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Hilary H. Price

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## Periodic Leave: An Analysis of Menstrual Leave as a Legal Workplace Benefit

This Comment analyzes menstrual leave as a legal workplace benefit. In recognition that not only biological, cisgender women menstruate, I wish to clarify my use of “women,” “individuals,” and “menstruators” as proxies for “people who menstruate.” Since not all menstruators are women and not all women menstruate,<sup>1</sup> these terms will be used interchangeably for the purposes of linguistic economy and clear communication. I intend for these terms to encompass the complete population of people who menstruate. Policy analyses should be read with the understanding that they would or would not apply to all individuals who menstruate.

### *I. Introduction*

In March 2017, headlines in Italy were abuzz with controversy. Soon, major international media outlets picked up on the commotion, sparking a global conversation.<sup>2</sup> The Italian Parliament was debating a proposed legislative bill providing Italian citizens with a new workplace benefit: paid menstrual leave. Designed to provide employees who menstruate with extra paid time off each month during their period, “woke” feminists heralded the legislation as a prospective triumph in recognition of health needs unique to half the population.<sup>3</sup> Others—men and women alike—decried the bill and warned of possibly grave effects, such as employers hiring fewer women, or women having lower salaries or fewer opportunities for advancement.<sup>4</sup>

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1. Non-women menstruators may include transgender males as well as intersex, nonbinary, and genderqueer individuals, among others. Not all women menstruate due to numerous factors such as hysterectomies, hormone imbalances, and menopause.

2. See, e.g., *Italy May Pass a Law That Grants Women Monthly Period Leave*, BBC (Mar. 30, 2017), <https://www.bbc.co.uk/bbcthree/article/84f67498-b882-49df-82c3-26d3847589db>; Anna Momigliano, *Giving Italian Women ‘Menstrual Leave’ May Backfire on Their Job Prospects*, WASH. POST (Mar. 24, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/03/24/giving-italian-women-menstrual-leave-may-backfire-on-their-job-prospects/>; Alison Millington, *Italy Could Soon Offer Women Three Days of Paid Menstrual Leave Each Month*, BUS. INSIDER (Mar. 29, 2017, 4:34 AM), <https://www.businessinsider.com/italy-paid-menstrual-leave-for-female-employees-2017-3>.

3. *Id.*

4. Samantha Cooney, *Italian Lawmakers Want to Implement Paid Menstrual Leave*, TIME (Mar. 28, 2017, 12:33 PM), <https://time.com/4714991/italy-lawmakers-paid-menstrual-leave/>.

Italy is not the first country to propose such legislation.<sup>5</sup> In fact, paid menstrual leave already exists in varied forms in several countries, including Japan, South Korea, Zambia, and Indonesia.<sup>6</sup> Yet the enactment and enforcement of menstrual leave might stir fiercer debate than any other workplace benefit.

The split in opinion on these legislative measures stems from differing views on how to achieve the various goals of menstrual leave policies and whether these policies cause more harm than good. Primary goals include providing job security to women with reproductive health-related issues, supporting countries' reproductive and population goals, and giving individuals enhanced opportunities to care for personal health issues without incurring adverse employment actions. An additional goal is reducing "presenteeism" at the workplace, a condition in which employees attend work but are too ill to maintain expected levels of productivity.<sup>7</sup> A 2017 study by researchers from various medical institutions and research foundations in the Netherlands showed that respondents reported an average productivity loss of 33 percent due to menstruation-related presenteeism, resulting in a mean loss of 8.9 days per year.<sup>8</sup> Furthermore, employees who attend work while ill account for greater productivity loss than absenteeism, which is absence from work altogether.<sup>9</sup>

This Comment seeks not to advocate for or against menstrual leave policies, but rather to provide insight into the vast array of complexities that make this issue so polarizing. Every country has its own culture, values, and level of gender equality, and thus the goals for a menstrual leave policy will vary according to countries' respective cultures. Part II provides a broad overview of existing menstrual leave policies across the world. Part III discusses the numerous controversies surrounding menstruation generally, as well as areas in which legal measures have been established or are gaining traction. Part IV assesses menstrual leave in the United States, both in terms of where it could fit into existing federal code, as well as

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5. *Id.*

6. *Id.*

7. Mariella Miraglia & Gary Johns, *Going to Work Ill: A Meta-Analysis of the Correlates of Presenteeism and a Dual-Path Model*, 21 J. OCCUPATIONAL HEALTH PSYCH. 261, 261 (2016) ("The first [definition of presenteeism] is attending work while ill. The second . . . is productivity loss stemming from attending while ill." (citation omitted)).

8. Mark E. Schoep et al., *Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women*, BMJ OPEN (June 17, 2019), <https://bmjopen.bmj.com/content/bmjopen/9/6/e026186.full.pdf>.

9. Miraglia & Johns, *supra* note 7.

examples of case law in which menstruation-related issues led to adverse employment actions. Part V explores the pros and cons a menstrual leave policy could engender. Part VI offers recommendations for how the United States could move forward in addressing menstruation-related issues for workers. Ultimately, it may be that a menstrual leave policy is not the answer, but rather a focused societal effort to bolster dialogue surrounding menstruation and workplace protections for an often overlooked and historically disenfranchised portion of the population: people who menstruate.

## *II. Menstrual Leave: The International Landscape*

This section will provide a comparative law analysis of existing menstrual leave policies—both successful and unsuccessful—throughout the world. Legislation surrounding menstrual leave traces back to post-World War II Japan. In 1947, after nearly twenty years of debate, Japan established a policy granting women paid leave for period-related matters.<sup>10</sup> In 1928, female conductors for the Tokyo Municipal Bus Company lacked access to bathrooms throughout the day.<sup>11</sup> Without access to toilets and sanitary napkins, women found work impossible.<sup>12</sup> Lobbyists for women in labor unions fought for and won the right to a paid menstrual leave law.<sup>13</sup> It provided for women suffering from menstrual pain or whose jobs might exacerbate menstrual pain to take *seiryūka* (“physiological leave”).<sup>14</sup> Given the longevity of Japan’s law, it provides a strong example of how menstrual leave can transpire in the long term. The results are discouraging: opponents have used it to argue against equal opportunities and wages for female workers, while employers have admitted to being less likely to hire women because paid leave adds to workplace overhead.<sup>15</sup> Menstrual leave can foster a perception that women would take unfair advantage of the policy. Some employers report that “it’s difficult to judge whether female employees really need the leave or are just ‘cashing in’ on being a

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10. Maham Javaid, *Asian Countries Have Been Offering Females Paid Menstrual Leave for Almost 70 Years*, TIMELINE (Feb. 17, 2016), <https://timeline.com/asian-countries-have-been-offering-females-paid-menstrual-leave-for-almost-70-years-401056aeb1ec>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

woman.”<sup>16</sup> Japan’s example encapsulates many of the prevailing arguments against menstrual leave that this Comment addresses,<sup>17</sup> underscoring why these policies are so difficult not only to enact, but also to enforce.

South Korea marks another country with well-established, longstanding menstrual leave legislation. In 1953, it enacted the Labor Standard Act (“LSA”), which established protections for working adult females.<sup>18</sup> These protections included a “maternity protection” provision that “grant[ed] one day’s menstruation leave with pay per month for maternity protection to females.”<sup>19</sup> But a 2003 revision of the LSA changed menstrual leave from paid to unpaid and stipulated “the request of the female concerned would be a necessary condition” to claiming the benefit.<sup>20</sup> This policy is largely ineffective because few employers observe the protections the LSA extends to female workers: “[T]here has been a great discordance between law and realit[y].”<sup>21</sup> In other words, the law provides blanket protections to employees, but few employers recognize the law in practice. Further, many Korean women are generally reluctant to claim the benefit because they are “deeply uncomfortable about asking male bosses for time off.”<sup>22</sup>

There is no national policy in Australia, but a small company gained media attention in 2017 when it enacted a paid menstrual leave policy. The Victorian Women’s Trust (“VWT”), a women’s advocacy group, offers its employees twelve paid days off annually “for employees experiencing

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16. *Id.*

17. *See infra* Section V.B.

18. Elim Kim, *Korean Women’s Activities for Legislation to Guarantee Gender Equality in Employment*, 5 J. KOREAN L., no. 2, 2006, at 49, 53.

19. *Id.* at 53–54.

20. *Id.* at 57.

21. *Id.* at 54.

22. Justin McCurry, *Period Policy in Asia: Time Off ‘May Be Seen as a Sign of Weakness’*, GUARDIAN (Mar. 4, 2016, 5:38 PM), <https://www.theguardian.com/lifeandstyle/2016/mar/04/period-policy-asia-menstrual-leave-japan-women-work>. For example, Yoon Jin-sung, a twenty-eight-year-old Korean employee at a male-dominated company, stated,

I don’t think my male colleagues understand the pain we have to go through during our period. Without such an understanding or a solid system that guarantees that right [of one day of menstrual leave per month], I think most of us would rather bite the bullet by taking medicine, which I do all the time to relieve my pain.

*Id.*

symptoms of menstruation and menopause.”<sup>23</sup> The policy is separate from the company’s sick leave policy and also provides employees with options to work from home or spend time resting in a comfortable office space.<sup>24</sup> VWT published a blog post explaining the rationale behind its decision to enact the policy and encouraging other companies to follow suit.<sup>25</sup> It even provides a “menstrual policy template” for readers to adopt in their own workplaces.<sup>26</sup> A VWT survey found that 58 percent of respondents said a day off to rest would improve their monthly period experience.<sup>27</sup> Twenty-six percent of respondents who had gone through menopause said taking time off when needed would have aided their transition.<sup>28</sup> Finally, 24 percent of all respondents said that being able to ask their employer for accommodations would improve their period experience.<sup>29</sup>

The Zambian statutory code has a provision allowing female workers to take off one day per month in relation to their periods.<sup>30</sup> Known as “mother’s day,” employers can be prosecuted if they deny workers this entitlement.<sup>31</sup> Zambian culture is generally patriarchal, and the policy supports the notion that childbearing and rearing is an important function of womanhood. Linda Kasonde, a Zambian lawyer, noted, “The reason why mother’s day is important within the Zambian context is that it recognizes that women are the primary care-givers in our society—regardless of whether they are married or not.”<sup>32</sup> While women as “primary caregivers” may be the status quo in Zambia, opponents of menstrual leave in less patriarchal countries might argue that this attitude constitutes proof that menstrual leave is anathema to true equality between the sexes.

