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Menstrual Dignity and the Bar Exam

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This Article examines the issue of menstruation and the administration of the bar exam. Although such problems are not new, over the summer and fall of 2020, test takers and commentators took to social media to critique state board of law examiners' ("BOLE") policies regarding menstruation. These problems persist. Menstruators worry that if they unexpectedly bleed during the exam, they may not have access to appropriately sized and constructed menstrual products or may be prohibited from accessing the bathroom. Personal products that are permitted often must be carried in a

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clear, plastic bag. Some express privacy concerns that the see-through bag outs test takers' menstruation as well as their birth-assigned sex — an especially difficult problem for transgender, genderqueer/nonbinary, and intersex individuals who do not wish to share that information.

The authors conducted a study documenting experiences with menstruation and the bar exam and examined BOLE policies and practices relevant to menstruation. The Article uses the data from these studies to delineate the contours and substance of the problem. To guide this analysis, the Article also analyzes BOLE policies under the Equal Protection Clause and local human rights laws, determining that current policies are likely unconstitutional and discriminatory. Finally, the Article proposes a comprehensive Model Policy that appropriately balances BOLE concerns against the important principles of privacy and respect, fairness and non-discrimination, promoting health, providing accommodations, and transparency. If adopted, the Model Policy would bring BOLE policies closer to the goals of the critical intersectional movements urging diversification of the legal profession, bar exam reform, and menstrual justice.

TABLE OF CONTENTS

INTRODUCTION

In the 21st century, it is hard to imagine that state boards of law examiners ("BOLEs") place obstacles in the path of menstruators — largely, but not exclusively women — seeking to enter the legal profession. But, as this Article shows through its comprehensive empirical and legal analysis of BOLE policies, they do just that. BOLEs thwart menstruating test takers primarily by restricting access to their own menstrual products and the bathroom or by failing to transparently disclose what access is permitted.[1] These deprivations are not merely administrative or bureaucratic hurdles, but rather they have the power to affect the physical and mental well-being of test takers, thereby challenging their test performance and the likelihood they will be

[1] *See infra* Part I.

licensed to practice law.[2] Further, they are an affront to the dignity of menstruators.[3]

If we look at the current status of women in the profession, these obstacles are far less surprising. Although the percentage of women attorneys has continued to grow over the last two decades,[4] women continue to constitute only twenty percent of existing law firm equity partners and about one-third of new equity partner classes.[5] Among tenured law professors, approximately seventy-five percent are male.[6] As of February 2021, only twelve of the ninety-three U.S. Attorneys were women.[7] Further, although transgender, genderqueer/nonbinary,

[2] *See infra* Part II.

[3] *See infra* Part II.

[4] *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] ("Women have made up almost half of the graduating class for approximately 20 years."). Throughout this Article, if we use the word "women," we are referring to anyone who identifies as a woman. If more specificity is required, we will use the appropriate term (e.g., "ciswomen" or "transwomen"). It would be helpful and appropriate for surveyors to gather data about attorneys recognizing the diversity of gender identities and presentations.

[5] NAT'L ASS'N OF WOMEN LAWS., 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 2 (2019), https://www.nawl.org/p/cm/ld/fid=1163 (last visited Feb. 10, 2021) [https://perma.cc/7KXL-ZYB6].

[6] *See* ELIZABETH MERTZ, FRANCES TUNG, KATHERINE BARNES, WAMUCII NJOGU, MOLLY HEILER & JOANNE MARTIN, AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 14-15 (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-_final-_abf_4.1.pdf [https://perma.cc/QSW3-FEY3] (comparing similar data from the *After Tenure* report (data collected 2005–08) and the ABA Tenured Law Professor Survey (data collected 2002–03)); *see also* Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 525 (2019) ("In legal education, women predominately occupy skills positions, including legal writing, clinic, academic success, bar preparation, or library. According to a 2010 Association of American Law Schools survey, the percentage of female lecturers and instructors is so high that those positions are stereotypically female.").

[7] *See U.S. Attorneys Listing*, OFF. OF THE U.S. ATT'YS, https://www.justice.gov/usao/us-attorneys-listing (last updated June 21, 2021) [https://perma.cc/MPV5-X4SX] (showing that thirteen of the ninety U.S. Attorneys, or approximately fourteen percent, are women); *see also* Catherine Smith & Trina Jones, *'Too Often Overlooked': Black Women Are Nearly Absent from the Federal Bench—It's Time to Change That*, NAT'L L.J. (Dec. 8, 2020, 2:31 PM), https://www.law.com/nationallawjournal/2020/12/08/too-often-overlooked-black-women-are-nearly-absent-from-the-federal-bench-its-time-to-change-that/ [https://perma.cc/Z8B4-ZDGQ] (decrying the lack of Black women appointed to the federal bench and observing that only five have served as circuit court judges).

and intersex individuals[8] — who also may menstruate[9] — are far more visible in popular culture than ever before,[10] they often feel compelled to remain in the shadows in the legal profession to remain employed.[11]

The barriers to the advancement of women and transgender, genderqueer/nonbinary, and intersex lawyers to positions of power are numerous and varied. They range from explicit discrimination and implicit bias[12] to the required number of billable hours that make it

[8] *See GLAAD Media Reference Guide — Transgender*, GLAAD, https://www.glaad.org/reference/transgender (last visited Feb. 10, 2021) [https://perma.cc/4YZF-8YGH] (defining the terms transgender, gender queer, and nonbinary). Although GLAAD also endorses the term "gender non-conforming" for those who do not adhere to traditional gender stereotypes, PFLAG notes that "some people view the term as derogatory." *PFLAG National Glossary of Terms*, PFLAG, https://pflag.org/glossary (last updated Jan. 2021) [https://perma.cc/Y2PR-X6ST]. The authors endorse PFLAG's urging that when using terms, everyone should "respect and use the terms people use for themselves, regardless of any prior associations or ideas about those terms." *Id.* Since the authors do not have the terms used by each test taker, the authors opt to use the phrase "transgender, genderqueer/nonbinary, or intersex" to inclusively refer to individuals who may not present themselves as the sex they were assigned at birth. *Id.*

[9] Wiley Reading, *My Period and Me: A Trans Guy's Guide to Menstruation*, EVERYDAY FEMINISM (Nov. 4, 2014), https://everydayfeminism.com/2014/11/trans-guys-guide-menstruation/ [https://perma.cc/LA3W-BUGK] (describing how transgender men and other nonbinary people may still menstruate).

[10] Walter Liszewski, J. Klint Peebles, Howa Yeung & Sarah Arron, *Persons of Nonbinary Gender — Awareness, Visibility, and Health Disparities*, 379 NEW ENG. J. MED. 2391, 2391 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6748626/ [https://perma.cc/J2VT-2DS6] ("As our society's concept of gender evolves, so does the visibility of contemporary nonbinary people.").

[11] *See* Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 UDC L. REV. 23, 25, 32 (2020), https://digitalcommons.law.udc.edu/udclr/vol23/iss1/3 [https://perma.cc/26EE-PBTU] (describing a study in which thirty-six percent of "other gender" attorneys reported "subtle but unintentional bias" in the workplace; finding that "other gender" attorneys "tend[ed] to report relatively lower salary ranges," and concluding that "[e]ven when people . . . who identify as LGBTQ+ advance professionally, they still encounter organizational barriers [including] attitudinal bias, expressly or subtly, through verbal and nonverbal 'microaggressions,'" as well as intentional bias, all of which "impede the full and equal integration of [LGBTQ+ individuals] into workplaces, and negatively affect the performance of their work groups"); *cf.* Patrick Folliard, *Getting Real: Transgender Attorneys Talk About Coming Out in the Workplace*, MCAA (July/Aug. 2008), https://www.mcca.com/mcca-article/getting-real-transgender-attorneys/ [https://perma.cc/L99T-2WSX] (transgender attorneys describing obstacles and discrimination they have faced).

[12] Blanck, Abdul-Malak, Adya, Hyseni, Killeen & Wise, *supra* note 11, at 29 n.17; WORKLIFE LAW, EFFECTIVE POLICIES AND PROGRAMS FOR RETENTION AND ADVANCEMENT OF

virtually impossible to create even the semblance of work-life balance.[13] In this context, perhaps it is not surprising that additional barriers exist at the threshold to practice: the bar exam.

Over the summer of 2020, test takers and commentators took to social media to critique BOLE policies regarding menstruation and the bar exam. Their posts demanded that test takers be allowed to use their own menstrual products and be provided bathroom access as needed during the two-or-three-day exam.[14] They were concerned about the harm and embarrassment that might occur if they unexpectedly began to bleed during the exam or that, if bleeding, they would not be able to attend to their menstruation.[15]

These were problems both for in-person and remote test takers. In-person test takers asserted the importance of bringing their own products, as each menstruator has different needs relating to the size, type, and hypoallergenic nature of the period products they must use.[16] In-person and remote examinees expressed concern about the frequency or suddenness with which they might need to go to the bathroom to attend to their menstruation and not be permitted to do

WOMEN IN THE LAW 2 (2013), https://worklifelaw.org/publications/Effective-Policies-and-Programs-for-Retention-and-Advancement-of-Women-in-the-Law.pdf [https://perma.cc/HJ3Z-QD4E] (reporting that "subtle bias has profound effects, and continues to shape office politics in ways that systematically disadvantages women and people of color").

[13] *See* WORKLIFE LAW, *supra* note 12, at 2 (observing that law firms will not be able to retain women, and young men, who parent if they continue to insist that full-time employment requires more than fifty work hours a week).

[14] *See* MK Cunningham, Esq. (@MKCunningham91), TWITTER (July 22, 2020, 11:24 AM PT), https://twitter.com/MKCunningham91/status/1285958943790043142 [https://perma.cc/TX6D-MTGA] (recent test taker declaring that "[p]eople who menstruate should not have to explain their products, bathroom habits, or any other facet of their bodies to exam proctors. #theend #bloodybarpocalypse"); Victoria Haneman (@TaxLawProf), TWITTER (July 21, 2020, 11:35 PM PT), https://twitter.com/TaxLawProf/status/1285780466784772097 [https://perma.cc/RAP2-6JEP] (observing that Nebraska's bathroom restrictions are "absurd, ableist, sexist and abusive").

[15] *See supra* note 14; *see also* Menstrual Products and the Bar, *Menstruation and the Bar Survey Results* (2020–21) [hereinafter *Menstruation and the Bar Survey Results*] (on file with authors). Issues with menstruation and the bar exam have occurred for years. *Id.* (capturing survey responses from test takers who reported negative experiences with menstruation and the bar exam dating back to 1983).

[16] *See* Margaret E. Johnson, Marcy L. Karin & Elizabeth B. Cooper, *Stop the Stigma Against Menstruation; Starting with the Bar Exam,* NAT'L JURIST (July 28, 2020, 3:31 PM), https://www.nationaljurist.com/national-jurist-magazine/stop-stigma-against-menstruation-starting-bar-exam [https://perma.cc/3DYH-2JPR] [hereinafter *Stop the Stigma*].

so.[17] Even at home, some BOLEs prohibited any movement away from the computer camera, flagging such exams for suspected cheating.[18]

Among those BOLEs that permitted test takers to bring their own menstrual products to the exam, many impinged on their privacy by requiring them to bring their menstrual products in a clear plastic bag to be inspected by security.[19] While some are comfortable displaying their menstruating-status, others may not be; such policies remove the choice regarding disclosure. Worse yet, the forced displaying of menstrual products made test takers vulnerable to harassment by ignorant exam proctors, one of whom demanded, "Do you really need those?" of a test taker in July 2020, as if menstruation is a punchline or voluntary.[20] While these experiences are potentially unsettling for *all* menstruating examinees, they are especially harmful to transgender,

[17] *See infra* Part IV.C.2 and 3 (discussing how policies which restrict bathroom usage during the test leave people who are menstruating unable to properly attend to themselves).

[18] Numerous problems have been reported with the exam software used for remote exams, including not accurately reading the faces of people of color and technical glitches. *See* Allie Reed, *Online Bar Exams Come with Face Scans, Bias Concerns*, BLOOMBERG L. (July 28, 2020, 2:01 AM), https://news.bloomberglaw.com/health-law-and-business/online-bar-exams-come-with-face-scans-discrimination-concerns [https://perma.cc/HJF7-CGPV]. In California, almost thirty-six percent of test takers' exams were flagged for alleged violations of policy. *See* Stephanie Francis Ward & Lyle Moran, *Thousands of California Bar Exam Takers Have Video Files Flagged for Review*, A.B.A. J. (Dec. 18, 2020, 2:15 PM CST), https://www.abajournal.com/web/article/thousands-of-california-bar-exam-takers-have-video-files-flagged-for-review [https://perma.cc/AX8D-XNW8]; Stephanie Francis Ward, *While Many Jurisdictions Had Few or No Online Bar Exam Testing Violations, California Had Many*, A.B.A. J. (Jan. 12, 2021, 12:14 PM CST), https://www.abajournal.com/web/article/while-many-jurisdictions-had-few-or-no-online-bar-exam-testing-violations-california-had-many [https://perma.cc/EYA4-DYNN].

[19] *See, e.g.*, Bridget Crawford, *You Can Now Bring Tampons to the Bar Exam in Arizona, But Not in West Virginia (What About Texas?)*, FAC. LOUNGE (July 18, 2020), https://www.thefacultylounge.org/2020/07/you-can-bring-tampons-to-the-bar-exam-in-arizona-now-but-not-west-virginia.html [https://perma.cc/52BN-DLSK] (sharing a screen shot from Arizona Supreme Court, Attorney Admissions, stating that "[a]pplicants will be permitted to bring in feminine products in their clear, personal baggie"); MO. BD. OF L. EXAM'RS, MISSOURI BOARD OF LAW EXAMINERS EXAMINATION SECURITY PROCEDURES, https://www.mble.org/security-procedures [https://perma.cc/33VG-7EBY] (stating that test takers may bring in "feminine hygiene products" in a "[c]lear quart-size plastic bag"); *Exam Rules*, STATE BAR OF CAL., http://www.calbar.ca.gov/Admissions/Examinations/Exam-Rules (last visited July 17, 2021) [https://perma.cc/XG8N-J46H] (stating that applicants must carry any "permitted personal items," which include "menstrual products," "in a small, clear plastic bag" to be brought into the exam area).

[20] BPrybol (@BPrybol), TWITTER (July 30, 2020, 5:43 PM PT), https://twitter.com/BPrybol/status/1288998671183486977 [https://perma.cc/GZR2-RWC5].

genderqueer/nonbinary, and intersex examinees who may not wish to disclose their biological anatomy to take the bar exam.[21]

To better understand the scope of the barriers facing menstruating test takers, the authors surveyed and analyzed BOLE policies and tracked test takers' self-reported experiences of menstruation and the bar exam.[22] Part I of the Article describes the methodology for that empirical work, the advocacy that led to the work being undertaken, and provides an overview of menstruation and the bar exam.[23]

Part II describes the survey results, offering new insights into the numerous aspects of the bar exam that create differential testing experiences for those who menstruate and those who do not.[24] Part II also identifies the five principles of dignity through which these problems and obstacles should be understood: Respect and Privacy; Fairness and Non-Discrimination; Promoting Health; Providing Accommodations; and Policy Transparency.[25] Burdening any of these interests causes both dignitary and tangible harm to menstruators.[26] By contrast, upholding these interests provides the foundation for adopting sound menstrual policies by BOLEs.[27]

Among the harms identified and reported in Part II of the Article are: lack of information about BOLE policies for anxious test takers who might menstruate during the bar exam, humiliation due to security screening practices, harassment of menstruating test takers, limited access to a test takers' own menstrual products, little product diversity or insufficient products when supplied by a BOLE, placement of products (when provided) solely in women's bathrooms, restricted

[21] In the United States, 1.2 million LGBTQ persons identify as nonbinary. Bianca D.M. Wilson & Ilan H. Meyer, *Nonbinary LGBTQ Adults in the United States*, UCLA SCH. OF L. WILLIAMS INST., https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/ (last visited June 25, 2021) [https://perma.cc/D2Z6-FFQU]; *see supra* note 11 (describing the bias and harassment transgender attorneys face when they have come out as transgender).

[22] *See infra* Part I. The authors' surveys were, by definition, limited to the retrospective experiences of test takers. Although some BOLEs have updated menstruation-related policies in response to the advocacy of MP and the Bar and others, see *infra* Part I.B, no jurisdiction has wholly adopted the basic elements contained in the Model Policy. Further, the general resistance and non-responsiveness of BOLEs to the inquiries of MP and the Bar, see *infra* notes 93-96, leave the authors concerned about the lack of alacrity employed by BOLEs to this critical issue.

[23] *See infra* Part I.

[24] *See infra* Part II.

[25] *See infra* Part II.

[26] *See infra* Part II.

[27] *See infra* Part II.

access to the bathrooms during the in-person and remote exam, and lack of administrative accommodations for menstruating test takers.[28]

Part III of the Article examines whether BOLE policies and practices violate the Equal Protection Clause on the basis of sex and determines that they most likely do.[29] This Part also assesses BOLE practices under state human rights laws and laws banning discrimination by entities licensed by the state, again finding grounds for liability.[30]

Part IV presents a novel contribution to this area of jurisprudence by responding to the empirical findings, the harms identified, and the legal failings of current BOLE practices: A Model Policy that provides a framework for state BOLEs to address the five principles identified in Part II and to comply with their antidiscrimination legal responsibilities, while still protecting their articulated security concerns.[31] The Model Policy offers adaptable solutions to problems identified by past test takers to ensure that present and future examinees do not face menstruation-related barriers to equitable test conditions — and admission to the bar.[32]

The timing of this proposal is particularly propitious: it arises in conjunction with reinvigorated efforts to diversify the bar and in the face of growing concerns about the relevance and fairness of the bar exam.[33] Indeed, the National Conference of Bar Examiners ("NCBE") recently has announced plans to significantly change the exam.[34] Absent

[28] *See infra* Part II.

[29] *See infra* Part III.

[30] *See infra* Part III.

[31] *See infra* Part IV.

[32] *See infra* Part IV.

[33] *See, e.g.*, Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 56, 64 (2019) [hereinafter *Better Bar Exam*] (observing that "[t]he time for comprehensive reform of the bar examination process is long overdue," identifying flaws with the exam including a failure to align bar exam content with "what law schools and the public expect law graduates to know," and noting that many have questioned "whether the bar exam actually measures the competencies required in the practice of law"); N.Y. STATE BAR ASS'N, REPORT OF THE NYSBA TASK FORCE ON THE NEW YORK BAR EXAMINATION 42, 75 (2020), https://nysba.org/app/uploads/2020/03/Report-of-the-NYSBA-Task-Force-on-the-New-York-Bar-Examination-With-Appendix-compressed.pdf [https://perma.cc/L7QT-M2XR] (critiquing the Uniform Bar Examination ("UBE"), *inter alia*, for its failure "to protect the public from ignorance, inexperience, and unscrupulousness" and for the "gender and race differentials" present in exam results).

[34] NAT'L CONF. OF BAR EXAM'RS TESTING TASKFORCE, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2-5 (2020), https://testingtaskforce.org/wp-content/uploads/2021/01/TTF-Preliminary-Bar-Exam-Recommendations2.pdf [https://perma.cc/AEN8-839R].

the adoption of a diploma privilege across the country,[35] however, the authors doubt that concerns about menstrual justice and the bar exam will be addressed without the carefully considered proposals found in the Model Policy.

I. MENSTRUATION AND THE BAR EXAM: EMPIRICAL RESULTS AND ANALYSIS OF BOLE POLICIES AND TEST TAKERS' EXPERIENCES

BOLEs must address menstruation in the administration of bar exams. To understand why, some background information about the structure of bar exams is needed. Although COVID-19 led some states to temporarily grant diploma privilege to practice law, successfully completing the bar exam is a prerequisite to obtaining a license to practice law in every jurisdiction except Wisconsin.[36] Each BOLE sets the required components and conditions for the bar exam in their jurisdiction, including policies that govern applicant conduct and test conditions.[37] This includes developing procedures to administer the

[35] *See* Beverly I. Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645-48 (providing an overview of the creation of the bar examination, its rise to prevalence, and its justifications in comparison to Wisconsin's experience with diploma privilege); REPORT OF THE NYSBA TASK FORCE ON THE NEW YORK BAR EXAMINATION, *supra* note 33, at 5-6 (proposing an emergency diploma privilege). *But see* Stephanie Francis Ward, *Jurisdictions with COVID-19-related Diploma Privilege are Going Back to Bar Exam Admissions*, A.B.A. J. (Dec. 10, 2020, 3:16 PM CST), https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions [https://perma.cc/VJC4-D3Y2] (observing that some jurisdictions that created a temporary diploma privilege in 2020 have returned to administering the bar examination in February 2021, albeit primarily remotely).

[36] WIS. SUP. CT. R. 40.03 (2009).

[37] BOLEs determine what material to test and how to do so, including whether to adopt the UBE or any of its component sections, namely, the Multistate Bar Examination ("MBE"), Multistate Essay Examination ("MEE"), and Multistate Performance Test ("MPT"), the MBE (even if not deemed a UBE jurisdiction) and/or state specific sections. BOLEs also are responsible for determining how to score the exam, what constitutes passing, whether and under what conditions to accept exams and scores from other jurisdictions, the necessary requirements, and qualifications for membership into that jurisdiction's bar or enforcing the judiciary's regulations regarding the same, including character and fitness screening and disseminating information to the public about how to become a member of the bar. One benefit of the UBE is that scores may be transferred to other UBE jurisdictions, which may result in admission based on reciprocity agreements between the states. NAT'L CONF. OF BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 18 chart 5 (2020), https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [https://perma.cc/QC8P-RY75] (reporting UBE Jurisdictions Admission by Examination or by Transferred UBE Score); *Overview of Bar Admissions Information*, A.B.A. (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/

examination, such as preparing for and managing logistics of the exam (e.g., securing appropriate location(s) and staff, developing the exam testing and break schedule), creating a process to review and decide petitions for accommodations, and addressing post-exam matters, such as grading and appeals.[38] BOLEs also are responsible for communicating with potential bar applicants and examinees about all aspects and conditions related to the bar exam and their governing policies.[39]

Most BOLEs use an exam format that brings hundreds to thousands of test takers to one or more locations in the state for a two-to-three day, in-person exam.[40] Each exam day consists of multiple test segments, broken up by a lunch break.[41] Consistent with those BOLE-created policies, test takers arrive, go through a security check that allowed candidates to keep only pre-approved categories of items with them in a particular size and type of bag, and stay at their exam seat while during active test sections, unless a pre-existing accommodation or process was followed such as asking a proctor for the ability to use a restroom during an exam session.[42] Maintaining exam security and integrity is a paramount consideration in these policies.[43] Among other penalties,

bar_admissions/basic_overview/ [https://perma.cc/XF5S-DX86]. *See generally* Melissa A. Hale, Antonia A.B. Miceli & Tania N. Sha, *What the Heck is the UBE?* in THE ULTIMATE GUIDE TO THE UBE, ch. 1 (2021) (explaining the UBE and each of its components; further observing that different accommodation and other administrative rules means that it really should be called the "Mostly Uniform Bar Exam"); *Bar Exam*, UNIV. OF D.C., https://www.law.udc.edu/page/BarExam (last visited Feb. 2, 2021) [https://perma.cc/2W8C-XFTD] (noting that the requirements to transfer scores varies by jurisdiction).

[38] *See, e.g.*, N.Y. CT. R. §§ 520.8, 520.9, 520.15 (2019) (granting New York's BOLE the ability to create the content and conditions of the bar exam, including "rules . . . as it shall deem necessary and proper to enable it to discharge its duties . . . ."); NAT'L CONF. OF BAR EXAM'RS, *supra* note 37, at 36-38 chart 10 (capturing in the Grading and Scoring chart when and how each jurisdiction grades the MBE, MEE, MPT, and/or other components of the exam).

[39] *See, e.g.*, *Exam Day References & Security Policy*, N.Y. STATE BD. OF L. EXAM'RS, https://www.nybarexam.org/Security/Security.htm (last visited Feb. 11, 2021) [https://perma.cc/T88J-3HDR] (providing exam day rules for the New York examination).

[40] *Overview of Bar Admissions Information*, *supra* note 37.

[41] *See* Hale, Miceli & Sha, *supra* note 37, at 6-7.

[42] *See, e.g.*, *Exam Day References & Security Policy*, *supra* note 39 (providing "Exam Day Instructions," including "important reminders for exam day").

[43] *See, e.g.*, N.Y. STATE BD. OF L. EXAM'RS, NEW YORK STATE BOARD OF LAW EXAMINERS BAR EXAMINATION SECURITY POLICY, https://www.nybarexam.org/docs/secpolicy.pdf (last updated June 2018) [https://perma.cc/3JKW-UA3B] (listing extensive rules, identifying permitted and prohibited items, and describing the state's "zero tolerance policy" for certain violations); *Testing Accommodations*, STATE BAR OF NEV., https://nvbar.org/licensing-compliance/admissions/bar-exam/testing-accomodations/ (last updated June

violating one of these policies could result in the cancellation of an examinee's scores.[44]

The NCBE guides BOLE choices related to exam content and conditions.[45] Specifically, they "develop and produce" the text of the common components of most bar exams and coordinate the Uniform Bar Exam ("UBE").[46] In so doing, they issue guidance and "provide support . . . before, during, and after each exam" to BOLEs that purchase their exam components, which includes every jurisdiction except Louisiana.[47] That guidance includes lists of test-day policies about what items examinees may bring into exams — and what items are prohibited such as paper, hats (unless for religious purposes), handbags, earplugs, or food ("unless pre-authorized").[48] Menstrual products are not specifically listed as a prohibited item and examinees are told that every jurisdiction "will provide specific information regarding materials [that] examinees are allowed to bring with them to the test center."[49] Along with the American Bar Association and Association of American Law Schools, the NCBE also publishes a "Code of Recommended Standards for Bar Examiners" to encourage BOLEs to follow certain principles, including the creation of a process to provide a "fair and equal opportunity" for applicants with disabilities to take a bar exam.[50]

Two things happened in relation to the bar exam in the summer of 2020. First, due to the pandemic,[51] states considered whether they would hold their July 2020 bar examinations in person, as is normally done, or remote.[52] Many states perseverated and then made last minute

23, 2021) [https://perma.cc/VP7R-6FH5] (describing the availability of testing accommodations that would not impair "the integrity of the examination process).

[44] *See, e.g.*, N.Y. CT. R. § 6000.13(f) (2021).

