, 2021), <http://www.feministlawprofessors.com/2021/05/periodpoverty-menstrualequity-menstrualjustice-or-menstrual-health-naming-the-norms-that-legal-scholars-seek> [https://perma.cc/R3FL-V4HJ].

stigma, harassment, and discrimination.¹⁶⁹ Professor Margaret Johnson, for instance, uses the term “menstrual justice” to capture all of these ideas.¹⁷⁰

Where, then, might menopause fit into this movement?¹⁷¹ As one of us has already suggested elsewhere in setting out principles for legal approaches to menopause, two possible views, more complementary than contradictory, guide this inquiry. Under one approach, advocacy focused on menopause could become a component of the menstrual advocacy movement—i.e., another aspect of “ensuring that involuntary biological processes like menstruation (as well as its absence) do not impair full participation in all aspects of public and private life.”¹⁷² Under a second approach, the emphasis is on the distinct nature of menopause. Rather than viewing menopausal issues as a subset of menstrual equity, this second view would focus on positioning menopause as “part of the growing movement to reclaim ‘older age’ as a positive time of growth and creativity, rewriting the narrative to eradicate stigma.”¹⁷³ The next two sections deploy these lenses successively to develop a more robust understanding of how menopause might fit within the menstrual equity movement.

B. Menopause as a Component of Menstrual Advocacy

Menstruation and menopause are obviously linked, with menarche (the first occurrence of menstruation) and menopause serving as bookends of reproductive capacity in approximately half the population. And cases like *Coleman* and *Flores*, which involve employees being terminated for their bleeding at work, are simultaneously menstruation and menopause cases.¹⁷⁴ After all, *Coleman*’s and *Flores*’s heavy *menstrual* bleeding led to their terminations, but it was their perimenopausal *status* that triggered unexpected

¹⁶⁹ See, e.g., Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 45–47 (2019) (articulating and embracing the concept of “menstrual justice”); Elizabeth B. Cooper, Margaret E. Johnson & Marcy L. Karin, *Menstrual Products and the Bar: Advocacy Seeks to Create Equal Bar Exam Testing Conditions for Menstruators*, BEST PRACTICES FOR LEGAL EDUC. (Aug. 5, 2020), <https://bestpracticeslegaled.com/2020/08/05/menstrual-products-and-the-bar-advocacy-seeks-to-create-equal-bar-exam-testing-conditions-for-menstruators/#MPandTheBar> [<https://perma.cc/KS8K-TCT8>] (same); Elizabeth B. Cooper, Marcy L. Karin & Margaret E. Johnson, *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1, 7–8, 32–33 (2021) (same); Karin, *supra* note 119, at 47–49 (same); *What Does Menstrual Equity Mean to You?*, WOMEN’S VOICES FOR THE EARTH, [<https://perma.cc/J5X4-E6YP>] (broadening the definition of menstrual equity to include eliminating stigma and increasing access to menstruation-related education).

¹⁷⁰ Johnson, *supra* note 169.

¹⁷¹ These issues were briefly discussed at the first-ever law review symposium focused on menstruation in 2021. See Naomi Cahn, *Justice for the Menopause: A Research Agenda*, 41 COLUM. J. GENDER & L. 27, 27 (2021); Jennifer Weiss-Wolf, *Menopause and the Menstrual Equity Agenda*, 41 COLUM. J. GENDER & L. 228, 232 (2021).

¹⁷² Cahn, *supra* note 171, at 38.

¹⁷³ *Id.*

¹⁷⁴ See *infra* Part III.A.1.

heavy bleeding in the first place. The menstrual and menopausal aspects of both cases are completely intertwined.¹⁷⁵

More broadly, the same stigmas and expectations of silence surround all aspects of the menstrual cycle, from menarche to menopause. Students, for example, have described their concerns that fellow students, teachers, or administrators will find out that they are currently menstruating. Indeed, as a way of gauging the impact of the menstrual advocates' focus on providing free menstrual products in schools, Professor Christopher Cotropia surveyed 693 females between eighteen and twenty-five years old, all of whom had attended high schools in the United States.¹⁷⁶ In addition to finding that many of them recalled needing menstrual products at school (either because they could not afford them or because their periods had started unexpectedly), he found that a large majority of them described having been embarrassed to ask school personnel for menstrual products, because that would mean revealing their menstruation.¹⁷⁷ "It's socially taboo to talk about periods," said one.¹⁷⁸ Another explained that "you had to get a hall pass to go to the nurse, and if you didn't look sick then everyone would guess why."¹⁷⁹ A third echoed: "it was always something I was embarrassed to ask, even though it's normal."¹⁸⁰

The embarrassment described by these students undergirds what Professor Jill Wood has called the "menstrual concealment imperative,"¹⁸¹ noting that "[m]enstruation is considered inappropriate public conversation to the extent that girls and women are often too uncomfortable to discuss the topic even with each other, healthcare providers, or family members."¹⁸² She adds that "[b]ecause menstruation is viewed as the antithesis of a sexually desirable feminine body, women learn that to be sexually desirable, attractive, and feminine[,] menstruation must be concealed."¹⁸³ Similarly, she posits that menstrual concealment is imperative not only because of concerns about appearing attractive and sexually appealing, but also because of the desire to appear competent and healthy. "Practically speaking, women are more successful in their lives if they appear unencumbered by their menses," she writes.¹⁸⁴ At least in terms of meeting ideals of cis femininity, "women's

¹⁷⁵ See also Karin, *supra* note 119 (discussing *Coleman* case).

¹⁷⁶ See Christopher A. Cotropia, *Menstruation Management in United States Schools and Implication for Attendance, Academic Performance, and Health*, 6 *WOMEN'S REPROD. HEALTH* 289, 291 (2019).

¹⁷⁷ *Id.* at 293 (reporting that 73.6% of respondents reported that they were "embarrassed to ask a school administrator" for access to menstrual products).

¹⁷⁸ *Id.* at 294.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Jill Wood, *(In)Visible Bleeding: The Menstrual Concealment Imperative*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES*, 320 (Chris Bobel et al. eds. 2020).

¹⁸² *Id.* at 322.

¹⁸³ *Id.* at 326.

¹⁸⁴ *Id.* at 328.

bodies must be clean, sexually attractive, and not inconvenient or uncomfortable for others.”¹⁸⁵

The irony, of course, is that the cultural imperative is not to conceal just periods—the *cessation* of periods is expected to be hidden as well. Recall Pippa Marriot’s sense of shame about aging and a desire to distance herself from mocking discussions of menopause.¹⁸⁶ Marriot’s fears about revealing her menopausal status is not unlike the students’ fears about revealing their menstrual status. If anything, silence is even more pervasive when it comes to menopause. For example, many schools offer sex education, including education around menstruation and puberty,¹⁸⁷ but there is no parallel program providing menopause education. And, with the continued popularity of books like *Are You There God? It’s Me, Margaret* as part of the cultural lexicon, getting one’s first period is seen by many as a coming-of-age to anticipate with some degree of excitement,¹⁸⁸ while the prospect of menopause is often—albeit not always—viewed with dread.¹⁸⁹

Professor Wood’s observations about the concealment imperative thus apply with equal (if not greater) force to menopause. The perfect cis feminine body is construed as one that is fertile but never bleeds—a biological impossibility that serves cis heterosexual male interests in both procreation and unfettered sexual access to cis women’s bodies.

Wood concludes that “as women’s ability to control their own bodies is increasingly under political attack, it is critical to illuminate the ways in which women’s disembodiment and willingness to distance themselves from their authentic experiences feeds patriarchal control of women’s bodies and therefore their lives.”¹⁹⁰ This call to action against the concealment imperative resonates equally in the menstruation and menopause contexts. Indeed, the menstrual advocacy movement’s targeting of the silence and stigma surrounding menstruation seems to have had a spillover effect, likely leading to

¹⁸⁵ *Id.* at 329.

¹⁸⁶ See *supra* notes 4–10 and accompanying text.

¹⁸⁷ See, e.g., *Sex and HIV Education*, GUTTMACHER INSTITUTE (Feb. 1, 2022), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/QGW4-TEAE>].

¹⁸⁸ See GUNTER, *supra* note 23, at 3 (“Thank God for Judy Blume!” writes Dr. Gunter).

¹⁸⁹ See, e.g., Susan Mattern, *What If We Didn’t Dread Menopause?* N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/opinion/sunday/menopause-symptoms.html> [<https://perma.cc/W8CU-BD3H>] (“[L]et’s stop talking about menopause as though there’s something wrong with it. Menopause isn’t just a collection of symptoms or a pathological condition.”). But see, e.g., Mona Eltahawy, *Perimenopausal Nefertiti and My Beautiful Belly*, FEMINIST GIANT (July 18, 2021), <https://www.feministgiant.com/p/essay-perimenopausal-nefertiti-and> [<https://perma.cc/4RRX-7U9Z>] (describing the author’s resumption of menstruation after receiving her second COVID vaccine: “I had not had a period since October 2020 and I was counting down to 12 months period-free, in excited anticipation of getting to the other side of menopause. Instead, there I was turning the bathroom closet upside down in search of pads . . . and typing ‘Covid vaccine menstruation into Google.’”).

¹⁹⁰ Wood, *supra* note 181, at 332.

increased coverage of menopause in the popular media and interpersonal discourse as well.¹⁹¹

For these reasons, menopause easily fits into the menstrual advocacy movement. Menstrual advocacy has already helped increase public awareness of menstruation-related needs. To the extent that the menstrual advocacy movement can incorporate more focused discussions about menopause as well, that will spur further progress. That said, it is important to recognize that menopause raises unique issues of its own. The next section highlights two analytic axes of difference between menstruation and menopause. First, menopause lies at the intersection point of infertility, aging, and disability. Second, the specific goals that advocates might seek to achieve may be different in the context of menopause versus menstruation.

C. Menopause as a Distinct Issue

1. Fertility and Youth versus Infertility, Aging, and Disability

Generally speaking, the contemporary menstrual advocacy movement has been somewhat youth-dominated. As noted above, the first big Change.org petition to repeal the tampon tax came in 2014 from twenty-one-year-old Laura Coryton in the United Kingdom; several of the parallel petitions in other countries came from people in their twenties as well.¹⁹² And many menstrual advocates have been even younger: middle school and high school students, as well as university students, have served as powerful and effective voices for ending menstruation-related stigmas and making menstrual products freely available in schools.¹⁹³ One notable example involved the “tampon cookie protest” of 2019, in which three unnamed seventh-graders baked tampon-shaped cookies when their school principal denied their

¹⁹¹ See, e.g., Jen Gunter, *Women Can Have a Better Menopause. Here's How*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/05/25/opinion/feminist-menopause.html> [https://perma.cc/C99B-7R7G]; Burden, *supra* note 15; Tingley, *supra* note 86; Grose, *supra* note 86; Lisa Selin Davis, *Why Modern Medicine Keeps Overlooking Menopause*, N.Y. TIMES (April 6, 2021), <https://www.nytimes.com/2021/04/06/us/menopause-perimenopause-symptoms.html>, [https://perma.cc/5YHT-QZKT]; Sumathi Reddy, *The Surprising Good News on How Menopause Changes Your Brain*, WALL ST. J. (June 14, 2021), <https://www.wsj.com/articles/the-surprising-good-news-on-how-menopause-changes-your-brain-11623698003> [https://perma.cc/949N-F64V].

¹⁹² See Helen Lock, *Meet the Young Activist Who Got the Tampon Tax Banned in the UK*, GLOBAL CITIZEN (Oct. 12, 2021), <https://www.globalcitizen.org/en/content/meet-activist-tampon-tax-laura-coryton> [https://perma.cc/6ZUA-LT2S] (profiling Laura Coryton and her campaign to end the tampon tax).