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23. Samantha Lauriello, *This Company Is Sparking Controversy for Offering Paid Time Off While You’re on Your Period*, HEALTH (Oct. 4, 2018), <https://www.health.com/condition/menstruation/australian-company-period-leave>.

24. *Id.*

25. Casimira Melican & Grace Mountford, *Why We’ve Introduced a Menstrual Policy and You Should Too*, VICTORIAN WOMEN’S TR. (May 23, 2017), <https://www.vwt.org.au/blog-menstrual-policy/>.

26. *Menstrual Policy: Policy Template*, VICTORIAN WOMEN’S TR., <https://www.vwt.org.au/menstrual-policy-2/> (last visited Nov. 8, 2020).

27. Melican & Mountford, *supra* note 25.

28. *Id.*

29. *Id.*

30. Kennedy Gondwe, *Zambia Women’s ‘Day Off for Periods’ Sparks Debate*, BBC NEWS (Jan. 4, 2017), <https://www.bbc.com/news/world-africa-38490513>.

31. *Id.*

32. *Id.*

In 2013, women's rights proponents in Russia derided legislator Mikhail Degtyaryov as sexist when he proposed a law affording women greater workplace protection surrounding menstruation.<sup>33</sup> Human rights campaigners considered the policy so absurd that they never took it seriously.<sup>34</sup> The head of a women's group, Marina Pisklakova-Parker, said, "If we are seriously debating women's efficiency at work during menstruation, we should also consider how fit for work men are after a drinking bout."<sup>35</sup> In other words, menstruation was to be viewed as a minor and temporary impediment to full functionality, akin to a hangover.

In India, full-time, female employees of the Bihar government have received two days of menstrual leave per month since 1992.<sup>36</sup> The leave is not designated as "menstrual," but rather is coded as leave for "biological reasons."<sup>37</sup> India's private sector may be catching on to the idea of menstrual leave, as well. In August 2020, two companies implemented their own policies.<sup>38</sup> One of these was the large restaurant aggregator, Zomato.<sup>39</sup> Demonstrating the company's desire to normalize dialogue surrounding menstruation-related matters, CEO Deepinder Goyal wrote to Zomato's employees, "There shouldn't be any shame or stigma attached to applying for a period leave. You should feel free to tell people on internal groups, or emails that you are on your period leave for the day."<sup>40</sup> "Menstrual leaves make workplaces more inclusive," said Shalini Jha, the founder of Project Alhar, a menstrual awareness organization.<sup>41</sup> Addressing criticism on social media that employers may discriminate against women if women are given the option for more leave, she said, "We would have implemented a blanket policy around menstrual [sic] leaves if cis-gender heterosexual men

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33. Damien Gayle, *Russian MP Accused of Sexism for Proposing Law Giving Women Two Paid Days Off a Month When They Are on Their Period*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-2382637/Russian-MP-proposes-law-giving-women-period-2-paid-days-work.html> (last updated Aug. 1, 2013, 12:36 PM).

34. *See id.*

35. *Id.*

36. Anam Ajmal & Vijaysinh Parmar, *Menstrual Leave Debated Online but Experts Give It a Thumbs Up*, TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/menstrual-leave-debated-online-but-experts-give-it-a-thumbs-up/articleshow/77474401.cms> (last updated Aug. 11, 2020, 7:05 PM).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

experience[d] periods.”<sup>42</sup> Her statement simultaneously addresses potential arguments that men are discriminated against by not receiving an equivalent amount of leave. Jha makes clear that men would have been granted the same privilege if they, too, menstruated.

Indonesia grants female employees two days of menstrual leave per month for the first and second days of menstruation.<sup>43</sup> In general, Indonesia grants workers generous leave, so this policy falls in line with a culture that appears to support time taken away from work. Indonesian workers enjoy fifteen paid annual public holidays,<sup>44</sup> contrasted with eleven in the United States.<sup>45</sup> With sick leave, employees are entitled to 100 percent of their wages for the first four months and 50 percent for the second four months.<sup>46</sup> Maternity leave is also generous, with employees receiving one-and-a-half months both before and after the birth of a child.<sup>47</sup> Those who suffer miscarriages receive paid leave—one-and-a-half months or another amount specified in a doctor-issued medical statement.<sup>48</sup> Interestingly, the country offers men only two days of paid paternity leave,<sup>49</sup> which suggests its paid leave policies favor women’s interests (or perhaps its expectations of women to fulfill family-centric roles).<sup>50</sup> Indonesia’s menstrual leave policy may appear effective in writing but is not in practice, as evidenced by

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42. *Id.*

43. NAFIS ADWANI, EMPLOYMENT AND EMPLOYEE BENEFITS IN INDONESIA: OVERVIEW (2015) (Westlaw, Practical Law Country Q&A 0-508-0242), <https://1.next.westlaw.com/0-508-0242?transitionType=Default&firstPage=true&contextData=%28sc.Default%29> (stating the law in Indonesia as of Nov. 1, 2015).

44. *Indonesia Global Compliance Guide*, REPLICON, <https://www.replicon.com/regulation/indonesia/> (last updated July 6, 2021).

45. This figure includes the 2021 addition of Juneteenth as a federal holiday; note the addition of a twelfth holiday, Inauguration Day, during election years. *See Policy, Data, Oversight: Pay & Leave*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=Historical-Date> (last visited Nov. 8, 2020); *see also* Kevin Freking, *Congress Approves Bill to Make Juneteenth a Federal Holiday*, AP NEWS (June 16, 2021), <https://apnews.com/article/juneteenth-congress-federal-holiday-3cc3b7a56ec97b0bae3dbdff1da092ee>.

46. *Indonesia Global Compliance Guide*, *supra* note 44.

47. *Id.*

48. *Id.*

49. *Id.*

50. *On Women’s Day, Workers Demand Longer Maternity Leave*, JAKARTA GLOBE (Mar. 8, 2015), <https://jakartaglobe.id/news/womens-day-workers-demand-longer-maternity-leave/> (“A three-month maternity leave is not enough for female laborers to take care of their newborns because babies need to be breastfed exclusively [for a longer period].” (alteration in original)).



certain corporations' enforcement practices: "[E]ven though Nike and Adidas were lauded for adopting the Indonesian law on menstrual leaves in all of their sweatshops . . . women were made to face excessive humiliation, such as being ask[ed] to pull their pants down to confirm if they were truly menstruating."<sup>51</sup>

Meanwhile, in at least three Chinese provinces,<sup>52</sup> women are entitled to one to two days of paid menstrual leave per month—provided they can obtain a certificate from a medical institute or hospital.<sup>53</sup> As in other countries, the policy is controversial. Opponents cited various problems with the policy, including added operational costs to account for female workforce members' absences and fear of upsetting supervisors.<sup>54</sup> Also, skeptics in China mirrored Japan in citing concern about the ambiguity surrounding whether "the employee is really sick or just cashing in on being a woman."<sup>55</sup> In 2011, politician Zhang Xiaomai provided sound rationale for a mandatory, blanket paid menstrual leave policy, arguing that "[m]ore than 85 percent of females were adversely affected by menstruation, and 78.5 percent of them didn't receive proper care during their periods."<sup>56</sup>

Given the numerous issues menstrual leave provokes, as well as the ways different cultures vary in their motivations for enacting menstrual leave policies, it is unsurprising that the proposed bill in Italy failed to obtain parliamentary approval. Italy could have been the first European country to pass a menstrual leave policy, but it failed to do so for the same reasons other countries have waffled on passing their own policies. Concerns about unintended adverse effects on menstruators may have colored at least some of the Parliament members' votes, especially because Italy is already

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51. Vrinda Aggarwal, *Leave to Bleed: A Jurisprudential Study of the Policy of Menstrual Leaves*, 8 J. INDIAN L. & SOC'Y 1, 5 (2017) (citing Timothy Connor, *We Are Not Machines*, CLEAN CLOTHES CAMPAIGN (Mar. 2002), <https://cleanclothes.org/resources/publications/we-are-not-machines.pdf>). Whether or not such practices remain in effect today is unclear, but their cited use at one time demonstrates how menstrual leave policies can cause more harm than good.

52. Hainan issued a non-mandatory policy in 1993, while Hubei issued a mandatory policy in 2009. The non-mandatory nature of Hainan's policy resulted in it being "not effectively implemented." Chen Xia, *Paid Menstrual Leave Provokes Controversy in China*, CHINA.ORG.CN (Feb. 16, 2016), [http://www.china.org.cn/china/2016-02/16/content\\_37800348.htm](http://www.china.org.cn/china/2016-02/16/content_37800348.htm). In 2016, Anhui joined Hainan and Hubei in enacting paid menstrual leave. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

reputed to permit harmful practices toward women in the workplace.<sup>57</sup> There, the employment rate for women is at 46 percent, the lowest rate in the entire European Union after Malta.<sup>58</sup> A particularly invidious practice is that of “white resignations,” in which female workers are forced to sign undated letters of resignation, effective immediately should they get pregnant or face long-term illness.<sup>59</sup> This practice reflects Italy’s apparent view of women’s role in society generally. The average partnered woman juggles roughly three-quarters of the domestic tasks, and her sphere is relegated to the home, caring for children.<sup>60</sup> These attitudes toward women—and prejudices toward working women—may have aided other Parliament members’ choice not to enact the menstrual leave policy. If the country ultimately wishes for women to remain in the home, policies facilitating their workplace mobility may be viewed as threatening to the fulfillment of women’s prescribed domestic roles. Yet cultural attitudes were likely not the only barricade to enactment. The policy itself had a potentially fatal flaw: the duration of leave it provided. The countries that successfully passed menstrual leave policies limited leave to either one or two days monthly.<sup>61</sup> Italy’s bill proposed three days per month,<sup>62</sup> totaling a staggering thirty-six days of paid menstrual leave per individual each year. It stands to reason that any physical condition requiring thirty-six days of absence from work seems more appropriately categorized under disability benefits than traditional leave benefits.