[45] *About NCBE*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/about/ (last visited Jan. 31, 2021) [https://perma.cc/PKB8-XZEU].

[46] *Id.*; *see supra* note 37 and accompany text (providing information about the various components of the bar exam).

[47] Griggs, *Better Bar Exam*, *supra* note 33, at 14 n.66; *About NCBE*, *supra* note 45.

[48] *MBE Test Day Policies*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mbe/test-day-policies (last visited Jan. 31, 2021) [https://perma.cc/QS7R-CBUD].

[49] *Id.*

[50] NAT'L CONF. OF BAR EXAM'RS, *supra* note 37, at x § IV ¶ 22.

[51] *See, e.g.*, Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/22CU-FMDM] (providing a timeline of the COVID pandemic from Dec. 31, 2019, through Dec. 20, 2020).

[52] Bridget J. Crawford & Emily Gold Waldman, *Tampons and Pads Should Be Allowed at the Bar Exam*, N.Y. L.J. (July 22, 2020, 2:09 PM), https://www.law.com/

decisions to push off the exam until the fall, hold it remotely, shorten its length, create a temporary diploma privilege, or some combination thereof.[53] The uncertainty of date and format caused significant distress among test takers, many of whom turned to social media to raise scrutiny of the bar exam and BOLEs' inhumane treatment of examinees.[54] The NCBE and the BOLEs doubled down and moved forward with the traditional content of bar exams (albeit shortening their length), administered primarily remotely, for the February 2021 exam.[55] For the July 2021 bar exam, the NCBE offered a remote and in-

newyorklawjournal/2020/07/22/tampons-and-pads-should-be-allowed-at-the-bar-exam/ [https://perma.cc/6P4R-PPQ2] [hereinafter *Tampons and Pads Should Be Allowed*]; Jennifer Weiss-Wolf, *Raising the Bar for Menstrual Equity. Period.*, MS. MAG. (July 23, 2020), https://msmagazine.com/2020/07/23/raising-the-bar-for-menstrual-equity-period/ [https://perma.cc/S26A-LEXZ]. Some in-person bar exams had to obtain a waiver of local social distancing requirements to move forward. *See* Joe Patrice, *Occupancy Limit? NO PROBLEM! Bar Exam Just Gets a Waiver for July Test*, ABOVE THE L. (July 10, 2020, 2:58 PM), https://abovethelaw.com/2020/07/occupancy-limit-no-problem-bar-exam-just-gets-a-waiver-for-july-bar-exam-missouri/ [https://perma.cc/6B95-PRR7] (sharing communication from Missouri BOLE that "the organizers of the bar exam applied for and were approved for a waiver to accommodate more than the current gathering size limit of 100 people").

[53] *See* Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52; Marsha Griggs, *An Epic Fail*, 64 HOWARD L.J. 1, 18, 27 (2021) [hereinafter *Epic Fail*]; Suzanne Darrow Kleinhaus, *Portability of the UBE: Where Is It When You Need It?* 12-14 (2020), https://tinyurl.com/3v493cnw [https://perma.cc/Q7D9-DFBQ] (detailing changes to the content of the bar exams in Nevada, Indiana, Florida, and other jurisdictions due to COVID). Other BOLEs created a hybrid system where the exam was administered in person to some candidates and remotely to others. *Testing Accommodations*, *supra* note 43 (in-person test administered in Nevada in July 2020 for examinees with accommodations that "cannot be administered remotely"). Texas went so far as to administer its bar exam in individual hotel rooms. Stephanie Francis Ward, *Bar Exam in Hotel Rooms Offered Test-takers Social Distancing and Private Bathrooms*, A.B.A. J. (Sept. 22, 2020, 1:56 PM CDT), https://www.abajournal.com/web/article/bar-exam-in-hotel-rooms-offered-test-takers-social-distancing-and-private-bathrooms [https://perma.cc/Q59Z-WPVU] (administering the bar exam in hotel rooms to maintain safe social distancing).

[54] *See* Johnson, Karin & Cooper, *Stop the Stigma*, *supra* note 16 (describing social media posts and bringing attention to the need for policy reform pertaining to the bar examination and menstruation); #barpocalypse, TWITTER, https://twitter.com/search?q=%23barpocalypse&src=typed_query&f=live (last visited Jan. 31, 2021) [https://perma.cc/5W33-YQV5] (using the hashtag to criticize the policies of the bar examination).

[55] *See February 2021 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS (2020), https://www.ncbex.org/ncbe-covid-19-updates/feb-2021-bar-exam-jurisdiction-information/ (last updated Jan. 12, 2021, 11:00 AM CST) [https://perma.cc/9KZ7-3USF] (tracking the test administration status of the February 2021 bar exams across the country, including nineteen jurisdictions that are holding in-person examinations); Joe Patrice, *Bar Examiners LITERALLY Doubling Down on Bad Ideas for February Bar Exam*, ABOVE THE L. (Jan. 19, 2021, 4:42 PM), https://abovethelaw.com/2021/01/bar-examiners-literally-doubling-down-on-bad-ideas-for-february-bar-exam/

person testing format; twenty-five BOLEs administered the in-person format and thirty BOLEs administered the remote format.[56] On June 1, 2021, the NCBE announced it would provide bar exam materials for "in-person testing only" for the February 2022 bar exam.[57]

Second, in the summer of 2020, test takers expanded their critique of the scheduling of bar exams to a critique of the NCBE and the BOLEs' substantive policies. The chaotic changes and their detrimental impact on a class of examinees — who shared their experiences online using #barpocalpyse[58] — resulted in multiple calls for reform.[59] Social media posts by test takers, academics, and others — often under #bloodybarpocalypse or #MPandtheBar — demanded unregulated access to test takers' own menstrual products and use of the bathroom when needed.[60] For instance, Professor Bridget Crawford urged a "free carry" BOLE policy, a term she coined, that would permit test takers to

[https://perma.cc/LK88-USPW] (observing jurisdictions that had limited exam content, and thus, reduced the time of the bar exam for the summer/fall 2020 cycle, have returned to the original two to three day exam).

[56] *July 2021 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/ncbe-covid-19-updates/july-2021-bar-exam-jurisdiction-information/ (last visited June 24, 2021) [https://perma.cc/3CXU-TKSY].

[57] *NCBE COVID-19 Updates*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/ncbe-covid-19-updates/ (last visited June 24, 2021) [https://perma.cc/4S5P-7HQU]. This article is current as of June 24, 2021; each cycle of bar exam administration may bring revised NCBE and BOLE bar exam administration policies.

[58] #barpocalypse, *supra* note 54; *see also* Griggs, *Epic Fail*, *supra* note 53, at 5-7, 25-26, 37-39 (observing that NCBE's resistance to reform prevented creativity and adaptability during the pandemic and describing how the electronic systems selected to administer remote bar exams failed — test runs crashed, the remote proctors and associated technology did not recognize the faces of all applicants, among other problems).

[59] *See* Griggs, *Epic Fail*, *supra* note 53, at 31-41 (analyzing licensing alternatives); N.Y. STATE BAR ASS'N, *supra* note 33, at 1, 3-4 (recommending numerous changes to the New York bar exam to fix its "serious problems").

[60] *See* Posts with #bloodybarpocalypse spearheaded by Professor Cat Moon (@inspiredcat), @LadyLawyerDiary, @BarExamTracker, and @MPandtheBar (calling for unregulated access to menstrual products and restrooms during the bar examination); *supra* note 14 (describing social media posts); *see also* 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 PRACS. FOR LEGAL EDUC. BLOG (Aug. 5, 2020), https://bestpracticeslegaled.com/2020/08/05/menstrual-products-and-the-bar-advocacy-seeks-to-create-equal-bar-exam-testing-conditions-for-menstruators/ [https://perma.cc/AF8E-SHFC] [hereinafter *Bar Exam Testing Conditions*] (describing use of social media as a mechanism of requesting reform from state bar examiners).

bring menstrual products into in-person exams without restriction.[61] Test takers, academics and others also demanded answers as to what was — and was not — allowed when policies were silent, unclear, or not timely communicated to examinees.[62] Collectively, this constellation of activity made clear the compelling need for strategic reform of menstruation-related BOLE policies.

A. Advocacy Relating to State BOLE Policies

To support and amplify the social media campaign to make BOLEs design their examinations with menstruators in mind, this Article's authors created an organization called Menstrual Products and the Bar ("MP and the Bar"), which works to eliminate the stigma associated with menstruation and to change unfair and outdated policies related to menstruation and bar examinations. In July 2020, the authors drafted a letter to the NCBE, advocating for a change to these policies.[63] It was signed by more than 2,800 lawyers, law students, law graduates and others within 24 hours.[64] The letter stated that without any evidence of test takers using menstrual products to cheat on the bar exam, BOLEs were unreasonably creating draconian period product and bathroom

[61] Bridget J. Crawford, *Menstruation and the Bar Exam: Unconstitutional Tampon Bans*, 41 COLUM. J. GENDER & L. 63, 68, 72 (2021) (urging "free carry" BOLE policies).

[62] *See, e.g.*, Bar Exam Tracker (@BarExamTracker), TWITTER (Aug. 5, 2020, 6:18 PM PT), https://twitter.com/BarExamTracker/status/1291181935318962l6 [https://perma.cc/H2LX-PRSK] (exchange initiated by 2020 examinee behind @BarExamTracker demonstrating questions that a state BOLE declined to answer, despite repeated asks); Marcy Karin (@ProfessorMLK), TWITTER (July 24, 2020, 3:00 PM PT), https://twitter.com/ProfessorMLK/status/1286783310522388480 [https://perma.cc/37K8-APL2] ("Hey @nevadabar, did you see our #MPandTheBar letter (http://bit.ly/MP-NVBar) asking for public, clear statement that examinees may bring their own menstrual products into #NVbarexam? Exam in 4 days. Clarification please."); *see also* Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60 ("In our efforts to get accurate and honest information from state Bar Examiners across the country, it has been deeply disconcerting to learn how many jurisdictions are silent on whether examinees may bring in their own menstrual products; have informal policies that contradict written statements about what items are allowed in the exam (e.g., not listing menstrual products in the list of items test-takers can bring in, but informally allowing them); or have stubbornly held onto their recalcitrant policies.").

[63] Letter from Elizabeth B. Cooper, Margaret E. Johnson, Marcy L. Karin et al., to Judith Gundersen, President & CEO, Nat'l. Conf. of Bar Exam'rs (July 20, 2020) [hereinafter Cooper, Johnson & Karin, Letter], https://bit.ly/30Aga8w [https://perma.cc/727Z-4ELV]. Also in July 2020, the Authors formed the organization Menstrual Products and the Bar, which was renamed Menstrual Policies and the Bar in November 2021; the short name MP and the Bar has been used throughout its existence.

[64] *Id.*

access policies.[65] It also argued against the lack of transparent policies about menstrual products that was causing easily-avoidable heightened test taker anxiety.[66] The authors later stated,

> [t]he harm here is four-fold: 1. It is wrong to make test-taking conditions more challenging for people based on the fact they menstruate; 2. It is wrong to limit test-takers to random products selected by Bar Examiners that could put test-takers' health and menstruation management at risk; 3. It is wrong to exclude text-takers from *any* menstrual products simply because they do not use the women's restroom; and 4. It is wrong to convey the harmful message that all people who menstruate are untrustworthy and do not belong in the legal profession.[67]

The authors also sent a letter to every BOLE that had a bar exam in July 2020 and did not have clear policies permitting personal menstrual products, attaching the NCBE letter and asking the BOLE to permit test takers to bring their own menstrual products and to make their policies transparent.[68] The NCBE never responded directly to the letter, but announced — in a report by LAW360 — that they had reached out to each BOLE and notified them that the NCBE did not classify menstrual products as "prohibited paper."[69]

On February 21, 2021, in recognition that the status quo consisted of "discriminatory" and "unjustified" policies that "impact[ed] examinees'

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[65] *See id.* at 2.

[66] *See id.*

[67] Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60.

[68] Cooper, Johnson & Karin, Letter, *supra* note 63; *see* Menstrual Products and the Bar, *Bar of Law Examiners ("BOLE") Policy Survey* (2020) (on file with authors) [hereinafter *BOLE Policy Survey*] (listing which jurisdictions permit menstrual products in their test day policies); *see, e.g.*, Letter from Elizabeth B. Cooper, Margaret E. Johnson, Marcy L. Karin, to Kan. Bd. of L. Exam'rs (July 23, 2020), https://bit.ly/MP-KSBar [https://perma.cc/4VLE-BHA9] ("We write to request that the Kansas Board of Bar Examiners (Board) publicly and expressly permit examinees to bring their own menstrual products to the July 2020 in-person bar exam."); Letter from Elizabeth B. Cooper, Margaret E. Johnson, Marcy L. Karin, to Wash. State Bar Ass'n (July 23, 2020), https://bit.ly/MP-WABar [https://perma.cc/96JX-65JM] ("We write to request that the Washington State Bar Association (Association) publicly and expressly permit examinees to bring their own menstrual products to the July 2020 in-person bar exam.").

[69] Hailey Konnath, *Allow Menstrual Products at Bar Exam, Thousands Tell NCBE*, LAW360 (July 20, 2020, 10:26 PM EDT), https://www.law360.com/legalindustry/articles/1293769/allow-menstrual-products-at-bar-exam-thousands-tell-ncbe [https://perma.cc/GPB3-FXHQ].

ability to focus on the bar exam," the American Bar Association adopted Resolution 105.[70] Sponsored by the Law Student Division and others, the resolution recommends that BOLEs adopt transparent policies that permit test takers to bring their personal menstrual products during the exam.[71] In addition, the Bar Advocacy Committee of the Association of Academic Support Educators ("AASE") included dignified access to menstrual products as part of its broader February 2021 campaign to obtain *Best Practices For Online Bar Examination*.[72] One goal of the AASE is "to level the playing field, both among applicants of varied backgrounds, and between the online and in-person versions of the exam."[73]

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[70] AM. BAR ASS'N, ABA MID-YEAR HOUSE OF DELEGATES RESOLUTION 105 (Feb. 22, 2021), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/105-midyear-2021.pdf [https://perma.cc/5JBX-3QPW]; *see also* Ayat Nizam, Chair, ABA Law Student Division, Remarks at ABA Midyear Meeting 2021 – House of Delegates Resolution 105, https://www.americanbar.org/news/reporter_resources/midyear-meeting-2021/house-of-delegates-resolutions/105/ [https://perma.cc/RDU4-WHDW].

[71] AM. BAR ASS'N, ABA RESOLUTION REVISED 105, https://www.americanbar.org/content/dam/aba/administrative/news/2021/02/midyear-resolutions/105.pdf [https://perma.cc/XR6G-5KEU]. Specifically, the ABA "urges" BOLEs:

> 1) to allow bar examinees to bring in tampons, pads, or other menstrual products ("menstrual products") into the bar exam in opaque, rather than clear, containers and be allowed to access those menstrual products unilaterally, without being accompanied or escorted by exam proctors;
>
> 2) to establish clear policies and rules which outline a protocol of allowing bar examinees to bring menstrual products into the bar exam; and
>
> 3) to publish, disseminate, or make easily accessible these policies allowing bar examinees to bring menstrual products into the bar exam.

[72] AASE, BEST PRACTICES FOR ONLINE BAR EXAMINATION 5-6 (2021) (on file with authors). Among other provisions, Recommendation E.(5) states, "The need for, use, and choice of menstrual hygiene products should not be questioned or dictated by any licensing authority. Menstrual hygiene products should not be touched or handled by any licensing authority or agent thereof. Applicants should not have to demonstrate, display, explain, or reveal menstrual hygiene products." *Id.*

[73] Law Professor Blogs Network Academic Support, *Best Practices for Online Bar Exam*, LAW SCH. ACAD. SUPPORT BLOG (Feb. 25, 2021), https://lawprofessors.typepad.com/academic_support/2021/02/best-practices-for-online-bar-exam-administration.html [https://perma.cc/SLK2-X2SJ]. During this same time, the authors published an article in LAW360 highlighting the expanded advocacy and urging BOLEs to permit test takers to bring in their own menstrual products and to have greater access to the bathrooms, along with other reforms. Elizabeth Cooper, Margaret Johnson & Marcy Karin, *Punishing Bar Exam Policies on Menstrual Products Must Go*, LAW360 (Feb. 25, 2021, 5:36 PM EST), https://www.law360.com/employment-authority/articles/1358884/punishing-bar-exam-policies-on-menstrual-products-must-go [https://perma.cc/S93B-H9Y4]. The article also provided a model policy, citing to this Article. *Id.*

As a result of the confluence of such pressure, states like Texas and West Virginia promised changes in 2020[74] and other jurisdictions like the District of Columbia created new menstruation-specific polices in 2021.[75] It is unclear, however, if these are permanent changes.

B. Empirical Research Regarding State BOLE Policies and Their Effect on Test Takers: Methodology

To understand the actual BOLE policies that were in place and their impact on test takers, MP and the Bar decided to undertake direct research. Teams of clinic students at UDC David A. Clarke School of Law under the supervision of Professor Marcy L. Karin and at Fordham Law School under the supervision of Professor Elizabeth B. Cooper researched the experiences of test takers relating to menstruation (or expected menstruation) and the bar exam.[76] They also sought the existing BOLE policies for bar exams administered in all fifty states, the

[74] While the West Virginia BOLE has not followed through on its promises, *FAQs*, W. VA. JUDICIARY, http://www.courtswv.gov/legal-community/Bd-of-Law/FAQs.html (last visited June 28, 2021) [https://perma.cc/W7H7-6HV8] (stating that "FAQs are being updated and will be posted soon"), the Texas BOLE did for the July 2021 bar exam. TEX. BD. OF L. EXAM'RS, TEXAS BAR EXAM GENERAL INSTRUCTIONS – JULY 2021, at 3 (2021), https://ble.texas.gov/bar-exam-general-instructions-july-2021 (last visited June 24, 2021) [https://perma.cc/D6W9-6HRG].

[75] Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60 ("West Virginia Bar Examiners insisted that they permitted products in the exam room, even though their website said differently. Texas state Bar Examiners changed their policy from not permitting products to permitting them at its September exam. (The state has issued contradictory statements, however, about whether this change is permanent.)"). This inconsistency was also identified in a Twitter thread at the time. *See* Marcy Karin (@ProfessorMLK), TWITTER (July 24, 2020, 7:30 AM), https://twitter.com/ProfessorMLK/status/1286669981523103744? [https://perma.cc/P9SR-J359]. For the first time, the Washington D.C. BOLE issued instructions for the July 2021 bar exam with a section entitled "Exam Policy Regarding Feminine Products, Medication and Health Related Items" for the first time. *July 2021 Uniform Bar Exam*, D.C. CT. OF APPEALS, https://admissions.dcappeals.gov/appinfo.action?id=1 (last visited June 24, 2021) [https://perma.cc/TY4Z-CE8C] (although calling them "feminine" products, the instructions permit menstrual products during the remote bar exam, do not require they be provided to the camera, and explicitly permit test takers to access the menstrual products during the exam if they cannot wait for a scheduled break "without creating a personal emergency.").

[76] *See BOLE Policy Survey*, *supra* note 68; Menstrual Products and the Bar, *Menstruation and the Bar Survey*, GOOGLE FORM, http://bit.ly/MPandTheBarSurvey (last visited Feb. 1, 2021) [https://perma.cc/3BCR-R2UR] (on file with the authors) [hereinafter *Menstruation and the Bar Survey*]; *Menstruation and the Bar Survey Results*, *supra* note 15.

District of Columbia, and five territories starting in the summer of 2020, both in person and remotely.[77] Below are the results of the research.

1. The Menstruation and the Bar Exam Survey: Methodology[78]

MP and the Bar captured the experiences of test takers related to menstruation and the administration of the bar exam in two ways: (1) obtaining social media stories shared by examinees; and (2) engaging in targeted outreach to test takers to share their stories. First, MP and the Bar scoured the internet for any experiences that test takers had already shared on social media platforms or elsewhere. To do this, MP and the Bar reviewed posts tagged with the #bloodybarpocalypse, #MPandTheBar, #menstrualequity, and/or #menstruationmatters hashtags and searched for key phrases related to menstruation and the bar exam.[79] Twitter contained the most posts highlighting test takers' negative experiences with menstruation and the bar exam. Many of these posts were then later shared on Facebook, Instagram, and LinkedIn or through blog posts or news articles. Collectively, this research uncovered the experiences of dozens of test takers.[80]

Second, MP and the Bar created a survey to uncover new information about examinees' experiences with menstruation and the bar exam.[81] The survey contained forty-nine questions, including a mix of open-ended short answer questions,[82] multiple-choice questions,[83] and

[77] *BOLE Policy Survey*, *supra* note 68.

[78] *See Menstruation and the Bar Survey*, *supra* note 76; *Menstruation and the Bar Survey Results*, *supra* note 15.

[79] These included variations of the following Boolean search: "bar exam" AND "(period OR menstruat! OR bleeding OR blood OR cramps OR cycle OR tampon OR pad)."

[80] *Menstruation and the Bar Survey Results*, *supra* note 15.

[81] *Id.*

[82] Questions included, for example, "What was your experience with menstruation and the bar exam?" The survey also utilized technology that automatically skipped sections of questions that did not apply to respondents based on the answer that was provided to an early question. For example, those identifying as a "non-menstruator" were not directed to questions about their own menstrual products. *Menstruation and the Bar Survey*, *supra* note 76.

[83] Questions included, for example, "Were you able to bring your own menstrual products into the bar exam? (select one) Yes; No; Do not recall; I did not need products during the exam."; "If so, what type of products were you allowed to bring into the bar exam? Pads; Tampons; Menstrual Cup; Absorbent garments; Cleaning Products (wet wipes, tissues, water and containers for product cleansing, etc.); Pain-Relief Products (Pain pills, heating patches/pads, topical ointments, etc.); Other clothing (underwear, pants, etc.); I was not able to bring products into the bar exam; Do not recall." *Id.*

"check any/all that apply" questions[84] designed to capture the details and scope of experiences with menstruation and the bar exam. It also asked about the jurisdiction, year, and format of the respondents' bar exam, their experiences with exam security and BOLE personnel, the availability of pre-exam instructions related to menstruation,[85] and access to products, breaks, and menstruation friendly bathrooms,[86] among other things. Finally, to protect confidentiality, respondents were able to submit the survey anonymously.[87] The link to the survey was pushed out in multiple ways, including via email to everyone who signed MP and the Bar's July 2020 NCBE letter, and posting on various social media platforms, including Twitter, Instagram, Facebook, and LinkedIn.[88]

By January 7, 2021, there were 136 unique responses to the survey,[89] capturing the experiences of test takers in twenty-nine jurisdictions

[84] The Survey asked: "Did you experience any of the following concerning menstruation and the Bar Exam? (check all that apply)

> I felt harassed by bar examiners about menstruation or menstrual products.
>
> I felt like my privacy was compromised because someone saw that I had menstrual products with me or I had to disclose my period.
>
> I had less time for the exam/break because of menstruation.
>
> I needed to use the bathroom during the exam to deal with my period, but was not permitted to do so.
>
> I felt feelings of shame or distrust for being a menstruator.
>
> I did not experience any of this."

Id.

[85] Respondents also were invited to email any policies related to menstruation and the bar exam that a BOLE provided to them to MPandtheBar@gmail.com. *Id.*

[86] *Id.*; *see* Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX & Menstruation*, 43 HARV. J.L. & GENDER 225, 243-44 (2020) (defining a menstruation friendly bathroom as "[a] safe and conveniently located toilet, [individual or] separated by gender (if communal or public), which provides privacy (doors, locks), a culturally appropriate menstrual waste disposal option (trash bins, chutes, pits), water and soap is available for washing blood off one's hands (water tap or bucket), suitable drainage and accessibility both during the day and night (area and internal lighting)") (citing MARGARET L. SCHMITT, DAVID CLATWORTHY, TOM OGELLO & MARNI SOMMER, MAKING THE CASE FOR A FEMALE-FRIENDLY TOILET 1-2 (Sept. 5, 2018), https://doi.org/10.3390/w10091193 [https://perma.cc/DWM2-HQBT]).

[87] *Menstruation and the Bar Survey*, *supra* note 76.

[88] *See* Menstrual Products and the Bar (@MPandtheBar), TWITTER (Dec. 18, 2020, 7:39 AM PT), https://twitter.com/MPandtheBar/status/1339958490345967617 [https://perma.cc/L8GM-R7A4].

[89] *Menstruation and the Bar Survey Results*, *supra* note 15.

over many exam cycles, including those administered through the end of 2020.[90]

2. BOLE Policy Survey: Methodology

In addition to gathering test takers' experience with menstruation and the administration of the bar exam, MP and the Bar set out to survey all relevant BOLE policies.[91] Starting in the summer of 2020, MP and the

[90] Respondents reported that they took the bar exam in the following jurisdictions: Alabama, Arizona, Arkansas, California, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia, and Ontario, Canada. *Id.*

[91] The policies used to administer other standardized and licensing exams also were reviewed and revealed a range of practices related to menstruation. Some contain policy provisions that adequately address components of menstruation. *See, e.g.*, *Test Center Procedures and Regulations*, GRE, https://www.ets.org/gre/revised_general/test_day/procedures (last visited July 21, 2021) [https://perma.cc/7YZF-AZMS] (allowing candidates to ask for a security screening "be performed by a staff member of the same gender and/or in an area sheltered from the view of other people"); GRE EDUC. TESTING SERV., 2020–21 GRE BULLETIN SUPPLEMENT FOR TEST TAKERS WITH DISABILITIES OR HEALTH-RELATED NEEDS, https://www.ets.org/s/gre/pdf/bulletin_supplement_test_takers_with_disabilities_health_needs_20_21.pdf (last visited July 21, 2021) [https://perma.cc/JV7R-8D5Q] (including extra breaks as a common minor accommodation for health-related needs); *LSAC Candidate Agreement: Terms and Conditions for the LSAT-Flex*, LAW SCH. ADMISSION COUNCIL https://www.lsac.org/about/lsac-policies/lsac-candidate-agreement (last visited July 21, 2021) [https://perma.cc/WT2Q-K9J4] (containing a variety of rules that apply to addressing menstruation such as allowing any candidate to request a "stop-the-clock break" accommodation and establishing a clear process to submit a complaint or feedback regarding test conditions); PEARSON, PCAT CANDIDATE INFORMATION BOOKLET 2021–2022, pearsonassessments.com/content/dam/school/global/clinical/us/assets/pcat/pcat-cib.pdf (last visited July 21, 2021) [https://perma.cc/ETF5-NMSY] (examinee may access "a personal item, such as an item needed to take to a restroom" during breaks). Available policies and other information also demonstrate that advocacy is needed to improve the way other governing bodies address menstruation during exam administration as well. *See, e.g.*, *SAT Test Day Checklist*, COLLEGE BOARD https://collegereadiness.collegeboard.org/sat/taking-the-test/test-day-checklist (last visited July 21, 2021) [https://perma.cc/BX62-CCL2] (no mention of menstruation or menstrual products); *LSAC Candidate Agreement: Terms and Conditions for the LSAT-Flex*, *supra* (same); *Testing Accommodations Pre Approved Personal Items*, PROMETRIC, https://www.prometric.com/sites/default/files/Permissible-items.pdf (last visited July 21, 2021) [https://perma.cc/KFQ6-NGFB] (failing to include menstrual products on the pre-approved list of permitted personal items for the GRE); *Exam Day and Testing*, U.S. MED. LICENSING EXAMINATION, https://www.usmle.org/bulletin/testing/#PersonalItems (last visited July 21, 2021) [https://perma.cc/R23C-CYVA] (prohibiting all personal items in the exam); Professor Griggs (@ProfessorGriggs), TWITTER (Aug. 12, 2020, 10:57 PM), https://twitter.com/ProfessorGriggs/status/1293743560454545409 [https://perma.cc/EPK3-8E7G] (sharing that a student was

Bar reached out to all of the BOLEs to better understand each jurisdiction's approach to test takers' menstrual product and bathroom access.[92] What should have been a straightforward inquiry proved to be anything but that.

