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Bar Exam Policies On Menstruation Still Fall Short

By **Margaret Johnson, Elizabeth Cooper and Marcy Karin**

In 1972, when Title IX[1] — the landmark sex equality in education law — was enacted, women constituted approximately 4% of U.S. lawyers.[2]

Fifty years later, we make up almost 40% of the profession and roughly 50% of recent law school graduates.[3] So much has changed over these five decades, but sex-based obstacles remain.

It is past time for the profession to remove gender and menstruation-related barriers — including at the bar exam, a rite of passage for newly graduated law students that is required in almost every jurisdiction to be able to practice law.

In 2020, a vocal social media movement, #bloodybarpocalypse, exploded to highlight long-standing menstruation-related problems connected to the bar exam.[4] That summer, we formed Menstrual Policies and the Bar to research and push back against the disparities in bar exam conditions that menstruating individuals face.

We analyzed the publicly available policies of the National Conference of Bar Examiners and all 56 Boards of Law Examiners, or BOLEs, for three exam administrations; conducted a survey of bar exam test takers; reviewed social media postings; and researched applicable constitutional and statutory discrimination law.[5]

The complete picture revealed a setting in which menstruating individuals — cisgender women, transgender men, and nonbinary, genderqueer and intersex individuals — were placed at a distinct disadvantage compared with their nonmenstruating colleagues.

Impediments included the decision of some jurisdictions to prohibit bar test takers from bringing their own menstrual products into the exam, and when permitted, to require them to carry their products in a clear plastic bag; to restrict bathroom access overbroadly; and to fail to post their menstruation-related policies transparently.

To counter these BOLE practices, we developed a model policy to underscore the need both for menstrual dignity in bar administration and the preservation of exam security.[6] The American Bar Association adopted some of our early recommendations in a resolution[7] and other stakeholders — judges,[8] the Association of Academic Support Educators,[9] law professors and lawyers[10] — have actively advocated for reform of BOLE discriminatory policies.

In addition, we distributed the model policy to every BOLE, requesting that they adopt its proposed practices, and inviting representatives to talk with discrimination experts and to hear directly from impacted menstruating individuals.

Although many BOLEs continue to fall short of full equality and persist in employing policies that hinder menstruating individuals' entry to the profession, others have revised existing



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rules to create more equal footing on the bar exam.

For example, 23 jurisdictions that have posted their July 2022 bar exam policies now explicitly and transparently address menstruation. This alleviates a huge stress for menstruating test takers, saving them from wasting precious study time tracking down existing policies and facilitating their choosing among multiple potential jurisdictions for the exam.[11]

Twenty-two of these jurisdictions explicitly allow test takers to bring their menstrual products into the exam room. This means they need not worry about being forced to use any ill-fitting BOLE-supplied or makeshift products that could distract them from the exam or cause unnecessary infections. In addition, transgender, nonbinary, genderqueer and intersex test takers need not worry about having access to menstrual products, that BOLEs typically placed solely in women's restrooms, if they provided them.

It also eliminates the time tax that other menstruating individuals still face when they are required to retrieve their products from proctors or outside the exam room. At least five of these policies have been created since July 2021.

Additional jurisdictions, such as Ohio and Washington, also provide products in all restrooms.[12] Sending mixed messages, however, are some states that prohibited test takers' bringing menstrual products back in 2020, such as Arizona and West Virginia.[13] Those states announced they would change their policies,[14] but have not done so in publicly available policies for the July exam this year.

At least five states — Iowa, Michigan, Minnesota, New York and Texas — have clarified security protocols, making them more protective of test takers' privacy. These include permitting both opaque or clear bags, allowing products to remain in their original, sterile packaging and providing private security inspection.[15] This will lead to fewer upsetting invasions of privacy just prior to the all-important bar exam and will spare transgender, nonbinary, genderqueer and intersex test takers from being outed.

On a related note, when referring to products, 17 jurisdictions now use modern and gender-inclusive language — e.g., menstrual products vs. feminine hygiene products. By eliminating the word "hygiene," these states also acknowledge that periods are not dirty. At least a dozen of these jurisdictions made this positive change this year.

One of the pervasive questions faced by menstruating individuals is whether they will have ready access to the bathroom during the exam. Many states now allow examinees to use the bathroom without penalty, although no additional test time is provided to attend to menstruation-related issues in these jurisdictions.