In the United States, where no governmental provisions currently exist, paid menstrual leave is left entirely up to employers. The most notable example is Nike, which introduced a company-wide menstrual leave policy in 2007 and requires business partners to sign a memorandum of

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57. See Anna Momigliano, *Italy Set to Offer ‘Menstrual Leave’ for Female Workers*, INDEP. (Mar. 25, 2017, 14:25), <http://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html> (noting that women in Italy are “already struggling to participate in the workforce”).

58. Catherine Hornby, *Italian Women Hope for Workplace Changes Post-Berlusconi*, REUTERS (Feb. 14, 2012, 8:10 AM), <https://www.reuters.com/article/us-italy-women/italian-women-hope-for-workplace-changes-post-berlusconi-idINTRE81D0W420120214>.

59. *Id.*

60. *Id.*

61. See Kim, *supra* note 18, at 53; Gondwe, *supra* note 30; ADWANI, *supra* note 43; Xia, *supra* note 52.

62. Momigliano, *supra* note 57.

understanding confirming that they will maintain Nike's standards.<sup>63</sup> (Although Nike's enforcement of its menstrual leave policy in Indonesia, if still in effect, suggests its practices beg further examination.) That said, in the past couple of years, menstrual leave has entered public discourse as more international companies, such as India's Zomato and Australia's VWT, have implemented these policies and as more countries like Italy and Russia contemplate such policies, even if they do not come to pass.

### *III. Controversies Surrounding Menstruation and Areas of Progress in the Law*

Menstruation is, at least for a certain number of years, a central fact of life for roughly half the world's population. In fact, "[o]n any given day, there are eight hundred million people on the planet who are menstruating."<sup>64</sup> Yet menstruation is also shrouded in secrecy, stigma, and shame. Menstruation has almost no presence in public discourse, and it can be a source of embarrassment and even disgust for women and men alike.<sup>65</sup> The stigma against menstruation is not a contemporary social construction—it has ancient roots. Aristotle "connected th[e] supposed inferiority [of women compared to men] specifically to menstrual blood, which he thought was inferior and less pure than semen in men."<sup>66</sup> Millennia later, his attitude persists. In a telling 2002 study published in *Psychology of Women Quarterly*, a woman appeared to accidentally drop either a hair clip or a tampon out of her handbag in front of an observer.<sup>67</sup> "[S]he was viewed as less competent, less likeable, and tended to be both psychologically and physically avoided" when she dropped the tampon instead of the hair clip.<sup>68</sup> There was not a statistically significant difference in this perception between men and women either; women matched men in their view of the woman as lower in competence and likeability.<sup>69</sup>

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63. Kayleigh Lewis, *Company Gives Women 'Period Leave' to Make Them More Productive*, INDEP. (Mar. 1, 2016, 20:27), <https://www.independent.co.uk/life-style/health-and-families/period-leave-menstruation-work-employment-uk-women-a6905426.html>.

64. Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 493, 494 (2019).

65. Tomi-Ann Roberts et al., "Feminine Protection": *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCH. WOMEN Q. 131, 131–33, 135–36 (2002).

66. *Id.* at 132.

67. *Id.* at 134.

68. *Id.* at 136.

69. *Id.* at 135.

In some places, menstruation coincides with diminished physical safety. Throughout the world, “toilets, hand-washing facilities, and water points are often wet, damp, ill-smelling, dimly lit, unhygienic spaces where one can slip, fall, hurt oneself, or fall ill. Worse, sanitation services are heavily gendered, and women across the world report a fear of being followed, seen, touched, or violated.”<sup>70</sup> Fortunately for women in the United States, conditions like these are rare, and menstruation is generally not as problematic as it can be in economically developing countries like India,<sup>71</sup> Nepal,<sup>72</sup> and Uganda.<sup>73</sup> United States citizens have greater access to menstrual care products and comparatively less cultural shame surrounding the process. Nonetheless, stigma about menstruation exists in the United States: women often feel compelled to disguise their menstrual status. A well-known, idiomatic “code” provides both women and men relief from the discomfort of naming menstruation and its related symptoms: “that time of the month,” “Aunt Flo,” and “the crimson tide,” to name a few examples.

Unfortunately, our continued embarrassment in talking about periods has harmful consequences. Women learn from a young age that their physical pain is normal, no matter the severity. They may refrain from seeking medical attention under the belief that their issue is neither in need of, nor

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70. Archana Patkar, *Policy and Practice Pathways to Addressing Menstrual Stigma and Discrimination*, in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES* 485, 487 (Chris Bobel et al. eds., 2020).

71. Aggarwal, *supra* note 51, at 19 (“In most parts of the country, menstruation is considered impure. Social construction of menstruation requires it to be shoved in the deepest private corners of a women’s [sic] life.”).

72. Heather Barr, *A Step in the Right Direction on Menstrual Stigma in Nepal: But Making Chaupadi a Crime Is Only a First Step*, HUMAN RIGHTS WATCH (Aug. 10, 2017, 10:16 AM), <https://www.hrw.org/news/2017/08/10/step-right-direction-menstrual-stigma-nepal#> (explaining the illegalization of the enduring practice of “Chaupadi,” in which menstruating women, believed to be “unclean,” are forced out of their homes and into outdoor huts that subject them to dangers such as fire and smoke inhalation, wintry weather conditions, snakes, and other predatory animals).

73. George Miiro et al., *Menstrual Health and School Absenteeism Among Adolescent Girls in Uganda (MENISCUS): A Feasibility Study*, 18 *BMC WOMEN’S HEALTH* article no. 4, 2018, at 9 (explaining that stigma and fear of teasing from boys lead Ugandan schoolgirls to school absenteeism during menstruation).

deserving of, investigation.<sup>74</sup> One study showed that 71.5 percent of participants believed that dysmenorrhea<sup>75</sup> was a normal part of life and that their own menstrual symptoms moderately affected their daily lives.<sup>76</sup> Because menstrual pain is so normalized but open discussion of it is not, women may neglect to consider that they are experiencing legitimate health conditions that require proper diagnosis and ongoing treatment by a medical care provider.

Another problem hindering support for women's reproductive health stems from a lack of understanding of (or appreciation for) the extent of pain some women suffer in relation to their menstrual period. Only in more recent years have hormonal issues such as polycystic ovarian syndrome ("PCOS"), dysmenorrhea, and endometriosis gained greater understanding outside the medical community. One such example is pre-menstrual dysphoric disorder ("PMDD"), which is, essentially, a much more severe version of the symptoms that women suffer during premenstrual syndrome ("PMS"), particularly those that are psychological in nature.<sup>77</sup> Between 3 percent and 8 percent of women who experience moderate to severe PMS also suffer from PMDD.<sup>78</sup> While PMDD is less common than PMS, its symptoms are disruptive to daily functioning, affecting sufferers' energy levels, moods, concentration, coordination, and physical wellbeing.<sup>79</sup> Alarming, suicidal ideation is also associated with PMDD, with 15 percent of PMDD sufferers attempting suicide in their lifetime.<sup>80</sup>

Given the severity and commonality of menstruation-related symptoms, one might expect that individuals who do not suffer from such conditions

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74. "[S]trong normalcy beliefs [surrounding dysmenorrhea] were a barrier to seeking care. This finding is consistent with research on endometriosis which reports that normalization of dysmenorrhea symptoms significantly delayed care seeking, diagnosis, and treatment." Chen X. Chen et al., *Beliefs About Dysmenorrhea and Their Relationship to Self-Management*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (May 13, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7509811/> (manuscript).

75. *Id.* (explaining that dysmenorrhea is the medical term for menstrual cramping, specifically defined as "abdominal cramps and other symptoms occurring just before or during a menstrual period (e.g., low back pain, nausea, vomiting, change in the number and type of bowel movements, change in appetite)").

76. *Id.*

77. Lori Smith, *Premenstrual Dysphoric Disorder (PMDD)*, MED. NEWS TODAY (July 10, 2018), [https://www.medicalnewstoday.com/articles/308332#\\_noHeaderPrefixedContent](https://www.medicalnewstoday.com/articles/308332#_noHeaderPrefixedContent).

78. *Id.*

79. *Id.*

80. *Women & Suicide*, INT'L ASS'N FOR PREMENSTRUAL DISORDERS, <https://iapmd.org/female-suicide> (last visited Feb. 20, 2021).

would be sympathetic to the plight of those who do. Surprisingly, that is not always the case. A school of progressive feminists rallies against the classification of menstruation-related ailments as diagnosable conditions out of concern that the medicalization of menstruation reinforces stereotypical notions of the menstruating woman as an “irrational female.”<sup>81</sup> While a valid concern, the failure to provide proper medical classification to these ailments threatens to undermine efforts to mitigate the pain that menstruators can experience. And there are practical legal ramifications in excluding menstruation-related ailments from legitimacy. For example, failure to recognize the psychological effects of menstruation as deserving of inclusion in the American Psychological Association’s Diagnostic and Statistical Manual of Mental Disorders could preclude conditions such as PMDD from earning fair consideration by legislatures for statutory protections. After all, if there is no salient medical issue in the eyes of the medical community, there is no basis for oversight or regulation by the legal community.

Controversies aside, it appears that change may be afoot when it comes to advancing the narrative about women’s reproductive health issues. A key legislative entry point to progress centers around removing economic barriers to menstrual care. Menstrual care products can be cost-prohibitive. In fact, one in four<sup>82</sup> teenagers struggle from “period poverty,” in which access to these products is inhibited by economic forces.<sup>83</sup> One such example is the “tampon tax,” which is a tax consumers pay for the purchase of tampons and other menstrual care products. Opponents of the tax argue it

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81. See Sally King, *Premenstrual Syndrome (PMS) and the Myth of the Irrational Female* (defining the “myth of the irrational female” as the concept that “women are pathologically emotional, and thus have a reduced capacity for reason, due to their reproductive biology”), in *THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES*, *supra* note 70, at 287, 287.

82. This figure has increased from one in five teens in 2019. See Nadya Okamoto & Maria Molland, *The Cost of Tampons Is Hurting Low-Income Girls. Let’s Fix That*, CNN BUS.: PERSPECTIVES (Oct. 21, 2019, 3:55 PM EDT), <https://www.cnn.com/2019/10/21/perspectives/period-poverty-menstrual-products/index.html>.