First, numerous states did not respond to the outreach, undertaken via email, telephone, and Twitter.[93] Second, those that did respond often declined to provide information, sometimes asserting confidentiality in the name of security.[94] Third, some BOLEs did not have established policies concerning menstrual products or had policies that were inconsistently employed (e.g., BOLEs that orally reported that examinees could bring menstrual products to the exam but omitted them from their written policies identifying materials permitted for the exam or in the exam room).[95] When a BOLE either was initially non-responsive or provided inconsistent information, MP and the Bar persisted with additional outreach, but ultimately had to accept silence as many BOLEs' final answer.[96]

With the growing acceptance that the COVID-19 pandemic would not abate, by late summer 2020 virtually all of the state BOLEs had opted to offer their next bar exam remotely,[97] including many that originally had planned for an in-person test in July. By definition, this required BOLEs to adopt (or adapt) a new policy regarding menstrual products and bathroom access.[98] Starting in late September 2020, MP and the Bar sought to reach those state BOLEs that were administering a bar exam from October 1, 2020, through the end of the year, focusing on those states that had not previously provided information. The

required "to lift up her shirt and turn around to prove she didn't have cheat sheets strapped to her body" before taking the MPRE).

92 *See BOLE Policy Survey*, *supra* note 68.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* In June 2021, MP and the Bar analyzed all policies on public BOLE websites for the July 2021 exam. The information is contained in the BOLE Policy Survey. *See id.*

97 *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/ (last visited July 18, 2021) [https://perma.cc/872H-XVTS]; *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/ (last updated Sept. 24, 2020, 11:34 AM CDT) [https://perma.cc/3N5J-MR8R].

98 *See infra* Part II. Some states permitted examinees to keep menstrual products on their table; some permitted them in the exam area, but not on the exam table; and some did not respond to our inquiry or explained that they did not think it was necessary to have products in the exam room. *See BOLE Policy Survey*, *supra* note 68.

attempted contact was to the twenty-seven states and territories administering bar exams in the fall and was made at least twice by email and/or telephone.[99] Once again, MP and the Bar had a very difficult time confirming the status of each BOLE's menstrual product policies, often receiving vague or incomplete responses — or none at all.[100]

This Article chiefly relies upon the information publicly available on BOLE websites.[101] When instructive, the Article refers to policies not posted on the website, but communicated by state BOLEs via email, telephone, or the media. Further, the Article incorporates the voices of menstruators who have taken the bar exam; their comments often originated in social media or in response to the MP and the Bar questionnaire. These reports provide insight into the impact of the BOLEs' failures to adopt explicit policies concerning menstruation.

C. Menstruation Generally

Before analyzing the results of the Menstruation and Bar Exam Survey and the BOLE Policy Survey, and to fully understand the impact of BOLE policies on menstruating test takers, it is important to have a brief refresher about how menstruation works. Menstruation is an involuntary biological process that causes the discharge of blood and tissue approximately once a month.[102] Individuals with a uterus and at least one ovary (reproductive sex organs), and are between puberty and menopause, are menstruators.[103] Most menstruators are cis girls and cis

[99] *BOLE Policy Survey*, *supra* note 68.

[100] *Id.*

[101] *See id.*

[102] *See Your Menstrual Cycle*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle (last visited July 18, 2021) [https://perma.cc/3KQP-ANCK] [hereinafter *Menstrual Cycle*].

[103] *See* Margaret E. Johnson, *Menstrual Justice*, 53 UC DAVIS L. REV. 1, 9 (2019) [hereinafter *Menstrual Justice*].

women.[104] Menstruators also may be trans boys, trans men, and persons who are genderqueer/nonbinary, or intersex.[105]

Menstruation each month generally lasts around five days[106] and often is called a "period."[107] The menstrual discharge averages two to five tablespoons of blood during one cycle.[108] Some menstruators may experience much heavier bleeding, including "[b]leeding through one or more pads or tampons every one to two hours," "[p]assing blood clots larger than the size of quarters," and "[b]leeding that often lasts longer than eight days."[109] While some menstruators experience a "regular" twenty-eight day cycle, the majority of menstruators do not.[110] It should also be noted that menstruation may co-occur with a range of

[104] The authors use the term menstruators or individuals who menstruate to identify the group of persons who have the capacity to menstruate. *See id.* at 9-10. Some potential menstruators may not menstruate due to pregnancy, breastfeeding, medical suppression, or medical or health issues. *Period Problems*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/menstrual-cycle/period-problems (last visited July 21, 2021) [https://perma.cc/4TC2-CT4E] [hereinafter *Period Problems*]. *See generally* Paula Adams Hillard, *Menstrual Suppression: Current Perspectives*, 6 INT'L J. WOMEN'S HEALTH 631, 635 (2014) (describing the potential benefits of "menstrual suppression" to alleviate menstrual symptoms and underlying conditions); *Menstrual Suppression*, NAT'L WOMEN'S HEALTH NETWORK, https://nwhn.org/menstrual-suppression/ (last updated July 9, 2015) [https://perma.cc/G23G-8CRP] (explaining that oral contraceptive pills and similar products can be used to suppress one's menstruation); Gina Shaw, *The No-Period Pills: The Newest Birth Control Pills Suppress Women's Menstrual Cycles. But Is This Wise?*, WEBMD, https://www.webmd.com/sex/birth-control/features/no-period-pills (last visited on July 21, 2021) [https://perma.cc/LV9E-RT7Z] (providing information about the benefits and potential detriments of period suppression).

[105] Sarah E. Frank, *Queering Menstruation: Trans and Non-Binary Identity and Body Politics*, 90 SOCIO. INQUIRY 371, 382 (2020), https://onlinelibrary.wiley.com/doi/pdf/10.1111/soin.12355 [https://perma.cc/D57W-29GZ] (describing menstruation by individuals with diverse gender identities); Johnson, *Menstrual Justice*, *supra* note 103, at 26-28.

[106] *See* Abigail Durkin, Note, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle Against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 135 (2017).

[107] *Id.*; *Menstrual Cycle, supra* note 102.

[108] *See* Durkin, *supra* note 106; *Menstrual Cycle, supra* note 102.

[109] Johnson, *Menstrual Justice*, *supra* note 103, at 10 (citing *Menstrual Cycle*, *supra* note 102). As an interesting aside, for the first time, blood clots were depicted on television in 2020. *See* EJ Dickson, *2020 was the Year of Period Blood on TV*, ROLLING STONE (Dec. 8, 2020, 1:54 PM), https://www.rollingstone.com/tv/tv-features/menstrual-period-on-tv-big-mouth-pen15-may-destroy-you-1099945/ [https://perma.cc/6UYM-2ARA].

[110] ELISSA STEIN & SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009) (citing a study showing sixty-one percent of menstruators had at least one unpredictable period and that others believe the percentage is higher).

diseases, such as endometriosis or secondary dysmenorrhea, which can be exceedingly disabling with extremely heavy flow, pain, or both.[111]

The unpredictable nature of periods means that menstruators often are caught off-guard, in need of menstrual products[112] and a bathroom and, if unable to access them in a timely fashion, may leak through their clothes.[113] To avoid these consequences, many menstruators regularly carry menstrual products and ensure they have bathroom access.[114]

Menstrual products are classified as medical devices by the U.S. Food and Drug Administration ("FDA") and include items used to absorb menstrual discharge such as pads, tampons, menstrual cups, sponges, or period underwear.[115] The type of product a menstruator uses and how often it is replaced depends upon the menstruator's flow at that particular time and the product's absorbency and size.[116] For instance,

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[111] Johnson, *Menstrual Justice*, *supra* note 103, at 14-15.

[112] It is almost inevitable that, during the decades of menstruating, a menstruator will get their period and not be carrying menstrual products. This may be because they did not know they would have their period or because they could not afford menstrual products. Period poverty — inadequate access to menstrual products, sanitation facilities, and menstrual education — is a real barrier to being able to attend to one's menstruation and has been linked to menstruating individuals' absence from school. Johnson, Waldman & Crawford, *supra* note 86, at 232; THINX & PERIOD, STATE OF THE PERIOD: THE WIDESPREAD IMPACT OF PERIOD POVERTY ON U.S. STUDENTS 1-2 (last visited Sept. 13, 2021), https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper_Thinx_PERIOD.pdf?455788 [https://perma.cc/N3CM-UJ3T]; *Period Poverty*, AM. MED. WOMEN'S ASS'N (Oct. 31, 2019), http://amwa-doc.org/period-poverty/ [https://perma.cc/B3NY-AEP3]. Having menstrual products in all restrooms, women's, men's, and all gender facilities, is very important to ensure that all menstruators have access not only to toilet paper, water, and soap, but also menstrual products. These provided products are a necessary supplement to — but not a replacement for — the personal menstrual products the menstruator chooses to carry to attend to their individual menstruation experience. *Infra* Part IV.A (including a definition of menstrual products in the Model Policy: "The term 'menstrual product' includes absorption materials such as tampons, maxi-pads, diapers, menstrual cups, and underwear; cleaning products such as wet wipes, tissues, water, and containers for cleansing; and pain-relief products such as pills, patches, and heating pads").

[113] Johnson, Waldman & Crawford, *supra* note 86, at 232, 242, 244; Johnson, Karin & Cooper, *Stop the Stigma*, *supra* note 16.

[114] *See supra* note 112.

[115] *Menstrual Cycle*, *supra* note 102; *see* Pub. L. No. 116-136, § 3702, 134 Stat. 281 (2019) (codified at 26 U.S.C. § 223) (CARES Act provision that deems menstrual products eligible for Flexible Spending Account and Health Savings Account reimbursements); 21 C.F.R. §§ 5400-5470 (1996) (defining and classifying a range of menstrual products from unscented pads to menstrual cups as either Class I or Class II medical devices); *Period Products, What are the Options?*, INT'L PLANNED PARENTHOOD FED'N (Nov. 18, 2020), https://www.ippf.org/blogs/period-products-what-are-options [https://perma.cc/DVP7-FETE].

[116] *Menstrual Cycle*, *supra* note 102.

tampons must be changed as often as every four hours to avoid the risk of toxic shock syndrome ("TSS").[117] But if a menstruator's flow is heavier, as is true for twenty percent of menstruators,[118] a tampon or pad may need to be changed every hour.[119]

Menstruators also must determine which products are the safest for them; for some, this means choosing the correct size, absorbency, applicator, and material (such as hypoallergenic items).[120] Some menstruators may choose medical suppression to manage their menstrual cycle through birth control pills or hormonal medication, although there may be health risks to this approach.[121] And without health insurance coverage, medical suppression may be an expensive option.[122]

During the menstrual cycle, menstruators may experience significant pain in "the low back, abdomen, and possibly the thighs," even in the absence of conditions such as endometriosis.[123] Further, about twenty percent of menstruators experience migraine headaches.[124] Menstruators also often experience premenstrual syndrome ("PMS"), which includes "physical symptoms such as 'swollen or tender breasts,' 'constipation or diarrhea,' 'bloating and gassy feeling,' 'cramping,' [and] 'headache or backache,'" as well as other manifestations, including anxiety.[125] Because menstruation may cause such varying and

[117] TSS is "a rare but sometimes deadly condition caused by bacteria that make toxins or poisons." *Id.* (recommending that menstrual cups and sea sponges be changed once or twice every twenty-four hours).

[118] *See* Durkin, *supra* note 106, at 133 (for these menstruators, the bleeding can be up to twenty-five times heavier, caused by medical conditions).

[119] *See Period Problems*, *supra* note 104.

[120] Johnson, Karin & Cooper, *Stop the Stigma*, *supra* note 16.

[121] STEIN & KIM, *supra* note 110, at 23-27, 30 (detailing the various methods of "medicalization" of menstruation and stating that "[s]o little is actually known about menstruation that it's hard to predict what the unintended effects of widespread suppression might be"); Shaw, *supra* note 104 (discussing the advantages and disadvantages of using birth control to reduce the incidence of getting one's period).

[122] STEIN & KIM, *supra* note 110, at 30; Hillard, *supra* note 104, at 635 ("Factors that play a part in the selection of an option for menstrual suppression include . . . cost or insurance coverage.").

[123] Johnson, *Menstrual Justice*, *supra* note 103, at 14 (quoting Laura A. Payne, Andrea J. Rapkin, Laura C. Seidman, Lonnie K. Zeltzer & Jennie Ci Tsao, *Experimental and Procedural Pain Responses in Primary Dysmenorrhea: A Systematic Review*, 10 J. PAIN RES. 2233, 2234 (2017)).

[124] *Period Problems*, *supra* note 104.

[125] Johnson, *Menstrual Justice*, *supra* note 103, at 14 (quoting *Premenstrual Syndrome*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/menstrual-cycle/premenstrual-syndrome (last updated Mar. 16, 2018) [https://perma.cc/2ZT6-AXGL]). Beyond PMS, menstruators can feel

distracting symptoms, menstrual products must be defined to include the items that menstruators take to address them, including over-the-counter and prescription pain medicine and hot water bottles.[126]

Slightly more than half of all recent law graduates are women,[127] the overwhelming majority of whom are of menstrual age. Other menstruating test takers include trans men, genderqueer/nonbinary, or intersex individuals. The lived menstruation experiences of these test-takers must be considered in the design and administration of the bar exam. BOLEs' failures to affirmatively do so is both illogical and arguably illegal; it also has the potential to cause great harm.

II. DIGNITY AND THE BAR EXAM

This Section explores BOLE treatment of test takers through five principles related to dignity: Respect and Privacy; Fairness and Non-Discrimination; Promoting Health; Providing Accommodations; and Policy Transparency. The analysis of each principle reveals a range of dignitary harms related to menstruation that are evident in BOLE policies or have been reported by individuals who have taken a bar exam. Many of these problems would be heart-breaking in any context; but when they occur during this critical licensing exam, they challenge basic principles of dignity, and as explained in the Section that follows, challenge constitutional norms and antidiscrimination principles.

The concept of dignity holds a key to understanding the harms caused by BOLE policies because it speaks to both the highly personal nature of menstruation[128] and because institutional policies directly affect

anxious when being scrutinized and their menstruation is exposed and when their period may arrive unexpectedly at difficult times to attend to it. *See* Tomi-Ann Roberts, *Bleeding in Jail: Objectification, Self-Objectification, and Menstrual Injustice*, *in* PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 57-58 (Chris Bobel et al. eds., 2020) [hereinafter PALGRAVE HANDBOOK] (indicating that women who are in jail and subject to body cavity searches feel anxious when menstruating); Johnson, Waldman & Crawford, *supra* note 86, at 241-43 (discussing the anxiety of school-age students when they do not have control regarding caring for their menstruation).

126 *See Menstrual Cramps*, WEBMD, https://www.webmd.com/women/menstrual-cramps#2-5 (last visited July 21, 2021) [https://perma.cc/CM7D-FGPT].

127 Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52 (internal citation omitted).

128 Bleeding unto itself is a bodily expression, whether because the skin is cut (and the bleeding helps to clean the wound) or because one is menstruating (indicating one may be fertile and also not pregnant). Menstruators are rarely ambivalent about their periods, whether thrilled, scared, or angry when first menstruating; resentful and frustrated when experiencing pain and discomfort; mournful or relieved upon menopause. *See generally* Elizabeth B. Cooper, *What's Law Got to Do with It? Dignity and Menstruation*, 41 COLUM. J. GENDER & L. 39, 41 n.10 (2021) (discussing how

menstruators' ability to engage equally in the external world.[129] Further, an affront to dignity around menstruation reinforces the negative messages menstruators receive about their bodies and reiterates the message that if a person bleeds — whether as women, trans men, genderqueer/nonbinary, or intersex individuals — they do not belong.[130]

Although the legal principle of dignity often is seen as underdeveloped, the Supreme Court has mentioned it over 1,000 times in its opinions,[131] and it has been especially helpful in shaping Eighth Amendment and Due Process jurisprudence.[132] Dignity also is powerfully employed in the Court's LGBT jurisprudence, where it has been upheld "as a counterweight to stigma."[133] It also has been

menstruators are "rarely ambivalent" about their periods and describing how some individuals may feel thrilled and scared when their period first arrives; some resent it; and "[s]ome cannot wait for menopause when others will mourn their lack of menses").

[129] Policies that impede menstruators' ability to fully engage in education, work, and the activities of daily living include: not supplying public school students with free access to quality products; not permitting menstruators to bring their own products into the bar exam; not providing workers time to use the bathroom to attend to menstruation; failing to include menstrual products in emergency-preparedness or response packages; denying free and ready access to products to people who are incarcerated or detained through our country's immigration policies; and imposing state and use taxes on such products as though they are "non-essential" goods. *Id.* at 1-2. *See generally* Valeria Gomez & Marcy L. Karin, *Menstrual Justice in Immigration Detention*, 41 COLUM. J. GENDER & L. 123 (2021) (describing the ways in which detainees are denied menstrual justice and how structural barriers keep their voices hidden); Johnson, *Menstrual Justice*, *supra* note 103 (cataloguing the myriad ways in which menstruators may experience injustice, including, *inter alia*, stigma, harassment, and lack of access to safe and affordable products); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, 41 COLUM. J. GENDER & L. 158 (2021) [hereinafter *Asking the Menstruation Question*] (discussing school surveillance of and discrimination against menstruating students).

[130] *See* Ingrid Johnston-Robledo & Joan C. Chrisler, *The Menstrual Mark: Menstruation as Social Stigma*, *in* PALGRAVE HANDBOOK 193 ("Clearly, the stigmatized status of menstruation has detrimental consequences for girls' and women's self-esteem, body image, self-presentation, and sexual health.").

[131] Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011) (noting that the word "dignity" appears in almost 1000 Supreme Court opinions).

[132] *See* Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J. L. & PUB. POL'Y 415, 424-30 (2017).

[133] Cooper, *What's Law Got to Do with It?*, *supra* note 128, at 42; *see* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 8-12 (2015) (describing the Supreme Court's growing dignity jurisprudence from Romer v. Evans, 517 U.S. 620 (1996), through Lawrence v. Texas, 539 U.S. 558 (2003), U.S. v. Windsor, 570 U.S. 744 (2013), and Obergefell v. Hodges, 576 U.S. 644, 671 (2015)).

recognized as a central principle in medicine and bioethics,[134] domestic violence law,[135] psychology,[136] and in countless other disciplines.[137]

The concept of dignity underlies the five key principles examined below. Not surprisingly, the disregard of each principle by state BOLEs also diminishes the dignity of menstruating examinees.

A. Privacy and Respect

> *At the [North Carolina] bar exam, an applicant had menstrual pads in her clear plastic bag. A screening proctor asked her "do you really need those?"* — Bprybol, @BPrybol (July 30, 2020).[138]

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[134] In the medical context, dignity is deeply tied to autonomy, which grew out of the principle of bodily integrity. *See* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 370-76 (1999); Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779, 818 ("Dignity is particularly well-suited to function as a guiding value in the context of rights related to healthcare as it is most frequently invoked by the courts to describe aspects of liberty, autonomy, and self-determination."). *See generally* RUTH FADEN & TOM BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986) (answering the question "what is informed consent").

[135] *See generally* Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 B.Y.U. L. REV. 1 (focusing on dignitary right to a home in order to address domestic violence); Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519 (2010) (arguing for greater support and respect for women survivors' dignity in order to address domestic violence more effectively).

[136] Psychologists have developed self-determination theory — composed of autonomy, competence, and the capacity to develop relationships — as the foundation for one's intrinsic well-being. *See* Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Role of Basic Psychological Needs in Personality and the Organization of Behavior*, *in* HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 68, 74 (Oliver P. John et al. eds., 3d ed. 2008) (identifying "only three basic and universal psychological needs: those for autonomy, competence, and relatedness"); *see also* Celia B. Fisher & Matthew Oransky, *Informed Consent to Psychotherapy: Protecting the Dignity and Respecting the Autonomy of Patients*, 64 J. CLINICAL PSYCH. 576, 576-88 (2008) ("Well-implemented informed consent procedures demonstrate . . . respect for clients' right to self-determination" and enhance "mutual trust.").

[137] *See* Nora Jacobson, *A Taxonomy of Dignity: A Grounded Theory Study*, 9 BMC INT'L HEALTH & HUM. RTS. 3, 6 (2009), https://bmcinthealthhumrights.biomedcentral.com/track/pdf/10.1186/1472-698X-9-3.pdf [https://perma.cc/CB8L-3NW2] (describing the "ubiquity [of] the idea of dignity" and its use "in theology, philosophy, law, political theory, sociology, medicine, and nursing" among other disciplines); *cf.* Kenneth S. Abraham & G. Edward White, *The Puzzle of Dignitary Torts*, 104 CORNELL L. REV. 317, 331 (2019) (observing that although "[d]ignity exists and is deserving of respect," that defining "what individual dignity consists of remains elusive").

[138] BPrybol, *supra* note 20.

> *The fact that I'm terrified of getting my period on exam day because I won't be able to get up and take care of it if I do is horrific.* — Liz Gill (Jan. 19, 2021).[139]

> *I just bled through my pants when it happened to me. I guess be prepared just in case, because NCBE doesn't care.* — @420AttyChicago (Jan. 19, 2021).[140]

Any individual who has taken a standardized exam understands that it is a stressful process. It is not uncommon for test takers to experience fear, self-doubt, and stereotype threat.[141] While it is not the responsibility of BOLEs to address or mitigate these responses, it is their responsibility to not exacerbate them, particularly if the basis of this further harm is the biological process of menstruation.[142]

One clear theme that emerged from responses to the Menstruation and the Bar Exam Survey and posts about bar experiences on social media was that BOLE inspection of menstrual products was humiliating,[143] especially the requirement to place the products in a

[139] Liz Gill (@LizCGil), TWITTER (Jan. 19, 2021, 10:44 PM), https://twitter.com/LizCGil/status/1351737360569012226 [https://perma.cc/KC2H-98GY].

[140] @420AttyChicago, TWITTER (Jan 19, 2021, 10:46 PM), https://twitter.com/420AttyChicago/status/1351737806612295682 [https://perma.cc/HHJ6-4LEQ].

[141] *See* CLAUDE STEELE, WHISTLING VIVALDI 22 (2011) (defining and describing the ways in which negative stereotypes about one's capacities, especially when based on race, gender, or other aspects of identity, can lead one to underperform); Robert W. Goldwater, *How to Alleviate Bar Exam Stress*, A.B.A. FOR L. STUDENTS (Jan. 30, 2020), https://abaforlawstudents.com/2020/01/30/how-to-alleviate-bar-exam-stress/ [https://perma.cc/N5FJ-NA9U] (describing the bar exam as "incredibly stressful, as no one is a lawyer until they have successfully passed the bar exam").

[142] For example, the failure of BOLEs to address menstruation adequately and appropriately at the bar exam could be understood, even subconsciously, as a message that menstruators should not become or do not deserve to become attorneys. Stereotype threat explains that by internalizing this concept (i.e., that one is not worthy or capable because they menstruate), a menstruator may actually perform less well on the bar exam. *See generally* WHISTLING VIVALDI, *supra* note 141 (describing theories for why students underperform).

[143] For instance, according to an email from the North Dakota BOLE, "menstrual products/feminine hygiene products are allowed in the exam room if they have been checked by a security proctor. We ask the examinee to discreetly show a security proctor the product. We then allow them to keep the product in their pocket." *BOLE Policy Survey*, *supra* note 68. And according to the Administrative Coordinator for Nebraska, menstrual products "may be inspected," but applicants may bring in as many as needed, provided they are wrapped in their original packaging. *Id.* The Utah BOLE provided, "[b]oth required and permitted items must be presented to a proctor for inspection upon entry into the test area." *Id.*

clear bag for all to see.[144] As I.S. (California 2020) stated, it is "embarrassing because we have to put our sanitary products in a clear gallon size plastic bag and are required to show its contents to the proctor before being let inside the testing center. Once seated, another proctor inspects the contents of the bag for an [sic] 'contraband.'"[145]

Test takers were also frustrated by the security protocol. In some test centers, examinees were forced to go through the lengthy process of two security checks.[146] Such an ordeal would probably have received no commentary by test takers except that the screening often was a charade. As reported by test takers, bar exam security officials repeatedly appeared simply to be going through the motions of inspection without any real scrutiny. Therefore, the onerous security was an unnecessary waste of time and a thoughtless invasion of privacy.[147] As Anonymous (Ohio, July 2019) states, the inspection was meaningless as the security "only felt up the outside of my clear plastic bag."[148]

Because the security screening seemed senseless even to the officials undertaking it,[149] test takers critiqued the scrutiny of menstrual products as gender-based discrimination. Anonymous (New York 2020) states, "I felt like a second-class citizen. And I absolutely hated having to describe that the big orange thing in my bag was for Menstruation. On top of this, the volunteers/proctors seemed to be from

[144] For example, Anonymous (Maryland 2018) stated, "People who menstruate shouldn't have to explain themselves to proctors and shouldn't have to keep their menstrual products in clear plastic bags for everyone to see." *Menstruation and the Bar Survey Results*, *supra* note 15. Anonymous (California July 2013) relayed the resulting anxiety and embarrassment from having to bring in menstrual products in a clear plastic bag. *Id.* The authors recognize that test takers' discomfort with public display of their menstrual products is driven by the larger stigma against menstruation. *See* Johnson, *Menstrual Justice*, *supra* note 103, at 15-23. This stigma needs to be eradicated. *Id.* Until then, the authors believe BOLEs should adjust their security policies to address test takers' concerns for privacy that result from the current menstrual taboo. The ABA agrees, recommending that bar examinees be permitted to bring in tampons, pads, or other menstrual products into the bar exam in "opaque, rather than clear, containers." ABA Mid-Year House of Delegates Resolution 105, *supra* note 70.

