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Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice

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Introduction

“Houston, we have a problem.”² In 1970 an explosion on board the Apollo 13 spacecraft’s flight to the moon damaged the air filtration system, causing carbon monoxide to build up in the cabin.³ The astronauts on board would be dead in a few hours if the system could not be fixed or replaced.⁴ NASA’s mission control in Houston, Texas called for engineers, scientists, and technicians to work with a set of materials identical to those on the spacecraft to build a filtration system under extreme time pressure.⁵ The result may have been “ugly, inelegant, and far from perfect” (like some law students’ writing), but it saved the astronauts’ life.⁶ The Apollo 13 situation may be a dramatic example of problem solving, creativity, and completing a task under extreme time pressure with life or death consequences; however, lawyers also work in stressful environments, under time pressure, while juggling multiple tasks involving life, liberty, or millions of dollars.⁷ How do recent law school graduates perform when

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² See Teresa M. Amabile et al., *Creativity Under the Gun*, HARV. BUS. REV., Aug. 2002, at 52 <https://hbr.org/2002/08/creativity-under-the-gun> [<https://perma.cc/F9Q9-KWTV>].

³ See *id.* (providing background to real-life example of time-pressured situation).

⁴ See *id.*

⁵ See *id.*

⁶ See *id.* (discussing necessary creative thinking under time-pressured situation).

⁷ See Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63, 72-73 (2016) (providing study of lawyers and areas for improvement in legal education).

facing a time-sensitive task when the stakes are high, when they are accustomed from law school of having several weeks or more, with feedback along the way, to complete that type of assignment?

Preparing students for admission into the bar and “effective, ethical, and responsible participation” in the legal profession is the goal of legal education.⁸ Yet preparing students to pass the bar exam and teaching law students fundamental lawyering may be viewed as mutually exclusive, rather than symbiotic.⁹ This Article does not advocate simply teaching to the bar exam, but recognizes that the skills needed for the performance test portion of the bar are also the lawyering skills needed to successfully practice law.¹⁰ Thus, this Article offers a way to satisfy these dual goals and help students succeed on both the bar exam and in practice by incorporating performance tests or time-pressured writing into the law school curriculum.

Part I of the Article provides a brief history of the bar exam, including its incorporation of the Multistate Performance Test.¹¹ Part II addresses why a law school curriculum should include performance tests or time-pressured writing assessments.¹² Part III offers ways to incorporate these types of assessments throughout the law school curriculum. Part IV discusses

⁸ See *ABA Standards and Rules of Procedure for Approval of Law Schools* 15 (2017-2018) [hereinafter *ABA Standards & Rules*]. Standard 301(a) states: “law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” *Id.*; see also Sabrina DeFabritiis, *IL Is the New Bar Prep*, 51 CREIGHTON L. REV. 37, 39 (2017) (commenting on goal of legal education with ABA rules).

⁹ See DeFabritiis, *supra* note 8, at 39-40 (observing symbiotic relationship when teaching lawyer skills with bar exam success).

¹⁰ See Patricia D. White, *Essential Questions: What to Ask About the Bar Exam*, N.Y. ST. B.A. J. (2018), http://www.nysba.org/Journal/2018/Sep/Essential_Questions_What_to_Ask_About_the_Bar_Exam/ [<https://perma.cc/ZS9S-C8YQ>] (calling for greater uniformity to achieve fundamental legal education goals). Recognizing that, “[i]n these parlous times for our legal system and the rule of law, it is essential that our educational institutions, our licensing system, and our many means of delivering legal services and access to justice are all working together, rowing in the same direction as it were.” *Id.*

¹¹ See *infra* Part I.