83. *State of the Period 2021: The Widespread Impact of Period Poverty on US Students*, PERIOD., <https://period.org/uploads/State-of-the-Period-2021.pdf> (last visited Oct. 18, 2021).

unduly burdens access to already cost-prohibitive, necessary products.<sup>84</sup> They allege that the tax uniquely and unfairly targets women:

The tampon tax is uncommon because it is one of the few tax policies that so blatantly discriminates against one class of individuals. Legislators and commentators have tried to find an analogy in the various state tax codes where another class of individuals is so clearly called out to bear the burden of a tax policy simply because of their biology—without success.<sup>85</sup>

The lack of a comparable male equivalent to the tampon tax adds to existing tension. For example, Viagra is tax-free in every state except Illinois.<sup>86</sup> “When products that are so specifically aimed at men and life enhancement, like Viagra, instead of life necessities, like tampons, are tax-free, it says that the broader society has little care to spare for menstrual health.”<sup>87</sup>

International legislative bodies have begun to notice the disparity between men’s and women’s tax burdens, as well as the issue of financial barriers to menstrual care products. Two countries have recently enacted major policies that could inspire a global sea change in approaches toward these economic issues. As of January 1, 2021, the United Kingdom has abolished the tax on women’s menstrual care products altogether.<sup>88</sup> An even more sweeping piece of legislation comes from Scotland. In November 2020, its Parliament unanimously approved a bill providing for a legal right to free menstrual products in schools, universities, and other public buildings.<sup>89</sup> Scotland’s goals for menstrual equity do not stop at the bill; its goals extend to educational initiatives and beyond. The bill’s author, Scottish Labour party health spokeswoman Monica Lennon, said, “Once

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84. For example, the tampon tax had cost Californians “born with a uterus more than \$20 million a year” prior to its elimination. David Williams, *California Public Schools Will Provide Free Menstrual Products Under New Law*, CNN (Oct. 9, 2021, 2:18 PM ET), <https://www.cnn.com/2021/10/09/us/california-menstrual-products-schools-trnd/index.html>.

85. Gwennyth S. Gamble Jarvi, Note, *Thank Hefner Erectile Dysfunction Is a Medical Condition: A Period Piece*, 15 PITT. TAX REV. 181, 203 (2018).

86. *Id.* at 204.

87. *Id.* at 206.

88. HM Treasury, *Tampon Tax Abolished from Today*, GOV.UK (Jan. 1, 2021), <https://www.gov.uk/government/news/tampon-tax-abolished-from-today>.

89. Gina Davidson, *Scotland Becomes First Country to Have Universal Free Period Products*, SCOTSMAN (Nov. 24, 2020, 6:52 PM), <https://www.scotsman.com/news/politics/scotland-becomes-first-country-have-universal-free-period-products-3045105>.

access to period products is secured for all, our next steps must be ensuring women's health in general remains high on the political agenda in Scotland and that we end all stigma around menstruation. This should start with menstrual wellbeing education in all schools."<sup>90</sup> Ms. Lennon also promised to work with trade unions in "improv[ing] period dignity in all workplaces."<sup>91</sup>

In sharp contrast with Scotland is Brazil, where President Jair Bolsonaro recently blocked a plan to distribute free period products to disadvantaged girls and women.<sup>92</sup> The bill would have reached homeless people, prisoners, and teenage girls at state schools and was expected to benefit 5.6 million women across Brazil.<sup>93</sup> In a country where period poverty is estimated to keep one in four girls out of school, his decision invoked outrage.<sup>94</sup> Rozana Barroso, president of the Brazilian Union of Secondary Students, called the veto "absurd and inhumane."<sup>95</sup> She added, "Have you ever imagined using paper, newspaper or breadcrumbs to contain menstruation? This is a harsh reality, especially among young people."<sup>96</sup>

As for the United States, it trails behind its Atlantic neighbors but strides ahead of Brazil.<sup>97</sup> While numerous states have either abolished the tampon tax or never had one due to lacking a sales tax, it remains in effect in thirty states.<sup>98</sup> That said, in October 2021, a significant piece of legislation passed in California, showing the needle may be moving further still toward reducing period poverty. Beginning in the 2022-2023 school year, a new law will require California public schools to stock bathrooms with free menstrual products for students in grades 6–12.<sup>99</sup> The law will also require

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90. *Id.*

91. *Id.*

92. Jo Griffin, *Bolsonaro Blocks Free Tampons and Pads for Disadvantaged Women in Brazil*, *GUARDIAN* (Oct. 11, 2021, 7:02 AM EDT), <https://www.theguardian.com/global-development/2021/oct/11/bolsonaro-blocks-free-tampons-and-pads-for-disadvantaged-women-in-brazil>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See generally* Okamoto & Molland, *supra* note 82 (condemning "[p]eriod poverty" as "an unacceptable national epidemic" in the United States).

98. Rachel Epstein, *The Current State of the Tampon Tax—and How We're Going to Eliminate It*, *MARIE CLAIRE* (May 3, 2021), <https://www.marieclaire.com/politics/a29490059/tampon-tax-state-guide/>.

99. *See* Williams, *supra* note 84.



the California State University system to stock free products in at least one central location on each campus.<sup>100</sup>

The social, cultural, and economic issues surrounding menstruation are complex and slow to change, raising important questions about what comes next for the United States with respect to legislating menstrual issues and the new issues that will arise as a result. If the tampon tax is eradicated across all fifty states, lobbyists for women's reproductive rights and equality in the workplace will undoubtedly turn their attention to other arenas. As a result, paid menstrual leave could conceivably become ripe for consideration in the near future. Part IV seeks to provide insight into, if not answer, the question of whether a menstrual leave policy could fit into the United States' employment statutes.

#### *IV. Legal Landscape: Existing Leave Policies in the United States and Case Law as Proof of Menstrual Leave's Utility*

The United States' legal authority surrounding the viability of menstrual leave is nebulous because none of its leave policies directly provides for the type of leave menstrual issues require: short-term, preferably paid leave. The two primary federal leave policies, the FMLA and ADA, nonetheless provide the best bases for analysis of a menstrual leave policy, while case law provides insight into the utility of a menstrual leave policy and the types of cases it may prevent or resolve.

##### *A. Statutes*

A key consideration regarding a menstrual leave policy in the United States is determining where such a policy would fit into statutory code. Work-leave provisions most commonly fall under the Family and Medical Leave Act of 1993 ("FMLA")<sup>101</sup> and the Americans with Disabilities Act ("ADA").<sup>102</sup> Menstruation-related issues must be classifiable as "medical conditions" to garner workplace protection under either of these Acts.

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100. *Id.*

101. *Family and Medical Leave (FMLA)*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/benefits-leave/fmla> (last visited Nov. 4, 2020).

102. *Americans with Disabilities Act (ADA)*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/disability/ada> (last visited Nov. 4, 2020).

### 1. FMLA

Given that the FMLA is the primary statute providing for family-related matters and that menstruation is a function of reproduction, it marks the clearest place to carve out a menstrual leave provision. The FMLA provides for twelve job-protected workweeks of leave within a twelve-month period.<sup>103</sup> It also requires employers to maintain the employees' health insurance benefits during the leave.<sup>104</sup> It covers the birth of a child and care of a newborn, the placement of a child for adoption or foster care with the employee, a serious health condition of the employee, and certain exigencies arising out of the employee having relatives in the military on "covered active duty."<sup>105</sup> The FMLA also provides for twenty-six workweeks of leave during a twelve-month period to care for a covered servicemember if the relationship is that of spouse, son, daughter, parent, or next of kin.<sup>106</sup> The goal of the FMLA is to "help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women."<sup>107</sup>

There are a few catches, however, that make the FMLA a suboptimal piece of legislation for housing a menstrual leave policy. Most glaringly, it only provides for unpaid leave.<sup>108</sup> More specifically, the FMLA provides for long-term, unpaid job protection, while the goal for a menstrual leave policy is short-term, paid job protection because menstruation-related issues typically require only short-term absence from work. Also, the FMLA does not apply to all companies; it applies to larger companies only, namely "all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees."<sup>109</sup> Furthermore, employees must have worked for the employer for at least one year and worked a minimum of 1250 hours during that time.<sup>110</sup> They must also work at a location employing fifty or more employees within a seventy-five mile

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103. *Family and Medical Leave (FMLA)*, *supra* note 101.

104. *Id.*

105. *Family and Medical Leave Act*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla> (last visited Nov. 4, 2020).

106. *Id.*

107. *Family and Medical Leave (FMLA)*, *supra* note 101.

108. *Id.*

109. *Id.*

110. *Id.*

radius.<sup>111</sup> Therefore, employees at small companies are not eligible for coverage under the FMLA, nor are employees whose tenure at their companies is under one year in duration. An issue with housing menstrual leave within the FMLA is that the Act exempts smaller companies, which may have fewer resources compared to larger companies. To stay competitive in attracting workers, small companies may, as a result, be compelled to pass their own internal menstrual leave policies that strain resources and overhead expenses. The burden would vary depending on the total number of employees, ratio of female to male employees, and density of female to male employees across the company's industry.

Another issue is that the FMLA's existing leave categories are broader: birthing and caring for a newborn, fostering or adopting a child, health issues generally, and certain military-related coverage. To enact a policy that is granular and consistent with a specific subset of reproductive health would situate a menstrual leave provision uniquely to its companion provisions within the FMLA. This is not to say that enactment under the FMLA is not viable. It is just that other, similarly granular policy proposals could then follow, potentially creating a slippery slope. Legislators may receive numerous other proposed additions to the FMLA. For example, individuals who suffer from migraine headaches may wish to have a policy serving their particular interests, and legislators would have to consider whether or not lines should be drawn protecting additional health conditions from job insecurity. Implementation of menstrual leave under the FMLA could result in a somewhat more burdened legislative system.

Despite these caveats, the FMLA may still provide the easiest inroad for implementing menstrual leave. Congress passing an entirely new piece of legislation could be time-consuming and cumbersome. Also, it may fail to launch altogether if it lacks adequate support and promotion by legislators and stakeholders. Therefore, it may be easier to amend the existing FMLA than to propose and enact an entirely new piece of legislation.

## 2. ADA

In contrast with the broad provisions of the FMLA, the ADA<sup>112</sup> is narrower, providing a set of protections specifically outlined for the subset of U.S. citizens who are classifiable as "disabled." Passed in 1990,<sup>113</sup> the

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111. *Id.*

112. 42 U.S.C §§ 12101–121017, 12131–12165, 12181–12189, 12201–12213.