[145] *Menstruation and the Bar Survey Results*, *supra* note 15.

[146] *Id.* (Anonymous (Maryland 2016) reported, "I made light of it at the time but to have to go through the normal security check in line with everyone else and then [be] separated to a second station [was] frustrating and embarrassing.")

[147] *See id.*

[148] *Id.*

[149] *See id.*

an older demographic and made it awkward when I told them that it was a pad."[150]

Test takers did not experience these dignitary and privacy harms only at the bar exam location.[151] Since no purses or book bags are permitted in the bar exam room, some test takers had to travel from their home to the exam with their clear plastic bag of menstrual products for all to see. As C.T. (New York, July 2011) stated, "I took the subway here in NYC with my clear plastic bag with my tampons visible to all. This seemed like one more humiliation to have to deal with, on top of all the other stress associated with taking the Bar."[152]

For some test takers, the screening creates even greater harm. As Anonymous (Maryland 2016), who identifies as a genderqueer/nonbinary person, states, "I felt like my privacy was compromised because someone saw that I had menstrual products with me or I had to disclose my period . . . ."[153] For transgender, genderqueer/nonbinary, and intersex persons, having to display menstrual products may force them to reveal a "deeply personal part of their identity without their consent and under someone else's terms."[154] Such an experience may cause a personal crisis for the test taker.[155] In addition, it may put a person at risk of potentially transphobic or gender-based harassment or discrimination from security officials or others.

In fact, one test taker described her security screening experience as harassing.[156] M.B. (Nebraska, July 2020) responded "I felt harassed by the security guards/proctors/bar examiners about menstruation or menstrual products. I felt like my privacy was compromised because someone saw that I had menstrual products with me or I had to disclose my period. I felt feelings of shame or distrust for being a menstruator."[157] Considering the great harms that can result from the screening and that the screening may be in fact meaningless, the current

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150 *Id.*

151 *See generally* Abraham & White, *supra* note 137, at 356 (describing the tort of "invasion of privacy" as one involving making public "matters . . . concerning another person's private life" that are "embarrassing or humiliating"); Jacobson, *supra* note 137, at 3 (discussing "dignity-of-self" as incorporating self-respect and self-worth).

152 *Menstruation and the Bar Survey Results*, *supra* note 15.

153 *Id.* (Anonymous, 2016 Maryland bar exam test taker).

154 Arielle P. Schwartz, *Why Outing Can Be Deadly*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/why-outing-can-be-deadly/ (last visited Feb. 1, 2021) [https://perma.cc/KU6R-AXM8].

155 *Id.* (concluding, for some, a forced outing may cause suicidal ideation).

156 *See Menstruation and the Bar Survey Results*, *supra* note 15.

157 *Id.*

policy and practice of screening menstrual products seems wholly unnecessary.

By contrast, some BOLEs have shown their capacity to change their policies to promote menstruating test takers' dignity while protecting exam security and integrity. For example, for the July 2021 in-person exam, the Minnesota BOLE permitted test takers to enter with their own menstrual products housed in an opaque bag, rather than in a clear plastic bag, rectifying the previous BOLE practice that test takers described as distressing.[158] Similarly, the Texas BOLE revised its policies for the July 2021 exam to permit test takers to bring their own menstrual products in an opaque box.[159]

Another indignity cited by test takers is the "time tax" on menstruators created by BOLE policies.[160] Menstruating test takers are not provided additional exam time when they must go to the restroom to attend to their menstruation. For example, while California BOLE permits test takers at the in-person exam to access the bathroom during much of the exam, its policy explicitly states that "extra time to use the restroom will not be granted."[161] Therefore, test takers must decide whether they will suffer the time tax or make the decision to possibly leak onto one's clothing, or "bleed out." As R.D. (New York, 2017) stated, "I basically just decided I would allow myself to bleed through rather than waste time going to change my diva cup since the clock would not stop and I didn't want to be at a disadvantage."[162] R.D.'s experience shows how menstruating test takers are placed in a catch-22 when their natural bodily functions are pitted against the required licensing exam to become a practicing lawyer.

The test takers' experiences recounted in this Part reflect the larger findings from the Menstruation and the Bar Survey. More specifically, twenty-eight percent of respondents reported that they felt their "privacy was compromised because someone saw that I had menstrual products with me or I had to disclose my period."[163] Twenty-one

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158 MINN. STATE BD. OF L. EXAM'RS, ALLOWED AND PROHIBITED ITEMS AT THE BAR EXAM 1 (2021), https://www.ble.mn.gov/wp-content/uploads/2017/09/Prohibited-and-Allowed-Items.pdf (last updated May 24, 2021) [https://perma.cc/6TQT-W37C].

159 TEX. BD. OF L. EXAM'RS, TEXAS BAR EXAM GENERAL INSTRUCTIONS – JULY 2021, at 3 (2021), https://ble.texas.gov/bar-exam-general-instructions-july-2021 (last visited June 24, 2021) [https://perma.cc/VLR7-4TJR].

160 *See* Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60, at 2.

161 *Exam Rules*, STATE BAR OF CAL., https://www.calbar.ca.gov/Admissions/Examinations/Exam-Rules (last visited June 24, 2021) [https://perma.cc/8X3Y-SV3W].

162 *Menstruation and the Bar Survey Results*, *supra* note 15.

163 *See id.* (surveying 100 people on their experiences regarding menstruation and the Bar Exam).

percent of respondents "felt feelings of shame or distrust for being a menstruator."[164] In addition, six percent of respondents stated that they "felt harassed by bar examiners about menstruation or menstrual products."[165] The respondents' experiences are perhaps not unexpected given the lack of BOLE policies protecting against mistreatment. For instance, none of the state BOLE policies state that they train personnel regarding menstruation product screening or bathroom access issues.[166] Similarly, none of the policies identifies the dignity, privacy, or confidentiality needs of menstruating test takers.[167]

Taken together, the message is clear: BOLE policies, their lack of policies, and their failure to publicly post existing policies negatively impact test takers who menstruate. Since at least fifty percent of the population menstruates or can menstruate, BOLE policies affect approximately fifty percent of its potential test taking population. While it is important that bar examiners permit test takers to bring in their personal menstrual products,[168] the BOLE requirement in some

164 *See id.*

165 *See id.* Interestingly only one percent of the respondents stated that they "had less time for the exam/break because of menstruation" and that they "needed to use the bathroom during the exam to deal with my period, but was not permitted to do so." *Id.* The low percentage of respondents reporting such issues may be because they knew ahead of the exam that they would not be able to access the bathroom. With this information, test takers could make alternative plans, such as menstrual suppression and not changing tampons as recommended to prevent TSS. *See supra* Part I.C.

166 *See BOLE Policy Survey*, *supra* note 68.

167 *See id.*

168 *See supra* Part I.C. For the July 2021 exam, many state BOLEs explicitly permitted remote test takers to have access to menstrual products during the exam. *See* COLO. SUP. CT., JULY 2021 COLORADO REMOTE BAR EXAMINATION – GENERAL INFORMATION GUIDE 8 (2021), https://www.coloradosupremecourt.com/PDF/BLE/July%202021%20CO%20Bar%20Exam%20General%20Information%20Guide.pdf (last visited June 24, 2021) [https://perma.cc/U9PU-TX58]; COMM. ON ADMISSIONS, D.C. CT. OF APPEALS, JULY 2021 UNIFORM BAR EXAM 4 (2021), https://www.dccourts.gov/sites/default/files/divisionspdfs/committee%20on%20admissions%20pdf/Notice%20Regarding%20July%202021%20Bar%20Exam.pdf (last visited June 25, 2021) [https://perma.cc/8STN-HK2S]; WASH. STATE BAR ASS'N, FAQS FOR JULY REMOTE UNIFORM BAR EXAMINATION IN WASHINGTON 7 (2021), https://www.wsba.org/docs/default-source/licensing/admissions/4-13-2021-july-remote-ube-faq.pdf?sfvrsn=ceb14f1_4 (last visited June 24, 2021) [https://perma.cc/ASC2-WDNR]. Similarly, many state BOLEs permitted menstrual products for the in-person bar exam in July 2021. *See Exam Rules*, *supra* note 161; *Allowed Items*, IND. SUP. CT. BD. OF L. EXAM'RS, https://myble.courts.in.gov/allowed-items (last visited June 24, 2021) [https://perma.cc/8SN8-EWFM]; MINN. STATE BD. OF L. EXAM'RS, *supra* note 158; MO. BD. OF L. EXAM'RS, *supra* note 19, at 2; TEX. BD. OF L. EXAM'RS, *supra* note 74; *Required and Allowed Bar Exam Items*, VA. BD. OF BAR EXAM'RS, https://barexam.virginia.gov/bar/barallowed.html (last visited June 24, 2021) [https://perma.cc/JHB8-2S72].

jurisdictions requiring examinees to bring them in a clear plastic bag — for everyone to see and to be subjected to special meaningless inspection — evidences a lack of respect and a disregard for the privacy and dignity of menstruating exam takers.

B. Fairness and Non-Discrimination

> *I got my period during the bar exam. This is a real issue. It's already a disadvantage as a woman having to think about this during the exam, so to add not having your product of choice is cruel.* — Dana Hill, @profdanahill.[169]

This Section focuses on the lack of fairness and the discriminatory nature of many BOLE policies, notwithstanding the value of fairness shared by the NCBE and the BOLEs.[170] These problems typically arise when menstruators are prohibited from bringing their own menstrual products with them into the exam.[171] Menstrual products are necessary to absorb menstrual flow during one's period and avoid leaks. Each menstruator has different needs relating to the size, type, and hypoallergenic nature of the period product, as well as the frequency with which they need to go to the bathroom to attend to their menstruation. When BOLEs preclude test takers from being able to use their own products, it causes unnecessary anxiety for test takers about whether and how they will be able to attend to their menstrual flow.

In summer 2020, Arizona, Pennsylvania, Texas, and West Virginia, all of which were administering in-person exams, had public and express policies precluding test takers from bringing their own menstrual products into the exam.[172] Not surprisingly, test takers

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[169] Dana Hill (@profdanahill), TWITTER (July 16, 2020, 5:31 PM EST), https://twitter.com/profdanahill/status/1283877046318440448?s=20 [https://perma.cc/624T-9XGX].

[170] Although we classify these occurrences as instances of unfairness that may constitute discrimination, they also may rightly be examples of other themes discussed in this section, such as a lack of respect or invasion of privacy. *See supra* Part II.A. They could also be examples of breaches of health concerns. *See infra* Part II.C.

[171] This is the remote exam equivalent of being able to enter into an exam room with menstrual products.

[172] *See BOLE Policy Survey*, *supra* note 68. For instance, the Pennsylvania BOLE February 2020 instructions precluded entering the exam room with menstrual products but stated it would provide them instead. It did not say in which bathrooms they would be located. Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60, at 1; PA. BD. OF L. EXAM'RS, RULES/RESTRICTIONS FOR WRITING APPLICANTS 4 (2020), https://bit.ly/PA-2-20-BarTicket [https://perma.cc/RS67-NQLZ]; *see also* Crawford, *supra* note 61, at 65, 72-73; Shannon Najmabadi, *Texas Lifts Tampon Ban at Bar Exam After Complaints Over Discriminatory Policy*, TEX. TRIB. (Aug. 1, 2020, 5:00 AM CST),

responded negatively to the lack of access to their own products.[173] V. (Texas, July 2020) states that she was "horrified" to learn that test takers would be unable to bring in their own menstrual products.[174] Taylor Soule, @TaylorSoule (Wisconsin, July 2020) stated, "Still mad that period products were not allowed to be brought into the Wisconsin bar exam I took last week, and no products were produced to test-takers on site."[175]

After an outcry on social media and other advocacy, the four jurisdictions promised to change their policies and permit menstrual products to be brought into the exam room.[176] Although the Arizona and Texas BOLEs did change the policy for the in-person exam, the Pennsylvania and the West Virginia BOLE websites still fail to contain policies that explicitly grant permission to bring menstrual products into the July 2021 exam room.[177]

Instead, West Virginia asserts that its policy permitting menstruating examinees to retrieve their products outside of the exam room with the assistance of a proctor is sufficient.[178] The Iowa BOLE similarly required

https://www.texastribune.org/2020/08/01/Texas-tampon-bar-exam/ [https://perma.cc/ZC8W-C6W]; Emily Mowry (@EmilyRMowry), TWITTER (July 24, 2020 10:26 AM EST), https://twitter.com/EmilyRMowry/status/1286669133506129927 [https://perma.cc/4ZJB-LF3C] (providing a snapshot of information provided by the West Virginia BOLE in July, 2020 that explicitly prohibits "feminine hygiene products"); Stephanie Francis Ward, *Do Some States Really Prohibit Bringing Tampons and Pads to the Bar Exam?*, A.B.A. J. (July 23, 2020, 12:47 PM CDT), https://www.abajournal.com/web/article/one-state-prohibits-bringing-tampons-and-pads-at-bar-exam-while-another-retreats-on-its-position [https://perma.cc/BXL5-64DQ]. Other states may also have prohibited the entry into exam rooms with menstrual products, but BOLE reticence to provide documentation of their policies renders this list incomplete. *See Menstruation and the Bar Survey Results*, *supra* note 15 (Wisconsin).

173 *See Menstruation and the Bar Survey Results*, *supra* note 15.

174 *Id.*

175 Taylor Soule (@TaylorOSoule), TWITTER (Aug. 4, 2020, 10:01 PM EST), https://twitter.com/TaylorOSoule/status/1290830287170084869 [https://perma.cc/B6TH-RKHV].

176 *See* Najmabadi, *supra* note 172; *see also BOLE Policy Survey*, *supra* note 68 (citing correspondence from Texas BOLE to MP and the Bar). The Texas BOLE informed MP and the Bar that "[e]xaminees for the September 2020 bar examination will be permitted to bring hygiene products into the individual hotel rooms we are reserving for each applicant. Our FAQ regarding the September examination will be updated with that information soon." *BOLE Policy Survey*, *supra* note 68.

177 *See BOLE Policy Survey*, *supra* note 68; *see also* Crawford, *You Can Now Bring Tampons to the Bar Exam*, *supra* note 19 (containing a screenshot of the relevant 2020 "Exam Update" from the Arizona Supreme Court Attorney Admissions).

178 *See BOLE Policy Survey*, *supra* note 68. Although not on the list of products allowed into the testing room and the state's FAQ says they are not allowed, a West Virginia BOLE official told *Above the Law* that people taking the bar exam will be able

examinees to keep their menstrual products at a bathroom check.[179] By definition, when required to seek permission to access their menstrual products, examinees in these jurisdictions were forced to disclose that they were menstruating.

BOLE requirements that menstruators obtain their products from a proctor or separate bag check area, rather than keep their products with them, unfairly impose a time tax on test takers or put them in an impossible position: they either lose time during the exam retrieving menstrual products that they should have been permitted to carry with them, or they must wait to attend to their menstruation during the break, risking leakage, discomfort, and possible health issues. Either way, the menstruating test taker is having to make emotional and physical self-care tradeoffs that other test takers do not even have to consider. BOLE failure to account for menstruators' need for easy access to their own menstrual products and the bathroom without adding exam time is unfair and discriminatory.[180]

In response to the summer 2020 scrutiny about this issue, including the letter drafted by the authors and signed by over 2,800 individuals,

(and have always been able) to access their own "feminine hygiene products" during the course of the exam. *Id.* However, the test takers must either keep their products outside of the testing area and have a proctor accompany the test taker to retrieve the products or the test taker must ask a proctor to hold the products as they take the exam. *Id.* Using these methods, the test taker may access their own menstrual products throughout the exam. *Id.* The feminine hygiene products provided by the West Virginia BOLE are in addition to whatever an applicant may bring (but not take into the actual testing room). *Id.*

[179] *Id.* On July 20, 2020, MP and the Bar called the Iowa BOLE and was told that while menstrual products are not listed as permitted items on information sent to test takers, test takers could bring in menstrual products and keep them at the bathroom check. *Id.* Professor Cat Moon received the following information in her #bloodybarpocalypse survey: "Iowa does not post any information ANYWHERE on period products. They are not on the list of items permitted. I had to email the office of professional regulation to get the info below. . . . Tampons and pads are certainly permitted. For test security purposes, we have to limit the number of items that applicants have on their desks, and we cannot have applicants accessing items that are stowed away under their desks. With that in mind, the procedure that we use for feminine hygiene products is for the applicant to check those items in with us when they enter the test room. We will put a post-it note with the applicant's ID number by the products and have them available at a table near the restroom check-out station. If those items are needed, then the applicant can simply grab them on the way out to the restroom." *Id.*

[180] *See* Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60, at 1; *see also* Jacobson, *supra* note 137, at 3, 7 (describing "dignity-in-relation" as a concept that examines how individuals are treated by other people, organizations, or entities; diminishment of this form of dignity typically occurs with an asymmetry of power that, on a societal level, can breed sexism among other social harms).

the NCBE stated that it does not consider menstrual products to be "prohibited paper" and encouraged all jurisdictions to permit test takers to bring in their personal menstrual products.[181] Therefore, the states that are not explicitly permitting menstruators to bring their own menstrual products into the exam are not following guidance from the NCBE.[182]

Moving bar exams to the remote, online format in summer and fall 2020 due to the pandemic did not resolve the issue of whether menstruating test takers would have ready access to their menstrual products. Again, many BOLEs did not publicly disclose their exam policies or did not have policies specifying whether test takers could bring their menstrual products into the exam room and keep them with them during the exam. Further, even when the authors contacted BOLEs to learn more, many did not respond.[183]

BOLEs' failure to publicly post their menstrual policies on their webpages undermines prospective test takers' ability to evaluate whether a jurisdiction's policies are menstrual friendly. Further, it requires menstruating examinees to waste precious time — when others are studying — to dig further to try to find BOLE policies. That some jurisdictions, such as West Virginia and Iowa, permit menstrual products without publicly stating so, or permit them only with certain provisos (as discussed above), is confusing and unfair. Finally, the non-public and often confusing policies send a sharp message to menstruators: BOLEs are not thinking of menstruators' needs or do not care sufficiently about them to provide a readily accessible, clear statement permitting entry into the exam room with menstrual products. This causes unnecessary confusion, added stress, and damage to the dignity of the menstruator who is seen as unworthy of such consideration. In addition to these untenable harms, precluding access to menstrual products creates significant health implications, which are discussed in the next Section.

Despite the advocacy and scrutiny in 2020 and 2021 regarding menstrual policies, the authors' updated BOLE Policy Survey shows that very few jurisdictions — whether administering the exam in person or remotely — had adopted menstrual friendly policies for the July 2021 bar exam. Fifty-five jurisdictions administered the bar exam in July 2021.[184] Only nine of them had policies explicitly permitting test takers

[181] *See* Konnath, *supra* note 69; *see also* Najmabadi, *supra* note 172.

[182] *See BOLE Policy Survey*, *supra* note 68.

[183] *See id.*

[184] *See Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/jurisdiction-information/ (last visited June 28, 2021) [https://perma.cc/MJ26-P4CQ]. It

to enter the exam room with their own menstrual products.[185] Forty-six jurisdictions had no explicit policies permitting menstrual products or expressly did not permit them.[186]

In addition to adopting explicit and transparent policies permitting entry into the exam room with menstrual products, BOLEs also must adopt non-discriminatory terminology. Even when addressing menstruation, numerous BOLEs use outdated, offensive, and exclusionary language. For example, rather than using the phrase "menstrual products" to discuss tampons, pads and menstrual cups, the policies most commonly use the term "feminine products."[187] This label perpetuates the belief that menstruation is not to be discussed explicitly; it ignores the reality that women are not the only menstruators; and it disregards the fact that persons who may not identify as "feminine" — such as transmen, persons who are genderqueer/nonbinary, or intersex, and "non-feminine" cis women — may also menstruate and need menstrual products.[188] The ABA, in its April 2021 resolution, also encouraged BOLEs to adopt the gender-inclusive term "menstrual products."[189]

More needs to be done to ensure BOLEs permit entry with menstrual products into in-person and remote bar exams, notify test takers of these policies, and use inclusive language. The Authors further explore the importance of these recommendations in their Model Policy, discussed *infra*, Part IV.

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should be noted that the NCBE reports that Puerto Rico will administer its bar exam in November, and Palau is not administering a bar exam this summer. *Id.*

185 *See BOLE Policy Survey*, *supra* note 68. Of the nine, four jurisdictions administered the bar exam remotely (California, Colorado, Washington, and Washington D.C) and five jurisdictions administered the exam in person (Indiana, Minnesota, Missouri, Texas, and Virginia). *Id.*

186 *See id.* Of the forty-six, twenty-four jurisdictions administered the exam remotely (Arizona, Connecticut, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virgin Islands, and Wisconsin) and twenty-two jurisdictions administered the bar exam in person (Alabama, Alaska, Arkansas, Delaware, Guam, Hawaii, Idaho, Kansas, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oklahoma, Oregon, Puerto Rico, South Carolina, South Dakota, West Virginia, and Wyoming). *See id.*

187 *See id.*

188 Johnson, *Menstrual Justice*, *supra* note 103, at 9; *see* Arisleyda Dilone, *She'll Become a Woman Later*, *in* PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 3, 6 (Kate Ferrell ed., 2018).

189 *See* ABA Mid-Year House of Delegates Resolution 105, *supra* note 70, at 3 n.1.

C. Promoting Health

> *[I was] frustrated at the thought of 1) not being able to carry my own [pads or tampons] as I've had surgery on my cervix and vaginal canal so the generic brands are painful and difficult for me to use; 2) of losing testing time to clean myself up and insert a painful product . . . .* — Anonymous (Texas, July 2018).[190]

> *If I didn't adjust my birth control I was going to get my period on the day of the bar exam and my period is physically debilitating so I couldn't have that happen, but now I'm in so much pain from adjusting it and I can't stop crying.* — @legallyypink, Feb. 14, 2021.[191]

Numerous test takers responding to the BOLE Policy Survey and posting on social media have raised serious health concerns resulting from not being permitted to bring in and use their own menstrual products.[192] It appears that BOLE interest in prohibiting menstrual products is to maintain the security of the exam questions and the security against cheating on the exam.[193] While no one would argue with the importance of maintaining security at the bar exam, there is absolutely no indication that allowing test takers to bring in their own

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[190] *Menstruation and the Bar Survey Results*, *supra* note 15.

[191] *Id.* (citing legally pink (@legallyypink), TWITTER (Feb. 14, 2021, 10:37 PM), https://twitter.com/legallyypink/status/1361157610179874818 [https://perma.cc/29XH-9ME7]).

[192] *See Menstruation and the Bar Survey Results*, *supra* note 15. While having BOLE-provided products as the only source of menstrual products is problematic for the reasons discussed in this section, it is important for BOLEs to provide an emergency supply of tampons and pads in the bathrooms for test takers. Menstruators often cannot anticipate the exact time their menstruation will begin, and this unpredictability is exacerbated by the stress of the bar exam.

[193] The security of the exam concern is to prevent the copying of the questions, and the security against cheating concern is to prevent test takers from entering the exam with contraband material that could be used to enhance their answers on the exam. *See Comments from Executive Director Susan Henricks*, TEX. TRIB. (July 30, 2020), https://static.texastribune.org/media/files/575d56ed90f446bf58493234f589a2fa/SH%20Statement.pdf?_ga=2.127382093.1976722529.1613009452-492014024.1612918821 [https://perma.cc/M7UZ-UWMB]; Joe Rosenberg (@JoeRosenbergLaw), TWITTER (Feb. 20, 2021, 7:18 AM), https://twitter.com/JoeRosenbergLaw/status/1363145986026201088 [https://perma.cc/43VC-PPAG] (sharing the correspondence between Jo Anne Simon, N.Y. Assembly member, and John J. McAlary, Executive Director, N.Y. BOLE, including that the BOLE considered "the security of the exam" as a factor in denying the request for on-demand bathroom breaks during the MPT, but was confident that the procedure of having applicants announce to the camera their need for a bathroom break and after the conclusion of the exam, submit in writing an explanation of the circumstances for their absence form camera view "should adequately address the situation").

products would — or has ever — posed a threat to exam security. The NCBE has even clarified that its recommended ban on allowing examinees to bring in scrap paper should not be understood to be a prohibition on their bringing in menstrual products — and encouraged state BOLEs to allow test takers to bring in their personal products.[194]

Even under a system where test takers may bring their own products into the exam room, the screening of such products needs to be improved to protect privacy and dignity, and to not endanger the health and safety of test takers.[195] For example, the screening should not require the removal of menstrual products from their original and sanitary packaging, as happened in Ohio when a test taker was "told to take my tampons out of the wrapper when going into the exam room[,] which is unsanitary."[196]

The Sections that follow identify three specific health-related harms that can occur when a state BOLE bans or restricts an examinee's access to their own menstrual products or limits their access to the bathroom, whether taking the exam in person or remotely. Each of these potential injuries is heightened for those individuals who are transgender, genderqueer/nonbinary, or intersex.[197] The last Section then discusses the special accommodations permitted by BOLEs and whether and how menstruators can access them.

1. BOLE-Provided Menstrual Products

> *They would not allow us to take our own products in . . . the products provided were cardboard tampons and subpar pads. I use tampons, the cardboard ones are difficult for women with sensitivity issues and are uncomfortable. I left the one I wore in all day and rushed back to the hotel at the end of the day (considering there was not much time during lunch). I nearly bled through my tampon but refused to use the ones provided as they were awful. —* Anonymous (Texas, July 2017).[198]

> *…while this did not apply to me, it is very possible that a trans man who menstruates, or someone non-binary who menstruates, takes*

194 *See* Konnath, *supra* note 69; *see also Menstruation and the Bar Survey Results*, *supra* note 15 (noting a respondent to the survey stated they were able to bring menstruation products into the bar exam).

195 *See supra* Part II.A and C.