¹² See *infra* Part II.

the benefits and challenges.¹³ Finally, Part V reviews ways in which scores on performance tests may inform law school curriculum and positively impact other assessments, including success on the bar exam and law school grades.¹⁴

I. History of the Bar Exam

Administered over two days; comprised of four, three-hour long segments; and generally including two hundred multiple-choice questions spanning seven subject matters; as many as two multistate performance tests and/or sixteen essays; the bar exam is a daunting reality for the majority of law school graduates.¹⁵ Self-proclaimed as an exam of minimal competency, the bar exam is intended to provide the public with assurances that those entrusted with a law license meet a minimum threshold.¹⁶ The exam is intended to “measure minimum competence for

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ See Emmeline Paulette Reeves, *Teaching to the Test: The Incorporation of Elements of Bar Exam Preparation in Legal Education*, 64 J. LEGAL EDUC. 645, 646 (2015) (accepting majority of law students sit for bar exam); Denise Riebe, *A Bar Review for Law Schools: Getting Students On Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 282 (2007) (noting regardless of effectiveness, bar exam remains reality for students); Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, 21 U. WISCONSIN L. SCH. F. GARGOYLE 1, 3-4 (1990), <http://gargoyle.law.wisc.edu/wp-uploads/2014/02/volume21issue1.pdf> [<https://perma.cc/5WCR-UBWT>] (identifying only state, Wisconsin, not requiring bar exam for in-state applicants); see also 2015 Law Graduate Employment Data, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO B. (Apr. 26, 2016), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_law_graduate_employment_data.authcheckdam.pdf [<https://perma.cc/U2A6-4PWK>] (reporting graduate data from 2015). In 2015, 39,984 students graduated law school; in that same year, and 39,955 first-time applicants sat for the July 2015 bar exam. See 2015 Law Graduate Employment Data, *supra*.

¹⁶ See Riebe, *supra* note 15, at 273 (explaining purpose of bar exam for consumer protection); Lorenzo A. Trujillo, *The Relationship Between Law School and The Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 74 (2007) (noting if bar exam tests too narrow, then public not protected from incompetent lawyers); see also *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975) (acknowledging bar exam tests minimal competency to practice). Both the essay and MBE portions of the bar exam are designed solely to assess the legal competence of bar examinees. See *Tyler*, 517 F.2d at 1102. While the passing score standing alone might have no significance, it represents the examiners’ considered judgment as to “minimal competence required to practice law,” the precise quality the examination attempts to measure. See *id.*

entry-level lawyers in a wide range of areas.”¹⁷ Despite this broad goal, the bar exam does not test, nor would it be realistic for it to test, all of the skills associated with the practice of law.¹⁸ In order to avoid the risk of narrowing the skills tested and thereby precluding applicants from sufficient opportunities to demonstrate their competence, the bar exam focuses on testing a broad base of legal knowledge and skills that are the foundation for success in legal practice.¹⁹

Critics of the bar exam argue that the exam fails to test the skills relevant to the successful practice of law, as well as the skills that effectively measure competence.²⁰ They argue that the exam focuses on memorization and that the artificial conditions do not represent the practice of law.²¹ Conversely, proponents of the bar exam believe that the exam properly tests minimal competency in terms of lawyering skills, tests general or broad rather than specific areas of law, and focuses on application rather than memorization.²² This dichotomy should

¹⁷ See Trujillo, *supra* note 16, at 74; see also Nat’l Conf. of Bar Exam’rs & Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements*, A.B.A. (Erica Moesher & Claire J. Guback eds., 2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf [<https://perma.cc/SJY5-MC8A>] [hereinafter *NCBE & ABA Guide*] (explaining purpose of MBE questions). The Code of Recommended Standards for Bar Examiners recommends that the selection of subjects for bar examination questions “should be upon the basic and fundamental subjects that are regularly taught in law schools.” See *NCBE & ABA Guide*, *supra* at ix.

¹⁸ See Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 442 (2004) (discussing testing competencies on bar exam); Riebe, *supra* note 15, at 281 (explaining not all lawyering skills tested on bar exam); Trujillo, *supra* note 16, at 85-86 (explaining examiners identified skills accurately tested in standardized tests and test those skills on bar exam); see also Tyler, 517 F.2d at 1102 (reasoning criticism on range of bar tested materials shows room for improvement, not elimination).

¹⁹ See Riebe, *supra* note 15, at 279 (listing fundamental skills essential to practice of law, all tested on bar exam); Trujillo, *supra* note 16, at 74 (noting competencies necessary for effective legal practice tested).

²⁰ See Trujillo, *supra* note 16, at 77-78 (noting bar exam ignores skills essential for career in law); see also *infra* notes 106-108, 116 and accompanying text (discussing assessment of student success and incorporation of MPT).

