“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,
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.

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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. 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.” 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. Marriot cited her physical and emotional symptoms as a large factor in her decision to take early retirement at age fifty-five. She later returned to teaching on a part-time basis, with far fewer responsibilities.

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.” Marriot recalled a workplace discussion when someone referenced the notion “that our staff room was full of hot flushes.”


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.”

Marriot’s perception was not unfounded. 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. More frequently, “menopausal” is a negative word used to put down or deride older women.

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. In 2021, Bloomberg News published a widely circulated article with the headline “Many Women Exit Workforce for a Little-Talked About Reason.” According to the research cited in the article, “menopause-related productivity losses can

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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.menopausethemusical.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-it-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).
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-
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. 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. Biologically speaking, menopause results from a decline in ovarian production of estrogen and progesterone. 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. 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.

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.”).
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. 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. 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). Another common physical symptom of perimenopause (which also can last into menopause) is hot flashes, sometimes also referred to as “hot flushes.” Other common perimenopausal and menopausal symptoms include night sweats, vaginal dryness, headaches, vertigo, and sleep disturbances.

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.” For example, Pippa Marriot, the drama teacher who took early retirement in part because of her perimenopausal symptoms, “found the perfect storm of menopausal

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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).


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.” 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.” 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. 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?’”

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. 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.

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

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48 Id.
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. The media, in turn, frequently reinforce negative messages about menopausal women.

Negative views about menopause create a culture of silence and stigma, which can have acute consequences, especially at work. Indeed, Pippa Marriott, the teacher quoted at beginning of this Article, spoke about the “‘baggage of stuff attached’” to menopause in the workplace. Marriott’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.” And, indeed, some women report being ridiculed, harassed, or stereotyped for being menopausal. 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.

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 INTL. 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 INTL. 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).

See, e.g., Marlene Cimons, *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”).


Id.

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/597729cbe531f7f77c7f610/t/
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.” 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. 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. 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.” Mike Funk, a trans man, experienced menopause as a result of his testosterone hormone therapy; his voice lowered and he grew a beard, too. For Funk, menopause was an intentional choice as part of his gender affirmation. 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.”

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.
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. 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”). 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. 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. 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.”

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.

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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.”).
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, 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.” The PWFA thus creates a stand-alone, rather than contingent, legal entitlement. Numerous states have already taken this step.

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. In 1993, Florida and North Carolina passed laws expressly permitting women to breastfeed in any public or private location. In 1994, Iowa passed a law providing breastfeeding exemptions from jury duty. 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. 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.” 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)

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).
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.”).
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).
been spurred in part by new scientific research about menopause, 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.

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. She was terminated from employment after accidentally bleeding onto the carpet at work, even though she immediately cleaned up the blood. 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). 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.

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

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87 See supra notes 35–36 and accompanying text.
90 Id.
comments or actions in the workplace. In *Burkhart v. American Railcar Industries*, 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.” 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?”

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*. 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. 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.” 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. When the employee who was being

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94 Id.
97 See id.
98 Id.
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.”

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. 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, Bailey, and Burkhart. 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 and Flores. And the third category includes cases like Sipple, 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. 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.

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.
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. This includes sexual harassment that takes the form of menopause-based harassment; it must rise to an extremely severe level. For example, although the courts permitted the Dault and Bailey cases to proceed, the court did not allow the Burkhart case to go forward. The legal framework for analysis of these cases is at least clear, though the outcome in Burkhart is troubling.

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. In Flores, the case involving the dental hygienist at a prison facility, the court convincingly articulated this point. 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.”

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.” 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-

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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.


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.


118 Id. at *6.

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-

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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). 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.” 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.

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.” 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.

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. In “normal” cases of menopause, however, courts have been

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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).
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). 133 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).

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. 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.

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-
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. 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.” 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. The petition ultimately received hundreds of thousands of signatures, and similar petitions were soon launched in early 2015 in both Canada and Australia.

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. 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...
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.”).


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.\textsuperscript{152} That same year, Apple’s iPhone Health app began to allow users to track their periods,\textsuperscript{153} and Kiran Gandhi purposely ran the London Marathon while “free bleeding.”\textsuperscript{154} Citing all of these instances, as well as Canada’s mid-2015 vote to repeal its tampon tax, \textit{Cosmopolitan} magazine ultimately proclaimed 2015 as “the year the period went public.”\textsuperscript{155}

To be sure, menstrual advocacy in the United States and elsewhere did not begin in 2015.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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


\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} See, e.g., Bobel, \textit{supra} note 84 at 740 (detailing the start of American menstrual advocacy in the 1970s); Crawford & Gold Waldman, \textit{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).

\textsuperscript{157} See Weiss-Wolf, \textit{supra} note 146, at xvi. See also \textit{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.”).

\textsuperscript{158} See \textit{PERIOD EQUITY}, https://www.periodequity.org/ [https://perma.cc/RB9Q-QRW2] (detailing which states still have tampon taxes).
in poverty.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{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).