196 *Menstruation and the Bar Survey Results*, *supra* note 15 (quoting Anonymous, Ohio, July 2018).

197 *See supra* note 21.

198 *Menstruation and the Bar Survey Results*, *supra* note 15.

> *the bar exam and is more comfortable using the men's bathroom. From asking friends, I know my bar examiners did not include any products in the men's restroom.* — K.F. (Pennsylvania 2019).[199]
>
> *I took birth control to make sure I wouldn't have my period during the exam.* — Anonymous (Ohio, July 2008).[200]

BOLEs that precluded test takers from bringing their own menstrual products swatted away concerns about the policy by pointing to their provision of menstrual products in women's restrooms.[201] Although MP and the Bar encourages BOLEs to provide menstrual products to assist test takers who unexpectedly start to menstruate during the exam,[202] barring test takers from bringing in their own menstrual products raises five key health-related concerns.[203]

First, as stated above by Anonymous in Texas, the inability of menstruating test takers to use their own products can cause pain or other issues, such as allergic reactions or insufficient absorbency of menstrual flow. Most menstruators have learned over time (sometimes through painful and embarrassing trial and error) which products work best for them: individuals require different sizes and levels of absorbency to best fit their body and menstrual flow, which often varies over the course of one's period.[204] Not knowing whether the state BOLE will provide the appropriate type (e.g., tampon, pad), size (e.g., super, regular, thin), or product material (e.g., cardboard or plastic tampon applicator; non-hypoallergenic; non-organic) will cause menstruators

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199 *Id.*

200 *Id.*

201 *See* ShaCamree Gowdy, *Tampons and Pads Are No Longer Banned at Texas Bar Exams*, CHRON. (Aug. 3, 2020, 10:56 AM), https://www.chron.com/news/houston-texas/article/Pads-and-tampons-will-not-be-prohibited-for-test-15454434.php [https://perma.cc/7CMR-SZKF] (reporting that the Texas BOLE had "found that applicants were fine using the products that were being provided").

202 *See infra* Part IV.A.

203 One jurisdiction, Pennsylvania, appears to be the exception in providing a wide array of menstrual products for use in February 2020. *See Menstruation and the Bar Survey Results*, *supra* note 15 ("I overheard a lot of test takers were very happy with the selection of products available. There were multiple brands and types of each product. They were also available in the bathrooms themselves whereas the proctors were outside the area so no one was witnessing you obtain a product. I was told this was not the way it always had been, but they were trying their best to provide products the best way possible."). For the July 2021 bar exam, no BOLE announced that it was providing menstrual products in the bathroom during the in-person exams. *See BOLE Policy Survey*, *supra* note 68.

204 *See Period Products*, *What are the Options?*, *supra* note 115 (describing the importance of using appropriate menstrual products).

undue anxiety and discomfort that can readily distract them from their studies leading up to the exam or, even worse, during the exam.[205]

Second, relatedly, if the product is too large, or if it is kept in too long (i.e., because the test taker is not permitted to use the bathroom), it can cause irritation, infection, or even toxic shock syndrome.[206] These physiological experiences, and the accompanying emotional anxiety, are disturbing, and create an unconscionable risk of derailing exam performance.

Third, some test takers who were restricted to only BOLE-provided menstrual products stated that BOLEs provided an insufficient supply, effectively leaving test takers with no menstrual products. As Anonymous in Illinois stated, "It was gross to have to supplement with toilet paper since the machine in the bathroom was out of supplies."[207] Emily Mowry (West Virginia, July 2020) took to Twitter to complain about the limited supply of menstrual products available given that test takers could not bring in their own.[208] Ms. Mowry stated, "WV had one box of tampons and one box of pads in the women's restroom (150 exam takers)."[209] Again, without access to products, menstruating test takers must keep in a previously-inserted tampon for too long, creating

[205] *See* Najmabadi, *supra* note 172 ("I felt like an outlaw at the bar exam because I needed menstrual products" and the bar had only provided "one kind of menstrual product . . . a box of super-absorbent tampons with cardboard applicators that some find uncomfortable . . . [I] smuggled in menstrual products."). A BOLE's failure to provide appropriate menstrual products implicates menstruators' dignity by imposing on their autonomy and bodily integrity. *See supra* introduction to Part II.

[206] *See* Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld & Emily Gold Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341, 360-61, 379 (2019) (discussing the need for increased safety of menstrual products); Durkin, *supra* note 106; Jen Gunter, *Are Reusable Feminine Cloths Safe?*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/well/are-reusable-feminine-cloths-safe.html [https://perma.cc/K8J5-ZNN8]; *The Facts on Tampons — and How to Use Them Safely*, FOOD & DRUG ADMIN., https://www.fda.gov/consumers/consumer-updates/facts-tampons-and-how-use-them-safely (last updated Sept. 30, 2020) [https://perma.cc/8R7R-DCHS] (suggesting that users seek medical care if a tampon causes discomfort, pain or causes an allergic reaction); Rachel Nall, *Why Do Menstrual Pads Cause Rashes?*, HEALTHLINE (May 29, 2018), https://www.healthline.com/health/rashes-from-pads [https://perma.cc/2VPP-RCMF] (mentioning that the use of some pads may cause vulvitis or other rashes, causing itching or discomfort). *See generally Menstrual Cycle*, *supra* note 102 (providing background information on the menstrual cycle).

[207] *Menstruation and the Bar Survey Results*, *supra* note 15.

[208] *See* Emily Mowry (@EmilyRMowry), TWITTER (Aug. 4, 2020, 10:11 PM EST), https://twitter.com/EmilyRMowry/status/1290832871062634497 [https://perma.cc/7MP5-ZQ8H].

[209] *Id.*

a health risk. In addition, test takers may experience embarrassing and very uncomfortable menstrual bloody leaks on their clothing and chairs when tampons or pads reach their absorbency limit.

Fourth, without appropriate menstrual products during the bar exam, some test takers resorted to extreme measures to attend to their menstruation.[210] For instance, learning that there would be no entry into the exam room with menstrual products, test takers saw no other alternative than to medically suppress their periods through birth control or hormonal medicine to avoid the risks of an overly-delayed tampon or pad change that could undermine their health, safety, comfort, and concentration during the exam.[211] It is deeply concerning that BOLE restrictive policies drive test takers to alter their body's hormone levels — in ways that may be unsafe — to ensure they can take the mandatory licensing exam on equal footing with others.

Further, as well-intentioned as it may be for BOLEs to supply menstrual products (whether exclusively or as a supplement), it is a mistake to provide them solely in the women's bathrooms.[212] Especially when they are the only products available, transgender, genderqueer/nonbinary, and intersex individuals who use the men's bathrooms will be wholly without access to these vital products. To not recognize their needs is both disrespectful and leaves them with no option but to risk an infection or TSS by using products that are too large and cannot be changed during the day, or to bleed visibly — potentially causing them both to be very embarrassed and to have outed themselves — by using products that are too small.

2. Breaks and Bathrooms: In-Person Exams

> *I had to calculate the time I used a new tampon so that I wouldn't take 'unnecessary' bathroom breaks but still make sure I did not exceed 4 hours without changing [to avoid Toxic Shock Syndrome].* — I.S. (California 2020).[213]

> *My endometriosis is such that I cannot use tampons, but only pads, and have to change them once every 30-45 minutes. I don't know that I could have physically sat for the exam under those conditions*

[210] *See Menstruation and the Bar Survey Results*, *supra* note 15.

[211] *See id.*

[212] *See id.*

[213] *Id.*

> *[restricted bathroom breaks]--including the excruciating pain.* — Anonymous (California, July 2019).[214]

> *Women shouldn't have to worry about bleeding into a chair or being humiliated by proctors in order to take a bar exam.* — LadyLawyerDiaries, @LadyLawyerDiary (July 16, 2020).[215]

The Menstruation and the Bar Survey revealed regulation and control of test takers' bathroom access during the exam. For example, Anonymous (Pennsylvania, July 2018) experienced this stating, "In PA, we were not allowed bathroom breaks at all once the test started (unless it was a scheduled break time)."[216] Some jurisdictions — such as Maine and Wisconsin — permitted only one test taker at a time to access the bathroom.[217] Other jurisdictions required test takers to sign in and out to use the bathroom.[218] Restrictions on bathroom access continued to exist for the July 2021 exam.[219]

Without access to the bathroom on an as-needed basis, test takers may find themselves bleeding unexpectedly and unable to attend to their menstruation. Even if the BOLE provides test takers with general bathroom access, BOLEs should not require test takers to get proctor permission or to sign in and out of the exam room to use the bathroom. These extra steps delay test takers' bathroom access and their ability to attend to their menstruation, including inserting or changing a tampon or pad, and further cause them to incur an unnecessary time tax.

3. Breaks and Bathrooms: Remote Exams

> *Hot take: the online bar exam is sexist against people who menstruate and cannot take bathroom breaks during modules. How*

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214 *Id.*

215 LadyLawyerDiaries (@LadyLawyerDiary), TWITTER (July 16, 2020, 10:43 PM EST), https://twitter.com/LadyLawyerDiary/status/1283955435356270595 [https://perma.cc/3SBW-TMS5].

216 *Menstruation and the Bar Survey Results*, *supra* note 15.

217 *See* STATE OF ME. BD. OF BAR EXAM'RS, MAINE BAR EXAMINATION SAFETY PRECAUTIONS 3 (2020), https://bit.ly/ME-920 [https://perma.cc/9R43-2TNU] (Maine's BOLE policy is the result of the COVID-19 pandemic and concern for social distancing); *see also* Bar Exam Tracker (@BarExamTracker), TWITTER (July 21, 2020, 9:37 PM EST), https://twitter.com/BarExamTracker/status/1285750697011687427 [https://perma.cc/2M2K-3WTR] (showing screenshot of Wisconsin BOLE July 2020 policy).

218 *See BOLE Policy Survey*, *supra* note 68 (showing, for example, that Missouri requires this procedure).

219 *See id.*

> *fun to be sitting in your own blood* — Andrea @drizzy_dree (Pennsylvania, September 2020).[220]
>
> *Guess who got her period in the middle of the #barexam and had to leave camera view for a few minutes or bleed all over her dad's really nice office chair? See y'all in February, I guess.* — Cecilia Scheeler, @CeceliaScheeler, Oct. 6, 2020 (Maryland, October 2020).[221]
>
> *Some folks were wearing Depends last time because of the lack of bathroom breaks. It was disgusting and cruel and still is.* — @420AttyChicago (Jan 19, 2021).[222]

In the summer of 2020, most jurisdictions delayed the administration of the bar exam to the fall and then wisely moved their exams to a remote format to deal with the COVID-19 pandemic.[223] In the remote exam context, BOLEs use surveillance security technology downloaded onto examinees' computers to monitor test takers' positions throughout the exam.[224] Many commentators have raised concerns about this surveillance technology.[225]

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[220] Andrea (@drizzy__dree), TWITTER (Sept. 28, 2020, 1:18 PM EST), https://twitter.com/drizzy__dree/status/1310629909447008256 [https://perma.cc/FWX2-LPAG].

[221] Cecelia Scheeler (@CeceliaScheeler), TWITTER (Oct. 6, 2020, 12:40 PM EST), https://twitter.com/CeceliaScheeler/status/1313519480803405833 [https://perma.cc/4XPM-2933].

[222] Drag Name: Beau Tucks (@420AttyChicago), TWITTER (Jan. 19, 2021, 10:51 PM EST), https://twitter.com/420AttyChicago/status/1351739094565613568 [https://perma.cc/NP8X-Y5RB]; *see also* Staci Zaretsky, *Yet Another Law School Grad Worried About Failing After Being Forced To Pee In Bottle During Remote Bar Exam*, ABOVE THE L. (Feb. 26, 2021, 3:15 PM), https://abovethelaw.com/2021/02/yet-another-law-school-grad-worried-about-failing-after-being-forced-to-pee-in-bottle-during-remote-bar-exam/ [https://perma.cc/XV2P-8DVK] (sharing Liz Gil's retweet of bar examinee's experience peeing in a bottle during the MEE and corresponding "worr[y] [that their] movements will look suspicious on the video file" because they are aware of "other test takers [that] have been flagged by the AI for otherwise innocuous behavior").

[223] *See* Griggs, *Epic Fail*, *supra* note 53, at 15-18 (describing efforts to obtain diploma privilege amid numerous problems with remote examinations).

[224] *See* Patrice, *supra* note 55.

[225] *See* David Rubenstein & Marsha Griggs, *It's Time to Re-Set the Bar for Online Proctoring*, BLOOMBERG TAX (Mar. 24, 2021, 1:00 AM), https://news.bloombergtax.com/daily-tax-report/its-time-to-re-set-the-bar-for-online-proctoring [https://perma.cc/J6FY-3GZU] (exploring the "fairness, efficacy, and safety of the AI proctoring system" and the impact on examinees of color and/or with disabilities, especially as remote proctoring of bar exams will continue after the pandemic); Letter from Noah Baron, Couns., Laws' Comm. for C.R. Under L., to Sean M. SeLegue, Esther P. Lin, Vanessa Holton & Sebastian Vos, State Bar of Cal. (Feb. 10, 2021),

The summer/fall 2020 remote exams were shorter than the traditional bar exam, holding only two 90-minute exam segments each day, separated by a 30-minute break. Still, remote test takers were often precluded from accessing the bathroom except during scheduled breaks. In California, this resulted in some test takers having no access to a bathroom for up to three hours.[226]

For the remote version of the July 2021 bar exam, only one BOLE jurisdiction — Louisiana — explicitly permitted access to the bathroom during the exam for any reason, even if not on break, because the exam was not proctored.[227] Twenty-nine jurisdictions helpfully posted a schedule online detailing the session and break start times, giving menstruators the opportunity to plan for their needs.[228]

Eight jurisdictions explicitly stated that test takers may not access the bathroom during the exam outside of the scheduled breaks.[229] Eight other jurisdictions permitted bathroom access outside of breaks only in an emergency.[230] Test takers who leave their seats during the exam in a jurisdiction where bathroom access during a test session is prohibited can suffer consequences. In most such jurisdictions, the test will be flagged and further examined for cheating by the BOLE.[231] As Cecilia

https://lawyerscommittee.org/wp-content/uploads/2021/02/Bar-Exam-FRT-Demand-Letter-to-State-Bar-Final.pdf [https://perma.cc/9MLH-UV7B] (threatening litigation against California's BOLE and Exam Soft Worldwide, Inc. due to the disparate impact that the facial recognition software used in the remote 2020 bar exam had on women and examinees of color).

226 Debra Cassens Weiss, *No Bathroom Break Allowed? Suit Says Rules for Remote Bar Exam Discriminate Against Disabled Grads*, A.B.A. J. (Sept. 16, 2020, 9:39 AM CDT), https://www.abajournal.com/news/article/no-bathroom-break-allowed-suit-says-rules-for-remote-bar-exam-discriminate-against-disabled-grads [https://perma.cc/C2Y2-WT2W] (discussing a lawsuit brought by students with disabilities stemming from bathroom restrictions during the remote bar exam in California).

227 *See BOLE Policy Survey*, *supra* note 68.

228 *See id.* (showing that twenty-nine of the fifty-four jurisdictions offering the bar exam in July 2021 provide the exam schedule with breaks: Alaska, California, Connecticut, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and Washington).

229 *See id.* (citing to California, Illinois, Indiana, Maryland, Michigan, New Jersey, North Carolina, and Ohio BOLE policies).

230 *See id.* (citing to Connecticut, Delaware, District of Columbia, Florida, Georgia, Massachusetts, New York, and Pennsylvania BOLE policies).

231 *See id.* (identifying jurisdictions where the consequences include flagging exams, such as New York, which states the exam will be flagged for investigation, and North Carolina, which states it will be flagged for fraud and misconduct). At least one October 2020 bar exam test taker peed in his pants to avoid being disqualified. *See* Karen Sloan,

Scheeler tweeted after her fall 2020 bar exam, "Got DQ'd [disqualified] for leaving camera view on #barexam. See y'all in February."[232]

If flagged, a menstruator may hope to appeal the decision by explaining they had to attend to a menstrual need (or other health issue).[233] However, most BOLEs do not clearly set forth the process or standards for appealing a decision.[234] Further, state BOLEs may be even less likely to give appropriate attention to such an appeal from a transman, or an individual who is genderqueer/nonbinary or intersex, if they do not appear to fit the narrowly-construed category of woman as menstruator. Whether a test taker is actually flagged does not diminish the stress and anxiety test takers feel taking the remote exam and worrying about bleeding and leaking without the ability to go to the bathroom.[235]

D. Providing Accommodations

> *I get really bad periods and I was counting the days to when my next one should be here. It has been coming on the last day every month. So I was cringing because the bar exam would be during my cycle. My symptoms range from cramps in the lower back to needing to lay in the fetal position despite Motrin or ibuprofen.*

States Say the Online Bar Exam Was a Success. The Test-Taker Who Peed in His Seat Disagrees, LAW.COM (Oct. 7, 2020, 3:40 PM), https://www.law.com/2020/10/07/states-say-the-online-bar-exam-was-a-success-the-test-taker-who-peed-in-his-seat-disagrees/ [https://perma.cc/55MQ-L545]. California clearly states that leaving the camera view can result in a "0" score for the exam session. *See BOLE Policy Survey*, *supra* note 68. Preventing or delaying use of bathroom facilities — by definition — impinges on a menstruator's bodily integrity and right to dignity, especially when it leads to urinating on oneself.

232 Cecelia Scheeler (@CeceliaScheeler), TWITTER (Dec. 3, 2020, 5:54 PM EST), https://twitter.com/CeceliaScheeler/status/1334632068232437768 [https://perma.cc/LK8Q-7YES].

233 *See BOLE Policy Survey*, *supra* note 68 (indicating a few jurisdictions that permit appeals); *see, e.g.*, R.I. BD. OF BAR EXAM'RS, RULES OF PRACTICE GOVERNING ADMISSION ON EXAMINATION AND BY TRANSFERRED UNIFORM BAR EXAMINATION SCORE 14-15 (2021), https://www.courts.ri.gov/AttorneyResources/baradmission/PDF/Board_of_Bar_Examiners-Rules_of_Practice.pdf [https://perma.cc/M78D-5JX9] (providing authority for test takers to file a petition within thirty days of the BOLE's decision in Rhode Island).

234 *See BOLE Policy Survey*, *supra* note 68 (showing that most BOLEs do not describe the entire process for alleged rule violations or complaint systems).

235 A few BOLE policies now state that they expect the majority of flagged exams will be resolved favorably for the test taker. *See id.* Nonetheless, this tentative assurance cannot eradicate the extreme stress of getting a flag on one's exam that could result in failing the exam or failing the character and fitness portion of bar admissions. The fact that test takers have to undergo this stress for a natural biologic function is absolutely unnecessary.

> *Yeah my jurisdiction told me 'go to your doctor and work it out. If you can't finish the exam for medical reasons, it's counted incomplete.' … Yeah, I asked if this was accomodation [sic] worthy. Basically it isn't. So if I spent more than 5 minutes away in the bathroom, I would have been flagged. Right now I'm bed ridden and dosed up. My study material is MIA until I am not birthing my own uterus.* — u/ExhaustedMonster (Kentucky 2020).[236]

> *I was worried . . . and was frustrated at the thought of . . . being required to spend the rest of the long testing day in clothes covered in blood because we couldn't carry extra clothes into the exam room . . . .* — Anonymous (Texas, July 2018).[237]

In general, BOLEs have not created a bar exam environment that recognizes that test takers may be menstruators. There is no assumption built into BOLE policies or the exam design that test takers will need their own personal menstrual products and unfettered bathroom access. As a result, access to personal menstrual products and bathrooms on an as-needed basis is often *per se* prohibited.[238]

In some jurisdictions, BOLEs provide a process that test takers could use to request an accommodation to access personal menstrual products or bathrooms. The process may be pursuant to a disability accommodation request or a non-disability, "administrative," "courtesy," or medical alert accommodation request, which typically must be made at the time of registration for the bar exam.[239] The

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[236] u/ExhaustedMonster, REDDIT (Sept. 6, 2020), https://www.reddit.com/r/barexam/comments/j0vlw2/bar_exam_and_periods/ [https://perma.cc/N863-CBKD]. Fortunately, despite the difficult circumstances, this test taker passed the bar exam. u/ExhaustedMonster, REDDIT (Dec. 1, 2020, 9:41 EST), https://www.reddit.com/r/barexam/comments/k44j9k/does_anyone_else_feel_like_they_wish_they_could/ge9ti4w?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/S69U-AUBX] ("I just got my results. Passed.").

[237] *Menstruation and the Bar Survey Results*, *supra* note 15.

[238] *See infra* Part II.D.

[239] *See BOLE Policy Survey*, *supra* note 68 (cataloguing these accommodation requests). For instance, the Massachusetts BOLE provides a form to test takers that provides administrative accommodations for health-related conditions that would not qualify as a disability. *See* MASS. BD. OF BAR EXAM'RS, REQUEST FOR SPECIAL ARRANGEMENT FOR A HEALTH-RELATED CONDITION: REMOTE BAR EXAM 1 (2021), https://www.mass.gov/doc/remote-bar-exam-health-related-conditions/download [https://perma.cc/T4NW-G5RY] [hereinafter REQUEST FOR SPECIAL ARRANGEMENT FOR A HEALTH-RELATED CONDITION]. Presumably this could be used for menstruation-related accommodations.

procedure for making an accommodation request varies by jurisdiction.[240]

While all jurisdictions seemingly have a procedure for a test taker to seek an accommodation for a disability under the Americans with Disabilities Act ("ADA"),[241] only thirty-five jurisdictions outline procedures to request accommodations for conditions that might not constitute a disability under the ADA.[242] Accommodations typically offered through this process include the right: (1) to use an assistance device that is otherwise prohibited from the exam room; (2) to bring in food, drink, and/or medication related to the reason for the accommodation; (3) to seek specific seating (e.g., to sit near the bathrooms); and (4) to offer emergency contact information.[243] Some BOLEs — such as New Mexico and Vermont — specifically permit administrative accommodations for lactating test takers to express their breastmilk.[244]

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[240] *See, e.g.*, REQUEST FOR SPECIAL ARRANGEMENT FOR A HEALTH-RELATED CONDITION, *supra* note 239 (describing Massachusetts' policies).

[241] *See BOLE Policy Survey*, *supra* note 68. *See generally* 42 U.S.C. § 12101 (1990) (explaining that the ADA is a federal law that prohibits discrimination and requires accommodations and opportunities for individuals with disabilities); Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 COLUM. J. GENDER & L. 235 (2021) (discussing the ADA's application to bar exams).

[242] These thirty-five states are Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Marianas, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. *See BOLE Policy Survey*, *supra* note 68. Interestingly, six of these states limited these accommodations solely to breastfeeding: Alaska, Kansas, Montana, New Mexico, North Carolina, and Vermont. *See id.*

[243] *See BOLE Policy Survey*, *supra* note 68. Because menstruation is not explicitly mentioned in any of these forms, it is not clear that menstruators may use them successfully. *See id.*

[244] *See BOLE Policy Survey*, *supra* note 68 (identifying the non-ADA Accommodation Policies for New Mexico and Vermont, as well as the other jurisdictions); *see also Breastfeeding Policies During the Bar Exam by State*, AM. CIV. LIBERTIES UNION ("ACLU"), https://www.aclu.org/issues/womens-rights/pregnancy-and-parenting-discrimination/breastfeeding-policies-during-bar-exam (last visited Feb. 1, 2021) [https://perma.cc/5QYW-HTKL]; Galen Sherwin, *New Mom Who Needed to Pump During Bar Exam Would Not Take 'No' for an Answer*, ACLU (Feb. 26, 2015, 10:21 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/new-mom-who-needed-pump-during-bar-exam-would-not-take-no [https://perma.cc/B3UK-ED86]; Andrew Wolfson, *Breast-feeding Mom Wins Breaks for Bar Exam*, COURIER J. (May 9, 2015, 2:51 PM), https://www.courier-journal.com/story/news/local/2015/05/09/breast-feeding-mom-wins-breaks-bar-exam/27039269/ [https://perma.cc/NV58-4WF9] (describing the efforts of a breastfeeding examinee to obtain break time

Even though test takers can seek to bring medical devices into the exam via the administrative accommodation process for lactation, back support, diabetes and the management of other biological conditions — and the FDA has designated menstrual products as medical devices — no BOLE includes menstrual products as an example of a medical device subject to an administrative accommodation process.

In a few jurisdictions, there is also a procedure for requesting an "emergency" accommodation, which is made after registration for the bar exam, but two to four weeks before it is administered.[245] Jurisdictions vary as to the required proof to gain any of these accommodations.[246]

While BOLEs should create policies that reflect menstruators' needs for bathroom and product access, when they do not exist, the permitted accommodations process should provide options for menstruators to have equal access to the bar exam as non-menstruators. Such administrative accommodations include modifications to limit the time tax, permit the test taker to sit near a bathroom, have increased access to products, and bring additional clothing to the exam.

accommodations to express milk; further quoting her ACLU counsel's observation that this accommodation "ignores the fact that requiring our client to dedicate that break to the expression of breast milk will deprive her of equal time to conduct any of the other activities to which the break period is typically dedicated-such as eating, going to the restroom, resting, walking, or stretching."). Just as bar examiners are now accommodating lactating examinees, they should do the same for menstruators.

[245] *See BOLE Policy Survey*, *supra* note 68. While no jurisdiction permits a same-day request, some do permit requests closer in time to the bar exam than the normal deadline for non-ADA accommodation. For instance, Puerto Rico accepts emergency requests "days" in advance and Tennessee accepts them seven days in advance. *See id.* Given the nature of menstruation, a test taker may not know they will menstruate until the day of or during the exam. The absence of same-day emergency administrative accommodation policies places menstruating test takers in an unfair situation. For in person exams, the lack of a same day policy means a menstruating test taker cannot request to enter the exam room with their menstrual products or to sit close to and have open bathroom access in order to attend to their menstruation. For a remote exam, the lack of a same day policy means the menstruating test taker risks being flagged for leaving the camera view to attend to their menstruation and being subject to the uncertainty of severe consequences. *See id.*

[246] *See BOLE Policy Survey*, *supra* note 68 (noting, for example, that Georgia requires the petitioner to submit a doctor's letter; Colorado, Illinois, and New York require medical documentation in support of a non-ADA accommodations request, but do not further specify the type of information required; Ohio requires a personal statement from examinees when requesting non-ADA accommodation requests; and that it is unclear in Colorado what must be submitted as a request).