113. *Americans with Disabilities Act of 1990, as Amended*, ADA.GOV, <https://www.ada.gov/pubs/adastatute08.htm> (last visited Feb. 13, 2021).

Act is divided into five titles: Employment (Title I); Public Services (Title II); Public Accommodations and Services Operated by Private Entities (Title III); Telecommunications (Title IV); and Miscellaneous (Title V).<sup>114</sup> Title I is most germane to the subject of menstrual leave since it encompasses obligations employers owe to employees. It requires covered employers to

provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment. Reasonable accommodation includes, for example, restructuring jobs, making work-sites and workstations accessible, modifying schedules, providing services such as interpreters, and modifying equipment and policies. Title I also regulates medical examinations and inquiries.<sup>115</sup>

Under the ADA, employers are barred from dismissing employees because of the employees' disabilities.<sup>116</sup>

The ADA could technically house a menstrual leave policy, but with a likely deal-breaking caveat: menstruation itself would have to be coined a disability under its terms.<sup>117</sup> Under the Act, "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>118</sup> While classifying

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114. *Id.* (noting that Title IV of the original law has been recodified as title 47, chapter 5).

115. *The Americans with Disabilities Act: A Brief Overview*, JOB ACCOMMODATION NETWORK (July 26, 2012), <https://askjan.org/articles/The-Americans-with-Disabilities-Act-A-Brief-Overview.cfm>.

116. 42 U.S.C. § 12112(a); *see also* *Buckley v. Consol. Edison Co.*, 155 F.3d 150, 153–54 (2d Cir. 1998).

117. Disability classification can be challenging to establish under the ADA. Even specific, long-term conditions that arise out of the menstrual cycle, such as endometriosis, have failed to gain classification of disability status for ADA purposes. *See, e.g.*, *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 937 (7th Cir. 2007). "Kampmier's endometriosis flares up a week or two before and after her menstrual cycle, during painful periods, and for a month and a half after surgery." *Id.* at 935. Nonetheless, the court here held that "[a]lthough endometriosis is undoubtedly painful, in this case it does not rise to the level of disability under the ADA." *Id.* at 937. Therefore, categorizing menstruation itself as a disability is a possibly insurmountable challenge, given that it is not a uniformly disabling process for all menstruators.

118. *Americans with Disabilities Act of 1990, as Amended*, *supra* note 113.

menstruation as a disability seems like a stretch, it clears the statutory requirements of a disability under the Act's terminology: menstruation does, at times, cause physical impairments that substantially limit one or more major life activities of its sufferers, and individuals who menstruate often have a formal medical diagnosis for associated conditions such as dysmenorrhea and endometriosis. The third element, "being regarded as having such an impairment," is likely more difficult for most individuals to satisfy given the private nature of reproductive health matters, but it is not a necessary element. Rather, each element individually suffices to satisfy the definition of "disability" under the ADA.

Yet, satisfaction of the "disability" elements may not suffice for granting disability status to menstruation-related issues. In practice, the process of disability classification is more difficult. Courts have repeatedly held that the type of interruption to daily life that physical ailments require must be of a certain duration:

Short term impairments are not generally deemed to be substantially limiting, and hence do not constitute a disability for the purposes of the ADA. Similarly, the suffering of occasional episodes of a long term or life-time impairment will not render the individual disabled because the physical manifestation of the impairment is of insufficient duration.<sup>119</sup>

Even if an exception were granted under the ADA to allow for shorter-term, menstruation-related issues, the ADA is not the ideal vessel for a menstrual leave policy. It would be a double-edged sword to classify menstruation as a disability under the ADA, because with disability often comes stigma. Opponents of paid menstrual leave would no doubt recoil at the possibility of women being considered disabled for, well, being women. On the other hand, painful conditions like dysmenorrhea can be disabling to the menstruators who suffer from them—even if only temporarily.<sup>120</sup> These individuals are ultimately left to fend for themselves in negotiating

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119. *Chen v. Citigroup Inv., Inc.*, No. 03 CV 6612(GBD), 2004 WL 2848539, at \*3 (S.D.N.Y. Dec. 9, 2004) (citing *Adams v. Citizen Advice Bureau*, 187 F.3d 315, 316 (2d Cir. 1999); *Colwell v. Suffolk Cnty. Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998)) (citation omitted).

120. Mike Armour et al., *Study Finally Shows How Disruptive Period Pain Really Is, and We Need to Talk About It*, SCI. ALERT (June 29, 2019), <https://www.sciencealert.com/period-pain-is-probably-causing-days-of-lost-productivity-each-year>; accord Schoep et al., *supra* note 8.

accommodations with their employers because they lack meaningful legal protection from menstruation-related adverse employment outcomes.

*B. Case Law*

Moving beyond the federal statutory codes, case law provides further guidance as to the need for legal protections for menstruators. There is, unfortunately, scant case law speaking to adverse employment outcomes stemming from menstruation-related conditions. This is unsurprising since there is little social discourse surrounding menstruation in the first place. Perhaps the most telling explanation for the dearth of case law is that menstruation is ultimately a private health matter. Disclosing private health conditions in the public record is daunting and may prevent many, if not most, individuals from pursuing claims altogether. There are, however, some cases on record in which plaintiffs incurred adverse employment outcomes due to their menstrual cycles and subsequently pursued legal recourse.

In one such headline-grabbing case, *Coleman v. Bobby Dodd Institute*, the American Civil Liberties Union of Georgia obtained a settlement for a woman fired from her job in 2016 because her menstrual blood leaked onto her office chair on two separate occasions.<sup>121</sup> The District Court for the Middle District of Georgia held that pre-menopause and sudden-onset heavy menstruation are not protected as sex-linked traits under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act.<sup>122</sup> The court further discussed whether the Pregnancy Discrimination Act should extend to conditions beyond pregnancy:

[E]arly Supreme Court precedent interpreting the [Pregnancy Discrimination Act] could be construed to extend this protection to uniquely feminine conditions beyond pregnancy, such as premenopausal menstruation. . . . Thus, a non-frivolous argument can be made that it is unlawful for an employer to treat a uniquely feminine condition, such as excessive menstruation, less favorably than similar conditions affecting both sexes, such as incontinence.<sup>123</sup>

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

122. *Id.* at \*2.

123. *Id.* (citation omitted).

The court ultimately rejected this argument, reasoning that the plaintiff's claims lacked merit because she had failed to assert "that her excessive menstruation was treated less favorably than similar conditions affecting both sexes."<sup>124</sup>

A case from the U.S. Court of Appeals for the Eleventh Circuit, *Young v. Colvin*,<sup>125</sup> centered around whether a plaintiff had a right to claim disability insurance benefits under the Social Security Act. She submitted for consideration numerous menstruation-related ailments, including PMDD, severe menstrual cramps, and excessive bleeding.<sup>126</sup> On appeal, the court considered whether an administrative law judge ("ALJ") who initially heard the case *ex parte* "erred as a matter of law in rejecting, failing to consider, or failing to state a basis for rejecting the plaintiff's allegations of severe menstrual pain and excessive bleeding."<sup>127</sup> The court held that

[i]n this case, the court would have to deliberately "close its eyes" to the ALJ's obvious omission of any discussion of Young's complaints of dysmenorrhea and menorrhagia—particularly in light of the testimony presented at the administrative hearing, the extensive medical record documenting these disorders, the reference to these disorders in the plaintiff's initial brief, and *the ALJ's numerous notes in his own opinion* observing (without any analysis) that the medical record establishes the presence of these underlying medical conditions.<sup>128</sup>

In other words, the ALJ had abundant evidence to uphold the plaintiff's claim of menstruation-related health conditions—including medical documentation<sup>129</sup> and notes in his own opinion—yet nonetheless rejected the plaintiff's allegations of such pain.<sup>130</sup> The court further held that the ALJ erred in rejecting the allegations. It explained that "[a] 'severe

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124. *Id.*

125. *Young v. Colvin*, No. 2:11CV889-CSC, 2013 WL 1336798 (M.D. Ala. Mar. 29, 2013).

126. *Id.* at \*2.

127. *Id.* at \*3.

128. *Id.* (citation omitted).

129. The medical record the ALJ reviewed included diagnoses of dysmenorrhea, menorrhagia, and PMDD. *Id.* at \*6. In all, the plaintiff received formal medical diagnoses of menstruation-related health conditions on sixteen separate occasions, yet the ALJ still rejected the plaintiff's allegations of these conditions. *Id.* at \*6–7.

130. *Id.* at \*7.

impairment’ [is] defined as ‘any impairment or combination of impairments which significantly limits [the claimant’s] physical or mental ability to do basic work activities.’”<sup>131</sup> Furthermore, the court said, “An impairment can be considered as ‘not severe only if the abnormality is so slight and its effect so minimal that it would clearly not be expected to interfere with the individual’s ability to work, irrespective of age, education or work experience.’”<sup>132</sup>

The plaintiff’s condition met the requirements for a severe impairment. She testified that “during the days when [her] impairments were most severe, she felt weak, suffered from excessive bleeding, was unable to leave the house, and would have to lie down with a hot water bottle in an attempt to relieve her symptoms.”<sup>133</sup>

*Young* may provide some insight into why women may not feel comfortable seeking systemic support for menstruation-related health issues. If empiric medical evidence verifying one woman’s health problems is struck down in the eyes of the law, it sends a message to all women that there is little reason to believe that legal protection exists for their own related issues. While the plaintiff ultimately prevailed in that the court held the ALJ’s ruling invalidating her health conditions was in error,<sup>134</sup> it was at great cost, i.e., the significant temporal and monetary expenses that accompany litigation, as well as the emotional expenses of sacrificed privacy and dignity.

In another case, model Rachel Rickert alleged that she was fired from her job representing Hyundai at the New York International Auto Show because of her period.<sup>135</sup> When she asked for a restroom break to change her tampon, she was told it was “too busy a time” and subsequently failed to make it to the restroom in time (presumably to avert stained clothes).<sup>136</sup> Two days later, Hyundai asked that she not return to work due to the incident.<sup>137</sup> The outcome of this case, however, is unclear. While Ms. Rickert filed a charge with the EEOC against Hyundai and her model

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131. *Id.* at \*5 (second and third alteration in original) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003)).