²¹ See *id.* at 78.

²² See *id.* at 85-86; see also *NCBE & ABA Guide*, *supra* note 17 (setting forth aspirational goals for guidance towards uniform practice of bar admission). The Code of Recommended Standards for Bar Examiners recognizes that the exam should test an applicant’s ability:

come as no surprise when we consider that we are discussing an exam whose written form is over 200 years old.²³

Presently, through the use of state-developed essay questions—the Multistate Bar Examination (MBE), the Multistate Professional Responsibility Examination (MPRE), the Multistate Performance Test (MPT), and the Multistate Essay Examination (MEE)—bar examiners have a variety of examination formats through which to assess an applicant’s competence to practice law.²⁴ Bar exam standards developed from a set of oral questions, administered and determined by a local court, to a professionally developed test on a national level.²⁵ In the Nineteenth Century, bar admission was mostly based on an oral exam,

[T]o identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues, and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory, or experience. Its purpose is to protect the public, not to limit the number of lawyers admitted to practice.

NCBE & ABA Guide, *supra* note 17, at ix.

²³ See Riebe, *supra* note 15, at 273 (noting bar exam dates back to mid-1800s); Robert M. Jarvis, *An Anecdotal History of The Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996) (setting forth history of bar exam from first administration in 1800s).

²⁴ See Marcia Kuechenmeister, *Admission To The Bar: We’ve Come a Long Way*, B. EXAMINER, at 33-36 (Feb. 1999) (explaining choices examiners have in constructing their state’s bar exam). Uniform Bar Examination (UBE) states use MBE, MPT, and MEE. See <http://www.ncbex.org/exams/ube/>. Non-UBE states, along with the MBE, can choose to use one or two MPTs, the MEE, as well as essays that test state specific law. See Trujillo, *supra* note 16, at 74 (analyzing different purpose of MBE, MEE, and MPT). The MBE measures an applicant’s ability to apply broad knowledge; the MEE measures depth of knowledge on a specific topic and the ability to synthesize that knowledge; the MPT measures practical skills; and the MPRE measures an applicant’s understanding of ethical and professional responsibilities. See *Tyler v. Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975) (acknowledging bar exam tests skills necessary for practice). States have a legitimate and substantial interest in excluding from the practice of law those persons who do not meet its standards of minimal competence. See *id.* The bar exam, consisting of multiple choice and essay questions, tests skills and knowledge which have a “logical, apparent relationship” to those necessary for the practice of law. See *id.*

²⁵ See Melli, *supra* note 15, at 3 (discussing history behind development of bar exam standards).

administered under the jurisdiction of the local court, without any guidelines.²⁶ In the 1880s, states began to create central boards of bar examiners with state-wide jurisdiction.²⁷ Within the decade, by 1889, twelve states had established state-wide boards, and by 1931 all states, except for Indiana, had such boards.²⁸

Massachusetts was the first state to move from an oral to a written exam.²⁹ The Massachusetts Court of Common Pleas required candidates who could not show three years of legal study to pass a written exam.³⁰ Shortly thereafter, several states began to experiment with a written bar exam.³¹ Early in the twentieth century, the American Bar Association (ABA), concerned with the existing low and inconsistent standards, began looking into a national structure to unify bar examiners.³² As a result, the National Conference of Bar Examiners (NCBE) was founded in 1931 to provide a national organization through which state boards of

²⁶ See *id.* (observing minimal standards for bar admission). “Prior to the mid-1800s, there were no written bar exams. Instead, the path to becoming a lawyer led hopefuls through ‘apprenticeships, self-directed reading, and oral examinations.’” See Lauren Schroeder, *The Bar Exam: Some History & Comparison*, U. HOUS. L. CTR. BLOG (July 28, 2010), <http://notabeneuh.blogspot.com/2010/07/bar-exam-some-history-comparison.html> [<https://perma.cc/C6YW-QJPS>].

²⁷ See Melli, *supra* note 15, at 3-4 (discussing gradual state move to centralized system).

²⁸ See *id.* at 4 (shifting to central board with state-wide jurisdiction).