Most notably, for the February exam this year, two jurisdictions — Idaho and Ohio — explicitly provided a route for menstruation-related administrative accommodations that might include permitting a test taker to sit close to the bathroom or bring in menstruation-related medication or medical devices.[16]

For the July exam, however, Ohio removed its administrative accommodation provision[17] and Pennsylvania added one.[18] It remains an open question whether BOLEs that do not explicitly address menstruation, but do have a mechanism to consider administrative accommodations, would consider menstruation-based requests.

The bar exam was created when the vast majority of test takers were cisgender —

nonmenstruating — men. Issues like access to menstrual products and bathrooms, privacy regarding menstrual products and administrative accommodations to deal with menstruation and pain were not considered. But times have changed and at least half of the test takers are menstruating individuals.

The positive changes we have described are critical and appreciated, but they are piecemeal and do not go far enough. Systemic barriers and stigma continue to cause needless harm and disadvantage to menstruating individuals.

All BOLEs can readily adopt the model policy's straightforward recommendations, which include:

- Permitting examinees to bring their own menstrual products into the bar exam, stored on their person or in a separate bag;
- Allowing them to access bathrooms and have appropriate breaks to address menstruation;
- Providing reasonable administrative accommodations as needed — e.g., seating with proximity to bathrooms, storage of additional clothing and provision of additional exam time;
- Training proctors and security personnel to facilitate implementation;
- Posting a complaint process that affords due process to those alleging violations of the policy; and
- Making all menstruation-related policies readily and transparently accessible on BOLE websites.[19]

The NCBE, which requires a uniform exam schedule, and the BOLEs have a responsibility to take more comprehensive and meaningful action — and to do so quickly, in advance of the upcoming exam this month.[20] And they must keep these concerns in mind as they develop the next generation of bar exam.

It is clear that BOLEs respond best to concerns raised by judges, lawyers and law students in their own jurisdiction, so we encourage interested individuals to reach out to their jurisdiction's BOLE to seek change. Equity for menstruating individuals belongs at the gateway to our profession. It is past time to realize Title IX's promise of gender equality and to bring menstrual justice to the bar exam.[21]

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[1] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

[2] Cynthia Grant Bowman, Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?, 61 Me. L. Rev. 1, 15 (2009).

[3] See Nat'l Ass'n for L. Placement, NALP Diversity Infographic: Women 1 (2016), <https://www.nalp.org/uploads/Membership/DiversityInfographic-Women.pdf> [<https://perma.cc/3MJF-LGBH>].

[4] See #bloodybarpocalypse, Twitter, https://twitter.com/search?q=%23bloodybarpocalypse&src=typed_query&f=live.

[5] Marcy L. Karin, Margaret E. Johnson, & Elizabeth B. Cooper, Menstrual Dignity and the Bar Exam, 55 U.C. Davis L. Rev. 1, 10-70 (2021). Relevant materials can be found in the MP and the Bar repository. Menstrual Policies and the Bar, bit.ly/MPandTheBar (last visited July 16, 2022).

[6] MP and the Bar, Menstruation and the Bar Exam: Model Policy and Operating Provisions (2021), <https://bit.ly/MPandtheBar-ModelPolicy>.

[7] Resolution 105, Am. Bar Ass'n (Feb. 22, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/105-midyear-2021.pdf>.

[8] Shannon Najmabadi, Texas Lifts Tampon Ban at Bar Exam after Complaints over Discriminatory Policy, The Texas Tribune (Aug. 1, 2020, 5:00AM), <https://www.texastribune.org/2020/08/01/Texas-tampon-bar-exam/>.

[9] Association of Academic Support Educators Bar Advocacy Committee Best Practices for Online Bar Examination, Ass'n Acad. Support Educators: Statements (Feb. 21, 2021), <https://associationofacademicssupportededucators.org/statements/association-of-academic-support-educators-bar-advocacy-committee-best-practices-for-online-bar-examination/>.

[10] Bridget Crawford, Menstrual Equity and the Bar Exam: Round Up of Op-Eds and Other Media Coverage, Feminist L. Professors (July 29, 2020), http://www.feministlawprofessors.com/2020/07/menstrual-equity-and-the-bar-exam-round-up-of-op-eds-and-other-media-coverage-bloodybarpocalypse/?utm_source=twitter&utm_medium=social&utm_campaign=Menstrual+Equity+and+the+Bar+Exam%3A+Round+Up+of+Op-Eds+and+Other+Media+Coverage+%23bloodybarpocalypse.

[11] MP and the Bar, Webinar (Statement of Jonteal Hasty) (Dec. 3, 2021), <https://bit.ly/Hasty-12-3-21>.