¹⁹³ See, e.g., Emily Donaldson, *These Dallas High School Teens Advocated for “Period Equity” to Provide a Free, Districtwide Solution for Students*, DALLAS MORNING NEWS (May 12, 2021), <https://www.dallasnews.com/news/education/2021/05/12/these-dallas-high-school-teens-advocated-for-period-equity-to-provide-a-free-district-wide-solution-for-students> [https://perma.cc/AQP7-VA8S] (chronicling successful advocacy of high school students).

request to make menstrual products available for free in the school restrooms.¹⁹⁴ Images of the cookies went viral on Twitter, receiving nearly 60,000 “likes.”¹⁹⁵ Similarly, it was high school student Sarah Groustra who wrote an editorial in the school newspaper that led Brookline, Massachusetts to become the nation’s first municipality providing free menstrual products in all town-owned restrooms.¹⁹⁶

Relatedly, Representative Grace Meng has noted that her own menstrual advocacy began with a letter she received from a high school girl who lived in the Representative’s congressional district in Queens.¹⁹⁷ The girl had written Representative Meng to express concern about the lack of menstrual products in homeless shelters.¹⁹⁸ That letter prompted Representative Meng to write a letter to then-Secretary of Homeland Security Jeh Johnson, asking him to add menstrual products to FEMA’s list of items that homeless shelters can purchase with federal grant funds.¹⁹⁹ Representative Meng’s quick success on that front inspired her to become a congressional leader in promoting menstrual equity.²⁰⁰

Consider, too, the global reach of the organization known as PERIOD, a non-profit organization “to end period poverty and stigma through service, education, and advocacy.”²⁰¹ Founded by two Portland, Oregon teenagers (now in their twenties), the organization boasts chapters in more than forty states and twenty countries.²⁰²

¹⁹⁴ See Johnson, Waldman & Crawford, *supra* note 17 at 226–27 (discussing 2019 action by three seventh-grade girls in response to the refusal of their school’s principal to make menstrual products available for free in the school restrooms).

¹⁹⁵ See Jarmanning, *supra* note 161 and accompanying text.

¹⁹⁶ See *id.*

¹⁹⁷ See Katie Kindelan, *This Congresswoman Nicknamed ‘Period Lady’ Is on a Mission to Give All Women Access to Period Products*, GOOD MORNING AMERICA (Oct. 18, 2019), [https://perma.cc/YGX2-9AD7].

¹⁹⁸ *Id.*

¹⁹⁹ Letter from Grace Meng, U.S. Rep. from New York 6th Dist., to Jeh Johnson, U.S. Sec’y of Homeland Sec. (Jan. 7, 2016) (citations omitted), [https://perma.cc/C3S8-NUWR].

²⁰⁰ Press Release, Congresswoman Grace Meng, FEMA to Permit Homeless Assistance Providers to Purchase Feminine Hygiene Products—Such as Tampons and Pads—With Federal Grant Funds (Mar. 1, 2016), [https://perma.cc/J9VQ-3TCA].

²⁰¹ See *What We Do*, PERIOD, [https://period.org] [https://perma.cc/MW3Q-2CR8].

²⁰² See *Chapters*, PERIOD, [https://period.org/chapters] [https://perma.cc/YF4M-SVVK]; *About Us*, PERIOD, [https://period.org/who-we-are] [https://perma.cc/EG52-UZJA] (“PERIOD. Was founded in 2014 by Nadya Okamoto and Vincent Forand, two high school students in Portland Oregon”). The precise number of PERIOD chapters is somewhat unclear, as Nadya Okamoto’s personal website claims that, “Under her leadership as Executive Director for five years, PERIOD addressed over 1.5 million periods and registered over 800 campus chapters in all 50 states and 50 other countries.” See *About*, NADYA OKAMOTO, [https://www.nadyaokamoto.com] [https://perma.cc/KAM4-NCPZ] (providing some details about the creation of PERIOD by Okamoto when she was sixteen years old “to end period poverty”). The organization severed ties with Okamoto in 2020. See *Changes at PERIOD*, PERIOD, [https://period.org/who-we-are] [https://perma.cc/EG52-UZJA]. The organization severed its ties with Okamoto after claims that she was involved in racialized marginalizing other activists, taking credit for the work of others, pressuring smaller organizations to become part of the PERIOD net-

To be sure, advancing the menstrual equity agenda has required vigorous, persistent, and sophisticated concurrent legal advocacy and lawmaking by persons many years these students' senior.²⁰³ The movement is truly an inter-generational one. But it does have a decidedly youthful energy.²⁰⁴ And in the most biological basic sense, menstruation is associated with fertility and the potential for pregnancy.²⁰⁵

Menopause, by contrast, has very different associations. It sits squarely at the intersection of infertility, aging, and—to some extent—disability, as well as potential issues of race and class.²⁰⁶ By definition, menopause means that one is no longer fertile; it is the bookend to the stage of life that begins with menarche.²⁰⁷ Furthermore, menopause undeniably is result of the aging process, unless induced by surgery, chemotherapy, hormonal treatments, or other medical treatments.²⁰⁸

Ageism, defined by Dr. Robert Butler as “a deep-seated uneasiness on the part of the young and middle-aged—a personal revulsion and distaste for

work, exaggerating the organization's work, and that she misrepresented her personal background. *See, e.g.,* Sophie Peel, *A Portland Student Became the Face of the Menstrual Equity Movement. Others Say She Silenced Them to Become Famous*, WILLAMETTE WEEK (July 29, 2020), <https://www.wweek.com/news/2020/07/29/a-portland-student-became-the-face-of-the-menstrual-equity-movement-others-say-she-silenced-them-to-become-famous> (describing Okamoto's ouster from the organization she co-founded) [<https://perma.cc/Q49J-VQPK>].

²⁰³ Note that Representative Meng was born in 1975, and Weiss-Wolf was born in 1967. *See Grace Meng 1975-, Cong. Record*, <https://web.archive.org/web/20200513163008/https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc226/pdf/GPO-CDOC-108hdoc226-3-10.pdf> [<https://perma.cc/E497-QXDF>]; Crawford & Gold Waldman, *supra* note 85, at 5. Class action litigation has been a major force in bringing about tampon tax repeal. *See* Crawford & Waldman, *supra* note 83, at 456–68. New York City Council Member Julissa Ferreras-Coplan and Jennifer Weiss-Wolf played major roles in the passage of law that made New York City in 2016 to become the first jurisdiction in the United States to legally require public schools to provide free menstrual products in schools. N.Y.C. ADMIN. CODE § 21-968. *See* Weiss-Wolf, *supra* note 146, at 148–52.

²⁰⁴ *See, e.g.,* Jackie Menjiva, *10 Young People Fighting Period Poverty and Stigma Around the World*, DOSOMETHING.ORG, <https://www.dosomething.org/us/articles/10-young-people-fighting-period-poverty> [<https://perma.cc/MPL9-SHFW>] (profiling ten activists ranging in age from sixteen to twenty-six).

²⁰⁵ *See supra* note 22 (defining menstruation).

²⁰⁶ *See supra* note 99–100 and accompanying text (discussing *Bailey v. Henderson*). *See also* Menopause (Support and Services) Bill 2021, HC Bill [16], (Eng.) <https://publications.parliament.uk/pa/bills/cbill/58-02/0016/210016.pdf> [<https://perma.cc/9S8A-RCXB>] (“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.”). In the United Kingdom, the Menopause (Support and Services) Bill was withdrawn in October 2021 when the government agreed to dramatically reduce the cost of hormone replacement therapy. *See, e.g.,* Sienna Rodgers, *Carolyn Harris Secures Victories in Menopause Support Campaign*, LABOUR LIST (Oct. 29, 2021), <https://labourlist.org/2021/10/carolyn-harris-secures-victories-in-menopause-support-campaign> (describing withdrawal of the bill) [<https://perma.cc/HXE7-WGSV>].

²⁰⁷ *See supra* note 22 and accompanying text.

²⁰⁸ *See supra* note 33 and accompanying text.

growing old,”²⁰⁹ is thus intertwined with attitudes toward menopause, a complicated dynamic that is not present with other aspects of the menstrual equity movement. It is not at all surprising that menopause harassment cases are often laced with ageism. In *Dault*, for instance, in addition to turning up the thermostat to mock an older nurse by trying to induce a hot flash, the harassing surgeon also said in front of colleagues and co-workers that the nurse had to “get off her feet for frequent breaks” because she was over fifty years old, compared her to a younger nurse whom he deemed a “MILF,” and also referred to younger female employees as “Charlie’s Angels.”²¹⁰ In a similar U.K. case, *A v. Bonmarche Limited*, a retail employee was called “menopausal” and a “dinosaur” in front of others.²¹¹ The tribunal ruled in that case that the employer had discriminated against the employee based on her menopausal status.²¹²

Ageism contributes not only to menopausal stigma, but also to menopausal silence. At a time when hair dye, plastic surgery, Botox, and other technologies make it increasingly possible to look younger than one’s age, menopause may function as a “tell” that many people do not want to disclose.²¹³ Given that many individuals who experience menopause are reluctant to discuss it, and that most young people lack much awareness or understanding of it, it is uncertain how much uptake menopause might have as an issue among menstrual advocates, practically speaking.

Whether menopause might have traction in a national advocacy organization like AARP (formerly known as the American Association of Retired Persons), meanwhile, could depend on the issue’s positioning. Formerly a dues-paying membership organization for those fifty years of age and older, AARP has approximately 38 million members.²¹⁴ Although AARP techni-

²⁰⁹ Robert N. Butler, *Age-Is: Another Form of Bigotry*, 9 THE GERONTOLOGIST 243, 243 (1969).

²¹⁰ *Dault*, 2020 WL 10139416 at * 1.

²¹¹ *A v. Bonmarche Ltd.* (2019) ET at 3 (Scot.), https://assets.publishing.service.gov.uk/media/5e21b7a1e5274a6c3f52a4e1/A_v_Bonmarche_in_Administration_4107766.19-Final.pdf [<https://perma.cc/JR46-MCZ6>].

²¹² *Id.*

²¹³ See, e.g., Bridget J. Crawford, *The Currency of White Women’s Hair in a Down Economy*, 32 WOMEN’S RIGHTS L. REPORTER 45, 49 (2011) (“In times of economic distress, these women turn to home hair dyes to conform to certain appearances. To have gray hair is to be old (unemployable and unattractive) or menopausal (unproductive and unsexual). To retain one’s hair color (natural or chosen) is to retain or currency of employability, utility and desirability.”). See generally NAOMI CAHN & NINA KOHN, GENDER AND AGING (book under contract with Oxford U Press) (addressing gender, aging, and stereotypes).

²¹⁴ See *Key Dates in AARP History*, AARP PRESS ROOM, <https://press.aarp.org/timeline> [<https://perma.cc/SMD3-NU2P>] (identifying 1999 as the year the organization changed its name “in recognition of the fact that many members continue to work full or part time”); AARP, AARP ANNUAL REPORT 38 (2019) https://www.aarp.org/content/dam/aarp/about_aarp/annual_reports/2019/2019-annual-report.pdf [<https://perma.cc/YKJ8-EXR8>] (stating in profile of AARP CEO Jo Ann Jenkins that she “leads the world’s largest non-profit, nonpartisan organization with nearly 38 million members . . . empowering people of all ages to choose how they live as they age”).

cally is a nonprofit organization with no formal political affiliation,²¹⁵ it is widely considered to be a “lobbying powerhouse” on issues related to older Americans,” including healthcare.²¹⁶ Given the political strength of AARP, imagine the possibilities if the organization adopted menopause as one of its signature issues. The organization might become involved in efforts to increase menopause awareness among the general public, better education for healthcare professionals about the symptoms and treatments for menopause, and the need for government-funded research about all aspects of menopause.²¹⁷ AARP even could advocate federal or state legislation that treats certain symptoms of menopause as a protected form of disability, as is the case in the United Kingdom,²¹⁸ or regulations requiring adoption of formal menopause policies by employers with more than a certain number of employees.

Thus, menopause could theoretically become part of the policy agenda of AARP or another advocacy group focused on the needs of older individuals. There would be several possible hurdles to clear, however. First, older people are not immune from cultural expectations of silence around menopause.²¹⁹ Second, to the extent that older people are retired from the

²¹⁵ See AARP, *supra* note 214.