132. *Id.* (citing *McDaniel v. Bowen*, 800 F.2d 1026, 1031 (11th Cir. 1986)).

133. *Id.* at \*10.

134. The court reversed and remanded the case. *Id.* at \*11.

135. *Model Claims Hyundai Fired Her for Having Her Period*, BBC NEWS (May 31, 2017), [https://www.bbc.com/news/world-us-canada-40109228?ocid=socialflow\\_twitter](https://www.bbc.com/news/world-us-canada-40109228?ocid=socialflow_twitter).

136. *Id.*

137. *Id.*



management firm, there are no publicly available documents at this time to indicate whether she proceeded with litigation, settled, or abandoned the suit altogether.

*Chen v. Citigroup Investment, Inc.* concerns a newly hired plaintiff's discharge from her job due to dysmenorrhea-related absences.<sup>138</sup> This case differs from others in that it was not just a substantive legal determination that barred the plaintiff from recovery, but also an attorney's oversight. The plaintiff brought forth discrimination claims under the ADA and Title VII, but she neglected to provide a basis for the Title VII cause of action, and the court dismissed the claim.<sup>139</sup> The ADA claim failed, as well, because dysmenorrhea was not covered in its provisions. The court considered dysmenorrhea a short-term impairment, which is not generally considered "substantially limiting" enough for the fulfillment of "activities that are of central importance to daily life"<sup>140</sup> to garner disability status under the ADA.<sup>141</sup> As a final blow to the case, the plaintiff did not provide the employer appropriate notice of her condition.<sup>142</sup> The court held that in the absence of this notice, the complaint's ADA claim failed viability.<sup>143</sup> "An employer cannot have discriminated against an employee on the basis of a known disability where the employer learns of the disability only after firing the employee."<sup>144</sup> Frustratingly, the dismissal of these claims may have been preventable had the attorney provided a basis for the Title VII cause of action. Had *Chen* been fully litigated, it could have provided useful

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138. *Chen v. Citigroup Inv., Inc.*, No. 03 CV 6612 (GBD), 2004 WL 2848539, at \*1 (S.D.N.Y. Dec. 9, 2004).

139. *Id.* at \*2 (Title VII prohibits employers from discriminating against employees on the basis of race, sex, national origin, color, or religion. Notably, it excludes disability from its protected classes.).

140. *Id.*

141. *Id.* at \*3.

142. *Id.* Other cases have noted similarly that a plaintiff must provide notice of an ADA condition to an employer. See *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1186 (11th Cir. 2005) ("[A] decision-maker who lacks actual knowledge of an employee's disability cannot fire the employee 'because of' that disability."); see also *Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 910 (11th Cir. 1996) ("In order to establish a *prima facie* case of discrimination under the ADA . . . a plaintiff must demonstrate that the employer had either actual or constructive knowledge of the [employee's] disability or considered the employee to be disabled."); *Rogers v. CH2M Hill, Inc.*, 18 F. Supp. 2d 1328, 1334 (M.D. Ala. 1998) ("Notice by the employee is needed in an ADA case . . . because without it the employer might not ever know that the employee suffers from a disability.").

143. *Chen*, 2004 WL 2848539, at \*3.

144. *Id.* at \*3.

precedent for similar future cases. Of note for ADA purposes is that the plaintiff in this case experienced dysmenorrhea, which is a short-term condition associated with menstruation. As discussed, short-term conditions are less apt to fall under ADA purview.<sup>145</sup> Therefore, a menstrual leave policy could have made all the difference in this case given that only longer-term conditions are likely to garner ADA protection.<sup>146</sup>

In *Jirak v. Federal Express Corp.*,<sup>147</sup> the plaintiff brought a civil rights action against her employer under Title VII and the Pregnancy Discrimination Act, which prohibits employment discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.”<sup>148</sup> Here, the plaintiff missed three work shifts and was also late several times during a five-month period.<sup>149</sup> (The case does not specify whether these absences were related to menstrual pain.) Her employer issued warnings regarding her absentee conduct.<sup>150</sup> Over the next couple of months, she had no more absences but was tardy a few more times.<sup>151</sup> Then, the plaintiff called in sick with back pain and menstrual cramps and was consequently terminated from employment.<sup>152</sup> She filed a complaint, alleging that menstruation, “like pregnancy, is a uniquely female attribute for which an employer may not lawfully discharge an employee.”<sup>153</sup> The court, as in *Coleman*,<sup>154</sup> applied a narrower interpretation of the Pregnancy Discrimination Act and rejected this argument, holding that “menstrual cramps are not a medical condition related to pregnancy or childbirth.”<sup>155</sup> This case marks another excellent example of a case in which a plaintiff may have benefited from the protections a menstrual leave policy could afford. Perhaps that final absence from work would not have led to the plaintiff’s discharge. Furthermore, if any of her previous absences had

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145. *Id.*

146. And even long-term conditions like endometriosis are not guaranteed ADA protection. *See, e.g., Kampmier v. Emeritus Corp.*, 472 F.3d 930, 935, 937 (7th Cir. 2007).

147. *Jirak v. Fed. Exp. Corp.*, 805 F. Supp. 193 (S.D.N.Y. 1992).

148. *Id.* at 195.

149. *Id.* at 194.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 195.

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

155. *Jirak*, 805 F. Supp. at 195.

resulted from menstrual pain, they too could have been protected under the policy.

Most recently, in July 2019, Virginia Department of Corrections (“VDOC”) prison staffer Joyce Flores was terminated from her job under suspicion of smuggling contraband.<sup>156</sup> The culprit? A tampon.<sup>157</sup> The facility’s body scanners were sensitive enough to detect tampons but could not distinguish between tampons and drugs.<sup>158</sup> Accordingly, the VDOC had passed a rule in 2018 banning individuals from entering its facilities while wearing tampons.<sup>159</sup> Although the rule was technically lifted about a week later due to public outcry, corrections officials continued to prohibit women from wearing tampons into the facilities.<sup>160</sup> Flores did not comply with the by-then-unofficial rule because she was going through peri-menopause and experiencing heavy periods.<sup>161</sup> After subjecting her to a humiliating search evidencing that she was, indeed, menstruating and not smuggling drugs, Flores was nonetheless placed on administrative leave.<sup>162</sup> Two weeks later, she was fired due to suspicion of contraband.<sup>163</sup>

Flores brought suit under Title VII claiming unlawful discrimination, alleging that “her termination was pretext for sex discrimination.”<sup>164</sup> The VDOC sought dismissal on grounds that Flores had failed to provide enough evidence to prove that she was fired on the basis of her gender.<sup>165</sup> The Western District of Virginia upheld Flores’ right to sue, finding that Flores had sufficiently alleged her claim of discrimination.<sup>166</sup> In his opinion, Judge Thomas T. Cullen said, “[B]ut for Flores’s menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged.”<sup>167</sup> The case is

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156. Jaclyn Peiser, *Virginia Prison Guards Accused a Staffer of Smuggling Contraband, so She Was Fired. It Was a Tampon, She Says*, WASH. POST (Feb. 25, 2021), <https://www.washingtonpost.com/nation/2021/02/25/prison-staffer-tampon-fired-virginia/>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Flores v. Va. Dep’t of Corrections, No. 5:20-cv-00087, 2021 WL 668802, at \*1, \*3 (W.D. Va. Feb. 22, 2021).

165. *Id.* at \*5.

166. *Id.* at \*6.

167. *Id.*

unresolved as of October 2021, but it appears to be ongoing, with reports by medical experts filed in August 2021.<sup>168</sup> This case marks another example of an adverse employment outcome that could have been prevented had a menstrual leave policy been in effect.

Finally, in a departure from the adverse outcomes above, the plaintiff prevailed in *Hart v. Malabar Pharmacy, LLC*.<sup>169</sup> In that case, an employee sought medical treatment for a “prolonged, five-month period of menstruation.”<sup>170</sup> She received a blood transfusion and diagnosis of PCOS.<sup>171</sup> She was given a doctor’s note instructing her to “stay home for ten days and avoid strenuous work thereafter.”<sup>172</sup> On the eighth day, her employer instructed her to report to work, which she did.<sup>173</sup> While at work, she was asked to mop, an activity prohibited by her medical condition.<sup>174</sup> As a result of her refusal to mop, she was fired.<sup>175</sup> The court held that the plaintiff’s five-month menstrual period and accompanying PCOS diagnosis sufficed as a disability under the ADA.<sup>176</sup> Here, too, a menstrual leave policy could have prevented the plaintiff’s adverse employment outcome because she may not have felt pressured to return to work before the end of her prescribed rest period.

This spectrum of case law suggests that a menstrual leave policy would aid in many cases in which menstruation led to adverse employment outcomes. A menstrual leave policy would certainly help in cases of short-term menstrual conditions and would also aid sufferers of long-term or chronic menstrual conditions when courts fail to recognize such conditions as covered medical conditions under the ADA or FMLA. Workers could therefore experience a dramatic reduction in adverse employment outcomes resulting from short-term menstrual conditions; individual, menstruation-related incidents; and longer-term issues that the law has yet to recognize as legitimate disabilities.

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168. Report or Affidavit of Dr. Jordan Haber M.D., DACR, FACR, *Flores*, No. 5:20-cv-00087, 2021 WL 3772492; Expert Review by Dr. Eric Swisher, *Flores*, No. 5:20-cv-00087, 2021 WL 3772489.

169. *Hart v. Malabar Pharmacy, LLC*, No. 6:19-cv-2347-Orl-31LRH, 2020 WL 1665869, at \*2 (M.D. Fla. Apr. 3, 2020).

170. *Id.* at \*1.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at \*2.

### *V. Pros and Cons of Menstrual Leave*

The pros of menstrual leave are compelling, but so are the cons. This section delves into the numerous benefits and drawbacks to menstrual leave policies, ranging in nature from social and cultural to economic, psychological, and legal.