[12] See Off. of Bar Admissions of the Sup. Ct. of Ohio, July 2022 Frequently Asked

Questions

2 <https://www.supremecourt.ohio.gov/AttySvcs/admissions/barExamFAQs.pdf>; Wash. State Bar Ass'n, Bar Exam Security Policy – Effective June 1, 2022, <https://admissions.wsba.org/getpdfform.action?id=560>.

[13] See Bridget Crawford, Do Not Bring Tampons or Pads to the Bar Exam in Arizona, The Faculty Lounge (July 16, 2020, 8:44PM), <https://www.thefacultyounge.org/2020/07/do-not-bring-tampons-or-pads-to-the-bar-exam-in-arizona.html>; W. Va. Bd. of Law Exam'rs, Frequently Asked Questions – Exam Applicants 3 <http://www.courtswv.gov/legal-community/Bd-of-Law/FAQs-Exam-Applicants.pdf>.

[14] Kathryn Rubino, If You're Menstruating Or Lactating During The Bar Exam You're Screwed, Above the Law (July 20, 2020, 3:28PM), <https://abovethelaw.com/2020/07/if-youre-menstruating-or-lactating-during-the-bar-exam-youre-screwed/>.

[15] See Iowa Bd. of Law Exam'rs, Frequently Asked Questions 4 (updated June 6, 2022), https://www.iowacourts.gov/static/media/cms/Website_FAQ_6_AE684BEEE2085.pdf; Bar Exam Security Policy and Conduct Policy, Mich. Cts.: Bd. L. Exam'rs <https://www.courts.michigan.gov/administration/committees-boards/board-of-law-examiners/exam-security-and-conduct-policy/> (last visited July 16, 2022); Minn. State Bd. of L. Exam'rs, Allowed and Prohibited Items at the Bar Exam (updated June 6, 2022) <https://www.ble.mn.gov/wp-content/uploads/2017/09/Prohibited-and-Allowed-Items.pdf>; N.Y. State Bd. of L. Exam'rs, New York State Board of Law Examiners Bar Examination Security Policy (June 9, 2022) <https://www.nybarexam.org/Docs/secpolicy.pdf>; Bd. of L. Exam'rs, Texas Bar Examination General Instructions – July 2022 <https://ble.texas.gov/bar-exam-general-instructions>.

[16] Bar Exam, Idaho State Bar: Admissions <https://isb.idaho.gov/admissions/bar-exam/#advgb-tabs-tab6> (last visited July 16, 2022); Off. of Bar Admissions of the Sup. Ct. of Ohio, February 2022 Bar Examination FAQ 3-4, <https://www.supremecourt.ohio.gov/AttySvcs/admissions/Feb2022FAQ.pdf>.

[17] See Off. of Bar Admissions of the Sup. Ct. of Ohio, July 2022 Bar Examination FAQ <https://www.supremecourt.ohio.gov/AttySvcs/admissions/barExamFAQs.pdf>.

[18] See Pennsylvania Board of Law Examiners, Pennsylvania Bar Examination Rules/Restrictions for Applicant (June 29, 2022), https://www.pabarexam.org/pdf/203_205/722_Tix_Instructions.pdf. Pennsylvania's new menstruation-related rules have led to confusion with at least some test takers, however. See Melissa JD, justice for Padmé Amidala, Twitter, <https://twitter.com/mermaidsailor/status/1546570118649581573?s=11&t=gxK0PGZWJtNecdo5Q4dfgA> (last visited July 18, 2022); https://www.reddit.com/r/barexam/comments/vwmi4j/heads_up_female_pa_bar_takers/?utm_source=share&utm_medium=web2x&context=3) (last visited July 17, 2022) (capturing uncertainty about whether access to restrooms—and whether one is permitted to bring one's own menstrual products or must use those provided by the BOLE—may depend on the floor to which the examinee is assigned to take the test).

[19] See supra n. 6. Additional recommendations include, are but not limited to, ensuring that test locations have ample bathrooms (ensuring that examinees wait no longer to use the women's bathroom than the men's bathroom) that are cleaned regularly and in good working order; supplying a variety of menstrual products in all restrooms; permitting same-day requests for limited administrative accommodations. Id.

[20] The bar exam is scheduled in most jurisdictions for July 26-27, 2022. Natl. Conf. Bar Exam, UBE Test Dates, <https://www.ncbex.org/dates/ube-test-dates/> (last visited July 17, 2022).

[21] See Margaret E. Johnson, Menstrual Justice, 53 U.C. Davis L. Rev. 1 (2019).