²¹⁶ See, e.g., Michael A. Fletcher & Zachary A. Goldfarb, *AARP Uses its Power to Oppose Social Security, Medicare Benefit Cuts for Retirees*, WASH. POST (Nov. 17, 2012), https://www.washingtonpost.com/business/economy/aarp-uses-its-power-to-oppose-social-security-medicare-benefit-cuts-for-retirees/2012/11/17/affb5874-2aa6-11e2-bab2-eda299503684_story.html [<https://perma.cc/U6MS-RXBL>] (calling AARP a “lobbying powerhouse”); Nina Kramer, *Pros & Cons for AARP*, POCKET SENSE (Sept. 26, 2017), <https://pocketsense.com/pros-cons-for-aarp-13662649.html> [<https://perma.cc/9DN6-9SNP>] (nothing that AARP’s political lobbying is not without some controversy, however, and giving as one example of internal discord the fact that “70,000 members resigned in 2006 to protest AARP’s Washington influence in passing the Medicare Prescription Drug law; these members wanted Medicare to centralize prescription-drug purchasing”).

²¹⁷ The need for greater awareness is clear. See *supra* Part I.B.

²¹⁸ See *Donnachie v. Telent Tech. Serv. Ltd* [2020] ET 1300005/2020, [16], https://assets.publishing.service.gov.uk/media/5f60c524e90e072bb92c65a8/Miss_J_Donnachie_v_Telent_Technology_Service_Ltd_Judgement_1300005_2020.pdf [<https://perma.cc/2EKJ-CNUC>] (interpreting provisions of the U.K. Equality Act 2010 to provide workplace protections for employees experiencing symptoms of menopause).

²¹⁹ See, e.g., Dennis R. Papini, Robert C. Intrieri & Paige E. Goodwin, *Attitude Toward Menopause Among Married Middle-aged Adults*, 36 WOMEN & HEALTH 55, 61–62 (2002), <http://doi.org/10.1300/J013v36n04> [<https://perma.cc/5MQ5-X79M>] (reporting results of study of 169 married couples in which female partners ranged in age from thirty-eight to sixty that women’s attitudes toward menopause are “more positive” than their male partners, and that wives “reported significantly more menopausal symptoms than their husbands perceived them as experiencing”); Sharon J. Parish et al., *The MATE Survey: Men’s Perceptions and Attitudes Towards Menopause and Their Role in Partners’ Menopausal Transition*, 26 MENOPAUSE 1110 (2019), doi: 10.1097 [<https://perma.cc/7VP8-CW8N>] (reporting results of survey of 450 men whose female partners ages forty-five to sixty-four experienced one or more specifically designated symptoms of menopause, and that seventy-seven percent of men surveyed said that they perceived themselves to be negatively impacted by their partner’s menopausal symptoms and slightly more than half of all participants knew that there were treatments available to address the symptoms of menopause).

workforce, they may not consider workplace changes to be an issue that impacts them personally.²²⁰ Third, there may be a cognitive bias among post-menopausal individuals, contributing to a tendency and their part to perceive menopause to be less “bad” than those who are currently suffering from the most severe symptoms of perimenopause perceive it.²²¹ Fourth, and relatedly, there may be a degree of indifference, undergirded by a belief held by some post-menopausal individuals that, if they did not have workplace or other support during menopause, there is no reason that others should have it, either.²²² For all of these reasons, menopause might not find an easy home in an advocacy group focused on issues of primary interest to older Americans. On the other hand, the AARP strongly supports paid family leave and parental leave policies, because these policies allow employees to “both attend to their own health needs and care for loved ones;”²²³ these policies have resonance far beyond AARP members. And, with AARP’s membership of those age 50 and over, menopause in the workplace is undoubtedly an important issue for many members, and policies towards menopause go far beyond the workplace.

That said, as discussed further below in Part IV, one challenge in garnering support for menstruation- or menopause- based modifications is that the secondary beneficiaries are less obvious. Indeed, as we point out, legislation providing for pregnancy or breastfeeding accommodations is often framed in terms of protecting babies, rather than in terms of protecting the pregnant or breastfeeding mother herself.²²⁴ Nevertheless, menopause-related advocacy can be co-located, with different challenges, in both the menstrual equity movement and the healthy aging movement. Indeed, there may be advantages to simultaneous uptake in multiple advocacy agendas.

²²⁰ See generally *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/cps/cpsaat03.htm> [<https://perma.cc/R642-9EBE>] (showing that in 2020, there were approximately 9.9 million workers 65 years and older in the workforce compared with approximately 44 million in the same age cohort who were not in the labor force).

²²¹ See JoEllen Wilbur et al., *The Influence of Demographic Characteristics, Menopausal Status, and Symptoms on Women's Attitudes Toward Menopause*, 23 J. OF WOMEN'S HEALTH 19 (1995).

²²² See, e.g., Jude Stewart, *Every Office Has Its Bullies; Here's How To Outwit Them*, FAST COMPANY (Jan. 23, 2013), <https://www.fastcompany.com/3004997/every-office-has-its-bullies-heres-how-outwit-them> [<https://perma.cc/3VAY-REQJ>] (discussing a related, but not identical context, of older women's workplace behavior toward younger female employees and quoting author Katherine Crowley as saying that, “[Older] women who had to work hard to make it to the top take issue with younger women who come right in and start succeeding without as much struggle”).

²²³ Jennier Millea, *AARP Testimony in Support of Paid Family Medical Leave Insurance*, AARP (March 13, 2013), <https://states.aarp.org/aarp-testimony-in-support-of-paid-family-medical-leave-insurance> [<https://perma.cc/6R6J-YB4P>] (documenting statement of Nora Duncan, Connecticut AARP State Director, in support of H.B. 6553, An Act Establishing a Task Force to Study Family Leave Insurance).

²²⁴ See *infra* Part IV.

In addition to menopause's link to aging, it is also connected to disability, given the very real symptoms (particularly during perimenopause) described above in Part I. But this is a complex relationship, on multiple levels. First, as discussed above, there is a double-edged sword problem. Classifying menopause as a "problem" or "disease" has sexist overtones and rests uneasily with the fact that roughly half of the population will inevitably experience it. Not classifying menopause as a disability, however, cuts off the main source of legal protection.

Second, and relatedly, the concept of disability itself has multiple meanings. The traditional medical model of disability frames disability as an individual condition requiring medical diagnosis and treatment.²²⁵ The social model of disability, by contrast, views disability as located in the interaction between the environment and the individual, rather than solely within the individual.²²⁶ This model invites us to expand our focus beyond specific accommodations for particular eligible individuals, and to think more broadly about re-designed "accommodating" environments that can ensure integration for all.²²⁷ This latter view comes closer to what we advocate in Part V, and helps to move past the abnormal/normal binary.

Menopause's intersections with infertility, aging, and disability set it apart from the larger menstrual advocacy movement. Indeed, Dr. Jen Gunter has drawn the connection among menopause, aging, and disability, particularly in terms of cultural perceptions:

Apparently there is nothing of lower value than an aging woman's body, and many in our society treat menopause not as a phase of life, but rather as a phase of death. Sort of a predeath. What little that is spoken about menopause is often viewed through the lens of ovarian failure—the assertion that menopause is a disease that exists because women and their ovaries are weak.²²⁸

²²⁵ See, e.g., 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) (describing the medical model of disability).

²²⁶ See *id.*; see also Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 428 (2000) (explaining that the social model does not treat "existing social arrangements as a neutral baseline"). Andrew Gerst and Tara 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. See Gerst & Schwitzman-Gerst, *supra* note 225 at 151; Crawford, Waldman & Cahn, *supra* note 88 at 60.

²²⁷ See Adam M. Samaha, *What Good Is the Social Model of Disability?* 74 U. CHI. L. REV. 1251, 1251-52 (2007) (explaining that most scholars do not adhere to a medical model of disability). 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, e.g., MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990).

²²⁸ GUNTER, *supra* note 23, at x; see also Cahn, *supra* note 171, at 28 (drawing similar connections); see also Naomi R. Cahn, Bridget J. Crawford & Emily Gold Waldman,

Gunter thus points directly to menopause's intersection with both aging (describing how society views it as "sort of a predeath") and disability (noting that society also views it as a "disease" or analogous to organ failure).²²⁹ But even as Gunter rejects the pejorative links among menopause, aging, and disability, she does not deny that menopause comes with actual symptoms for many people.²³⁰ On the contrary, much of her book is devoted to advising people about how to adjust to these changes and, at times, manage them with various treatments.²³¹ Although Gunter approaches the topic as the medical practitioner she is, rather than as an attorney, her point is that menopause should not have to be viewed as a disease or a weakness in order to be taken seriously and addressed; it should simply be seen as a "planned change, like puberty."²³² In the legal context, the social model of disability helps provide a framework for thinking about how the workplace itself can contribute to the challenges of menopause.²³³

D. *The Agenda for Menopausal Advocacy*

In addition to menopause's intersectional nature, there are also complex questions about a substantive agenda for menopausal advocacy. In the context of *menstrual* advocacy, the agenda has largely been product-based.²³⁴ The contemporary menstrual advocacy movement kicked off with efforts to repeal the tampon tax.²³⁵ This issue has distinct salience; the tax appears right on store receipts for people to see.²³⁶ And it is a problem with a clear

Managing and Monitoring the Menopausal Body, U. CHI. LEGAL FORUM at Part II (forthcoming 2022) (pointing out that menopausal therapies are designed to "treat" an illness that is normal for half the population).

²²⁹ GUNTER, *supra* note 23, at x.

²³⁰ Part 2 includes chapters addressing "[v]asomotor [s]ymptoms," atypical bleeding, heart disease, and other potential symptoms. *Id.* at 71–210.

²³¹ For example, Part 3 is titled "Therapy for the Change, Hormones, Diets, and Supplements," and Part 4 is titled "Taking Charge of the Change." *Id.* at viii.

²³² *Id.* at back cover.

²³³ 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*, THE GUARDIAN (Oct. 17, 2017), <https://www.theguardian.com/science/shortcuts/2017/oct/11/why-women-secretly-turn-up-the-heating> [<https://perma.cc/MF63-99T3>] (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. See *id.*

²³⁴ See, e.g., Chris Bobel & Breanne Fahs, *From Bloodless Respectability to Radical Menstrual Embodiment: Shifting Menstrual Politics from Private to Public*, 45 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 955–56 (critiquing "[p]roduct-focused menstrual activism" as "overly concerned with the politics of respectability").

²³⁵ See *supra* note 141 and accompanying text.

²³⁶ See Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 546 (2017) ("Another reason that the movement to repeal the tampon tax has garnered so much support is that the issue is both concrete and easy to understand. Women know how much they pay per month for menstrual hygiene products and are outraged when they find out that similar products used primarily

solution: eliminate the tax.²³⁷ Similarly, problems like the lack of accessible, affordable menstrual products in schools, prisons, and homeless shelters also have clear, product-based solutions: provide them for free.²³⁸ Of course, these solutions are not themselves free. Elimination of the tampon tax cuts into the tax base and menstrual products are not without cost to some party.²³⁹ But such solutions have the advantage of being relatively straightforward. Moreover, they have been attainable, practically and politically, in numerous U.S. states and in other countries.²⁴⁰ As much as menstrual advocacy is also increasingly encompassing non-product issues, such as the need to provide better menstrual education and to reduce menstrual stigma and discrimination,²⁴¹ its actual advocacy efforts and legislative wins have centered around products.

Menopause, by definition, is much less connected to menstrual products themselves, at least after menstruation ceases. Those who have ceased menstruating permanently will not likely need these products. Thus, the aims of menopause advocacy are not as immediately quantifiable. Menopause does, however, have distinct micro- and macro-economic costs. As Part II described, absenteeism and workplace departures due to menopause represent substantial economic losses that could be stemmed by more robust legal approaches.²⁴² Meanwhile, outside of the workplace, menopausal thera-

by men are not subject to taxation. Thus, the issue of gender discrimination is reduced to dollars and cents. The consequences are felt each month by every menstruating woman.”)