#### *A. Pros of Menstrual Leave*

The most obvious potential benefit of a menstrual leave policy is enhanced job security for menstruators. As the cases above depict, adverse employment outcomes such as job termination can result from menstruation-related incidents. If menstruators were afforded a leave policy, they would have discretion to either attend work or stay home, preventing job termination resulting from scenarios involving stained clothing (as in Rachel Rickert's case)<sup>177</sup> and office equipment (as in *Coleman*).<sup>178</sup> Additionally, employee retention could stand to improve as employees would feel that their employers cared about their health and wellness.<sup>179</sup>

Prevention of adverse employment outcomes is not the only benefit a menstrual leave policy can confer. Another positive effect is that menstruators could gain psychological benefits. Women are the best judges of their own wellness, and for society to entrust women with self-assessment capabilities would bolster collective confidence in their right to bodily autonomy. This benefit is not only psychological; presenteeism in the workplace could diminish as women could stay home rather than report to work while incapacitated. Also, menstruators' experiences in the workplace would improve if there were a menstrual leave benefit and, more importantly, if they felt supported in taking advantage of that benefit, as evidenced by the Victorian Women's Trust's survey data.<sup>180</sup>

Another potential benefit is that menstrual leave encourages more discussion of menstruation in the workplace and other contexts. Discussion

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177. *See Model Claims Hyundai Fired Her for Having Her Period, supra* note 135.

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

179. *See Melican & Mountford, supra* note 25 (“[The Trust’s menstrual policy] sends a clear, strong message that menstruation and menopause are normal, it is appreciat[ed] that the associated symptoms can be difficult, and that self-care at these times, as needed, is supported and valued. More widely applied . . . [menstrual leave] will lead to happier—and at least equally productive—workplaces.”).

180. *See id.*

can beget de-stigmatization, which “may be helpful to those who experience menstrual cycle-related illnesses such as endometriosis and dysmenorrhea.”<sup>181</sup> This is because the “social unacceptability of the discussion of menstruation symptoms can result in societal pressure to keep menstrual distress a secret from coworkers and health professionals alike.”<sup>182</sup> Given the aforementioned study that found that 71.5 percent of participants suffering from dysmenorrhea believed it was normal,<sup>183</sup> this imperative to remain silent is problematic. Perhaps a leave policy could help reduce this percentage of menstruators who have normalized and silenced their pain despite it materially affecting their lives.

Menstrual leave also stands to benefit small but far-too-often overlooked segments of the population, namely genderqueer and non-binary individuals, as well as transgender men. A policy could help individuals who identify within these groups to feel safer because they may “face increased amounts of transphobia and other types of gender discrimination” during menstruation, and “[i]f their menstrual status is revealed, this can result in both discrimination and violence.”<sup>184</sup> By having a menstrual leave policy in effect, these individuals could use the leave and avoid having their menstrual status disclosed, thus mitigating the risk of discrimination and violence. Because menstrual leave policies are still so rare, however, there is little data demonstrating its benefits, so most benefits are theoretical as opposed to verifiable.

#### *B. Cons of Menstrual Leave*

While the benefits to menstrual leave policies could be substantial, because they are still theoretical, it is unclear whether they are outweighed by numerous potential cons. Perhaps the most obvious drawback of a menstrual leave policy is that its utilization requires a certain measure of relinquished privacy. While indeed the conversation around menstrual equity is gaining traction, the topic remains predominantly taboo. Many beneficiaries of a policy might not wish to disclose their menstrual status to their employers to claim the benefit. In our current culture, women gain little from disclosing their menstrual status and, in fact, benefit from its

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181. Rachel B. Levitt & Jessica L. Barnack-Tavlaris, *Addressing Menstruation in the Workplace: The Menstrual Leave Debate*, in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES, *supra* note 70, at 561, 561.

182. *Id.* at 566.

183. Chen et al., *supra* note 74.

184. Levitt & Barnack-Tavlaris, *supra* note 181, at 567.

concealment. As the tampon and hair clip study showed, individuals who are known to be menstruating are viewed as less competent and likeable.<sup>185</sup> Therefore, “[w]omen’s widespread concern about concealing their menstrual status is at least somewhat justified”<sup>186</sup> because, “[p]ractically speaking, women are more successful in their lives if they appear unencumbered by their menses.”<sup>187</sup>

Furthermore, users of the policy may feel wary taking advantage of it on an ongoing basis. One day’s absence would not necessarily elicit attention, but an employee who routinely takes one or two days off per month under the menstrual leave policy will likely gain other employees’ notice. Supervisors and colleagues might perceive the women who claim the benefit as unable (or perhaps worse, unwilling) to work. This would no doubt undermine, if not negate altogether, the progress a menstrual leave policy could facilitate in the first place. In the long run, this effect will be cumulative across industries. Employers may feel disincentivized from hiring women of reproductive ages, lest they prove to fall under the class of “problematic” employees with ongoing absenteeism. Women could be viewed as a liability to business growth and productivity, and some employers may simply decide to focus their hiring efforts on men who have no legally protected cause for missing work.

Opponents of menstrual leave also cite a concern that female employees will abuse the policy as a means of “cashing in” on being a woman, as in the examples from opponents of the policies in Japan and China.<sup>188</sup> This argument seems weaker, and frankly, biased. Given that a menstrual leave policy requires the beneficiary to waive her privacy and reveal her menstrual status to her employer, and potentially other colleagues with whom she collaborates, there is a low likelihood that she will take advantage of the policy unless she really feels a need. Again, women are the best judges of their wellness requirements and know whether a menstrual period necessitates absence from work. While there may be a few women that create a habit of always taking the maximum leave allowance each month, it seems unlikely that this would become the prevalent norm.

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185. Roberts et al., *supra* note 65, at 133 (“[W]omen whose menstrual status is revealed would be viewed as less competent and also would be liked less and physically avoided.”).

186. *Id.* at 136.

187. Jill M. Wood, *(In)Visible Bleeding: The Menstrual Concealment Imperative*, in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES, *supra* note 70, at 319, 328.

188. See Javaid, *supra* note 10; Xia, *supra* note 52.

Other opponents may argue that a menstrual leave policy perpetuates inequity between men and women, with men on the losing side. On its face, this argument is factually sound—there is no equivalent policy option for men to have legally protected workplace leave. However, it is unpersuasive for a couple of reasons. First, men do not menstruate. There is no purely male equivalent to a menstrual period, i.e., no recurring hormonal, physical change that sometimes necessitates medical diagnosis or care. Put simply, the need for a male-specific paid leave policy is not present in the same way it is for individuals who menstruate. Furthermore, one can argue that there is an interest in accounting for a long history of gender inequity, particularly in the workplace. The purpose of this Comment is not to delve into the finer mechanics of women’s rights, but in a country that only passed suffrage one hundred years ago, the gap in equity between the sexes is still inching its way toward closure.

If these social and cultural points are not enough, there are practical legal drawbacks to a menstrual leave policy. Perhaps the biggest challenge such a policy would face is enforcement at the state level. Unlike other countries that have successfully enacted menstrual leave policies, the United States must reconcile conflicts between its federal and state statutes. Separation of powers is embedded into the core of American democracy, and a blanket federal policy may incite resistance from states seeking to minimize federal oversight. Should a federal menstrual leave policy come to pass, even those in supportive states could face obstacles to enforcing menstrual leave due to conflicting state statutes. For example, California’s Unruh Civil Rights Act forbids businesses from discriminating between members of protected classes.<sup>189</sup> The Act applies to all businesses in California,<sup>190</sup> not just large businesses (as is the case with the FMLA). Beyond protected classes such as sex, race, color, religion, and citizenship, the Act also prohibits discrimination based upon medical condition.<sup>191</sup> Therefore, a California employer opposing menstrual leave could attempt to cite multiple grounds for obstructing the policy. He or she might argue, for example, that menstrual leave requires discrimination between the protected classes of sex because women are essentially afforded a right that men are not. An alternative argument is that employees with menstruation-related medical conditions should not be conferred benefits over employees who suffer

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189. CAL. CIV. CODE §§ 51(b)–(c) (West Supp. 2016).

190. *Id.*

191. *Id.*



from non-menstrual medical conditions. While federal preemption would likely triumph in these cases, government-mandated menstrual leave could create an onslaught of federalism-related conflicts.

Issues surrounding passage and enforcement of menstrual leave are vast and complex. It is not a one-dimensional issue, but rather gives rise to myriad conflicts across social, cultural, economic, sex, and gender contexts. Perhaps that is why menstrual leave is almost universally contested: stakeholders across each of these arenas have valid and often incompatible interests.

Nonetheless, there are signs that the tide of progress may be turning when it comes to lifting the stigma surrounding menstruation. In the past couple of years, the concept of “menstrual equity” has gained traction in social discourse and the media.<sup>192</sup> For example, the company Pantone, known for its proprietary color system, as well as its “Color of the Year” campaign, made headlines in September 2020 when it launched a bright red shade, eponymously called “Period.”<sup>193</sup> A collaboration between Pantone and the Swedish menstrual product brand Intimina, the shade was specifically designed to decrease the stigma surrounding menstruation.<sup>194</sup> Vice president of the Pantone Color Institute, Laurie Pressman, cited goals of “embolden[ing] those who menstruate to feel proud of who they are” and “urg[ing] everyone, regardless of gender, to feel comfortable to talk spontaneously and openly about this pure and natural bodily function.”<sup>195</sup> Whether or not such campaigns generate positive discourse or instead incur backlash is beside the point. The key takeaway is that this collaboration signals a shift in society’s willingness to engage in a dialogue about menstruation. It marks a sharp departure from most menstrual product campaigns, which have historically perpetuated notions of shame and concealment surrounding menstruation.<sup>196</sup>

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192. Weiss-Wolf, *supra* note 64, at 520–21.

193. Jacqui Palumbo, *Pantone Launches Bold New Color to Combat Menstruation Taboos*, CNN (Sept. 29, 2020), <https://www.cnn.com/style/article/pantone-new-color-period-wellness/>.

194. *Id.*

195. *Id.*

196. Roberts et al., *supra* note 65, at 132 (explaining that “advertisers market menstruation as a ‘hygiene crisis’ that must be effectively managed with their products to avoid soiling, staining, embarrassment, and odor”); *see also* Roseann M. Mandziuk, “Ending Women’s Greatest Hygiene Mistake”: *Modernity and the Mortification of Menstruation in Kotex Advertising, 1921–1926*, 38 *WOMEN’S STUD. Q.* 42, 54 (2010) (“To not purchase Kotex was to risk continued ill health, private mortification, and public shame . . .”).