²⁹ See Riebe, *supra* note 15, at 273 (noting Massachusetts started written bar exam in 1855); Jarvis, *supra* note 23 (discussing shift from oral to written bar); Melli, *supra* note 15 (discussing oral exams historically conducted before judge or admitted lawyers of court where admission sought).

³⁰ See Jarvis, *supra* note 23 (explaining structure of early bar exam); see also Riebe, *supra* note 15, at 273 (explaining no more diploma privilege). “In the 1920s, the ABA rejected the diploma privilege, stating that every candidate should be subject to an exam by a public authority.” See Riebe, *supra* note 15, at 273. This position has been consistently reaffirmed. See *id.* But see *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS. (Dec. 17, 2018), <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/26D8-TEE9>] (maintaining diploma privilege for admission to practice Law in Wisconsin). The University of Wisconsin Law School and Marquette University Law School certify their graduates’ legal competence under the diploma privilege and allow their graduates to practice in-state without sitting for bar exam. See *id.*

³¹ See Jarvis, *supra* note 23 (delineating national shift from oral to written bar).

³² See Melli, *supra* note 15, at 4-5 (explaining reasons for move to national standardized exam).

bar examiners could cooperate with each other, the law school community, and the organized bar.³³

Following its creation, the NCBE focused on helping states strengthen the quality of their bar exams.³⁴ To further the goal of creating “uniformity of objectives and practices in bar admission throughout the United States,” the ABA, NCBE, and the Association of American Law Schools, promulgated the Code of Recommended Standards for Bar Examiners.³⁵ The Code provides recommendations to state authorities in their execution of duties relating to admission to the bar.³⁶ Through these recommendations, the Code reflects one of the first instances where the purpose of the bar exam was expressly stated:

[to] test the applicant’s ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory or experience.³⁷

To date, the NCBE remains the principal national organization concerned with the quality of the bar exam and the standards for admission to the bar.³⁸

A. The Multistate Bar Exam

³³ See Jarvis, *supra* note 23, at 378 (discussing creation of NCBE); see also *NCBE & ABA Guide*, *supra* note 17, at vii (outlining inception of NCBE). The Code provides recommendations to state authorities in their execution of duties relating to admission to the bar. See *NCBE & ABA Guide*, *supra* note 17, at vii.

³⁴ See Melli, *supra* note 15, at 4-5 (commenting on NCBE contributions to bar exam process). State examiners were discouraged from using definition style questions. See *id.* Instead the NCBE promoted the use of hypothetical questions that required legal analysis rather than rote memorization. See *id.* at 4. This style of questions remains in use in the modern bar exam. See *id.*

³⁵ See *NCBE & ABA Guide*, *supra* note 17, at vii.

³⁶ See *id.* (reaffirming need for hypothetical questions requiring written answers).

³⁷ National Conference of Bar Examiners, *The Bar Examiners’ Handbook* 25 (1968).

³⁸ See Melli, *supra* note 15, at 3.

What is now known as the modern-day bar exam is less than fifty years old.³⁹ In 1972, following the evolution of an oral to written essay examination, the NCBE dramatically changed the bar exam, when, for the first time, it administered the MBE.⁴⁰ This change resulted, in part, from the growing number of applicants and in recognition that most other professions, including medicine, accounting, and engineering, require their members to meet minimum national standards, at least in part through multiple choice exams.⁴¹

The MBE, sometimes referred to as the anchor of the bar exam, is now administered in every state except for Louisiana.⁴² The MBE provides a uniform test, but allows the jurisdictions to retain control by setting their own passing grades.⁴³ The MBE is a six-hour, two-hundred multiple choice question exam with the stated purpose of assessing “the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.”⁴⁴ Most recently updated in February 2015, the MBE is comprised of seven subject areas including: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.⁴⁵ Applicants have approximately 1.8 minutes to complete

³⁹ See Jarvis, *supra* note 23, at 378 (discussing transition for oral state specific bar exams to national standardized exam); Melli *supra* note 15 (explaining creation of national standardized exam).

⁴⁰ See Melli, *supra* note 15 (recounting inception of multiple choice questions into bar exam).

⁴¹ See *id.* at 4 (identifying other professional standardized exams and noting ease in grading many multiple choice exams).