²³⁷ See Crawford & Waldman, *supra* note 83, at 486–87 (2019) (“Because the tampon tax is highly salient and the discriminatory impact is one that consumers can easily quantify, tax would provide immediate financial relief to women and have a powerful signaling effect.”).

²³⁸ See Crawford & Waldman, *supra* note 85, at 59–62 (chronicling advocacy that led New York City to become the first city to require that menstrual products be made available for free in public schools, homeless shelters, and prisons).

²³⁹ See Bridget Crawford, *How Much Do “Free” Tampons Cost? #MenstrualCapitalism and Examples from New York State*, FACULTY LOUNGE (Sept. 14, 2018), <https://www.thefacultylounge.org/2018/09/how-much-do-free-tampons-cost-menstrualcapitalism-and-examples-from-new-york-state.html> [<https://perma.cc/7GXS-F8PS>] (reporting that the city of Yonkers, New York estimated that providing free menstrual products for all public school students would cost approximately \$29 per student per year); Bridget Crawford, *How Much Do “Free” Tampons Cost Schools? \$2.48 Per Student Per Year in Cambridge, MA*, FEMINIST L. PROFESSORS (May 10, 2020), <http://www.feministlawprofessors.com/2020/05/how-much-do-free-tampons-cost-schools-2-48-per-student-per-year-in-cambridge-ma/> [<https://perma.cc/S97H-83YW>].

²⁴⁰ See Crawford & Waldman, *supra* note 85, at 72–73 (describing legislation in California, Illinois, New Hampshire, New York, and Virginia that makes menstrual products available for free in school restrooms) and 89–91 (describing federal law and multiple states’ law that make menstrual products available for free for prisoners, but noting that “in the majority of states, there remains no statutory guarantee of any kind of prisoners’ access to menstrual products”).

²⁴¹ See Johnson, Waldman & Crawford, *supra* note 17, at 258–263 (arguing for better menstrual education in schools in efforts to decrease stigma, shame, and harassment).

²⁴² Philip Sarrel et al., *Incremental direct and indirect costs of untreated vasomotor symptoms*, 22 MENOPAUSE: J. OF THE N. AM. MENOPAUSE SOC’Y 260, 264 (2015) (studying health care claims of over 500,000 women and estimating that the “cost” of menopausal-related hot flashes over a 12-month period was approximately \$340 million in health care costs and \$28 million due to lost work).

pics and treatments can be expensive for those who choose to use them.²⁴³ It thus makes sense to consider menopause from an economic perspective as well as from a cultural and health perspective. Broadly speaking, menopausal equity—in terms of access to affordable and appropriate medical care and opportunities to participate in economic and public life—is a productive framework.²⁴⁴ Research into menopause-specific treatments is an example of the potentially expansive nature of this agenda.²⁴⁵ Including menopause in sex-education lesson plans or in medical school training is another example.²⁴⁶

To more fully explore what menopause equity could mean, it is helpful to contextualize menopause even more broadly—not just in relation to menstruation, but alongside pregnancy and breastfeeding, as well. Considering these four reproduction-associated conditions or processes together illuminates their interrelationships and how the law should evolve more broadly to address them. The Article's next Part widens its lens further to integrate pregnancy and breastfeeding into the discussion of menstruation and menopause.

IV. CONNECTIONS ACROSS MENOPAUSE, MENSTRUATION, PREGNANCY, AND BREASTFEEDING

Many cultural and physiological threads connect pregnancy, breastfeeding, menstruation, and menopause. All four of them are directly connected in some way to childbearing and the reproductive system. While not all cis women experience each (or any) of these, and not all who experience them are cis women, the four reproduction-associated conditions or processes are biologically and culturally closely linked to what has been historically called the female sex.²⁴⁷ Negative attitudes toward all of them are intertwined with sexism and misogyny. Moreover, all four conditions or processes implicate the sameness/difference debate that has engaged feminist legal theorists for decades: How is equality best achieved? Should advocates focus on the need

²⁴³ In 2017, for example, treatments related to menopause were close to \$3 billion. See Katie Thomas, *Prices Keep Rising for Drugs Treating Painful Sex in Women*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/health/vagina-womens-health-drug-prices.html> [https://perma.cc/E8G6-AQW7].

²⁴⁴ See *infra* Part V.

²⁴⁵ See Cahn, Crawford & Waldman, *supra* note 228, at 45 (advocating for better funding for menopause-related research).

²⁴⁶ See Mindy Christianson et al., *Menopause education: needs assessment of American obstetrics and gynecology residents*, 20 MENOPAUSE: J. OF THE N. AM. MENOPAUSE Soc'y 1120, 1120 (2013) (finding in a study of 258 obstetrics/gynecology residency training directors that less than twenty percent of medical residents under their supervision receive menopause-related education).

²⁴⁷ See *supra* note 61 and accompanying text.

for formally equal treatment of all people, or should they emphasize the need to accommodate differences, particularly those that are biologically based?²⁴⁸

The first section of this Part explores commonalities and divergences in social attitudes toward the four reproduction-associated conditions or processes in an effort to map the existing (and largely unspoken) socio-legal hierarchy among them. Pregnancy and breastfeeding seem to occupy a top tier and receive the most sympathetic and favorable treatment. Indeed, there is already a federal law requiring certain accommodations for breastfeeding employees; and in 2021, the House of Representatives passed the Pregnant Workers Fairness Act, which (if it becomes law) will require employers to make reasonable accommodations for all pregnant employees who need them, regardless of whether their pregnancies are “normal,” “abnormal,” or somewhere in between.²⁴⁹ Menopause, meanwhile, occupies the lowest tier; it is largely ignored in the law, and accompanied by stigma and silence in social settings. Menstruation is located somewhere between these two tiers, as socio-legal change is gradually moving in the direction of recognizing the material needs of those who menstruate.

A. Common Social Attitudes

Industrial-organizational psychologists Alicia Grandey, Allison Gabriel, and Eden King have grouped these four processes or conditions into what they call the “three Ms”: menstruation (“premenstrual fluctuations and monthly periods”); maternity (“prenatal bodily change and postnatal lactation,” thus covering both pregnancy and breastfeeding); and menopause (“perimenopausal changes and the cessation of the menstrual cycle”).²⁵⁰ They suggest that in the workplace, each of the “three Ms” triggers similar external perceptions. The person experiencing the condition or process deviates in some salient way from the traditional archetype of an ideal worker who “has no sexuality, emotionality, and does not procreate.”²⁵¹ Furthermore, “when one of the three Ms is brought into work (e.g., breastfeeding worker pumping, senior manager having a hot flash), the incongruence with ideal worker expectations can have costs to career advancement,” the authors observe.²⁵²

Shared negative perceptions about these conditions or processes can be roughly grouped into three related categories. The first category involves the physical aspects, which still seem to trigger squeamishness—even disgust—

²⁴⁸ See, e.g., Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 300–06 (1991) (tracking arc of scholarly developments in both fields).

²⁴⁹ See *supra* notes 72–75 and accompanying text.

²⁵⁰ See Alicia A. Grandey, Allison S. Gabriel & Eden B. King, *Tackling Taboo Topics: A Review of the Three Ms in Working Women's Lives*, 46 J. OF MGMT. 7, 8 (2020).

²⁵¹ Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 151 (1990).

²⁵² Grandey et al., *supra* note 250, at 9.

in some people.²⁵³ There is particular stigma around the uterine bleeding that comes with menstruation and perimenopause (and sometimes during the post-partum period as well).²⁵⁴ On top of that, there is a broader discomfort with the fluids and “leakiness,” as Grandey, Gabriel, and King put it, that can attend all four conditions or processes.²⁵⁵ Menstrual blood, breastmilk, and even the evidence of pregnancy (e.g., when the “water” breaks) are treated as undesirable bodily effluvia.²⁵⁶ In the case of breastfeeding, which all fifty states now protect in some form,²⁵⁷ studies still find that many people feel disgust in response to images of breastfeeding or breast pumping.²⁵⁸ This is true whether the setting is truly public, such as a municipal park, or semi-private, such as in a workplace.²⁵⁹

The second category of negative perceptions concerns the emotional aspects of the four reproduction-associated conditions or processes—a throwback to the old idea of female “hysteria,” the etymology of which notably traces directly back to the word for *womb* in both Greek and Latin.²⁶⁰ The “three Ms” (or the four reproduction-associated conditions or processes of pregnancy, breastfeeding, menstruation, and menopause, on which this Article focuses) are each linked to perceptions of being hormonal and irrational.²⁶¹ Specifically, Grandey, Gabriel, and King note that “[i]n Western society, beliefs exist today that PMS and menstruation create intense negative moods and impair decision making” and even that “menstruation affects cognitive ability.”²⁶² Relatedly, research indicates that some people consider pregnancy as a kind of cognitive impairment (“due to distraction from their growing bodies”) and that menopausal individuals are considered depressed, weak, and/or irrational.²⁶³

Stereotypes about menopausal and post-menopausal women emerged in the run-up to the 2016 presidential contest between Hillary Rodham Clinton and Donald Trump. “Do we want a menopausal woman with her finger on the button?” read the headline of one letter to the editor.²⁶⁴ In a related roundtable discussion published in *The Atlantic*, historian Laura Briggs

²⁵³ See *id.* at 22, 24 (discussing the socially learned “disgust response” to the 3 Ms).

²⁵⁴ *Id.* at 12.

²⁵⁵ *Id.* at 8. Literary scholars have been engaged in the study of the “leakiness” of women’s bodies for over thirty-five years. See Gail Kern Paster, *Leaky Vessels: The Incontinent Women of City Comedy*, 18 RENAISSANCE DRAMA 43, 43 (1987).

²⁵⁶ See, e.g., Gavin Jack, Kathleen Riach & Emily Bariola, *Temporality and Gendered Agency: Menopausal Subjectivities in Women’s Work*, 72 HUM. REL. 122, 126 (2019).

²⁵⁷ See *supra* note 80.

²⁵⁸ Grandey et al., *supra* note 250, at 15.

²⁵⁹ See *id.*

²⁶⁰ *Hysteria*, OXFORD ENGLISH DICTIONARY (3d ed. 2022) (Hysteria was originally thought to be due to a disturbance of the uterus and its functions).

²⁶¹ See, e.g., Grandey et al., *supra* note 250, at 8–9, 18.

²⁶² *Id.* at 12, 13.

²⁶³ See *id.* at 15, 18.

²⁶⁴ William Burke, Letter to the Editor, The Modesto Bee (last visited March 12, 2022), <https://www.modbee.com/opinion/letters-to-the-editor/article93838042.html> (on file with Harvard Journal of Law and Gender).

linked the aspersions of incompetence or physical weakness cast on Hillary Clinton to similar attacks on younger female politicians, identifying “hysteria” as the connective thread among the biological processes spanning across the female life span.²⁶⁵ “The thing I expect from elections where women are politicians,” Briggs observed, “is the suggestion that if they’re menstruating, then they’ll go off the deep end and start World War III or something.”²⁶⁶ From Briggs’ vantage point, when pundits or voters attached negative epithets to Hillary Clinton, the candidate was “really being called . . . a woman—and a hysterical woman.”²⁶⁷

The third category of negative perceptions center on the belief that pregnancy, breastfeeding, menstruation, and menopause render individuals less capable and committed, particularly at work. Undoubtedly, capability is closely related to the above notions of hysteria and irrationality. The commitment aspect introduces a different element, though; it is focused on caregiving obligations and resonates particularly in cases of pregnancy and breastfeeding. “Managers and coworkers may mentally cloak pregnant women and new mothers in a haze of femininity, assuming they will be empathetic, emotional, gentle, nonaggressive—that is, not very good at business,” Professor Joan Williams observes.²⁶⁸ Relatedly, “an absent mother is often thought to be grappling with child care.”²⁶⁹

What all three categories of negative perceptions share is sexism. That sexism may manifest as pure misogyny, in terms of the stigma and disgust that surrounds menstrual blood and menstruating individuals as “dirty” or “impure,” or more subtle expectations of what it means to be “professional” and who the baseline ideal employee even is (i.e., a cis man who has no caregiving responsibilities for others).²⁷⁰ Indeed, this discussion parallels the social model of disability discussed in Part III. As Grandey, Gabriel, and King explain, although there is a general assumption of unidirectionality—

²⁶⁵ Nora Kelly Lee, *Hillary Clinton and the Resurrection of Old-School Hysteria*, THE ATLANTIC (Sept. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/09/hillary-clinton-health-conspiracy-hysteria/501293> [https://perma.cc/SV84-ZW74] (reprinting the author’s dialogue with Laura Briggs).