Another contribution to the dialogue about menstruation comes from the 2018 Academy Award-winning documentary short titled *Period. End of Sentence*. While attending a United Nations conference, English professor Melissa Berton and her student learned that in parts of India, many women feel forced to drop out of school because of a lack of access to sanitary products and mistreatment from men during their periods.<sup>197</sup> Professor Berton and the student formed The Pad Project, a nonprofit that raised enough money to both purchase a pad-making machine and produce the film.<sup>198</sup> The documentary brought attention to the disparity in access to menstrual care products across India and the surrounding regions, and today the organization continues to raise money for pad machines and supplies.<sup>199</sup>

Finally, the non-profit organization PERIOD launched National Period Day in 2019, seeking to raise awareness of and eliminate period poverty.<sup>200</sup> The group held rallies across every U.S. state to call attention to menstrual equity.<sup>201</sup> It also publicized a video explaining that period poverty forces some women to use cardboard in lieu of store-bought menstrual care products.<sup>202</sup> In it, women with bloody noses state, “If you think it’s uncomfortable to talk about period poverty, imagine the people with cardboard in their underwear.”<sup>203</sup> “If faces were bleeding, someone would do something.”<sup>204</sup>

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197. Marguerite Ward, *Oscar-Winning Documentary ‘Period. End of Sentence.’ Explores Menstrual Stigma*, TODAY (Feb. 23, 2019, 8:08 AM), <https://www.today.com/health/netflix-documentary-period-end-sentence-reveals-impact-pad-machine-t149216>.

198. *Id.*

199. *Id.*

200. Li Cohen, *Inaugural National Period Day Calls for Menstrual Equity*, CBS NEWS (Oct. 19, 2019, 11:22 PM), <https://www.cbsnews.com/news/period-day-first-ever-national-period-day-demands-menstrual-equity-2019-10-19/>. National Period Day marked its second year of celebration in 2020. Denise Maher, *National Period Day Is October 10*, EVERYDAY HEALTH (Oct. 9, 2020), <https://www.everydayhealth.com/menstruation/national-period-day/>. The fate of National Period Day remains unclear, as it does not appear to have taken place in 2021, perhaps due to the risk the COVID-19 pandemic has posed to large gatherings. Nonetheless, Menstrual Hygiene Day appears to have filled the void, with its 2021 day of awareness reaching “a record-breaking 566 million people with positive stigma-busting messaging.” MENSTRUAL HYGIENE DAY, <https://menstrualhygieneday.org/> (last visited Oct. 4, 2021).

201. Cohen, *supra* note 200.

202. *Id.*

203. *Id.*

204. *Id.*

These examples derived their motivation from both economic causes and a desire to de-stigmatize discourse surrounding menstruation. Once economic issues such as period poverty and the tampon tax have been eradicated, hopefully the discourse generated through efforts to dissolve those issues can transfer to matters of menstrual equity in the workplace.

### *VI. Recommendations*

In light of the pros and cons of menstrual leave, it is a delicate issue whether or not such a policy should ever come to pass in the United States. In our current social climate, menstrual leave feels almost naïve—progressive at first glance and yet potentially disastrous in its effects. That said, menstruators need better protection from menstruation-related adverse employment outcomes. This section considers alternatives to a menstrual leave policy.

The best solution may be one that is discreet, universal, and beneficial to all: one federally mandated day of paid leave per month for all employees—regardless of the employee’s sex—and with no explanation required. Such a policy would eliminate virtually all the problems menstrual leave poses, and it would also help to compensate for the arguably insufficient sick leave policies that U.S. citizens receive compared to citizens of other countries.<sup>205</sup> While some may consider this policy audacious on its face, one day off per employee per month need not pose a threat to the bottom line. In fact, it may even bolster productivity: presenteeism would likely diminish because employees could simply use this day of leave to take care of themselves rather than working while ill. Employees would also have more opportunities to manage other personal matters, such as medical appointments and childcare-related issues.

A viable alternative, brought to light during the COVID-19 pandemic, is a flexible, work-from-home option. With this option, menstruators could work from home one or two days as needed and thus have access to rest,

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205. The United States’ FMLA is its primary work leave provision and provides only for unpaid leave. By contrast:

Worldwide, workers in 145 countries have access to paid sick time, which includes lost-wage compensation for employees who are absent due to temporary illness or incapacitation. . . . Currently, only about 65% of American full-time workers have access to sick leave, whereas low-income, part-time and service-sector workers have coverage rates of less than 20%.

Dylan Karstadt, Comment, *Too Sick to Work? Defending the Paid Sick Leave Movement and the New Jersey Paid Sick Leave Act*, 44 SETON HALL LEGIS. J. 145, 150 (2020).

lying down, and symptom management like using heating pads and taking breaks. The pandemic normalized widespread work-from-home practices, and in the burgeoning aftermath, many employers view it as a practicable option for conducting their business moving forward.<sup>206</sup> Plus, a work-from-home option averts nearly all the drawbacks of a menstrual leave policy that permits days taken completely off work. Working from home would better protect employee privacy because no one would have to know their colleague was working from home due to menstrual pain. It could mitigate adverse employment outcomes, circumvent sex and gender discrimination arguments, and avoid hindering workplace productivity. Perhaps most importantly, employers would have little incentive to reduce hiring of women. A significant drawback of this option, however, is that it would only protect workers in administrative and office-based industries. Workers in service-based industries such as transportation, cosmetic, and food service, as well as those based on hourly wages, could be virtually precluded from the menstrual leave benefit.

If menstrual leave is ever instituted, a result might be the reassessment of workplace leave benefits that male employees receive. For example, men in the United States receive comparatively fewer parental leave benefits than women.<sup>207</sup> Companies could decrease this disparity by increasing paternity leave for men. A potential benefit of paternity leave is that any arguments about unfair treatment between the sexes based upon granting of menstrual leave might be somewhat mitigated by the fact that this option confers its benefit primarily on male workers. The problem with this option, however, is that paternity leave would be left entirely to the devices of employers;

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206. See Uri Berliner, *Get a Comfortable Chair: Permanent Work from Home Is Coming*, NPR (June 22, 2020, 12:26 PM), <https://www.npr.org/2020/06/22/870029658/get-a-comfortable-chair-permanent-work-from-home-is-coming>; Joey Hadden et al., *21 Major Companies That Have Announced Employees Can Work Remotely Long-Term*, BUS. INSIDER (Dec. 14, 2020, 9:35 AM), <https://www.businessinsider.com/companies-asking-employees-to-work-from-home-due-to-coronavirus-2020>; Rob McLean, *These Companies Plan to Make Working from Home the New Normal. As in Forever*, CNN BUSINESS (June 25, 2020, 6:57 PM), <https://www.cnn.com/2020/05/22/tech/work-from-home-companies/index.html>.

207. Cara Brennan Alamano, *Paid Paternity Leave Should Be the Norm in the US*, WORLD ECON. F. (Nov. 27, 2020), <https://www.weforum.org/agenda/2020/11/paid-paternity-leave-in-the-united-states/> (“In the US, being granted paternity leave is a rare gift, not a common benefit. . . . In too many American workplaces, new dads receive the unspoken message that they need to keep putting in the same hours and effort, and that taking parental leave signals a lack of professional drive and commitment.”).

there would be no governmental force behind such leave.<sup>208</sup> Because they are employer-driven, paternity leave policies can vary not only state-to-state, but even city-to-city. Only five states (plus Washington, D.C.) currently mandate that employers provide any sort of paid paternity leave: New York, California, New Jersey, Washington, and Rhode Island.<sup>209</sup>

An important consideration is that not every man would need or want paternity leave. It would certainly help men whose partners are of childbearing age, but a significant portion of male workers would be precluded from this benefit's privileges due to marital/relationship status, family planning decisions, and so forth. While enhanced paternity leave is an option, it is unclear whether it might help as many men as a menstrual leave policy would help menstruators. In other words, the distribution of benefits among employees may be uneven among the sexes. That said, because post-menopausal women and non-menstruating employees would be exempt from menstrual leave benefits, the disparity in beneficiaries between the sexes could be comparable, but further studies would be necessary to make any such determinations.

Among these recommendations, it seems that the most viable (and beneficial) solution is one day of paid leave per month, per employee. This option benefits all employees of all ages, regardless of maternity or paternity status, menstrual status, or otherwise. While employers would likely rally against this provision initially, given the evidence that shows presenteeism in the workplace has a greater adverse effect than does absenteeism,<sup>210</sup> time might reveal that this option bolsters overall morale and productivity. That said, the remote working option is a viable (if not slightly lesser) option for menstruators in that it shares many of the same benefits of one day of monthly paid leave including enhanced privacy, opportunities for rest and symptom management, and a lesser threat of employers hiring fewer women.

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208. After all, there is no nationwide federal mandate for paid maternity leave, either. Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 *YALE J.L. & FEMINISM* 185, 187 (2009).

209. Adam Bulger, *What Are the Laws Around Paternity Leave and Family Leave in the U.S.?*, *FATHERLY* (Aug. 19, 2021, 1:31 PM), <https://www.fatherly.com/love-money/paternity-leave-laws-state-us/>.

210. Miraglia & Johns, *supra* note 7.

*VII. Conclusion*

The ultimate issue here is, perhaps, not the question of whether a menstrual leave policy should exist in the United States, but rather the continuing stigma surrounding discourse about menstruation. Without its stigma, menstruators may be more apt to seek medical diagnoses and care for menstruation-related ailments. In the employment context, they would feel more empowered to work with their employers to determine solutions that work for employees and employers alike.

While our culture needs to foster a more open discourse surrounding menstruation, ironically, a broad, non-specific “personal leave” or “work-from-home” policy may be the only palatable solution in the meantime. Regardless, the dialogue surrounding menstrual leave is essential because it highlights where our society falls in its valuation of sex equality and its accompanying commitment to sex equality in the workplace. Continuing to chip away at society’s discomfort toward menstruation may one day help to close the gap in equity among the sexes once and for all. For now, it seems that a menstrual leave policy in the United States may be premature, but it stands to reason that if a culture supports true equality among the sexes—in pay, taxation, and even (or especially) access to personal hygiene products—menstrual leave may one day align with the broader societal goals that sex equality seeks to realize.

*Hilary H. Price*