\textsuperscript{160} See, e.g., id. at 255–56.

\textsuperscript{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 Jarmanning, 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).

\textsuperscript{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. 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.”

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. 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. Other states are considering proposals to distribute menstrual products directly to low-income households.

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).


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

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\(^{168}\) See Crawford & Gold Waldman, \textit{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 combating “period poverty.” See, e.g., Diane Taylor, \textit{Period Poverty Has Surged in UK During Covid Pandemic}, \textit{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., \textit{Menstrual Health: A Definition for Policy, Practice, and Research}, 29 \textit{Sexual & Reprod. Health Matters} 1, 2 (2021) (providing a lengthy definition of menstrual health). One of us has commented on these differences in terminology:

[My 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.](https://perma.cc/R3FL-V4HJ)
stigma, harassment, and discrimination. Professor Margaret Johnson, for instance, uses the term “menstrual justice” to capture all of these ideas.

Where, then, might menopause fit into this movement? 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.” 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.” 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. After all, Coleman’s and Flores’s heavy menstrual bleeding led to their terminations, but it was their perimenopausal status that triggered unexpected

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} “It’s socially taboo to talk about periods,” said one.\textsuperscript{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.”\textsuperscript{179} A third echoed: “it was always something I was embarrassed to ask, even though it’s normal.”\textsuperscript{180}

The embarrassment described by these students undergirds what Professor Jill Wood has called the “menstrual concealment imperative,”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{184} At least in terms of meeting ideals of cis femininity, “women’s

\textsuperscript{175} See also Karin, supra note 119 (discussing Coleman case).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{178} Id. at 294.

\textsuperscript{179} Id.

\textsuperscript{180} Id.


\textsuperscript{182} Id. at 322.

\textsuperscript{183} Id. at 326.

\textsuperscript{184} Id. at 328.
bodies must be clean, sexually attractive, and not inconvenient or uncomfortable for others.”

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. 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, 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, while the prospect of menopause is often—albeit not always—viewed with dread.

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.” 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

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185 Id. at 329.
186 See supra notes 4–10 and accompanying text.
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] (“Let’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. 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. 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. 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

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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 id.
196 See Jarmanning, supra note 161 and accompanying text.
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.
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
growing old,” 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.”

In a similar U.K. case, *A v. Bonmarche Limited*, a retail employee was called “menopausal” and a “dinosaur” in front of others. The tribunal ruled in that case that the employer had discriminated against the employee based on her menopausal status.

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. 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. Although AARP techni-

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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/time-line [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, it is widely considered to be a “lobbying powerhouse” on issues related to older Americans, including healthcare. 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. 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, 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. Second, to the extent that older people are retired from the

215 See AARP, supra note 214.

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

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. 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. 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. 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;” 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. 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, “[O]lder 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”).


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. 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. 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. 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.
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). 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. 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. 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.” 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.

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. The contemporary menstrual advocacy movement kicked off with efforts to repeal the tampon tax. This issue has distinct salience; the tax appears right on store receipts for people to see. 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 “vasomotor symptoms,” 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.
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. 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. 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. 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. 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, 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. Meanwhile, outside of the workplace, menopausal therapy for 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."

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.”).

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).


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”).

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).

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).
pies and treatments can be expensive for those who choose to use them. 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. Research into menopause-specific treatments is an example of the potentially expansive nature of this agenda. Including menopause in sex-education lesson plans or in medical school training is another example.

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. 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).
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 lacta-
tion,” 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 devi-
ates 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 au-
thors 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—
There is particular stigma around the uterine bleeding that comes with menstruation and perimenopause (and sometimes during the post-partum period as well). 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. Menstrual blood, breastmilk, and even the evidence of pregnancy (e.g., when the “water” breaks) are treated as undesirable bodily effluvia. In the case of breastfeeding, which all fifty states now protect in some form, studies still find that many people feel disgust in response to images of breastfeeding or breast pumping. This is true whether the setting is truly public, such as a municipal park, or semi-private, such as in a workplace.

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. 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. 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.” 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.

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. In a related roundtable discussion published in The Atlantic, historian Laura Briggs

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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).
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.
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 centers 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—

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.
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.\textsuperscript{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.\textsuperscript{272} The material conditions of the workplace matter.\textsuperscript{273} Their conclusion—that “[w]e need to accommodate women’s health across work contexts and advocate for healthier conditions for all”\textsuperscript{274}—resonates with this Article’s ultimate recommendations for legal reform, discussed in Part V.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\subsection*{B. Divergences in Social Attitudes}

\subsubsection*{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 \textit{fertility} (since it is a sign of ovulation), menstruation clearly joins menopause on the other side of the \textit{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-

\begin{footnotes}
\footnotetext{271} Grandey et al., \textit{supra} note 250, at 21.
\footnotetext{272} \textit{Id.} at 21–22.
\footnotetext{273} \textit{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).
\footnotetext{274} \textit{Id.} at 28.
\footnotetext{275} \textit{See infra} Part V.
\footnotetext{276} \textit{See supra} notes 72–75 and accompanying text.
\footnotetext{277} \textit{See generally supra} Part II.C.
\end{footnotes}
ment and well-being. 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.” 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. “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.”