E. Policy Transparency

> *[West Virginia] . . . never did tell exam takers we could bring our own [menstrual products into the exam room] (despite [West Virginia BOLE's] media statements saying we could), but they also didn't say anything about the one in my Ziploc both days [when I went through security].* — Emily Mowry (West Virginia, July 2020).[247]

> *. . . please provide better instructions and address this head on when sending instructions for the exam! I was forced to remove my tampons from my clear plastic bag and throw them away, I was given no prior instructions as far as allowing feminine products in our bags and assumed this would be okay. While it is something natural, no women [sic] wants to watch their tampons being pulled out of the bag in their packaging (no alterations) in front of hundreds of people.* — Anonymous (Texas, February 2018).[248]

> *The woman in charge of the bar exam was incredibly rude and uncouth in her responding to our questions about using menstrual products. We were originally told we would not be allowed to use the restroom prior to the exam (though some of us were forced to come 2 hours early due to covid social distancing protocols at check-in) unless we had a doctor's note as to why we would need to change our pads/tampons in a two hour window. Once her response went viral, she sent all of us an email saying she had never told us we couldn't use the restroom prior to the start of the exam, even though we all had screenshots of her response.* — M.B. (Nebraska, July 2020).[249]

As seen in these test takers' experiences, menstruators seeking to learn bar examiners' policies about menstrual products and bathroom access often have difficulty ascertaining them.[250] This Section discusses the lack of transparency of current BOLE policies.

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[247] Soule, *supra* note 175 (referencing the reply of @EmilyRMowry to Taylor Soule's tweet); *see also* Jessica Gardner (@Jess_Gardner44), TWITTER (Aug. 4, 2020, 8:06 PM), https://twitter.com/Jess_Gardner44/status/1290801223520653313?s=20 [https://perma.cc/SK5P-CHE6] (discussing another NCBE developed licensing exam for lawyers, the MPRE, and stating "I'm taking the MPRE (an exam you take before the bar exam) next Tuesday & my period is due to start on Monday. Don't see any feminine products on allowed on the list. [Pensive face emoji] #bloodybarpocalypse").

[248] *Menstruation and the Bar Survey Results*, *supra* note 15.

[249] *Id.*

[250] *See supra* notes 247–249.

Bar examiners' specific policies relating to menstruation are often not on the BOLE website.[251] If the policies are not clear, a test taker may try calling or emailing the BOLE for additional information but may have a difficult time reaching the office or may receive contradictory answers.[252] Test takers need the information prior to registration so that, if necessary, they can apply for an accommodation in a timely manner (typically due at registration). Further, if they have choices about which jurisdiction's bar exam they will take, the menstruation policy can be a considered factor. At a minimum, state BOLEs need to explicitly publish their menstruation policies before the exam, eliminating unnecessary anxiety and wasted time that test takers otherwise must use to try to find accurate information and sift through false rumors.[253]

Many BOLEs, it appears, also do not provide policies about menstrual products to test takers via email.[254] Only 36 of the 135 respondents to the *Menstruation and the Bar Survey* stated that they received instructions prior to the bar exam about access to menstrual products, product storage, and bathroom access.[255] The majority of those who received instructions received them by email, rather than on the BOLE website, where the information could be more easily accessed prior to registration and in preparation for the exam.[256] The lack of website policies, emailed policies, or any policies, causes unnecessary confusion among the test takers. The voices of Emily Mowry, Anonymous, and M.B. at the beginning of this Section provide insight into the experiences of the many other test takers left wondering whether and how they would be able to gain access to their products and the bathroom during the exam.[257]

For the July 2021 bar exam, transparency remained spotty. Some jurisdictions, such as Kentucky and Louisiana, do not have any policies about the bar exam on their website.[258] Other jurisdictions may have

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[251] *See BOLE Policy Survey*, *supra* note 68 (identifying all BOLE policies relating to menstruation).

[252] During the summer and fall of 2020, MP and the Bar contacted BOLEs but had difficulty reaching them and received conflicting information. Notes on file with authors.

[253] *See supra* note 248 and accompanying text.

[254] *See BOLE Policy Survey*, *supra* note 68.

[255] *See Menstruation and the Bar Survey Results*, *supra* note 15.

[256] *See id.*

[257] *See Menstruation and the Bar Survey Results*, *supra* note 15; Gardner, *supra* note 247; Soule, *supra* note 175.

[258] *See BOLE Policy Survey*, *supra* note 68 (identifying that Kentucky and Louisiana do not have policies on their BOLE websites).

general policies about the exam, but fail to communicate about access to menstrual products, bathrooms, or administrative accommodations.[259] This Part shows that there is a need for BOLE policy reform to diminish the harms to menstruating test takers and to place them on equal footing with their peers. Reforms should specifically address the principles of privacy and respect, fairness and non-discrimination, promoting health, providing accommodations, and policy transparency. The next Part considers the likely legal implications of current BOLE policies and their impact on menstruating test takers.

III. BOLE POLICIES ARE LIKELY UNCONSTITUTIONAL AND VIOLATE HUMAN RIGHTS LAWS

This Part discusses whether BOLE policies disadvantaging menstruators are discriminatory on the basis of sex.[260] For this analysis, we explore BOLE interests in creating and disseminating exam administration policies and their failure to do so. We also revisit the dignitary harms experienced by test takers' that were examined in Part II.

Relevant to this analysis is an understanding of the relationship of menstruation to sex and to gender identity. As described in Part I, menstruation occurs between puberty and menopause for the vast majority of cis women and other persons who have the reproductive organs of a uterus and at least one ovary, such as some transmen, genderqueer/nonbinary, and intersex individuals.[261] Accordingly,

[259] *See id.* Forty-six jurisdictions do not post policies relating to whether entering the exam room with menstrual products is permitted. *See supra* Part II.B (citing *BOLE Policy Survey*, *supra* note 68). Of the forty-six, twenty-four jurisdictions are administering the exam remotely (Arizona, Connecticut, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virgin Islands, and Wisconsin), and twenty-two jurisdictions are administering the bar exam in person (Alabama, Alaska, Arkansas, Delaware, Guam, Hawaii, Idaho, Kansas, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oklahoma, Oregon, Puerto Rico, South Carolina, South Dakota, West Virginia, and Wyoming). *See BOLE Policy Survey*, *supra* note 68.

[260] *Cf.* Johnson, *Menstrual Justice*, *supra* note 103, at 30-38; Johnson, Waldman & Crawford, *supra* note 86, at 237-41.

[261] Johnson, *Menstrual Justice*, *supra* note 103, at 30-38; *Hysterectomy*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/a-z-topics/hysterectomy [https://perma.cc/NS38-W85G] (discussing hysterectomies and explaining that once the uterus is removed, a person will no longer have periods, and if both ovaries are removed, a person will no longer have periods). Therefore, one uterus and one ovary are necessary for a person to be able to menstruate. *What Does Intersex Mean and Do Intersex People Have Periods?*, NATRACARE, https://www.natracare.com/

menstruation is related to sex organs, and therefore, treating individuals differently because they menstruate gives rise to the constitutional claims and other legal claims explored below.[262]

The first Section discusses the legal consequences of such discrimination by examining the Constitution's Equal Protection Clause prohibitions on state discrimination based on sex. The next

blog/do-intersex-people-have-periods/ (last visited Aug. 2, 2021) [https://perma.cc/RDM5-ZZGC] (explaining that intersex persons menstruate if they have a uterus, ovaries, and a vagina).

[262] It is important to understand the terms sex, gender, and gender identity. As aptly explained by Planned Parenthood, "sex is a label — male or female — that you're assigned by a doctor at birth based on the genitals you're born with and the chromosomes you have. It goes on your birth certificate." *Sex and Gender Identity*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity (last visited July 25, 2021) [https://perma.cc/HW63-8W57]; *see also GLAAD Media Reference Guide – Transgender*, *supra* note 8 (explaining that "[a] person's sex, . . . is actually a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics").

Male genitals include the testicles and the penis. *Male Reproductive System*, KIDSHEALTH, https://kidshealth.org/en/parents/male-reproductive.html?ref=search (last visited July 25, 2021) [https://perma.cc/N26S-WXR4]. The female external reproductive sex organs include the vulva. *What are the Parts of the Female Sexual Anatomy?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/health-and-wellness/sexual-and-reproductive-anatomy/what-are-parts-female-sexual-anatomy (last visited July 25, 2021) [https://perma.cc/4DWY-RQ56]. Female internal reproductive organs include a vagina, uterus, fallopian tubes, and ovaries. *Id.* The term sex then refers to a binary classification, based on external reproductive organs. It is also called one's assigned sex, or less accurately one's "biological sex." The latter is a less accurate term because some persons (often called intersex persons) can have so-called male and female reproductive organs and hormones. *See Sex and Gender Identity*, *supra*.

The term gender can be understood as "a social and legal status, and set of expectations from society, about behaviors, characteristics, and thoughts. Each culture has standards about the way that people should behave based on their gender. This is also generally male or female. But instead of being about body parts, it's more about how you're expected to act, because of your sex." *Id.*

Gender identity is defined as "how you feel inside and how you express your gender through clothing, behavior, and personal appearance. It's a feeling that begins very early in life." *Id.* According to the Human Rights Campaign, gender identity is "[o]ne's innermost concept of self as male, female, a blend of both or neither — how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth." *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited July 25, 2021) [https://perma.cc/4U56-KSQE]; *see also GLAAD Media Reference Guide – Transgender*, *supra* note 8.

Section examines state antidiscrimination laws in licensing, public accommodation, and public programs and services.

A. BOLE Policies Are Likely Unconstitutional Under the Equal Protection Clause

As this Section explains, BOLE policies relevant to menstruation-related discrimination are likely unconstitutional as discrimination on the basis of sex under the Equal Protection Clause.[263]

1. BOLEs Are State Actors

BOLEs are state actors subject to the U.S. Constitution.[264] As discussed above, BOLEs unfairly treat menstruators in several ways:

[263] U.S. CONST. amend. XIV, § 1.

[264] Actions of state agencies, departments, and officials acting in their official capacities are state action for constitutional purposes. *See* Avery v. Midland Cnty., 390 U.S. 474, 479 (1968) ("The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State."); Cooper v. Aaron, 358 U.S. 1, 17 (1958); Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 245-46 (1931); *Ex parte* Virginia, 100 U.S. 339, 347 (1879).

In most states, the BOLE is a state agency supervised by the state's highest court. *Basic Overview*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/ (last visited July 26, 2021) [https://perma.cc/G8LN-KVFU]. In other states, although the BOLE may not be expressly designated as a state agency, it acts under a grant of authority pursuant to state law and engages in regulatory activity on behalf and under the supervision of the state. *See* MICH. COMP. LAWS ANN. § 600.925 (1961).

In a majority of states, BOLE members are appointed by the highest officials of one or more branches of state government. *See, e.g.*, CAL. BUS. & PROF. CODE § 6046.5 (2019) (providing that the non-attorney members will be appointed evenly by the Senate Rules Committee, Speaker of the Assembly, and the Governor); CAL. CT. R. 9.4(a), (b) (2019) (indicating the State Supreme Court makes appointments based on the nominations provided by the Board of Trustees of the State Bar); ME. BAR ADMISSION R. 3(a) (2020) ("The lawyer members of the Board shall be appointed by the Governor on the recommendation of the Supreme Judicial Court."); TENN. SUP. CT. R. 7 (declaring the BOLE is part of the judicial branch, but the Supreme Court makes appointments and has "general supervisory authority over the Board's actions"). The responsibilities, restrictions, and policies involving the state bar examiners vary by state. Universally, however, state governments have deeply connected themselves with the examiners and state BOLEs operate under express state authority and supervision.

Courts have held official conduct of BOLEs to be state action and applied both the Eleventh and Fourteenth Amendments to state Boards and bar associations. *See* Kaimowitz v. Fla. Bar, 996 F.2d 1151, 1155 (11th Cir. 1993) (citing Ginter v. State Bar of Nev., 625 F.2d 829 (9th Cir. 1980)); McFarland v. Folsom, 854 F. Supp. 862, 872 (M.D. Ala. 1994); *see also* Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 375 (5th Cir. 1989) ("It is well established that a Bar Association, acting in its regulatory capacity, is a state actor"); Woodard v. Va. Bd. of Bar Exam'rs, 420 F. Supp. 211, 213 n.3 (E.D. Va.

(1) they preclude menstruators from entering the bar exam room with their personal menstrual products; (2) they limit menstruators to only BOLE-provided menstrual products; (3) they limit BOLE-provided menstrual products to women's restrooms; (4) they use gender-specific language ("feminine hygiene") to describe menstrual products, thereby excluding non-feminine/non-female menstruators; (5) they preclude menstruators' emergency bathroom access outside of the scheduled breaks; (6) they do not provide menstruators non-ADA accommodations for bathroom and menstrual product access; (7) they harass menstruators regarding their carrying and use of menstrual products and access to the bathroom; (8) they potentially disqualify remote test takers who leave the camera view to attend to menstruation; and (9) they do not provide transparent policies regarding menstruation and the bar exam.[265] This Section discusses how these acts likely violate the Constitution.[266]

1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979) (noting "[t]he Court is satisfied that the Board is an agent of the state . . . "). Additionally, some states expressly extend qualified immunity protections to official acts of the Board. *See* TENN. R. S. CT. R. 7, § 12.10.

State BOLEs are state actors because the BOLE acts under express authority of the state, engages in legislative, judicial and/or executive actions, and receives constitutional protections of the state. Therefore, the BOLE is a public entity and its official actions in establishing, administering, and grading bar exams are attributable to the state.

Others agree that BOLEs are state actors. Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52; *see* Crawford, *supra* note 61, at 68.

[265] *See supra* Part II.

[266] For an expansive analysis finding that the taxing of menstrual products violates the Constitution's prohibition of sex-based discrimination under intermediate scrutiny and even under the Constitution's lower level "rational basis" scrutiny, see Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 481-83 (2019) [hereinafter *Unconstitutional Tampon Tax*]. For purposes of this article, and space constraints, we focus on an argument that the bar examiners' differential treatment of menstruators is sex-based discrimination and violates the Constitution's Equal Protection Clause because it cannot survive intermediate scrutiny. For other constitutional legal analysis of bar examiners' treatment of menstruators, see Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52; Crawford, *supra* note 61, at 68-72; see also Erwin Chemerinsky & Jennifer Weiss-Wolf, *Op-Ed: Taxing Tampons Isn't Just Unfair, It's Unconstitutional*, L.A. TIMES (July 11, 2019, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-weiss-wolf-tampons-tax-20190711-story.html [https://perma.cc/UQ5L-J93Q]. In addition, the aggregation of a BOLE's acts towards menstruators could constitute sex-based harassment. *See* Part III; *see also Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sex-based-discrimination (last visited July 25, 2021) [https://perma.cc/97UW-CAJP] (defining "Sex Discrimination Harassment").

2. Discrimination on the Basis of Menstruation Is Sex-Based Discrimination

Discrimination against menstruators or because of menstruation is discrimination on the basis of sex.[267] It is sex-based because it is based on the menstruator's reproductive "female" sex organs, such as the uterus, which is the situs of the menses that is discharged during the menstrual cycle.[268]

Such discrimination may also be on the basis of sex, gender, gender identity or any combination of these three based on the discriminator's expectations for a person's conformity with sex, gender, or gender identity expectations.[269] For instance, a person may discriminate against a transman who menstruates because he is not meeting the discriminator's gender expectations that men do not menstruate. As another example, when a BOLE provides menstrual products only in women's bathrooms, thereby excluding menstruators who are not or do not identify as cis women, the BOLE is discriminating on the basis of sex, gender, and gender identity.

This analysis is bolstered by *Bostock v. Clayton County*, in which the Supreme Court found that Title VII's prohibition of discrimination "on the basis of sex" covered discrimination against individuals who are transgender, gay, or lesbian.[270] In supporting its decision, the Court reasoned that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on

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[267] *See* Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 206, at 355-56 (discussing Marcy L. Karin's recommendation for a legislative amendment and/or regulatory guidance that clarifies that menstruation is covered under existing employment discrimination laws); Johnson, *Menstrual Justice*, *supra* note 103, at 28-37 (identifying discrimination against menstruating employees as discrimination under Title VII, 42 U.S.C. § 2000e); Johnson, Waldman & Crawford, *supra* note 86, at 226, 263 (identifying discrimination against menstruating students as sex-based discrimination under Title IX, 20 U.S.C. § 1681); *see also* Widiss, *supra* note 241, at 242 (citation omitted) ("Theorists and advocates addressing both employment-related and non-employment-related claims should therefore consistently argue that menstruation discrimination is sex discrimination, full-stop. As noted above, prior to *Gilbert*, the circuit courts and the EEOC unanimously stated that pregnancy discrimination was sex discrimination. The PDA simply clarified and restored that interpretation. Similarly, menstruation discrimination should be recognized as sex discrimination, whether or not statutes were amended with language similar to the PDA.").

[268] *See supra* Part I.C.

[269] *Cf.* Widiss, *supra* note 241, at 243 ("Menstruation, like pregnancy, is a condition linked to female biology and associated with stereotypical assumptions about women's proper role in society.").

[270] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741-43 (2020).

sex."[271] The Court explained that in discriminating against an individual who is transgender, the actor is "intentionally penaliz[ing] a person identified as [one sex] at birth for traits or actions that it tolerates in an employee identified as [another sex] at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the [action]."[272]

Federal courts of appeals already have extended *Bostock*'s analysis, holding that discrimination against individuals who are transgender can constitute sex discrimination under the Equal Protection clause of the Fourteenth Amendment.[273] Accordingly, since discrimination against menstruators is direct evidence of discrimination against cis women, transgender men, genderqueer/nonbinary persons, and intersex individuals based on their reproductive anatomy and sex organs, these actions likely violate the Constitution's prohibition of sex-based discrimination against each of these categories of persons.[274]

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[271] *Id.*

[272] *Id.*

[273] *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, S. Ct. (June 28, 2021) (noting that the school district's policy discriminated on the basis of sex and violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution by requiring a student to use the bathroom that corresponded with his birth-assigned sex rather than his gender identity); Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1296 (11th Cir. 2020) (stating plainly that "discrimination against a transgender individual because of [his or] her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender").

[274] Professors Crawford and Waldman also argue that BOLEs likely violate the Equal Protection Clause of the U.S. Constitution by discriminating on the basis of sex when precluding menstrual products. Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52; *see* Crawford, *supra* note 61, at 68-72; *cf.* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 266, at 474-82 (arguing that the tax on tampons is unconstitutional). The arguments often rely on the fact that most menstruators are cis women. *Id.* Crawford and Waldman argue that the BOLEs refusal to permit menstruators, the vast majority of whom are women, from bringing in their own personal menstrual products is discrimination based on sex. Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52. They concede that the bar examiners do not use the term "sex" or "women" in their written policies, but observe that the "rules are, nevertheless, sex-based." *Id.* Because menstruation is sex-based itself, and because menstruation and menstrual products are so closely associated (at least historically) with the "female" sex, the products function in the constitutional law context as a proxy for sex, Crawford and Waldman argue. *Id.* Therefore, they reason that banning menstrual products likely violates equal protection, even if various BOLE policies are neutral on their face (i.e., all candidates are prohibited from bringing them to the bar exam). *Id.* Since no one other than a menstruator would bring a menstrual product into a bar exam, they argue, only menstruators are impacted by the ban on bringing in one's own menstrual products. *Id.* Crawford further argues that even if menstrual product bans are not treated as facially discriminatory, their disparate impact

Two of the BOLEs' actions — providing test taker menstrual products only in women's bathrooms and using gender-specific language to refer to menstrual products — are directly sex-discriminatory. They exclude individuals who may identify as male and use men's bathrooms (e.g., transmen or individuals who are genderqueer/nonbinary, or intersex and menstruate). In addition, harassment of menstruators for menstruating, such as by discounting the need to bring in menstrual products, may also constitute direct evidence of sex-based discrimination.

BOLEs also differentially treat menstruators when they do not permit them to bring in menstrual products necessary for their health and safety but permit test takers to bring in water and other items. [275] The same is true when BOLEs do not permit menstruating test takers to seek administrative accommodations[276] that are available for other conditions. Because menstruators are a sex-based category of persons, BOLE actions that result in a "denial of opportunity" of access to the bar examination provide grounds for a sex-based discrimination claim under the Constitution.[277]

Discrimination on the basis of sex receives "heightened scrutiny" under the Equal Protection Clause,[278] which requires the state to prove it has an "exceedingly persuasive" justification for its differential

combined with a discriminatory intent means that BOLE policies are unconstitutional. *See* Crawford, *supra* note 61, at 70-72.

[275] For instance, in Montana, the BOLE permitted test takers to bring in the signed Montana Bar Examination Code of Conduct, Government Issued Photo ID, earplugs, wallet, keys, facial tissues, medication and medical items, non-digital watch, pens, pencils, erasers, and one clear plastic bottle of water, juice, or soda. *See* Marcy Karin (@ProfessorMLK), TWITTER (July 26, 2020, 2:23 PM), https://twitter.com/ProfessorMLK/status/1287453527372107777 [https://perma.cc/2724-RGNF]; Texas Board of Law Examiners, *September 2020 Texas Bar Exam — Exam Check-In Procedures*, YOUTUBE (Sept. 1, 2020), https://www.youtube.com/watch?v=ItPxPsRdYAc [https://perma.cc/UCR5-HKHS]; *cf.* TEX. BD. OF L. EXAM'RS, TEXAS BAR EXAMINATION GENERAL INSTRUCTIONS FOR FEBRUARY 2021, at 3, https://ble.texas.gov/bar-exam-general-instructions (last visited Feb. 10, 2021) [https://perma.cc/QEH8-5WF4] (permitting "[i]ndividually wrapped feminine hygiene products").

[276] For a discussion of administrative accommodations, see *infra* Part IV.B.1.

[277] *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996). It also may serve as the basis of a purposeful discrimination claim in violation of a state Equal Rights Act. *See*, *e.g.*, Currier v. Nat'l Bd. of Med. Exam'rs, 462 Mass. 1, 13-17 (2012) (expanding the state's Equal Rights Act, MASS. GEN. LAWS ch. 93, § 102 (a) (2020), to cover intentional sex-based discrimination by allowing the claim of a lactating examinee to proceed against the relevant medical board on allegations that the board's policy denied her the time and accommodations provided to male examinees, who were not forced to use break time to address a sex-linked condition).

[278] *Virginia*, 518 U.S. at 532-33.

treatment of menstruating test takers.[279] To survive heightened constitutional scrutiny, the state must show that the BOLE classification of menstruators (1) "serves 'important governmental objectives'" and (2) "'that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[280] For this analysis, Texas BOLE will serve as an example.

As to the first part of this analysis, the Texas BOLE articulates four objectives for not permitting test takers to take menstrual products into the bar exam.[281] First, it identifies that an objective of exam security is to protect its proprietary information, the MBE questions.[282] Specifically, the BOLE is concerned that test takers could record exam questions and share them with proprietary bar prep companies or others. Second, and similarly, the Texas BOLE states that it has an interest in securing the bar examination questions because test takers may record or take notes on the questions and share them with test takers who are taking the exam a few days later than others.[283] Third, and also related to security, the Texas BOLE asserts an objective to protect against test takers from bringing materials into the exam that would permit them to cheat on the exam.[284] Fourth, the Texas BOLE states that the objective in precluding menstrual products is to avoid long security lines that would be inevitable if the BOLE had to inspect all the test takers' menstrual products.[285]

It is likely that courts would find that test security is an important government interest for a licensing exam. If there were inadequate exam security, the bar licensing exam would be an ineffective gate keeper for a profession that serves as officers of the court and in fiduciary

279 *See id.*

280 *Id.* at 516.

281 *See Comments from Executive Director Susan Henricks*, *supra* note 193.

282 *Id.*

283 *See id.*

284 *Id.*

285 *See id.* It should be noted that the New York BOLE identified "security of the exam," without providing more specifics, as one reason it had decided not to permit on-demand bathroom breaks. *See* Rosenberg, *supra* note 193 (sharing the correspondence between Jo Anne Simon, N.Y. Assembly member, and John J. McAlary, Executive Director, NY BOLE, including that the BOLE considered "the security of the exam" as a factor in denying the request for bathroom access, but was confident that the informal procedure of having applicants announce their need for a bathroom break to a camera and having someone review the video "should adequately address the situation"); *cf.* Joe Patrice, *Bar Examiners Thought About Bathroom Breaks but Decided it Was Funnier for People to Piss Themselves*, ABOVE THE L. (Feb. 17, 2021), https://abovethelaw.com/2021/02/bar-examiners-thought-about-bathroom-breaks-but-decided-it-was-funnier-for-people-to-piss-themselves/ [https://perma.cc/A7YN-ZLLF].

relationships with clients.[286] Accordingly, at least the first three objectives offered by Texas BOLE would most likely be found to be important government objectives under the first step of the constitutional equal protection clause analysis.

As to the second part of the analysis, the question is whether BOLE actions affecting menstruators are "substantially related" to the "important government interests."[287] Courts would likely find the BOLE measures unconstitutional because the nexus between the state interest and the means for achieving that interest is not close enough to survive heightened scrutiny. For instance, as to the first and second governmental objectives (protecting against the recording or writing down of questions), banning menstrual products is not substantially related because the MBE questions are created by the NCBE, who has the main interest in securing the test questions, and the NCBE has stated that menstrual products should be permitted into the examination room.[288]

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[286] *See How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/court_officers/#:~:text=The%20lawyers%20for%20both%20sides,presented%20by%20competent%20legal%20counsel [https://perma.cc/N9UT-CZYL]; AM. BAR ASS'N, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1, at 29 (1980), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf [https://perma.cc/Y67T-EKWK]. On the other hand, the bar exam itself has been critiqued as not being an adequate gatekeeper for practicing lawyers separate and apart from test security because it tests content that is not relevant to the practice of law through unreliable standardized test mechanisms that discriminate against marginalized communities. Further, commentators and organizations have pushed back against the bar exam as an unjustified monopoly in all but one state for entrance into the practice of law. *But see* Allen Mendenhall, *The Bar Exam Is Unfair and Undemocratic*, NEWSWEEK (Apr. 15, 2015, 5:53 PM EDT), https://www.newsweek.com/bar-exam-unfair-and-undemocratic-322606 [https://perma.cc/URT2-X9K4]. Such advocates for this position discuss waiver into the attorney bar upon satisfactory completion of law school (like Wisconsin has had for years) or apprenticeships as a pathway to bar membership. *But see* Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer, Comes Under Fire*, N.Y. TIMES (Mar. 19, 2015), https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html?_r=1 [https://perma.cc/V4QN-UFVH]. For purposes of this article, we are assuming test security is an important government interest, without taking a position on the bar exam as an appropriate gatekeeper to the profession.