²⁶⁶ *Id.* (quoting Laura Briggs). Briggs also explained that hysteria was “associated with femaleness and femininity in the late 19th and early 20th centuries because of the generalized way in which it seemed to describe all women all the time . . . And, of course, [it was] strongly associated with childbirth and menstruation.” *Id.* (alteration in original).

²⁶⁷ *Id.*

²⁶⁸ Joan C. Williams, *The Maternal Wall*, HARV. BUS. REV. MAG. (Oct. 2004), <https://hbr.org/2004/10/the-maternal-wall> [https://perma.cc/YH7K-PATG].

²⁶⁹ *Id.*

²⁷⁰ See, e.g., Maureen C. McHugh, *Menstrual Shame: Exploring the Role of ‘Menstrual Moaning,’* in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES, *supra* note 181, at 411 (“Periods are perceived as a strictly negative process that is dirty, disgusting, and icky.”); Rachel Cooper, *7 Things We Need to Understand About Periods At Work*, INHERSIGHT (Jan. 7, 2020), <https://www.inhersight.com/blog/insight-commentary/we-need-to-understand-periods-at-work> [https://perma.cc/QML3-FTM9] (discussing menstrual taboos in the workplace, resulting in some employees feeling “like you have to hide that you’re menstruating, even though it’s completely normal”).

i.e., that “the three *Ms* impair work outcomes”—the reality is bi-directional.²⁷¹ In other words, the work environment may impact an employee’s subjective experience of pregnancy, breastfeeding, menstruation, and menopause just as much as those processes or conditions impact the employee’s performance at work.²⁷² The material conditions of the workplace matter.²⁷³ Their conclusion—that “[w]e need to accommodate women’s health across work contexts and advocate for healthier conditions for all”²⁷⁴—resonates with this Article’s ultimate recommendations for legal reform, discussed in Part V.²⁷⁵

To be sure, the law already has made some progress in this direction, especially with the passage of antidiscrimination legislation relating to pregnancy and breastfeeding, and the potential passage of the Pregnant Workers Fairness Act.²⁷⁶ But even as menstruation is garnering more legal recognition in some domains—such as tax policy—nowhere are menstruation or menopause explicitly named and protected by antidiscrimination legislation.²⁷⁷ The next section turns to the divergences in social attitudes to help explain the relative positions of pregnancy, breastfeeding, menstruation, and menopause in the socio-legal hierarchy.

B. Divergences in Social Attitudes

1. Procreation versus Non-procreation

The most basic difference between pregnancy and breastfeeding on the one hand, and menstruation and menopause on the other, is the procreative divide. While menstruation can be grouped with pregnancy and breastfeeding in terms of indicating *fertility* (since it is a sign of ovulation), menstruation clearly joins menopause on the other side of the *procreation* line. After all, menstruation and menopause both signify the absence of a pregnancy. Conversely, pregnancy or breastfeeding mean that a potential or actual child is in the mix, which has helpful political implications. For example, in the context of breastfeeding, federal and state laws that protect the right to breastfeed at work have been advanced as a way to promote babies’ nourish-

²⁷¹ Grandey et al., *supra* note 250, at 21.

²⁷² *Id.* at 21–22.

²⁷³ *See id.* at 27 (“[C]onvenient bathroom locations with access to menstrual hygiene products are characteristics of supportive organizations, as are pumping/nursing locations that are clean, private, and quiet. Another change helpful for menopause is ensuring that employees have control over the temperature or air regulation in offices (i.e., small fans, taking outside walks, opening windows.”) (internal citations omitted).

²⁷⁴ *Id.* at 28.

²⁷⁵ *See infra* Part V.

²⁷⁶ *See supra* notes 72–75 and accompanying text.

²⁷⁷ *See generally supra* Part II.C.

ment and well-being.²⁷⁸ As a result, as Professor Elizabeth Hoffmann observed about laws like the federal Lactation at Work Law, “even when the official rights holder, the woman, requests accommodation, she is able to frame it as fighting for the benefit of another, not for herself alone.”²⁷⁹ This is a useful dynamic both on the macro level (in terms of political support for such laws) and on the micro level (in terms of individual employees who seek breastfeeding accommodations). “Lactating workers have no need to embrace a frame as being excluded, worry about perceptions of selfishness, or wrestle with victimhood status,” Hoffman explains.²⁸⁰ “Instead, the Lactation at Work Law enables very different kinds of rights talk—the rights of the child, not the rights of the employee herself.”²⁸¹

A similar dynamic exists with laws that prohibit pregnancy discrimination and provide for pregnancy accommodations. “As a conservative, pro-life Republican, I don’t want anyone choosing between a job and a child,” said Delaware State Senator Colin Bonini, who sponsored Delaware’s Delaware Pregnant Workers Fairness Act.²⁸² This law—like the proposed Pregnant Workers Fairness Act that is now pending in Congress—requires Delaware employers to reasonably accommodate pregnant workers.²⁸³ The state law thus goes beyond the current federal Pregnancy Discrimination Act, which requires employers to accommodate pregnant workers only to the extent that they accommodate similarly-situated non-pregnant workers.²⁸⁴ Similarly, the *New York Times*, in an article with the telling headline “Divided Over Abortion, but Joining Forces for Women’s Workplace Rights,” reported that Kentucky’s pregnancy accommodations bill was introduced by State Senator Alice Forgy Kerr, a pro-life legislator.²⁸⁵ She noted that the “hardest sell on these bills, I have to say, are to men . . . [and] what I stressed to them, these pro-life legislators, is that this is a pro-life measure.”²⁸⁶ As she put it: “We want our women to have safe pregnancies so

²⁷⁸ See, e.g., ELIZABETH A. HOFFMANN, LACTATION AT WORK: EXPRESSED MILK, EXPRESSING BELIEFS, AND THE EXPRESSIVE VALUE OF LAW 180 (2021) (“accommodation for workplace milk expression can also be framed as a right for the employees’ children”).

²⁷⁹ *Id.* at 180. The federal Lactation at Work Law was an amendment to the Fair Labor Standards Act in 2010 mandating certain protections for lactating employees. *Id.* at 2.

²⁸⁰ *Id.* at 180.

²⁸¹ *Id.*

²⁸² See Marsha Mercer, *States Adding More Protections for Pregnant Workers*, THE FLORIDA TIMES-UNION (Jan. 9, 2015), <https://www.jacksonville.com/story/news/reason/2015/01/09/states-adding-more-protections-pregnant-workers/15646476007/> [<https://perma.cc/TSV9-ZC6F>] (quoting Delaware legislator Colin Bonini).

²⁸³ See Tara Siegel Bernard, *Divided Over Abortion, but Joining Forces for Women’s Workplace Rights*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/your-money/abortion-pregnancy-work.html> [<https://perma.cc/78WU-ATNU>].

²⁸⁴ *Id.* (quoting Republican Kentucky state senator Alice Forgy Kerr).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

that they can have healthy babies.”²⁸⁷ Meanwhile, pro-choice groups are equally supportive of pregnancy accommodation laws, as pro-choice advocate Ashley Crary Lidow observed with respect to a similar law in South Carolina.²⁸⁸ “We were all on the same page pragmatically,” she explained.²⁸⁹

By contrast, menstruation and menopause signal that an actual or potential child is *not* currently in the picture. Accordingly, there is no helpful baby-protective rationale for laws that protect employees who are menstruating or going through menopause; such laws focus on the person menstruating or going through menopause and no one else.

2. *Choice versus Involuntariness*

Relatedly, both pregnancy and breastfeeding involve some degree of choice, as compared to menstruation and menopause. Of course, not all pregnancies are planned or chosen. But the (albeit very shaky and uneven) availability of abortion²⁹⁰ at least means that for some people, there is *some* degree of choice as to whether to continue a pregnancy.²⁹¹ Similarly, breastfeeding is not the only option for feeding babies; formula is an alternative.²⁹² Thus, laws that protect pregnancy and breastfeeding can be justified in part as promoting or enabling *choices* that society wants to support, i.e., carrying a pregnancy to term and then breastfeeding the child. In fact, with respect to the choice between breastfeeding and formula-feeding, some governments have gone beyond lactation accommodations at work and put a heavier thumb on the scale. New York City’s “Latch on NYC” campaign, for instance, prompted hospitals to stop distributing free infant formula and also launched a public awareness campaign that featured posters throughout the city that emphasized the benefits of breastfeeding.²⁹³

²⁸⁷ *Id.*

²⁸⁸ *Id.* (quoting Ashley Crary Lidow of the Women’s Rights & Empowerment Network in Columbia, South Carolina, a group that supports abortion rights).

²⁸⁹ *Id.*

²⁹⁰ At the time of this Article’s writing, the right to abortion is increasingly under attack. See *Whole Woman’s Health et. al. v. Jackson*, 142 S. Ct. 522 (2021); *Dobbs v. Jackson Women’s Health Organization*, ___ S. Ct. ___ (argued December 1, 2021). See also, e.g., David S. Cohen, Greer Donley, & Rachel Rebouche, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1558758 (discussing potential scenarios in a post-*Roe* world).

²⁹¹ It is important to note that not all people who choose pregnancy necessarily end up with a living baby. See Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1061 (2021) (noting that there are “millions of pregnant women in the United States who make a choice to parent their child but do not physically produce a living child at the end of pregnancy” due to miscarriage and stillbirth”).

²⁹² See, e.g., Gina Shaw, *Breastfeeding vs. Formula Feeding*, GROW BY WEBMD, <https://www.webmd.com/baby/breastfeeding-vs-formula-feeding> [<https://perma.cc/H72B-H97N>] (June 17, 2021) (discussing advantages of breastfeeding but noting that “[f]ormula feeding is also a healthy choice for babies” and that if “you use a formula, your baby will get the best possible alternative to breast milk”).

²⁹³ See, e.g., Todd Neale, *NYC to Limit Baby Formula in Hospitals*, MEDPAGE TODAY (July 31, 2012), <https://www.medpagetoday.com/pediatrics/parenting/33993> [<https://>

This dynamic of choice is absent from menstruation and menopause. These conditions or processes are largely involuntary. People cannot choose precisely when their periods will start, nor when their ovarian function will begin decreasing. There is simply no role for law in “nudging” people one way or the other here,²⁹⁴ and no potential to encourage “desirable” or “undesirable” choices with respect to menstruation or menopause (whatever those might be). This is a missing arrow in the quiver of advocacy strategies for laws that accommodate and protect menstruating, perimenopausal, and menopausal employees.

3. *Celebration versus Silence and Stigma*

Another key difference is the silence and stigma that accompany menstruation and especially menopause, as opposed to the far more public, often celebratory nature of pregnancy and breastfeeding. This Article has already discussed the external and even internalized stigma that surround both menstruation and menopause. This, in turn, prompts people to remain silent about them.²⁹⁵

To be sure, pregnancy is not always an exciting event or public experience, either. Unplanned pregnancies are common, and for many people, a positive pregnancy test is an entirely unwelcome development.²⁹⁶ And those who choose to terminate their pregnancies often keep that experience private.²⁹⁷ For others, however, pregnancy is eagerly desired and pursued—to the point that use of assisted reproductive techniques like artificial insemina-

perma.cc/3RCP-AJGE] (describing the purpose of the Latch On NYC campaign “to reduce the influence of baby formula promotion and encourage breastfeeding for new mothers”).

