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Punishing Bar Exam Policies On Menstrual Products Must Go

By **Elizabeth Cooper, Margaret Johnson and Marcy Karin** (February 25, 2021, 5:36 PM EST)

The third week in February marks the biannual ritual of law graduates sitting for the grueling two-day bar exam, a prerequisite to being licensed to practice law that is run by each state's board of law examiners.

This ritual also marks the boards' ongoing use of menstruation-related barriers, such as lack of menstrual product and bathroom access, which likely violate the U.S. Constitution and state anti-discrimination laws. Despite urgent requests for reform, the examining boards continue use of their punishing policies.

We, along with others, have been advocating for change.[1] The American Bar Association this week passed a resolution,[2] citing our recommendations,[3] that demands boards of law examiners create a transparent policy that clearly permits examinees to carry their own menstrual products in opaque containers. Our model policy, set forth in our recent article, "Menstrual Dignity for Bar Examinees," endorses this and proposes additional mechanisms to support dignity for menstruating test-takers.[4]

During summer and fall 2020, we captured the experiences of test-takers related to menstruation by obtaining social media stories shared by examinees and by engaging in targeted outreach to test-takers to share their stories. This survey uncovered experiences of over 166 test-takers.[5]

This research and our survey of board of law examiners policies — many of which are disappointingly not publicly available — revealed pervasive discriminatory behavior rooted in a lack of understanding of menstruation or respect toward menstruators.

One of the worst policies we found was a prohibition by the boards in Texas and Pennsylvania on examinees' using their own products. Without products of the proper size, absorbency and material, a menstruating examinee may suffer from improper fit, bodily irritation, infection or worse.

After public outcry last year, these jurisdictions promised to adjust their policies, but it's unclear whether lasting changes have been implemented.

Nonetheless, in jurisdictions from West Virginia to Iowa, test-takers have reported not being allowed to bring menstrual products into the exam room.[6] Instead, examinees have been required to check them and to request permission to access them during the exam.

This not only is insulting to menstruators who need these products to attend to urgent bodily functions, it also causes them to incur a time tax away from their exams.



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Further, in some jurisdictions — including California[7] and Virginia[8] — test-takers are permitted to bring their own products, but they must carry them in a clear plastic bag, which for some may be embarrassing.

Examinees have been questioned and harassed about their products in front of their peers. One North Carolina proctor demanded of a test-taker carrying menstrual pads, "Do you really need those?"[9] treating menstruation either as a punchline or a voluntary bodily function.

Based on our survey, problems also have been reported in Ohio, where a menstruator was instructed to remove her tampons from the wrapper when going into the exam room — an unsanitary result at best.[10] These practices are especially harmful to transgender men and nonbinary examinees who may be involuntarily outed by this prejudicial scrutiny.

Restricted bathroom access and other barriers persist, even after COVID-19 forced many bar exams online.

Numerous boards of law examiners have required examinees to stay within camera view or risk disqualification. For example, examinees in Massachusetts "must remain seated with their face visible to the camera for the entire duration of each 90-minute test session," according to the state's bar exam guidance.[11]

Similar restrictions have been adopted in California,[12] Connecticut,[13] New Jersey,[14] New York[15] and Ohio,[16] among others. Pennsylvania has allowed one five-minute bathroom break during an exam session without further action by the examinee.[17]

A few states have instructed test-takers to stay seated at their camera unless there was "an urgent need," as in Florida,[18] or an "emergency," as in the case of New Hampshire,[19] though neither term was defined.

Consequently, some examinees placed towels on their seats in case they bleed through their clothing, wore diapers, or pled forgiveness for leaving to use the bathroom.[20] Others actually started or adjusted birth control prescriptions to avoid menstruating during the exam.[21]

This is discrimination on the basis of sex — as menstruation is a basic biological function linked to reproductive organs — which is prohibited by the equal protection clause of the U.S. Constitution and countless state anti-discrimination statutes.

In the U.S. Supreme Court case of *U.S. v. Virginia*,[22] Justice Ruth Bader Ginsburg declared: "'Inherent differences' between men and women ... remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."

That was in 1996. It is now 2021.

And while gender is now understood to go beyond the binary, the core of Justice Ginsburg's statement rings true: No test-taker should be denigrated because they menstruate. The ABA recognizes this; the boards of law examiners should, too.

It is true that some jurisdictions have promising policy provisions.

For instance, the Virginia Board of Law Examiners website explicitly identifies menstrual products among the items that test-takers can bring to the exam.[23] The Georgia board allows examinees taking the online bar exam to leave the screen to use the restroom.[24] And in Utah, examinees are permitted to use the restroom without restricting the length of time or frequency of visits.

Together, these components have the potential to make a decent policy that acknowledges and respects menstruating test-takers. Strikingly, our research failed to turn up one state that had all of the components of a just and fair policy.

The inadequate state board policies are a constraint on menstruating examinees' opportunity to

take the bar exam on the same terms as nonmenstruators. They also are reminders that cisgender men — who do not menstruate — still disproportionately hold positions of leadership as judges, partners in law firms, tenured professors and U.S. attorneys.

State boards of law examiners — the gatekeepers of the legal profession — contribute to this uneven playing field.

This is a serious and disturbing problem with a simple solution: Boards can adopt our model policy mentioned above.[25]

The policy, which both eradicates differential treatment and maintains exam security, builds on five key principles: (1) privacy and respect; (2) fairness and nondiscrimination; (3) health and security; (4) access to accommodations; and (5) transparency.