[287] *See Virginia*, 518 U.S. at 533.

[288] Konnath, *supra* note 69; *see also MBE Test Day Policies*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mbe/test-day-policies/ (last visited Feb. 10, 2021) [https://perma.cc/N3RR-QTUP] (menstrual products omitted from NCBE list of prohibited materials for bar exams).

Banning menstrual products also is not substantially related to any of the four proffered objectives because test takers are permitted to bring in other items.[289] If other items are permitted, then menstrual products — an essential item for menstruators who could be more than half of the test-taking population — can also be permitted without compromising security. There is nothing that distinguishes the inspection of menstrual products from any other materials examinees can bring into the bar exam or that would create longer security inspection lines. Accordingly, there is no exceedingly persuasive justification for banning menstrual products necessary for individuals who menstruate.[290]

As with banning menstrual products, limiting bathroom access for menstruators during nonscheduled breaks, disqualifying test takers who leave the camera in a remote exam to attend to an emergency menstrual flow, and harassing menstruators regarding their menstrual products and use of the bathroom, are not substantially related to the governmental objective and would also likely fail constitutional scrutiny. Because the bar examiners often provide disability accommodations for other test takers that require unregulated bathroom breaks,[291] such bathroom access for in-person or remote testing is not critical to security. In addition, while routine inspections of menstrual products might satisfy the causal nexus for test security, harassment during those inspections, such as the incident where a proctor asked a menstruator "do you really need those [menstrual products]?," does not.[292]

As Justice Ruth Bader Ginsburg wrote in *United States v. Virginia*, "'[i]nherent differences' between [sexes], we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity[;] such classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."[293] Accordingly, BOLEs' differential treatment of menstruators cannot survive the heightened constitutional scrutiny applied to sex-based classifications.

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289 *See* Crawford & Waldman, *Tampons and Pads Should Be Allowed at the Bar Exam*, *supra* note 52. *See* Karin, *supra* note 275 (discussing the Montana BOLE's extensive list of permitted items).

290 *See Virginia*, 518 U.S. at 531, 533.

291 *See BOLE Policy Survey*, *supra* note 68 (citing to the availability of disability accommodations, administrative accommodations, and medical alert accommodations).

292 BPrybol, *supra* note 20.

293 *Virginia*, 518 U.S. at 533-34.

BOLE use of gender-specific language ("feminine products" as opposed to "menstrual" or "period" products)[294] and, if providing menstrual products, providing them only in women's bathrooms, are facially discriminatory on the basis of sex. It is not clear how the state BOLEs would justify these differential actions. While women constitute the majority of menstruators, they are not the only menstruators. Without a viable "exceedingly persuasive" justification, the state bar examiners' explicitly gendered categorization of products and placement of products could fail constitutional scrutiny on their own or as one part of the broader claim of harassment described above.[295] Perhaps the bar examiners would proffer cost as a justification because providing products in women's, men's, *and* all-gender bathrooms would be more expensive, but it is doubtful that choosing one gender over another in providing products as a means of reducing cost would pass the "heightened scrutiny" of constitutional analysis.

As established in this Section, there is a strong constitutional argument that BOLEs' discriminatory treatment of menstruating test takers is unconstitutional. The next Section discusses the legal implications of BOLE treatment of menstruators under state human rights laws.

B. BOLE Policies Likely Violate State Human Rights Laws

BOLE discrimination against menstruators also likely violates statutory discrimination law.[296] These antidiscrimination provisions

[294] For the February 2021 bar exam, the Texas BOLE publicly and expressly permitted test takers to bring into the exam menstrual products, but unfortunately called them "feminine hygiene products." TEX. BD. OF L. EXAM'RS, TEXAS BAR EXAMINATION GENERAL INSTRUCTIONS FOR FEBRUARY 2021, at 3 (2022), https://ble.texas.gov/bar-exam-general-instructions [https://perma.cc/2K28-RLDE].

[295] *Virginia*, 518 U.S. at 531-33; *see also* Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52.

[296] The ADA also may offer some menstruating test takers an avenue to obtain accommodations. While menstruation itself is not a disability, there are menstruation-related components to impairments that qualify as disabilities under the ADA, as amended by the ADAAA. *See supra* Part II.D. For those test takers, Titles II and III of the ADA explicitly allow challenges to the fairness of the administration of a bar exam. ADA Title II, 42 U.S.C. § 12132 (1990) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); ADA Title III, 42 U.S.C. § 12189 (1990) ("Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional . . . purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."); 28 C.F.R. § 35.130(b)(6) (2016)

prohibit covered entities from engaging in adverse actions or establishing barriers on the basis of a protected category.[297] As a result, the first step in finding a BOLE liable for discrimination is confirming that it is a covered entity under the relevant statute and then demonstrating that its "bad act" is on the basis of a protected category.[298] While BOLEs are not covered entities under Title VII,[299] they are covered under some state and local human rights laws as licensing organizations, entities responsible for providing public accommodations, or providers of public programs. Accordingly, presuming entity coverage, acts taken by BOLEs that discriminate on the basis of sex or gender identity — including discriminatory acts related to menstruation — are likely illegal under some state laws. The

(licensing examinations may not be administered "in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability"); *see also* Neha M. Sampat & Esmé V. Grant, *The Aspiring Attorney with ADHD: Bar Accommodations or a Bar to Practice?*, 9 HASTINGS RACE & POVERTY L.J. 291, 313 (2012) (analyzing the application of Title II of the ADA to state bars given their receipt of public funds). The only recourse for this type of discrimination, however, is obtaining an accommodation on a future exam. M. Patrick Yingling, *Learning Disabilities and the ADA: Licensing Exam Accommodations in the Wake of the ADA Amendments Act of 2008*, 59 CLEV. STATE L. REV. 291, 294-95 (2011).

297 State human rights laws often mirror such proof schemes under Title VII as direct evidence and circumstantial evidence claims. Circumstantial evidence claims often create an inference of discrimination on the basis of sex, for example, by highlighting a male comparator who did not suffer the same adverse action as a female. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252-53 (1981). Direct evidence claims do not require a comparator because no inference is necessary; the act itself shows the discrimination on the basis of sex. Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motives Cases*, 1993 WIS. L. REV. 231, 234-36. Direct evidence claims include allegations of sexual harassment and, the authors argue, some forms of discrimination on the basis of menstruation. *See id.*

298 *See infra* Part III.

299 *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089, 1096 (5th Cir. 1975) (indicating Title VII does not apply to BOLEs as they are "neither an 'employer,' an 'employment agency,' nor a labor organization"); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934-35 (2020) (arguing that professional responsibility dictates licensing non-discrimination even if these 1970s cases carve out Title VII coverage); W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L.J. 563, 568-69 (1989) (arguing for coverage and pointing out that the Supreme Court has never decided as such); Michele A. Yankson, Note*, Barriers Operating in the Present: A Way to Rethink the Licensing Exception for Teacher Credentialing Examinations*, 89 N.Y.U. L. REV. 1902, 1915-16 (2014) (positing potential coverage for some licensing entities by analogizing to covered employment agencies, despite *Tyler* and its progeny).

rest of this Section explores enterprise liability and potential responsibility under state and local human rights laws.

1. Licensing Discrimination

Many state antidiscrimination laws (often called human rights laws) apply only to employers, employment agencies, or labor-management organizations.[300] However, some states specifically prohibit licensing agencies — such as BOLEs — from engaging in discrimination on the basis of protected categories.[301] None of these laws include "menstruators" as a protected class; however, every state that has a human rights law includes sex as a protected category.[302]

In addition, as of August 2021, twenty-five states include gender identity or expression as a protected category.[303] Those states that do not explicitly do so would likely interpret "sex" to provide this coverage after *Bostock*.[304] This is especially likely given the frequency with which states apply judicial interpretations of Title VII to similar local protections.[305] Further, some states enumerate pregnancy and related medical conditions as protected categories.[306] Menstruators should be included under all of these categories.

Presuming coverage, the scope of protected activities varies. For example, in Colorado, no person may be denied a license to practice law because of sex.[307] Florida makes it illegal to discriminate against an

[300] *See, e.g.*, D.C. Code § 2-1401.11(a)(1)-(4) (2021).

[301] *See*, *e.g.*, 28 R.I. GEN. LAWS ANN. § 28-5.1-14 (2021); SOUTH DAKOTA RULES FOR ADMISSION TO PRACTICE LAW R. 16-16-14 (2021) ("No person shall be refused a license under this chapter on account of sex"). *But see* Kohn v. State Bar of Cal., No. 20-CV-04827-PJH, 2020 WL 6290382, *1, 8 (N.D. Cal. Oct. 27, 2020) (relying on CAL. BUS. & PROF. CODE § 6001 (2020) to dismiss plaintiff's claim against the State Bar for failure to grant time accommodations under CAL. GOV'T CODE §§ 11135, 12944 (2020) — the state's licensing discrimination provision — because the legislature had not explicitly included the State Bar as a covered entity for licensing discrimination).

[302] Iris Hentze & Rebecca Tyus, *Sex and Gender Discrimination in the Workplace*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx [https://perma.cc/HE9C-THWV]. The District of Columbia and Puerto Rico similarly ban discrimination on the basis of gender identity or expression. *Id.*

[303] *Id.*

[304] *See supra* Part III.A.2.

[305] *See, e.g.*, 14 C.J.S. *Civil Rights* § 63 (2021) (interpretations of Title VII guide the application of local discrimination protections).

[306] *See, e.g.*, Hentze & Tyus, *supra* note 302 (noting the states that cover discrimination on the basis of pregnancy and related medical conditions in their human rights laws).

[307] COLO. REV. STAT. ANN. § 13-93-102 (2017).

individual seeking a license or taking an examination because of that individual's sex.[308] In New York, it is unlawful for a licensing agency to "subject any individual to harassment because of . . . gender identity or expression, [or] sex[.]"[309] Further, when assessing what constitutes licensing harassment, New York applies a lower standard than that used in traditional workplace harassment claims.[310] In licensing discrimination claims, the harassment does not need to be "severe or pervasive" to qualify as illegal.[311] Rather, it is illegal for an individual to be subjected "to inferior terms, conditions or privileges[.]"[312] New York also requires licensing agencies to provide reasonable accommodations to known "pregnancy-related conditions . . . in connection with a[n] occupation sought[.]"[313]

Thus, state licensing laws offer examinees the right to engage in protected activities such as taking a foundational exam to obtain a professional license, like a bar exam, free from discrimination or harassment on the basis of menstruation. Any number of existing BOLE policies and practices likely violate this principle.[314] For example, outing a trans examinee by requiring them to keep menstrual products in a clear bag likely constitutes harassment, and would be deemed more than a "trivial inconvenience" under New York's lower standard. Unfortunately, not every state has a licensing provision that test takers could use to seek relief from discrimination against them as menstruators.

2. Discrimination in the Provision of Public Accommodations

In addition to providing potential liability for licensing discrimination, state laws may prohibit BOLEs from denying the equal use of a "public accommodation" because of sex or gender

308 FLA. STAT. ANN. § 760.10(5) (2019).

309 N.Y. EXEC. LAW § 296(1)(h) (2019).

310 *Compare id. with Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., https://www.eeoc.gov/harassment (last visited Sept. 1, 2021) [https://perma.cc/8PR2-M68N] (explaining that harassing conduct is unlawful under federal antidiscrimination law when "the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive").

311 N.Y. EXEC. LAW § 296(1)(h).

312 *Id.* Licensing agencies are afforded an affirmative defense if "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." *Id.*

313 *Id.* § 296(3)(a). Licensing agencies may raise an affirmative defense if providing reasonable accommodations would impose an undue hardship. *See id.* § 296(3)(b).

314 *See supra* Part III.A.

identity/expression. Although these laws have their roots in ensuring physical access,[315] public accommodations no longer are limited to providing access to a building or particular public space. Although what constitutes a public accommodation today varies by state, at their core, these laws are interpreted broadly to prevent discrimination or harassment in the consumption of goods and the right to use services or to obtain privileges.[316] In addition, these laws usually require places of public accommodations to make goods, services, and privileges accessible.[317] Every jurisdiction with a public accommodation law includes sex as a protected category,[318] and twenty-five states (plus the District of Columbia and Puerto Rico) explicitly include gender identity.[319]

For example, the New York Human Rights Law declares that "[t]he use of places of public accommodation and the . . . use of . . . commercial space without discrimination" is a civil right under state law.[320] The law continues by declaring that "[i]t shall be an unlawful discriminatory practice for any person [controlling] any place of public accommodation . . . directly or indirectly, to refuse, withhold from or deny to [a covered] person any of the accommodations, advantages,

315 *See generally* Alton Hornsby Jr., *Looking Back on the Fight for Equal Access to Public Accommodations*, ECON. POL'Y INST. (July 2, 2014), https://www.epi.org/publication/fight-equal-access-public-accommodations/ [https://perma.cc/S4YB-5MRC] (describing some of the demonstrations and early fights for legal access to public spaces, which culminated in the creation of desegregation provisions in the Civil Rights Act to provide a right to public accommodations); *The ADA Archive*, THE ADA PROJECT, https://www.adalawproject.org/ada-archive [https://perma/cc/P2Y8-AY66] (last visited Sept. 4, 2021) (capturing the ADA's legislative and regulatory history, including information about the provisions that prohibit discrimination in access to public accommodations).

316 *See*, *e.g.*, N.Y. EXEC. LAW § 292(9) (2020); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 81 (2019) (citing MINN. STAT. ANN. § 363A.03(34) (2019)).

317 *See* Sepper & Dinner, *supra* note 316, at 81 (observing that these are included in a representative public accommodations statute, even though specific language varies).

318 *See id.* at 80, 81, 104 (detailing the history of these laws from Colorado in 1969 to today); *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/33HC-5C4B]; *see, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 92A (2016) ("A place of public accommodation . . . shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public . . . .").

319 Hentz & Tyus, *supra* note 302.

320 N.Y. EXEC. LAW § 291(2) (2019).

facilities or privileges thereof . . . ."[321] As this text demonstrates, people must be afforded the same opportunities and advantages related to public accommodations. Anyone that is denied that opportunity may file a complaint and seek recourse.[322] In essence, a state public accommodation protection means that a covered entity may not provide discriminatory treatment to a customer and may be required to offer modifications to ensure accessibility of services.

These laws have served as the basis for obtaining exam modifications in other professions. For example, a nursing mother sued the National Board of Medical Examiners for refusing to provide additional break time to express milk during an exam that serves as a prerequisite to graduating from medical school and working to obtain a medical license.[323] The Massachusetts Supreme Judicial Court held that the Board was subject to the law because it administered the exam in a place of public accommodation.[324] It further ruled that the Board violated the state public accommodation statute when it engaged in a sex-linked classification by failing to provide a lactating test taker with the same accommodations made available to examinees for non-lactation based reasons.[325] The ACLU has incorporated this reasoning in successful advocacy on behalf of bar exam applicants seeking accommodations for breastfeeding.[326]

The same analysis should hold true for menstruators taking the bar exam. First, menstruation is a sex or gender-identity linked

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[321] *Id.* § 296(2)(a); *see, e.g.*, UTAH CODE ANN. § 13-7-3 (2018) ("All persons . . . are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of . . . sex, pregnancy . . . .").

[322] *See, e.g.*, N.Y. EXEC. LAW § 297(1) (2009) (containing the authority for an aggrieved person to file a complaint and enforce their rights under the human rights law).

[323] Currier v. Nat'l Bd. of Med. Exam'rs, 462 Mass. 1, 3-4 (2012).

[324] *Id.*

[325] *Id.* at 20-21.

[326] *See, e.g.*, Letter from Galen L. Sherwin, Senior Staff Att'y, ACLU Women's Rights Project and William E. Sharp, Legal Dir., ACLU of Kentucky, to Elizabeth S. Feamster, Dir. and Gen. Counsel, Ky. Bd. of Bar Exam'rs (Apr. 24, 2015), https://www.aclu.org/sites/default/files/field_document/kybar.appeal.pdf [https://perma.cc/5H6F-JRHH] (regarding a denied request for "Non Standard Test Accommodations" to Jacquelyn Bryant-Hayes); Letter from Kristen E. Northcutt, Deputy Dir., Ky. Bd. of Bar Admissions, to William E. Sharp, Legal Dir., ACLU of Ky. (May 7, 2015), https://www.aclu-ky.org/sites/default/files/wp-content/uploads/2015/04/kybba.ltr_.pdf [https://perma.cc/E5PS-ED9K] (Kentucky BOLE letter responding to ACLU letter sent on April 24 about the denial of "Non Standard Test Accommodations" to Jacquelyn Bryant-Hayes, noting that extra time would be provided).

characteristic. Second, BOLEs may not engage in a practice or policy that denies access to the same public accommodation provided to non-menstruators. For example, the imposition of a time tax on menstruation may run afoul of public accommodation provisions that compel entities to provide services in a non-discriminatory fashion. This might include a BOLE denying a request to sit near a restroom to limit time away from the exam to attend to menstruation, the failure to provide additional time more broadly to address menstruation (without limiting exam time), or the failure to allow test takers to step away from a computer screen during a remote exam without repercussion. The failure to provide these readily achievable time-space modifications to menstruating examinees could constitute sex discrimination under state public accommodations provisions.

Similarly, giving access to BOLE-provided products to only some menstruating test takers could serve as the foundation of a failure to provide public accommodations claim. For instance, an examinee could show that they were a member of the protected class (sex or gender identity), were discriminated against in the use of a public accommodation (no access to BOLE-provided menstrual products to address menstruation), and that the examinee's status as a member of a protected class was a contributing factor in that discrimination (the examinee's gender identity prevented them from accessing BOLE-provided products available only in bathrooms to which they do not have access). As each of these examples demonstrates, a BOLE's failure to address menstruation may discriminatorily deny access to a public accommodation.

3. Discrimination in the Administration of Public Programs

Some states also explicitly prohibit discrimination in the provision of any government facility, service, program or benefit on the basis of sex. For example, Louisiana declares that no subdivision or board of the state "shall harass or discriminate on the basis of . . . sex [or] gender identity . . . in the provision of any service and/or benefit by such agencies, departments, offices, commissions, boards or entities."[327] Similarly, the District of Columbia declares that "it shall be an unlawful discriminatory practice . . . to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived" sex, gender identity or expression.[328]

[327] La. Exec. Order No. JBE 2016-11 § 1 (July 1, 2016), https://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-11.PDF [https://perma.cc/5RPW-ZJBB].

[328] D.C. CODE § 2-1402.73 (2019).

Preventing test takers from bringing menstrual products into the exam, for example, could violate these laws by limiting the ability of someone who is menstruating from participating in or passing the exam on the basis of sex or gender identity or expression.

For the reasons set forth in this Part, BOLEs' treatment of menstruators is likely illegal under the Constitution as well as state and local human rights laws that protect against discrimination on the basis of sex, gender, and gender identity. Accordingly, BOLEs should create comprehensive and responsive policies that account for menstruation and promote a non-discriminatory bar exam and more inclusive bar.

IV. POLICY RECOMMENDATIONS

Increasing calls for menstrual justice in the bar exam have paralleled the voices seeking broader reform of the exam to ensure it assesses legal knowledge and skills in a fair and relevant manner. Major change seems inevitable now that the NCBE has entered the conversation.[329] While the clear articulation of policies to address menstruation during the bar exam must be included in that reform, BOLEs must act now. Accordingly, this Section sets forth MP and the Bar's Model Policy and the underlying reasoning supporting each proposal.

A. Menstruation and the Bar Exam: The Model Policy and Operating Provisions

This Section proposes a Model Policy and Operating Provisions that present applicants and examinees with appropriate information, dignity, choice, and equity related to menstruation and the bar exam. BOLEs should adopt the Model Policy and adapt the Operating Provisions to address the needs of their jurisdiction. In addition, the NCBE, American Bar Association, and Association of American Law Schools should incorporate the Model Policy into their joint "Code of Recommended Standards for Bar Examiners" and support its adoption by state BOLEs.[330] The text of the proposed Model Policy and Operating Provisions follow.

Model Policy

The BOLE commits to principles of dignity, privacy, sensitivity, fairness, non-discrimination, and exam integrity with respect to

[329] Calls to reform the exam are plentiful and the NCBE itself is considering changes in the future. *See* NAT'L CONF. OF BAR EXAM'RS TESTING TASKFORCE, *supra* note 34.

[330] *See* NAT'L CONF. OF BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 37.

menstruation and the bar exam. To ensure equitable treatment, examinees shall be allowed to bring their own menstrual products into the bar exam, stored on their person or in a separate bag, and may access bathrooms and have reasonable breaks to address menstruation. Menstruating examinees also shall be provided reasonable administrative accommodations as needed. This includes modifications to exam conditions such as access to menstrual products and bathrooms, storage of clothing, and the provision of additional exam time. Applicants and examinees also shall have access to a complaint process and be afforded due process for any alleged violation of this policy. Finally, the BOLE commits to enforcing this policy related to menstruation and the administration of the exam in an accountable and transparent manner.

Operating Provisions

Privacy, Respect, Fairness, and Non-Discrimination

1. **Privacy**: BOLE personnel will maintain the dignity, privacy, and confidentiality of applicants and examinees when implementing menstruation-related policies, including when responding to questions regarding menstruation and when inspecting products at an exam.

2. **Training**: The BOLE shall train all officials, proctors, security, office staff, and other personnel who administer and preside over the examination. These personnel shall have access to and be trained on the BOLE policies on menstruation, including those related to non-discrimination, product possession, security checks, breaks and bathroom usage, accommodations, same day limited accommodations, and policy transparency.

3. **Non-Discrimination**: The BOLE shall use appropriate non-discriminatory and inclusive language, facilities, policies, and actions. The BOLE also shall not engage in adverse practices based on menstruation or the potential for menstruation.

Menstrual Products

4. **Definition of "Menstrual Product"**: The term "menstrual product" includes materials that absorb menstrual discharge such as tampons, maxi-pads, diapers, menstrual cups, and underwear; cleaning products such as wet wipes, tissues, and water; and pain-relief products such as pills, patches, and heating pads.

5. **Product Possession**: Examinees are permitted to keep, access, and use personal menstrual products during the bar exam.

6. **Product Inspection and Storage**:

a. **In-Person Exam**: Examinees may choose to bring menstrual products to the exam and keep them stored in a separate clear or opaque bag or on their person. In the interest of maintaining exam security, these products may be inspected upon entry into the exam.

i. **Inspection Method Choice**: If inspection of menstrual products is required, examinees shall have the option of the inspection occurring in a private room or area and may make that decision on the day of the exam.

ii. **Product Integrity**: Examinees may bring menstrual products into the exam in their original packaging. To protect the sterility of products, examinees shall not be required to open an individual menstrual product that is sealed or to remove it from packaging.

iii. **Presumption of Need**: Examinees shall not be questioned about their need to bring menstrual products into the exam.

iv. **Additional Bag for Menstrual Products**: Examinees shall not be required to bring menstrual products in the same bag as other personal items that are permitted in the exam. Rather, examinees shall have the option of bringing a separate bag for menstrual products to provide for the number and/or variety of products needed, and to ensure that examinees' menstrual needs do not limit their ability to bring other, authorized personal items into the exam.

b. **Remote Exams**: Examinees shall be allowed to keep menstrual products in camera view without penalty. For exam security purposes, examinees may be required to hold up any products they intend to use during the exam to show the video or proctor that the products are sealed and in original packaging.

7. **Other Menstrual Product Provisions for In-Person Exams:**

a. Carrying Products: Examinees shall be allowed to carry security-cleared menstrual products during the exam from the test location to the bathroom without further inspection.

b. BOLE-Provided Products: Tampons and pads of different sizes and materials will be provided for free in all bathrooms on-site (i.e., women's bathrooms, men's bathrooms, and all-gender bathrooms). Examinees shall use the administrative accommodations process if they have a need for a specific style/brand of product (e.g., due to an allergy).

Breaks and Bathrooms

8. **Exam and Pre-Set Breaks Schedule**: A clear and public schedule of the exam, including designated examination and break times, will be published in advance of the exam. Such breaks shall be long enough to permit all examinees to use the bathroom and to allow those who are menstruating sufficient time to change, clean, or dispose of their menstrual products. There will be at least one thirty-minute break for every ninety minutes of examination time.

9. **Other Bathroom Breaks**: Outside of pre-set breaks, examinees shall be permitted to use the bathroom during examination periods on an as-needed basis, with appropriate security-related restrictions described below.

a. In-Person Exams: Examinees may leave their desk to use the bathroom without penalty, except that in the interest of minimizing noise and traffic disruptions, examinees may be required to obtain a proctor's permission to do so.

b. Remote Exams: After providing oral or written notice to the BOLE via exam software, examinees may leave the camera view during the examination to address menstruation. If technically feasible, the exam material will be locked and inaccessible to the examinee until they return to camera view from using the bathroom.

10. Bathroom, In-Person Exams:

a. Number: Each exam testing location shall have ample bathrooms (women's bathrooms, men's bathrooms, and all-gender bathrooms) for examinees to use, ensuring that examinees wait no longer to use the women's bathroom than the men's bathroom.

b. Location: Bathrooms shall be located within a reasonable distance of exam rooms and shall be easily accessible by examinees.

c. Facility Cleanliness: Bathrooms used during exam testing shall be cleaned regularly and offer adequate waste bins, functioning soap dispensers, and working sinks.

d. Selection: Examinees may use the bathroom that best corresponds to their gender-identity. Access also shall be provided to an all-gender bathroom, which can be created by temporarily changing the signs on an existing bathroom.

Accommodations

11. Administrative Accommodations: Applicants and examinees shall have access to an administrative accommodation process to seek and obtain exceptions to bar examination policies to address menstruation. Potential administrative accommodations include an exam location in closer proximity to a bathroom for in-person exams, modifications to product storage rules, access to additional clothing, and additional test time.

12. Accommodations Schedule: All applicants and examinees shall have access to information regarding any timelines and appeal rights related to seeking administrative accommodations.

13. Same Day Limited Accommodations: Examinees may ask an exam proctor and obtain limited administrative accommodations related to menstruation on the day of the exam itself, including during the exam. Same day accommodations are limited in scope and may include changes in seating to be closer to a bathroom and access to additional clothing.