²⁹⁴ See generally CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008) (defining a nudge as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives” and adding that to “count as a mere nudge, the intervention must be easy and cheap to avoid”).

²⁹⁵ As discussed above, this menstrual concealment imperative begins early—with students not even wanting the school nurse, let alone fellow classmates, to know that they are menstruating—and it continues for decades, all the way into menopause, at which point it intersects with ageism. See *supra* Part III.B.

²⁹⁶ Approximately forty-five percent of all pregnancies in the United States are unintended (that includes unwanted as well as mis-timed). *Unintended Pregnancy in the United States*, GUTTMACHER INSTITUTE (Jan. 2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> [https://perma.cc/ZP8D-V7YR].

²⁹⁷ See, e.g., Catherine Kim, *#YouKnowMe: Why Women are Sharing Their Abortion Stories: Abortion is a Taboo Subject. #YouKnowMe is Trying to Change That*, Vox (May 17, 2019, 2:30 PM), <https://www.vox.com/policy-and-politics/2019/5/17/18629279/youknowme-hashtag-twitter-women-abortion-stories> [https://perma.cc/7ACA-DR9J]; Diana Reese, *Sharing Abortion Stories at Speakout Aims to Reduce Shame and Stigma*, WASH. POST (Nov. 20, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/11/20/sharing-abortion-stories-at-speakout-aims-to-reduce-shame-and-stigma/> [https://perma.cc/YGR3-MEWM].

tion and in vitro fertilization have skyrocketed in the past few decades.²⁹⁸ Pregnancy thus is very different from menstruation and menopause, which are passively awaited (absent medical or chemical induction of menopause).

Furthermore, pregnancies generally cannot be kept hidden in the same way that menstruation or menopause can.²⁹⁹ Although many people remain quiet about their pregnancies during the first trimester, and pregnancies can often be physically hidden until some point in the second trimester, most pregnancies ultimately become physically visible at some point.³⁰⁰ And, unlike the “menstrual concealment” imperative, there is no contemporary cultural expectation that people will conceal their pregnancies throughout the gestational period.³⁰¹ On the contrary, pregnancy announcements—in cards, social media posts, and so on—are common.³⁰² So, too, are pregnancy congratulation cards, baby showers, baby gift registries, and increasingly popular “gender reveal” parties.³⁰³

Breastfeeding, too, has become increasingly public, in connection with growing societal support (and even pressure, in some cases) for breastfeeding as opposed to formula-feeding.³⁰⁴ All states now guarantee the right to

²⁹⁸ See *Fortune Bus. Insights, Assisted Reproductive Technology (ART) Market*, KEY MARKET INSIGHTS (Aug. 2018), <https://www.fortunebusinessinsights.com/industry-reports/assisted-reproductive-technology-art-market-101811> [<https://perma.cc/2HYP-4H9L>] (projecting a global market of \$45.08 billion for assisted reproductive technology in 2026, up from 21.32 billion in 2018).

²⁹⁹ But see *College Student Arrested After Cops Find Dead Newborn in Dorm Room*, CNN (Oct. 26, 2007) <http://www.cnn.com/TRANSCRIPTS/0710/26/ng.01.html> [<https://perma.cc/EC7T-8KJ9>] (reporting that a nineteen-year-old college student “hadn’t told anyone about her pregnancy, not even her roommate. And after the baby was born, not only did she try and hide it from police, but denied ever giving birth. Police say after the baby was born, [the student] wrapped the infant’s body in a garbage bag. It wasn’t long before the baby was found and a call went out to 911. [The student] tried again to hide the baby, this time in her room”).

³⁰⁰ See Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 755–60 (2018) (discussing the multiple ways that pregnancy can alter one’s appearance).

³⁰¹ This was not the case in the 1970s, when teachers could lose their jobs if they became pregnant. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (striking down such a policy); see also Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J.L. & FEMINISM 343, 405 (2010) (concluding that *LaFleur* brought together reproductive liberty and sex equality).

³⁰² E.g., Bruce Feiler, *How to Tell a Million People: ‘We’re Having a Baby!’*, N.Y. TIMES (May 29, 2016), at ST1 (noting that when couples learn they are having a baby, they could write notes, make phone calls, or “[S]end a mass email? So 1990s. These days . . . they often whip out their cellphones, shoot a video and post it on social media.”).

³⁰³ E.g., Alex Williams and Kate Murphy, *A Boy or Girl? Cut the Cake*, N.Y. TIMES (Apr. 8, 2012), at ST1 (discussing the history of gender reveal parties). Hallmark offers a selection of pregnancy greeting cards. *Pregnancy Greeting Cards*, Hallmark (2021), <https://www.hallmark.com/pregnancy/pregnancy-cards/pregnancy-greeting-cards/> [<https://perma.cc/3M9P-BEXQ>].

³⁰⁴ See Cohen, *supra* note 82, at 56–57 (noting that white, middle-class women “not only have the economic ability to breastfeed and access lactation support, but also are culturally expected to do so part of performing good mothering” whereas parents of color “may have reduced support” to breastfeed or express milk “largely because they tend to

breastfeed in public.³⁰⁵ And even people who choose to breastfeed only in private generally do not conceal the mere *fact* that they are breastfeeding. After all, it is generally understood that babies need to be fed one way or another; if anything, in many circles, more stigma currently surrounds formula-feeding than breastfeeding.³⁰⁶

Here, too, this distinction has legal implications. The silence surrounding menstruation and menopause historically has translated into legal silence as well. The tampon tax once again furnishes a useful example: why were menstrual products not included on states' lists of tax-exempt products, even when other necessities (and even non-necessities) were?³⁰⁷ As two of us have noted elsewhere, it is logical to infer that this omission resulted from a combination of a lack of awareness and understanding about menstruation, as well as the desire *not* to consider or discuss it.³⁰⁸ Indeed, once social media enabled the tampon tax issue to gain widespread attention, numerous states and countries changed their laws in relatively short order.³⁰⁹

Ironically, some legislators pushing for menstrual equity have begun harnessing the discomfort around discussing menstruation to their advantage. Representative Grace Meng has observed that when she talks about various aspects of the Menstrual Equity for All Act, "some [legislators] have said that to my face: 'I'll sign on, and you don't need to explain anymore.' I think that's hilarious. . . however I can get them to be a co-sponsor if that's part of our strategy, I'm fine with that."³¹⁰ It is interesting to consider how this dynamic might lead to even further progress—what other proposals regarding menstruation and menopause might legislators go along with, just to end the conversation as soon as possible? But, of course, at least some legislators need to initially break the silence and start the conversation. With menopause, that may be an uphill battle.

have less access to both family and medical leaves as well as to high quality and culturally relevant pre- and post-natal care").

³⁰⁵ See generally Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1840–43 (2018) (surveying state laws guaranteeing a right to breastfeed in public).

³⁰⁶ See, e.g., *id.* at 1855 ("[I]t is critical that any law that protects the choice to breastfeed does not stigmatize the decision to formula feed—for whatever reason—in a way that coerces women to breastfeed.").

³⁰⁷ See Crawford & Waldman, *supra* note 83, at 441–42 (providing multiple examples of state laws that subjected menstrual products to sales tax while exempting other "necessary" unisex or male-oriented products).

³⁰⁸ See *id.* at 444 (noting that "the tampon tax has a disparate impact on women and likely is connected to indifference toward (or squeamishness about) the female biological process of menstruation").

³⁰⁹ See Crawford & Waldman, *supra* note 85, at 39–42, 48–50 (discussing ongoing initiatives to repeal the states sales tax on menstrual products).

³¹⁰ Eliza Collins, *This Lawmaker Pushed the Trump Administration to Put Tampons in Prisons. She Isn't Stopping There*, USA TODAY (May 28, 2019), <https://www.usatoday.com/story/news/politics/2019/05/28/grace-meng-wants-everyone-to-have-access-to-pads-and-tampons/3752363002> [<https://perma.cc/TX9E-RJH4>] (quoting Grace Meng).

The multiple axes of analysis discussed in Parts III and IV—ageism, disability stigma, the potential (or lack thereof) for product-based remedies, procreation, choice, visibility, and silence and stigma—help explain why menopause occupies a lower spot in the socio-legal hierarchy than do pregnancy, breastfeeding, and even menstruation. Currently, menopause is largely unaddressed in the law at all, let alone in any explicit or comprehensive way. But that invisibility does not speak to menopause's *worthiness* of legal protection; in fact, menopause's legal and cultural invisibility may make a stronger case for legal interventions. Menopause's position at the bottom of the socio-legal hierarchy is unmerited and inappropriate.

That said, many questions remain about *how* the law should address menopause. There is much less clarity and universality around menopause, in every respect, compared to pregnancy, breastfeeding, or menstruation. The length of the menopausal transition varies widely, as does its symptoms.³¹¹ There are no seemingly universal responses—such as, for instance, free menstrual products—so it is harder to envision precisely what menopause equity would look like or how it could be translated into law. In addition, because people tend to conceal menopause and its symptoms, menopause can seem like an abstract, depersonalized concept.³¹² That widespread concealment may even lead to skepticism about the need for menopause-specific accommodations. In the related context of menstruation, researchers surveyed a representative sample of 600 adults living in the United States about their attitudes toward menstrual leave policies in the workplace³¹³ (an approach followed by some other countries, such as Japan and parts of China).³¹⁴ Nearly half of the participants thought that menstrual leave policies would have negative effects, while only twenty-three percent envisioned positive effects.³¹⁵ In particular, thirty-four percent thought a menstrual leave policy would harm the workplace because some employees would abuse it,³¹⁶ and eleven percent thought that menstrual leave policies were unnecessary because menstruation was not onerous.³¹⁷ Any menopause-specific policies might run into similar or even greater concerns about

³¹¹ See *supra* Part 1.A.

³¹² See *supra* notes 181–185 and accompanying text.

³¹³ Jessica L. Barnack-Tavlares et al., *Taking Time to Bleed, Perceptions and Attitudes Toward Menstrual Leave Policy*, 40 HEALTH CARE FOR WOMEN INT'L 1355, 1361 (2019), <https://www.tandfonline.com/doi/full/10.1080/07399332.2019.1639709> [https://perma.cc/DXL4-V3UU].

³¹⁴ See, e.g., Julia Hollingsworth, *Should Women Be Entitled to Period Leave? These Countries Think So*, CNN (Nov. 20, 2020), <https://www.cnn.com/2020/11/20/business/period-leave-asia-intl-hnk-dst/index.html> [https://perma.cc/9WQ6-6945].

³¹⁵ Barnack-Tavlares, *supra* note 313.

³¹⁶ *Id.*

³¹⁷ *Id.* at 1367 (noting that some survey participants made comments like “suck it up”).

being unnecessary, overly generous, or an opportunity for unfair strategic behavior by some employees at the expense of others.

That said, the ways the law *has* increasingly begun to protect pregnancy, breastfeeding, and menstruation provide a starting point for how menopause might eventually receive protection as well. Indeed, the most straightforward path to menopausal advocacy may well be paved by contextualizing menopause alongside the three other reproduction-associated conditions or processes. Conversations focused on how the law should treat pregnancy, breastfeeding, and menstruation—with the broader goal of ensuring that these processes do not impede full participation in the workplace and society—should explicitly mention menopause as well. This might help both to undercut menopausal stigma and to shape a menopausal advocacy agenda. The next section explores many of the underlying symptoms and needs associated with all four processes, pointing to the logic of considering them together.