The policy, for example, allows examinees to bring in their own menstrual products while permitting their inspection; grants bathroom access as needed, except to minimize noise and traffic; creates a structure to request administrative accommodations; and compels boards of law examiners to be transparent about their policies, reducing the unnecessary anxiety current test-takers experience when they — too often — cannot find them.

The model policy promotes the dignity of menstruating examinees, complies with the law, and maintains exam security.

If boards of law examiners are not willing to adopt these policies on their own, state courts should step in. But it does not have to come to that. These boards control access to the legal profession — a profession that prides itself on equity, justice and fundamental fairness. It is time they practice the principles they preach. It is, after all, 2021.

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[1] Elizabeth B. Cooper, Margaret E. Johnson, Marcy L. Karin, Menstrual Products and the Bar: Advocacy Seeks to Create Equal Bar Exam Testing Conditions for Menstruators, Best Practices for Legal Education, <https://bestpracticeslegaled.com/2020/08/05/menstrual-products-and-the-bar-advocacy-seeks-to-create-equal-bar-exam-testing-conditions-for-menstruators/> (August 5, 2020).

[2] American Bar Association, House of Delegates Resolution 105, https://www.americanbar.org/news/reporter_resources/midyear-meeting-2021/house-of-delegates-resolutions/105/ (Midyear meeting 2021).

[3] American Bar Association: Law Student Division, Colorado Bar Association Virgin Islands Bar Association, ABA Section of Civil Rights and Social Justice, Report to the House of Delegates, <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/105-midyear-2021.pdf>, at Part III; notes 1, 7, 12, 18, 19, 20, 23, 25, 26 and 27.

[4] Elizabeth B. Cooper, Margaret E. Johnson & Marcy L. Karin, Menstrual Dignity for Bar Examinees, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790439 (Feb. 22, 2021).

- [5] See Cooper, Johnson & Karin, *supra* note 4, at 13-15
- [6] Menstruation and the Bar Survey, cited in *id.* (on file with authors).
- [7] The State Bar of California, Exam Rules, <https://www.calbar.ca.gov/Admissions/Examinations/Exam-Rules> (last visited Feb. 24, 2021).
- [8] The State Bar of Virginia, Allowed Bar Exam Items, <https://barexam.virginia.gov/bar/barallowed.html> (last visited Feb. 24, 2021).
- [9] BPrybol (@BPrybol), TWITTER (July 30, 2020, 8:43 PM), <https://twitter.com/BPrybol/status/1288998671183486977>; Elizabeth B. Cooper, Margaret E. Johnson & Marcy L. Karin, Menstrual Dignity for Bar Examinees, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790439 at 20 (Feb. 22, 2021).
- [10] See Cooper, Johnson & Karin, *supra* note 4, at 27.
- [11] FAQs Related to Examination for Admission to the Massachusetts Bar, What testing conditions are required?, <https://www.mass.gov/guides/faqs-related-to-examination-for-admission-to-the-massachusetts-bar#-exam-administration-questions-> (last visited Feb. 24, 2021).
- [12] The State Bar of California, February 2021 Bar Exam FAQs www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February-2021-Bar-Exam-FAQs.pdf (last visited Feb. 24, 2021).
- [13] FAQs Related to the February 2021 Remote Bar Exam in Connecticut, <https://www.jud.ct.gov/cbec/RemoteExam.pdf> (last visited Feb. 24, 2021).
- [14] New Jersey Board of Bar Examiners, <https://www.njbarexams.org/faq.action#640> (last visited Feb. 24, 2021).
- [15] Frequently Asked Questions (FAQS) for the February 2021 New York Bar Examination, https://www.nybarexam.org/Content/Updated%20Final_FAQs%20NY%20Remote%20Exam%20UBE_01.12.2021.pdf (last visited Feb. 24, 2021).
- [16] The Supreme Court of Ohio, <https://www.supremecourt.ohio.gov/AttySvcs/admissions/RemoteTestingFAQFeb2021.pdf> (last visited Feb. 24, 2021).
- [17] Testing Conditions for Remote Bar Exam – February 22-24, 2021, https://www.pabarexam.org/pdf/203_205/221%20Exam%20Testing%20Conditions.pdf (last visited Feb. 24, 2021).
- [18] Florida Board of Bar Examiners, Frequently Asked Questions, February 2021 Examination, <https://www.floridabarexam.org/web/website.nsf/faq.xsp#2666> (last visited Feb. 24, 2021).
- [19] New Hampshire Office of Bar Admissions, FAQ- February 23 and 24, 2021 Remote UBE Exam, <https://www.courts.state.nh.us/nhbar/NH-FAQ-1-5-2021.pdf> (last visited Feb. 24, 2021).
- [20] See Cooper, Johnson & Karin, *supra* note 4, at 31-33; Menstrual Products and the Bar (@MPandtheBar), BPrybol TWITTER (Feb. 24, 2021 4:50 PM), <https://twitter.com/MPandtheBar/status/1364694190354034692>.
- [21] See Cooper, Johnson & Karin, *supra* note 4, at 28.
- [22] **United States v. Virginia et al.** , 518 U.S. 515, 533 (1996).
- [23] Virginia Board of Bar Examiners, <https://barexam.virginia.gov/index.html> (last visited Feb. 24, 2021).

[24] Supreme Court of Georgia Office of Bar Admissions, <https://ei.examsoft.com/GKWeb/login/gabar> (last visited Feb. 24, 2021).

[25] See Cooper, Johnson & Karin, *supra* note 4, at 52-56.

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