Complaints and Violations

14. Complaint System: Applicants and examinees shall have access to an online portal on the BOLE website to submit comments, concerns, and complaints about issues surrounding menstruation and the bar exam, including those related to personnel, site, or testing conditions.

a. Complainants shall not be required to provide identifying information to utilize this process.

b. Following the administration of each exam, the BOLE shall publish on its website a summary of the complaints it has received; the number of times each complaint was made; and the action(s), if any, it is taking to address test takers' concerns. This information shall be published, without disclosing the identity of any examinee, no later than the date on which exam results are published.

15. Accessibility: Applicants and examinees shall have access to the complaint system via the bar examination website or a designated email address.

16. Alleged Rule Violation Process: Examinees shall be afforded due process in response to any alleged violations of bar exam rules related to menstruation. This includes:

a. Timely, specific notice to examinees of any alleged rule violation related to menstruation;

b. The right to review relevant/flagged footage related to any allegations of remote exam violations;

c. The opportunity to respond; and

d. A commitment that the BOLE will handle the investigation in a timely, confidential, and just manner, including providing the applicant with the result of the inquiry prior to the next bar exam's registration deadline and notice of their right of appeal.

Policy Transparency

17. Policy Location and Distribution: All policies related to menstruation shall be publicly available on the BOLE website. Examinees also shall be e-mailed a copy of the policies prior to taking the exam.

> **18. Contact Information**: Contemporaneous and up-to-date contact information for BOLE personnel, including at least a name, phone number, and email address as a point of contact for questions from applicants and examinees shall be posted on the BOLE public website.
>
> **19. Communication**: Applicants and examinees shall receive a response to any phone or email inquiry about menstruation policies within two business days of the test taker's initial contact. If additional time is needed to respond to an examinee's inquiry, the BOLE will provide the examinee with a timeline for a substantive response within two business days of the initial inquiry.

B. Justification for the Model Policy and Operating Provisions

No bar examinee should have to choose between taking the bar exam and safely managing their period. BOLEs should not be administering bar exams in arguably unconstitutional ways or enforcing discriminatory licensing practices that stigmatize a regular bodily function. Moreover, too many jurisdictions — whether through sheer oversight or deliberate indifference — have failed to adopt any policies regarding menstruation.[331] There is no reason to place these additional burdens on menstruators who are seeking to become members of our profession.

The Model Policy and Operating Provisions (together, "the Model Policy") seeks to remedy these and other problems too often caused by a BOLE's failure to consider the basic needs of menstruators — and to acknowledge that a predictable percentage of examinees will be menstruating when taking the bar exam. It is time for the NCBE and the BOLEs to ask the menstruation question,[332] which can be done in a way that aligns with their stated values (including maintaining security) and amidst the backdrop of ongoing conversations about bar exam reform, the need to diversify the bar, and a broader call for menstrual justice. After asking the menstruation question, the need for the Model Policy should be evident.

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[331] *BOLE Policy Survey*, *supra* note 68 (charting states that have failed to address menstruation, in whole or in part, in bar administration policies that are publicly available).

[332] Johnson, *Asking the Menstruation Question*, *supra* note 129, at 161-62.

1. The Model Policy Effectively Integrates the Dignity-Related Principles

In Part II of this Article, we examined the problems and obstacles faced by menstruating test takers through five principles of dignity: Respect and Privacy; Fairness and Non-Discrimination; Promoting Health; Providing Accommodations; and Policy Transparency.[333] These five principles in turn form the basis for the recommendations in the Model Policy.

First, adopting the Model Policy will inherently reflect and enforce a degree of **respect and privacy** for examinees that currently is missing from many BOLE policies. The Model Policy offers respect, for example, by: allowing menstrual products to be carried in an opaque container and examined in private;[334] training proctors not to question an examinee's need to bring in menstrual products;[335] and not subjecting an examinee's bag(s) to reinspection once they are in the exam room (absent specific suspicion of wrongdoing).[336] These are just some of the provisions that would reflect these fundamental principles and that one should expect from an entity that will determine whether an applicant has not only the intelligence, but also the ethical bearings to become a member of the bar.

Second, **fairness and non-discrimination** are core values that inform our profession's conceptualization of justice.[337] To treat menstruating test takers differentially, or unfairly, belies our commitment to justice exactly when we should be reaffirming this duty — namely, when applicants are seeking to join the legal profession. Some of the key provisions in the Model Policy that seek to create a fair and level playing field include allowing test takers to bring in their own menstrual products so they are not physically uncomfortable, do not face health risks, and are not distracted from the exam by fear of leakage — issues not faced by non-menstruators.[338] Further, they should be permitted to carry their product on their person or in a separate bag so as to not take

[333] *See supra* Part II.

[334] *See supra* Part IV.A, Model Policy ¶¶ 6.a. 6.a.i.

[335] *See supra* Part IV.A, Model Policy ¶ 6.a.iii.

[336] *See supra* Part IV.A, Model Policy ¶ 7.a.

[337] *See ABA Mission and Goals*, A.B.A., https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Sept. 4, 2021) [https://perma.cc/L4RZ-WY65].

[338] *See supra* Part IV.A, Model Policy ¶ 7.b. Should BOLEs wish to provide menstrual products as a matter of courtesy and support for menstruators, they should be of sufficient diversity to meet the needs of most menstruators. *See supra* Part IV.A, Model Policy ¶ 4.

up the space of other necessities, such as food, which may not otherwise be available to test takers during official breaks.[339]

The Model Policy also reflects these principles in ways that allow state BOLEs to reduce the likelihood they will be found in violation of the constitutional or statutory rights of menstruating test takers.[340] For example, it states that BOLEs must provide breaks long enough to allow menstruators to use the bathroom and also get a genuine break, as non-menstruators do.[341] It also reduces fear of retaliation by creating a process through which test takers can anonymously raise concerns, complaints, or suggestions to improve the administration of future bar examinations.[342] The Model Policy also affords due process to remote test takers whose exams are flagged (e.g., because they left the camera's view to use the bathroom to attend to menstruation) by permitting them to challenge this act.[343]

The Model Policy also seeks to create fair exam conditions, free from discrimination, by permitting all examinees to use the bathroom that corresponds to their gender identity and providing access to all-gender bathrooms,[344] even in those jurisdictions without specific laws mandating non-discrimination based on gender identity.[345] Further, BOLEs that choose to provide menstrual products to examinees would be required to make them available in women's bathrooms, men's bathrooms, and in all-gender bathrooms, which removes the differential

[339] *See supra* Part IV.A, Model Policy ⁋ 6.a.iv.

[340] *See supra* Part III (outlining potential constitutional and statutory liability concerns for state BOLEs that engage in discriminatory behavior).

[341] *See supra* Part IV.A, Model Policy ⁋ 8. Providing an adequate number of bathrooms and stalls is also essential for providing adequate breaks for those who are menstruating. *See supra* Part IV.A, Model Policy ⁋ 10.a. There should be a minimum of a thirty-minute break for every ninety minutes of testing. *See supra* Part IV.A, Model Policy ⁋ 8. Further, bathrooms should be near exam rooms for all genders and readily accessible by examinees. *See supra* Part IV.A, Model Policy ⁋ 10.b.

[342] *See supra* Part IV.A, Model Policy ⁋ 15. This complaint process should be accessible via the BOLE website and notice of its existence should be including in email communications from the BOLE to examinees. *See supra* Part IV.A, Model Policy ⁋16.

[343] Part IV.A, Model Policy ⁋16.

[344] *See supra* Part IV.A, Model Policy ⁋ 10.d.

[345] *See supra* Part III.B. It remains to be seen whether states or localities need to adopt such specific protections, or whether specific statutory or regulatory provisions will be considered necessary under the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct., 1731, 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 prohibits an employer from firing an individual employee merely for being gay or transgender).

impact that current policies have on people of all genders who menstruate.[346]

Third, the Model Policy balances and **promotes** both the **health** and well-being of menstruators and the interests of state BOLEs in administering a secure exam. Some important provisions that reflect this balance include permitting test takers to bring their own products to the exam, preventing proctors from removing sealed or pre-packaged menstrual products during security screening, and offering menstrual products that are varied in size and function in all bathrooms, should the jurisdiction opt to provide them.[347] The Model Policy also affirmatively recognizes the importance of inspecting an examinee's bags (and menstrual products) upon entry to the test site. Further, it acknowledges that, even though examinees generally should be permitted to use the bathroom as needed — which is essential for test takers' health — it may be necessary to restrict their use to limit the number of people in a bathroom or to reduce movement at the start and end of each exam segment. Similarly, the Policy recommends that BOLEs create a system to allow remote examinees to use the bathroom with notice (e.g., speaking to the camera to explain the reason for movement).[348] Implementing these and the other provisions of the Model Policy would help both to protect the health and well-being of examinees and to preserve the security and integrity of the bar exam.

Fourth, unlike the current, widely varying approaches to **providing accommodations** among BOLEs,[349] the Model Policy strategically incorporates standard adaptations that will meet many common needs among menstruators (e.g., permitting examinees to bring in their own products and allowing them to use the bathroom as needed, so long as it does not violate security protocols).[350] It also recognizes, however, that some test takers may experience particularly heavy or painful periods and that they may require individualized accommodations.[351] The Model Policy calls upon BOLEs to create an administrative, or courtesy, accommodations application process (or utilize an existing

[346] *See supra* Part IV.A, Model Policy ¶ 7.b.

[347] *See supra* Part IV.A, Model Policy ¶¶ 6.a.2., 7.b.

[348] MP and the Bar would support locking the exam, if technically feasible, while the examinee is in the bathroom.

[349] *See supra* Part II.D.

[350] *See supra* Part IV.A, Model Policy ¶¶ 6, 8-10.

[351] *See supra* Part IV.A, Model Policy ¶ 11.

one) that is available to menstruators whose needs may extend beyond the baseline needs already addressed by the Model Policy.[352]

This approach creates respectful, fair, and non-discriminatory exam conditions and permits individual examinees to request administrative accommodations to deal with menstruation-related complications. It also recognizes that some menstruators may not be aware that they need an accommodation until the days or moments leading up to the exam (e.g., they unexpectedly get their period, perhaps caused by exam stress) by allowing requests for "same day" accommodations, which are smaller adjustments that are more limited in scope.[353]

Thus, the Model Policy encourages state BOLEs to treat menstruation the same way it treats other reasonably foreseeable examinee needs during the bar exam: acknowledge its existence and plan accordingly. By doing so, only a small minority of menstruators will need to seek accommodations (reducing the burden on the state BOLEs as well as on bar applicants); further, when they do, there will be a straightforward process in place.

Fifth, implementing the Model Policy's recommendations related to **policy transparency** would address the lack of guidance regarding menstruation too-often experienced by test takers. There is no legitimate reason that state BOLEs cannot be wholly transparent about exam-related policies. Yet, a consistent complaint voiced by test takers is that they could not find information about their BOLE's menstruation policies or that the BOLE's email or oral policies differed from policies contained on the website.[354] This absence or inconsistency needlessly exacerbates test takers' anxiety, causing them to waste time they could be using to study or for self-care to ferret out the policies, and further spurs misinformation and distrust among examinees.

These problems all can be easily resolved by placing policies related to menstruation (e.g., products, bathroom use, accommodations) on the BOLE's publicly-available website *and* by emailing the information to examinees.[355] In addition, contact information for bar officials who

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[352] *See supra* Part IV.A, Model Policy ⁋ 11 and accompanying text (describing how some menstruators may need to bring additional underwear or a change of clothes to deal with heavy menstrual bleeding); *see also supra* Part IV.A, Model Policy ⁋ 13 (describing a process through which examinees can request emergency and day-of-exam accommodations).

[353] *See supra* Part IV.A, Model Policy ⁋ 13. In the interest of fairness, this same day limited accommodation could also be used for non-menstruation reasons such as by an examinee who broke their leg and needs a special seating arrangement.

[354] *Menstruation and the Bar Survey Results*, supra note 15.

[355] *See supra* Part IV.A, Model Policy ⁋ 17.

are authorized to answer inquiries about information provided on the BOLE website, or to respond to concerns about a lack of necessary information, should be posted,[356] and inquiries should be timely answered (e.g., within two business days of the initial contact).[357]

In sum, by addressing the five dignity-related principles, the Model Policy offer BOLEs the opportunity to remove ongoing obstacles related to menstruation and the bar exam, to create a better testing environment, to treat all test takers justly, and to comply with applicable federal and state law.

2. The Model Policy Aligns with NCBE/BOLE Values and Bar Reform Efforts

The Model Policy balances the needs of menstruating test takers with the stated BOLE concerns regarding exam administration. It also aligns with other stated values of the NCBE and the BOLEs. Specifically, the NCBE identifies fairness, integrity, excellence and service as its core values.[358] Numerous state BOLEs similarly embrace "the advancement of the ethical and competent practice of law"[359] as a core part of their role.[360] By complementing NCBE and BOLE values and offering adaptable solutions to problems identified by past test takers, the Model Policy ensures that present and future examinees do not face menstruation-related barriers to just test conditions, whether taken in-person or remotely.

As described above, addressing menstruation is not the only change that is needed for the bar exam. There are active campaigns to reform both the conditions and substance of the bar exam, as well as questions about the fundamental validity of the exam. As those broader, long-term

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[356] *See supra* Part IV.A, Model Policy ⁋ 18.

[357] *See supra* Part IV.A, Model Policy ⁋ 19. If additional time is needed to respond to bar-related inquiries, this fact should be communicated to the question-asker within two business days. *Id.*

[358] *About NCBE*, *supra* note 45.

[359] *Our Mission: What We Do*, STATE BAR OF CAL., http://www.calbar.ca.gov/About-Us/Our-Mission (last visited Sept. 4, 2021) [https://perma.cc/9475-Y2LV].

[360] *See, e.g.*, N.Y. CODE OF PRO. RESP. EC 8-2 (2007) (providing: "Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law."); s*ee also* N.Y. CODE OF PRO. RESP. CANON 8, EC 8-3 (2007) (presuming that "the fair administration of justice" is foundational and requires "the availability of competent lawyers" to ensure its existence); N.Y. CODE OF PRO. RESP. CANON 8, EC 8-5 (2007) (establishing guidance to ensure "the fair administration of justice").

reform conversations proceed, adopting the Model Policy offers an easy, cost-effective opportunity for the NCBE and the BOLEs to address the issue of menstrual equity and to show they are responsive to the needs of law graduates. Speedy reform will ensure that additional test cycles will not pass before change comes.

3. The Model Policy Supports Intersecting Movements to Diversify the Bar

The menstrual justice movement recognizes that being a menstruator often intersects with multiple other attributes of self-identity.[361] In the context of the bar exam, adopting policies that acknowledge menstruation is an important step; however, BOLE policies also need to reflect and recognize the ways in which menstruation intersects with issues of sex, gender, gender identity, reproduction, health, disability, race, and socio-economic class.[362] Recognizing (and destigmatizing) these intersections at the entry point into the profession creates a model for addressing related issues in the legal profession. For example, the apparent invisibility of menstruating test takers is analogous to other situations in our profession where biological needs are ignored, such as when courts and law practices provide neither the facilities nor the time for newly-parenting attorneys to express breast milk.[363]

Similarly, acknowledging the need for all-gender bathrooms for the bar exam to appropriately address menstruation signals a larger need to acknowledge the existence and increase the numbers of transgender, genderqueer/nonbinary, and intersex lawyers. Further, improving access to accommodations for menstruation — including menstruation-related disabilities — might help destigmatize and improve

361 *See* Johnson, *Menstrual Justice*, *supra* note 103, at 73-76.

362 *See* Johnson, *Asking the Menstruation Question*, *supra* note 129, at 158, 160 (citing Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1265 (1991)).

363 *See* Vivia Chen, *Warning: Breast-Feeding is Dangerous (to Your Career)*, LAW.COM (Nov. 13, 2018), https://www.law.com/americanlawyer/2018/11/13/warning-breastfeeding-is-dangerous-to-your-career/ [https://perma.cc/LY7D-U5PS] ("49 percent of the more than 770 women surveyed had concerns that breast-feeding at work could impact their career growth. Moreover, 47 percent of the breast-feeding working moms also said the need to pump has spurred them to consider a job or career change"); Kathryn Rubino, *Yes, You Can Be a Breastfeeding Mom and a Trial Attorney at the Same Time*, ABOVE THE L. (Aug. 8, 2018, 12:15 PM), https://abovethelaw.com/2018/08/yes-you-can-be-a-breastfeeding-mom-and-a-trial-attorney-at-the-same-time/ [https://perma.cc/K4MD-23N7] (discussing reserving a conference room at a courthouse for pumping, taking precautions so security does not misinterpret the breast pump, and acting to ensure the jury is not affected by a breastfeeding attorney/mother's need to leave courtroom).

communication, including transparency, about accommodations for disabled members of the bar more generally. In addition, should BOLEs voluntarily offer a genuine variety of menstrual products, so all menstruators have a safe and appropriate selection to meet their needs, it would send a message about countering period poverty and issues of economic class,[364] especially to those recent law school graduates who are already saddled with enormous debt.[365]

Finally, paying attention to the historic invisibility of all of these individuals and populations should serve as a vital reminder of our profession's responsibility to rectify the exclusion of people of color from visible, leadership positions in the bar, academy, government, firms, and other legal institutions.[366] Thus, adopting the Model Policy is one more way that the NCBE and the BOLEs can acknowledge the reality of who is and is not in the pipeline to practice — and take an important step toward truly diversifying the legal profession and removing obstacles in the way of meeting that goal.

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[364] *See* Johnson, *Asking the Menstruation Question*, *supra* note 129, at 160, 164-65.

[365] Melanie Hanson, *Average Law School Debt*, EDUCATIONDATA.ORG, https://educationdata.org/average-law-school-debt (last updated July 10, 2021) [https://perma.cc/ZDT7-JFD5] (Approximately seventy-four percent of law students graduate in debt and the average cumulative debt is $160,000).

[366] *See* Kelliann H. Payne, Erkang Ai & Christine Zimmerman, *Diversity Needs to Extend to Leadership in the Legal Profession*, LAW.COM (Feb. 28, 2020, 12:11 PM), https://www.law.com/thelegalintelligencer/2020/02/28/diversity-needs-to-extend-to-leadership-in-the-legal-profession/?slreturn=20210111101607 [https://perma.cc/HQD2-PWNJ] ("According to a recent National Association of Law Placement (NALP) survey, 45% of associates are women and 23% are minorities. But there is still work to do to increase diversity at the firm leadership level. A 2018 NALP survey found that only 19% of all equity partners are women, only 6.6% are racial/ethnic minorities, less than 3% are LGBTQ+, and less than 0.5% self-reported having a disability."); *see also* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/6S97-3TPE] ("4 percent of active attorneys identified as Black or African American in 2007 and 4 percent identified as Hispanic or Latino" per the National Lawyer Population Survey, rising slightly to 5 percent each by 2017); Meg McEvoy, *ANALYSIS: Black Workers Are Under-Represented in Legal Industry*, BLOOMBERG L. (June 11, 2020, 1:45 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-black-workers-are-under-represented-in-legal-industry [https://perma.cc/XA3T-SAQE] ("As of June 9, there were 140 sitting judges of African-American or mixed African-American race on Article III courts, out of 1,387 active judges, according to data from the Federal Judicial Center.").

4. The Model Policy Furthers the Menstrual Justice Movement

The social media movement of #bloodybarpocalypse brought the active menstrual equity[367] and menstrual justice[368] movements to the bar exam.[369] In recent years, advocates have fought for and succeeded in obtaining law and policy reform concerning menstruation, law, and society.[370] For instance, many states and the federal government have enacted laws to require free access to menstrual products for persons in carceral facilities.[371] Additionally, states and local jurisdictions have taken steps to provide free access to menstrual products in schools.[372]

[367] Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 206, at 343; BRINGING RESOURCES TO AID WOMEN'S SHELTERS & UNIVERSITY OF THE DISTRICT OF COLUMBIA DAVID A. CLARKE SCHOOL OF LAW LEGISLATION CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 4-9 (2018), http://bit.ly/BRAWS-BriefingReport [https://perma.cc/9FR8-K89C] [hereinafter BRAWS]; Weiss-Wolf, *supra* note 52.

[368] *See* Gomez & Karin, *supra* note 129; Johnson, *Asking the Menstruation Question*, *supra* note 129; Johnson, *Menstrual Justice*, *supra* note 103, at 5, 79; Michele Estrin Gilman, *Periods for Profit and the Rise of Menstrual Surveillance*, 41 COLUM. J. GENDER & L. 100, 102, 111-13 (2021) (expanding menstrual justice to include data feminism).

[369] *See, e.g.*, Cooper, Johnson & Karin, *Bar Exam Testing Conditions*, *supra* note 60 (extolling the efforts of those using #bloodybarpocalypse to draw attention to state bar examiner policies harming menstruators and describing related advocacy by MP and the Bar and others); Crawford & Waldman, *Tampons and Pads Should Be Allowed*, *supra* note 52 (identifying ways in which state bar examiners have not met the needs of menstruating test takers in the context of COVID-19); Johnson, Karin & Cooper, *Stop the Stigma*, *supra* note 16 (explaining how distrust of menstruators by bar examiners is similar to that same distrust in other contexts and must be eliminated wherever it occurs); Weiss-Wolf, *supra* note 52 (discussing advocacy under #bloodybarpocalypse and the importance of achieving menstrual equity in the bar exam and elsewhere).

[370] *See, e.g.*, Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 206, at 350, 354-55 (describing advocacy campaigns and new menstrual access laws in the District of Columbia, Maryland, and Virginia); Holly Seibold & Gianna Fienberg, *Free to Bleed: Virginia House Bill 83 and the Dignity of Menstruating Inmates*, 22 RICH. PUB. INT. L. REV. 69 (2019) (detailing a limited new law to improve access to menstrual products in Virginia jails); *Reproductive Justice Inside*, NARAL PRO-CHOICE MARYLAND, https://prochoicemd.org/reproductive-justice-inside/ (last visited Sept. 4, 2021) [https://perma.cc/EZJ4-6Q4P] (identifying their successful work on menstrual equity issues in Maryland's correctional facilities); *Issues*, PERIOD EQUITY, https://www.periodequity.org/issues (last visited Sept. 4, 2021) [https://perma.cc/SSV5-YZ4U] (mentioning ongoing campaigns and thirteen state laws that eliminated the tax on menstrual products; twenty-seven states continue to tax such products and others do not have sales tax or never taxed menstrual products).

[371] *See* Gomez & Karin, *supra* note 129, at 131-32; Johnson, *Menstrual Justice*, *supra* note 103, at 47-49.

[372] *See Testimony in Support of B23-0887, the Expanding Student Access to Period Products Act of 2020: Hearing on D.C. B23-0887 Before the Comm. of the Whole and the Comm. on Educ.,* 23d D.C. Council 2-3 (2020), http://bit.ly/PPinSchools-MK-GAA-

There is a national campaign afoot to eradicate the so-called "tampon tax," the sales and value-added tax placed on menstrual products by many states.[373] Further, plaintiffs are bringing lawsuits under the Constitution and antidiscrimination laws asserting that discrimination based on menstruation constitutes sex-based or disability-based discrimination.[374]

Situated within this larger movement to stop the societal taboo of menstruation and the resulting harms flowing from menstrual stigma is the BOLEs' treatment of menstruating test takers. As with other areas of society,[375] it is time for BOLEs to stop perpetuating menstrual injustice in the bar exam — mistreating and discriminating against menstruators — and to create inclusive, non-discriminatory, and accommodating policies, such as those contained in the Model Policy.

CONCLUSION

As with other movements to reform the bar exam and the legal profession, it is time for the NCBE and the BOLEs to stop stigmatizing menstruation and disadvantaging menstruating test takers. This Article

Testimony [https://perma.cc/7JHN-YBXN] (statement of Marcy L. Karin and Galina M. Abdel Aziz); Johnson, Waldman & Crawford, *supra* note 86, at 255-57; Weiss-Wolf, *supra* note 52; *see, e.g.*, Virginia Breen, *Queens Teens Get School Meal Hubs to Distribute Menstrual Products*, CITY (May 13, 2020), https://www.thecity.nyc/health/2020/5/13/21259528/queens-teens-get-school-meal-hubs-to-distribute-menstrual-products [https://perma.cc/8F7H-3ENG] (describing how two high school juniors convinced the Department of Education to distribute menstrual products at school food-distribution sites during the coronavirus crisis).

373 Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 206, at 1345-49 (describing efforts to enact, fund, and implement the tampon tax repeal in D.C.); Weiss-Wolf, *supra* note 52; *see, e.g.*, Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 266, at 439-40, 474-82.

374 Johnson, *Menstrual Justice*, *supra* note 103, at 28-45; *see, e.g.*, Marcy L. Karin, *Menstruation at Work*, slides from the University of Baltimore Applied Feminism and Privacy Conference (Apr. 22, 2021), https://bit.ly/Karin-2021-UBSlides [https://perma.cc/M3LQ-A3J3] (providing an overview of laws that address menstruation at work — including cases that have alleged menstrual discrimination and the failure to provide menstrual accommodations using existing sex, gender, and disability discrimination protections); Marcy L. Karin, Remarks at Periods and Workplace Policy, Colloquium on Scholarship in Employment and Labor Law (UNLV Boyd School of Law, Oct. 11, 2019) and Southern Clinical Conference (University of South Carolina School of Law, Oct. 20, 2018) (categorizing and describing this litigation) (on file with the authors).

375 *See* Johnson, *Menstrual Justice*, *supra* note 103, at 15-22; BRAWS, *supra* note 367, at 2-5. *See generally* PALGRAVE HANDBOOK, *supra* note 125 (containing seventy-two chapters that explore menstruation and the experiences of menstruators in multiple aspects of society around the word).

analyzes the problem of menstruation and the bar exam through recent empirical findings of test takers' experiences as well as state BOLE policies and practices. The Article also examines the problem through the lens of equal protection jurisprudence and state and local human rights antidiscrimination doctrines and determines that current policies and practices are likely unconstitutional and discriminatory.

The Model Policy proposed in this Article appropriately balances security and other concerns of the NCBE and the BOLEs with the five principles of Respect and Privacy, Fairness and Non-Discrimination, Promoting Health, Providing Accommodations, and Policy Transparency. In recommending that state BOLEs adopt the Model Policy, this Article integrates the menstrual justice movement with other intersectional movements to diversify the bar and promotes much-needed bar reform. By adopting the Model Policy, the NCBE and the BOLEs will take an important step toward menstrual justice, help stop the stigma against menstruators, and remove unnecessary barriers to the practice of law.