C. *Shared Symptoms and Needs*

Pregnancy, breastfeeding, menstruation, and menopause have numerous shared symptoms, both physical and psychological. Hot flashes, for instance, are fairly common not only during menopause, but also during pregnancy.³¹⁸ One scientific study on the topic observed that “[h]ot flashes during pregnancy are commonly discussed in the popular literature, yet there has been a relative silence about them in the academic literature.”³¹⁹ For both pregnancy and menopause, hot flashes are likely the result of marked hormonal changes, particularly in estrogen levels.³²⁰ The researchers found, in fact, that of the 429 pregnant women they studied, thirty-five percent reported hot flashes at least one point during pregnancy, with the most common time being the third trimester.³²¹ Another example of a shared physical symptom is migraine headaches, which are often linked to the hormonal changes that come with menopause, various points in the menstrual cycle, and first-trimester pregnancy.³²²

The four conditions or processes also give rise to common physical needs. Frequent bathroom access, for example, is important for those who are pregnant, menstruating, or going through perimenopause. With preg-

³¹⁸ See, e.g., *Pregnancy and All Things Heat-Related (You, the Weather, Your Bath Water, and More)*, HEALTHLINE.COM, <https://www.healthline.com/health/pregnancy/hot-pregnant> [<https://perma.cc/KLX6-Y6Q6>] (finding that “hot flashes during pregnancy are usually hormonal”).

³¹⁹ Rebecca C. Thurston et al., *Prospective Evaluation of Hot Flashes During Pregnancy and Postpartum*, 100 FERTILITY & STERILITY 1667, 1667 (2013).

³²⁰ *Id.*

³²¹ *Id.* at 1669.

³²² See, e.g., Elie Sader & Melissa Rayhill, *Headache in Pregnancy, the Puerperium, and Menopause*, 38 SEMINARS IN NEUROLOGY 627 (2018) (noting associations between migraines and all three conditions or processes).

nancy, this need arises both in the first trimester (when frequent urination results from hormonal changes and rising fluid levels) and the third trimester (when frequent urination results from the fetus's pressing on the bladder).³²³ For menstruation and perimenopause, the need for bathroom access arises from menstrual bleeding.³²⁴ Relatedly, although regular and frequent bathroom access is not as salient for those who are breastfeeding, those individuals do need regular breaks to either feed or express milk.³²⁵ Similarly, sleep deprivation (and thus the need to catch up on sleep in one way or another, such as through flexible scheduling or break times) is a common physical effect of pregnancy, menopause, breastfeeding, and even menstruation. In cases of pregnancy, menstruation, and menopause, this is often due to either hormonal changes, hot flashes, and/or physical discomfort like back pain; for someone who is breastfeeding, sleep deprivation stems from the nutritional needs of newborns, who typically need to eat every one to three hours.³²⁶

The hormonal changes during all four reproduction-associated conditions or processes can also have common psychological effects, although these vary widely from individual to individual. "For some women, times of reproductive transition pose a high risk for the onset or exacerbation of depressive or dysphoric symptoms," explain psychiatrists Laura Miller, Christina Girgis, and Renu Gupta in a paper titled "Depression and Related

³²³ See, e.g., *Pregnancy—Body Changes and Discomforts*, U.S. DEP'T. OF HEALTH & HUM. SERVS. OFF. ON WOMEN'S HEALTH (Jan. 30, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/body-changes-and-discomforts> [<https://perma.cc/6JMS-RND5>] (discussing increased need to urinate during pregnancy); *The Causes of Frequent Urination During Pregnancy and What to Do*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/frequent-urination-during-pregnancy> [<https://perma.cc/5PSL-XDKH>] (explaining reasons for increased need to urinate during pregnancy).

³²⁴ See, e.g., Hawi Teizazu et al., "Do We Not Bleed?" *Sanitation, Menstrual Management, and Homelessness in the Time of COVID*, 41 COLUM. J. OF GENDER & L. 208 (2021) (discussing importance of access to reliable restrooms in order to manage menstruation).

³²⁵ See, e.g., Shana M. Christup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 480–81 (2001) (identifying marketplace employment as one of the reasons for shorter breastfeeding durations among women who return to work shortly after childbirth not only because of "typical difficulties related to breastfeeding (i.e. fatigue, breast engorgement, and leaking milk), but also . . . difficulties arising from the work environment, including finding time and a convenient area to express milk and concern about maintaining milk supply").

³²⁶ See, e.g., Hallie Levine, *Can't Sleep While Pregnant?*, N.Y. TIMES (April 13, 2020), <https://www.nytimes.com/article/pregnant-sleep-issues-guide.html> [<https://perma.cc/535W-3HVG>]; GUNTER, *supra* note 23, at 205–10 (chapter entitled "Will I Ever Feel Rested Again? Sleep Disturbances and How to Tackle Them"); Shazia Jehan et al., *Sleep and Premenstrual Syndrome*, 3 J. SLEEP MEDICINE & DISORDERS 1061, 1061 (2016) (noting that fluctuations of hormones during menstruation may cause disturbed sleep in some people); Maria Masters, *Nutritional Needs of Babies: the First 12 Months* (March 24, 2021), <https://www.whattoexpect.com/first-year/feeding-baby/nutritional-needs-of-babies/> [<https://perma.cc/F5VG-L53T>].

Disorders During the Female Reproductive Cycle.”³²⁷ They point to premenstrual dysphoric disorder, premenstrual exacerbation of depression during the late luteal phase of the menstrual cycle, perinatal depression, postpartum major depression, and perimenopausal depression as exacerbations of this phenomenon across the life span.³²⁸ Importantly, the researchers conclude that “most women do not develop depressive symptoms during reproductive transition,” but also note that “evidence is accumulating to support the hypothesis that some women have a heightened vulnerability to emotional disturbance at times of rapid hormonal flux.”³²⁹ Similarly, psychologist Liisa Hantsoo and psychiatrist Neill Epperson have observed that “anxiety disorders among women often precipitate or worsen at times of hormonal fluctuation, including puberty, the premenstruum, pregnancy or postpartum, and the menopausal transition,” a fact they link to a combination of biological and social factors.³³⁰

Mere mention of this psychological research runs the risk of appearing to endorse sexist tropes of women as “hormonal” or “hysterical.”³³¹ To be clear, that is not our intent. Indeed, as we have highlighted, most individuals do not experience significant depressive or anxious symptoms in connection with these reproduction-associated conditions or processes.³³² Furthermore, in discussing the common physical symptoms, we do not suggest that these conditions or processes are inherently disabling. They are not. Our goal, rather, is to emphasize the similarities across these pregnancy, breastfeeding, menstruation and menopause, and the insights gained by viewing them together, rather than in silos.

Indeed, in the same way that scientists have highlighted the need for greater research into the causes of and treatments for negative symptoms associated with the four reproduction-associated conditions or processes discussed in this Article, it is useful to think about how the *law* can address them in a more overarching and integrated way. Because common needs cut across several of these conditions or processes, there may be common ways for law to address them. For example, the prevalence of hot flashes suggests the importance of workplace climate control and dress code adjustments to make it easier for pregnant and menopausal employees to remain at work. Similarly, given the extent to which sleep disturbances are associated with all four reproduction-associated conditions or processes, flexible schedules come to the fore as a useful solution. And a common need cutting across all

³²⁷ Laura J. Miller, Christina Girgis & Renu Gupta, *Depression and Related Disorders During the Female Reproductive Cycle*, 5 WOMEN'S HEALTH 577, 577 (2009).

³²⁸ *Id.* at 577–83.

³²⁹ *Id.* at 582.

³³⁰ See Liisa Hantsoo & C. Neill Epperson, *Anxiety Disorders Among Women: A Female Lifespan Approach*, 15 FOCUS 162, 162–168 (2017), <https://focus.psychiatryonline.org/doi/full/10.1176/appi.focus.20160042> [<https://perma.cc/C65Q-N35K>].

³³¹ See *supra* notes 260–267 and accompanying text.

³³² See *supra* Part I.A.

four is the need for break times, either to access the bathroom (in the case of pregnancy, menstruation, and menopause) or to pump (in the case of breastfeeding). Each of these suggestions points to the importance of workplaces that provide some degree of accommodations and flexibility. The law can play an important role in encouraging or even mandating those accommodations and flexibility, where possible, in order to promote equity and equality. In this Article's final Part, we suggest ways the law can respond in the future to multiple needs that cut across pregnancy, breastfeeding, menstruation, and menopause.

V. SUGGESTIONS FOR LEGAL CHANGE

In considering how the law might evolve to better address all four reproduction-associated conditions or processes, we begin by considering the law's current protections for pregnancy and breastfeeding, which currently rank as the "higher" processes in the socio-legal hierarchy. Doing so is instructive for the consideration of menopause equity, in two ways. First, the legal protections for pregnancy and breastfeeding can be used as a sort of baseline up to which the legal treatment of menopause should be raised. Second, the analysis invites an inquiry into how to *raise* the baseline of legal protection for all four reproduction-associated conditions or processes. Although our focus in this section is on employment discrimination, there are several other areas, such as the push to eliminate tampon tax, in which the four conditions or processes can draw lessons from one another.

A. *Take Pregnancy and Breastfeeding Protections as a Baseline*

In Part II of this Article, we explained that menopause-related employment discrimination cases can be grouped into three different categories: (1) cases where employees are subjected to harassment or discrimination based on their actual or perceived menopausal *status*; (2) cases where an adverse job action is taken against employees for their menopausal *symptoms*, such as unexpected heavy perimenopausal bleeding; and (3) cases where employees request but are denied *accommodations* for their menopausal symptoms.³³³ Exploring how each of these categories are treated in the pregnancy and breastfeeding contexts helps to highlight where, in particular, the law is lacking as to both menopause and menstruation.

With cases involving harassment, there is not much difference as to how menopause-based harassment, pregnancy-based harassment, breastfeeding-based harassment, other forms of sexual harassment, and even harassment on the basis of other protected characteristics (such as race and religion) are treated.³³⁴ In all of these circumstances, a "hostile work envi-

³³³ See *supra* Part II.B.

³³⁴ See *supra* Part II.C.1.

ronment” claim can be brought, but will only be successful when the harassment was severe or pervasive enough to change the terms and conditions of employment.³³⁵ As discussed above, courts tend to set a very high bar in these cases.³³⁶ This inappropriately high standard is problematic for all harassment cases, including menopausal harassment cases. On a slightly more positive note, however, harassment based on reproduction-associated conditions or processes is at least recognized as a form of sexual harassment.³³⁷ And, because menopause is a reproduction-associated condition or process, it is likely on the same legal footing as pregnancy, breastfeeding, and menstruation.

By contrast, with cases involving discrimination on the basis of *symptoms*, there is a divergence across the reproduction-associated conditions or processes. Because the Pregnancy Discrimination Act (PDA) explicitly amended Title VII to emphasize that discrimination “on the basis of pregnancy, childbirth, or related medical conditions” counts as sex discrimination, punishing an employee for her pregnancy-related symptoms would be a clear Title VII violation.³³⁸ Similarly, because lactation has been recognized as a “related medical condition” to pregnancy and childbirth, this is generally true for breastfeeding as well.³³⁹ As discussed above, however, not all courts have extended this approach to menopausal or menstrual symptoms.³⁴⁰ The illogical approach of the *Coleman* court, which looked for a comparator, is not required by Title VII, and indeed the *Flores* court ruled otherwise.³⁴¹ But the fact that Title VII currently names only pregnancy, childbirth, and “related conditions,”³⁴² while omitting any mention of menstruation or menopause, has opened the door for courts to exclude discrimination on the basis of menstruation-related or menopause-related symptoms from the scope of Title VII. Indeed, Title VII is a prime example of the very legislative encoding of a hierarchy that this Article critiques.³⁴³ The four reproduction-associated conditions or processes are all linked and should not be ranked.³⁴⁴

³³⁵ See *supra* note 110 and accompanying text.

³³⁶ *Id.*

³³⁷ See *supra* Part II.C.1.

³³⁸ See *supra* notes 70–73 and accompanying text.

³³⁹ See *supra* Part II.A.

³⁴⁰ See *supra* Part II.B.2.

³⁴¹ See *supra* notes 118–123 and accompanying text.

³⁴² Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2000)).