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. This law—like the proposed Pregnant Workers Fairness Act that is now pending in Congress—requires Delaware employers to reasonably accommodate pregnant workers. 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. 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. 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.” 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.
284 Id. (quoting Republican Kentucky state senator Alice Forgy Kerr).
285 Id.
286 Id.
that they can have healthy babies.”

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.
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”).
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, 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.

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. And those who choose to terminate their pregnancies often keep that experience private. For others, however, pregnancy is eagerly desired and pursued—to the point that use of assisted reproductive techniques like artificial insemination...
tion and in vitro fertilization have skyrocketed in the past few decades.\textsuperscript{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.\textsuperscript{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.\textsuperscript{300} And, unlike the “menstrual concealment” imperative, there is no contemporary cultural expectation that people will conceal their pregnancies throughout the gestational period.\textsuperscript{301} On the contrary, pregnancy announcements—in cards, social media posts, and so on—are common.\textsuperscript{302} So, too, are pregnancy congratulation cards, baby showers, baby gift registries, and increasingly popular “gender reveal” parties.\textsuperscript{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.\textsuperscript{304} All states now guarantee the right to


\textsuperscript{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”).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.”).


\textsuperscript{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. 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.

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? 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. Indeed, once social media enabled the tampon tax issue to gain widespread attention, numerous states and countries changed their laws in relatively short order.

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.” 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.


306 See, e.g., id. at 1855 (“It 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).

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. 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. 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 workplace (an approach followed by some other countries, such as Japan and parts of China). Nearly half of the participants thought that menstrual leave policies would have negative effects, while only twenty-three percent envisioned positive effects. In particular, thirty-four percent thought a menstrual leave policy would harm the workplace because some employees would abuse it, and eleven percent thought that menstrual leave policies were unnecessary because menstruation was not onerous. Any menopause-specific policies might run into similar or even greater concerns about

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311 See supra Part 1.A.

312 See supra notes 181–185 and accompanying text.


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-


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). For menstruation and perimenopause, the need for bathroom access arises from menstrual bleeding. Relatively, 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. 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.

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

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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”).

Disorders During the Female Reproductive Cycle.” 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. 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.” 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.

Mere mention of this psychological research runs the risk of appearing to endorse sexist tropes of women as “hormonal” or “hysterical.” 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. 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.
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. 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. In all of these circumstances, a “hostile work envi-

333 See supra Part II.B.
334 See supra Part II.C.1.
“Contextualizing Menopause in the Law” 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.\textsuperscript{335} As discussed above, courts tend to set a very high bar in these cases.\textsuperscript{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.\textsuperscript{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.\textsuperscript{338} Similarly, because lactation has been recognized as a “related medical condition” to pregnancy and childbirth, this is generally true for breastfeeding as well.\textsuperscript{339} As discussed above, however, not all courts have extended this approach to menopausal or menstrual symptoms.\textsuperscript{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.\textsuperscript{341} But the fact that Title VII currently names only pregnancy, childbirth, and “related conditions,”\textsuperscript{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.\textsuperscript{343} The four reproduction-associated conditions or processes are all linked and should not be ranked.\textsuperscript{344}

\begin{footnotes}
\item[335] See supra note 110 and accompanying text.
\item[336] Id.
\item[337] See supra Part II.C.1.
\item[338] See supra note 70–73 and accompanying text.
\item[339] See supra Part II.A.
\item[340] See supra Part II.B.2.
\item[341] See supra notes 118–123 and accompanying text.
\item[343] See id.
\item[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).
\end{footnotes}
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.\textsuperscript{345} By contrast, under current federal law, there is no stand-alone entitlement to pregnancy accommodations, let alone menstrual or menopausal accommodations.\textsuperscript{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.”\textsuperscript{347} The pregnancy accommodation mandate is thus contingent, rather than independent, and once again menstruation and menopause are left out altogether.\textsuperscript{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.\textsuperscript{349} This distinction is ripe for broader change.

\textbf{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.\textsuperscript{350} Of course, the specific nature and extent of needed changes will vary depending on the level of symptoms involved. But the basic \textit{entitlement} should be a constant, rather than kicking in only when the situation is deemed “abnormal.”

\textsuperscript{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).

\textsuperscript{346} See supra notes 67–75 and accompanying text.

\textsuperscript{347} See id.

\textsuperscript{348} See id.

\textsuperscript{349} See supra Part II.C.3.

\textsuperscript{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 volunt-

355 Id.
356 See supra notes 315–317 and accompanying text.
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.\textsuperscript{360} Indeed, many observers have concluded that remote work—at least to some extent and for some workers—is here to stay.\textsuperscript{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.\textsuperscript{362}


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.