³⁴³ See *id.*

³⁴⁴ “We are linked, not ranked” is a phrase associated with Gloria Steinem, who used it in connection with the idea that all humans are linked and should not be ranked. See Philip Galanes, *Ruth Bader Ginsburg and Gloria Steinem on the Unending Fight for Women’s Rights*, N.Y. TIMES (Nov. 14, 2015), <https://www.nytimes.com/2015/11/15/fashion/ruth-bader-ginsburg-and-gloria-steinem-on-the-unending-fight-for-womens-rights.html> [<https://perma.cc/66H3-GNRW>] (quoting Steinem on her suggestion that Feminist.com use the slogan on baby bead bracelets); *History and Vision, WE ARE LINKED NOT RANKED*, <https://wearelinkednotranked.com/pages/history-and-vision> [<https://perma.cc/XJU9-BXEX>] (explaining that the bracelets were being used as a fundraiser for the non-profit organization).

Finally, as to the third category of discrimination cases—those involving requests for accommodations—unevenness persists across the four reproduction-associated conditions or processes. In these cases, breastfeeding occupies the top spot on the hierarchy, because federal law now explicitly requires employers and certain public buildings to provide some accommodations for breastfeeding.³⁴⁵ By contrast, under current federal law, there is no stand-alone entitlement to pregnancy accommodations, let alone menstrual or menopausal accommodations.³⁴⁶ The PDA only requires accommodations for pregnant employees to the extent that those accommodations are provided to “other persons not so affected but similar in their ability or inability to work.”³⁴⁷ The pregnancy accommodation mandate is thus contingent, rather than independent, and once again menstruation and menopause are left out altogether.³⁴⁸ Meanwhile, the Americans with Disabilities Act (ADA), as noted above, has been interpreted by courts not to require accommodations for the typical symptoms that arise from “normal” pregnancies, menstruation, or menopause; it is only the “abnormal” cases that are covered.³⁴⁹ This distinction is ripe for broader change.

B. Raise the Baseline: Providing Greater Protection for All Four Reproduction-associated Conditions or Processes

An important path to greater protection for all four reproduction-associated conditions or processes is to discard the abnormal/normal binary when interpreting the ADA. This Article has shown that this dichotomy does not fit well here, given the goal of ensuring equal opportunity for all people. With all four conditions or processes, it is “normal”—or at least not atypical or unexpected—to experience some physical or psychological symptoms that can rise to the level of interfering with work.³⁵⁰ Of course, the specific nature and extent of needed changes will vary depending on the level of symptoms involved. But the basic *entitlement* should be a constant, rather than kicking in only when the situation is deemed “abnormal.”

³⁴⁵ See *supra* notes 80–82 and accompanying text (discussing the 2010 amendments to the Fair Labor Standards Act and the Fairness for Breastfeeding Mothers Act of 2019).

³⁴⁶ See *supra* notes 67–75 and accompanying text.

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See *supra* Part II.C.3.

³⁵⁰ A U.K. tribunal reasoned that there is “no reason why, in principle, ‘typical’ menopausal symptoms cannot have the relevant disabling effect on an individual.” *Donnachie v. Telent Tech. Serv. Ltd.* [2020] ET Case No. 1300005/2020, at 5, https://assets.publishing.service.gov.uk/media/5f60c524e90e072bb92c65a8/Miss_J_Donnachie_v_Telent_Technology_Service_Ltd_Judgement_1300005_2020.pdf [<https://perma.cc/594W-L4L7>]. That approach should be equally applicable under U.S. law. In fact, the text of the ADA itself does not require symptoms to be “atypical” or “abnormal”; it is the EEOC’s guidance—as well as judicial interpretations—that have led to that result. See *supra* notes 128–129 and accompanying text.

The Pregnant Workers Fairness Act (PWFA) would make that entitlement a reality for pregnant and (presumably) breastfeeding employees, by requiring employers to “make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee,” unless the employers can show undue hardship.³⁵¹ There would be no more carve-outs for “normal” pregnancies—a welcome change. By not mentioning menstruation and menopause, though, the PWFA still leaves them on the lower rungs of the legal ladder. Indeed, the gap between them and pregnancy/breastfeeding could become even larger. As we have written elsewhere, possible solutions are to include menstruation and menopause in the text of the PWFA itself, or to propose a parallel act that protects them.³⁵² An explicit legislative reference to menstruation and menopause would go a long way toward both equalizing and raising the baseline level of protection for all processes.

A parallel course of action would be for the United States Equal Employment Opportunity Commission or even the private sector to issue “best practices” guidelines, highlighting how workplace policies can help ensure that none of these four reproduction-associated conditions or processes unnecessarily limit people’s ability to remain and succeed at work. Again, effective best practice guidelines would highlight the commonalities among pregnancy, breastfeeding, menstruation, and menopause, emphasizing cross-cutting needs for regular bathroom access, temperature control, dress code adjustments, break times, scheduling flexibility, and general flexibility overall. The more that employers understand that these types of policies are broadly relevant to many employees, the more worthy of investment and commitment they seem. And, although this Article’s principal focus has been the workplace, several of these recommended best practices—particularly break times, bathroom access, and temperature control—are equally relevant in other contexts, such as large sites for standardized testing, like bar examinations or medical board exams, for example.³⁵³

To take the analysis a step further, just as it is helpful to contextualize menopause among the other reproduction-associated conditions or processes, it is also valuable to contextualize the very *concept* of workplace accommodations. Indeed, the very concept of specific, one-off accommodations still makes the individual who needs accommodation stand out as unusual. Transitioning away from strict approaches to more flexible policies likely will appeal to all employees, not only those who are pregnant, breastfeeding, menstruating, or menopausal. In a *New York Times* opinion

³⁵¹ See Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021) (“An act to eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”).

³⁵² See Crawford, Waldman & Cahn, *supra* note 88, at 68–70 (proposing modifications to the PWFA).

³⁵³ See, e.g., Cooper, Karin & Johnson, *supra* note 169.

piece questioning, “What if Disability Rights Were For Everyone?,” disability activist Ari Ne’eman observed, “[T]he increasingly broad reach of disability rights protections also offer a set of tools to help many who never thought of themselves as disabled and perhaps never will,” noting that “[p]regnancy is not a disability under the A.D.A. [sic], but disability law has inspired a more expansive vision of workplace rights,” such as the PWFA.³⁵⁴ This observation suggests the possibility of exploring accommodations for everyone, of challenging the very concept of accommodation and its individual focus, and instead asking: “Can a movement born to address discrimination against a particular minority evolve into something greater—a larger push for rights for all?”³⁵⁵

Ne’eman’s thoughts echo those of Rachel B. Levitt and Jessica L. Barnack-Tavlaris, two of the researchers who found that many people had negative reactions to the concept of particularized menstrual leave policies.³⁵⁶ In a subsequent article, they suggest that evaluating “menstrual leave can serve as an entry point to discussions about workplace culture and accommodations more generally.”³⁵⁷ They note that alternatives to menstruation-specific policies could include broadly applicable policies like “workplace flexibility more generally (for example, more time off, the ability to work from home, customized work schedules),” the reevaluation of “attitudes surrounding absenteeism and work ethic,” “equipping workplaces with rest/break rooms for anyone who is feeling under the weather—physically, mentally, or emotionally,” and “stocking bathrooms or breakrooms with menstrual products, hot pads, and pain relievers.”³⁵⁸

It is hard to imagine legal mandates for these sorts of widely applicable policies for all employees—i.e., for requiring employers to become broadly “accommodating,” as opposed to requiring employers to make specific “accommodations” for eligible employees. That said, the Covid-19 pandemic has opened the door to a reimagining of the workplace, including how offices function and where work can be accomplished, at least for professional white-collar workers.³⁵⁹ This, in turn, may force some employers to volunta-

³⁵⁴ Ari Ne’eman, *What if Disability Rights Were for Everyone?*, N.Y. TIMES (Oct. 1, 2021) <https://www.nytimes.com/2021/10/01/opinion/disability-rights-biden-us.html> [<https://perma.cc/C7A5-3UQP>].

³⁵⁵ *Id.*

³⁵⁶ See *supra* notes 315–317 and accompanying text.

³⁵⁷ Rachel B. Levitt & Jessica Barnack-Tavlaris, *Addressing Menstruation in the Workplace: The Menstrual Leave Debate*, in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES, *supra* note 181, at 572.

³⁵⁸ *Id.* at 570–71.

³⁵⁹ E.g., Claire Cain Miller, *The Office Will Never be the Same*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/style/office-culture.html> [<https://perma.cc/5XHP-8C8V>]. But this flexibility was not available to all, and not all jobs can be performed remotely. As Aziza Ahmed and Jason Jackson point out in the context of pandemic exposure, “[f]or many BIPOC, controlling risk of exposure was nearly impossible, since both places of employment, necessary for financial stability, and the home, necessary for survival, became key sites of risk of exposure.” Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to Covid-19*, 121

rily implement more flexible policies, in order to attract and retain a talented workforce.³⁶⁰ Indeed, many observers have concluded that remote work—at least to some extent and for some workers—is here to stay.³⁶¹ Ultimately, the needs of menopausal individuals thus can be recognized and contextualized not only in light of pregnancy, breastfeeding, and menstruation, but also in light of the widely-held desire for more flexibility.

CONCLUSION

This Article has situated menopause within the context of other reproduction-associated conditions and processes, comparing and contrasting its cultural and legal treatment with that of pregnancy, breastfeeding, and menstruation. It has identified a socio-legal hierarchy of such processes and symptoms. Within that hierarchy, although all are equally deserving of attention, menopause sits at the bottom of that hierarchy, in large part because of its association with aging and disability. Yet the Article has also shown how menopause clearly has resonance with the other conditions and processes.

Just as the law has an important role in ensuring that pregnancy, breastfeeding, and menstruation do not hamper participation in public life, so too does the law have a significant role when it comes to menopause. The legal efforts and victories (and setbacks) in these other three contexts provide potential directions for how to handle menopause. One critical lesson is the need to challenge law's abnormal/normal binary: a "normal" condition, such as menstruation or perimenopause, can nonetheless be accompanied by symptoms that require minor changes in the workplace (such as bathroom access, temperature control, break times, and/or some flexibility in scheduling). Under the social model that we advocate, the focus is largely on the broader setting and context, rather than on the individual experiencing symptoms, allowing for recognition that even "normal" conditions exist on a spectrum and that workplaces should strive to accommodate all.³⁶²

COLUM. L. REV. F. 47, 63 (2021). It is also important to recognize that not all employees can or seek to work remotely, and that the possibility of remote work does not obviate the need for physical workplaces that are accommodating and inclusive.

³⁶⁰ Tim Minahan, *What Your Future Employees Want Most*, HARV. BUS. REV. (May 31, 2021), <https://hbr.org/2021/05/what-your-future-employees-want-most> [<https://perma.cc/26HQ-6CTB>].

³⁶¹ See, e.g., Joel Berg, *Remote Work is Here to Stay. Banks are Still Sorting out How to Adapt*, AM. BANKER (Nov. 16, 2021), <https://www.americanbanker.com/news/remote-work-is-here-to-stay-banks-are-still-sorting-out-how-to-adapt> [<https://perma.cc/E4KL-FWTA>]; David Gelles, *What Bosses Really Think About the Future of the Office*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/business/corner-office-return.html> [<https://perma.cc/79NB-EKAU>].

³⁶² See generally IRIS BOHNET, *WHAT WORKS: GENDER EQUALITY BY DESIGN* (2016) (describing how changing design of systems changes the outcome); CAROLINE CRIADO PEREZ, *INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN* (2019) (discussing hidden assumptions in various data-gathering projects).

Regardless of the particular reproduction-associated condition or process, the overall goal for the law should be to move beyond individual one-off accommodations for “abnormal” conditions toward recognition of the broad spectrum of what can be considered “normal” experiences. Such an approach challenges the abnormal/normal dichotomy and is necessarily part of a larger scholarly dialogue that challenges binary thinking about gender and disability. By chipping away at the stigma surrounding menopause, this Article seeks for menopause a socio-legal solicitude equal to the one that exists for breastfeeding and pregnancy and that is beginning to emerge for menstruation.