⁴² See Nat’l Conf. of Bar Exam’rs, *Jurisdictions Administering the MBE*, MULTISTATE B. EXAMINATION, <http://www.ncbex.org/exams/mbe/> [<https://perma.cc/YR9H-7L7P>] (highlighting jurisdictional information for MBE). The term anchor refers to the MBE’s psychometric value measuring competence with reliability and validity. See Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 573 (2015) (discussing validity of bar exam criticism).

⁴³ See Bratman, *supra* note 42, at 574.

⁴⁴ See *Jurisdictions Administering the MBE*, *supra* note 42. Presently, the MBE is administered in all states and territories except for Louisiana and Puerto Rico. See *id.*

⁴⁵ See Nat’l Conf. of Bar Exam’rs, *Preparing For The MBE*, MULTISTATE B. EXAMINATION, <http://www.ncbex.org/exams/mbe/preparing/> [<https://perma.cc/YB6Q-JGE7>] [hereinafter *NCBE MBE Article*] (introducing general areas of law tested on MBE).

each question. In addition to the MBE, a small minority of states administer their own local multiple choice questions.⁴⁶

B. The Multistate Professional Responsibility Exam

Less than ten years after the introduction of the MBE, the NCBE, in response to a desire by state bar examiners to test applicants' broad knowledge of ethics, introduced the MPRE.⁴⁷ The MPRE is a two-hour, sixty-question multiple-choice examination designed to measure an applicant's knowledge and understanding of established standards related to the professional conduct of lawyers.⁴⁸ While not administered as part of the bar exam, every jurisdiction except Maryland, Wisconsin, and Puerto Rico requires its applicants to pass the MPRE.⁴⁹

C. The Multistate Essay Exam

Despite the continuing evolution of the bar exam, essays have remained a principle component of the exam as they have served the examiners well in assessing an applicant's ability to analyze facts, reason logically, and apply principles of law.⁵⁰ As such, they remain a

⁴⁶ See generally Nat'l Conf. of Bar Exam'rs & Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements* (Judith A. Gundersen & Claire J. Guback eds., 2018), <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> [<https://perma.cc/7VVE-FG7C>] (outlining guide for recommended standards).

⁴⁷ See Melli, *supra* note 15 (explaining purpose for incorporating ethics component into national standardized exam).

⁴⁸ See Nat'l Conf. of Bar Exam'rs, *Jurisdictions Requiring the MPRE*, MULTISTATE PROF. RESP. EXAMINATION, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/W2XR-BLNX>] (explaining structure of MPRE).

⁴⁹ See *id.* In lieu of a passing score on the MPRE, Connecticut and New Jersey accept successful completion of a law school course on professional responsibility. See *id.* Conversely, in Massachusetts, Iowa, and Rhode Island, receiving a passing score on the MPRE is a prerequisite to sitting for the bar exam. See *id.*

⁵⁰ See *Chaney v. State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967) (holding state bar examiners had right to use essay examination as qualification standard). The court stated the essay examinations, as a qualification standard, may show that applicants have the "capacity to analyze general legal knowledge" and to apply such general legal knowledge as graduates of accredited law schools are expected to possess. See *id.*; see also Kuechenmeister, *supra* note 24, at 29 (explaining purpose of MEE). While the bar exam varies by jurisdiction, each tests the candidate's ability to write. See Kuechenmeister, *supra* note 24, at 29. Some states weigh the essays more heavily than multistate. See *id.*; see also Nat'l Conf. of Bar

significant component of the bar exam and are administered in all jurisdictions.⁵¹ While many states continue to test state specific laws, since 1988, states have also had the option to adopt the MEE in whole or in part.⁵² In recognition of the challenges state examiners faced in drafting good essay questions, the MEE was an attempt to improve the quality of the essay portion of the bar exam.⁵³ The NCBE has consistently discouraged states from administering exams focusing on mere memorization of the law.⁵⁴ Instead, it has promoted the use of written exams that use hypothetical fact patterns, test multiple interrelated legal problems, and require an analysis of law and fact.⁵⁵ The MEE offers states the opportunity to incorporate essays into their bar exam that have been vetted by two groups with expertise in the areas of law covered by the question.⁵⁶

The MEE consists of six thirty-minute questions covering twelve areas of law which vary from exam to exam; some questions may include issues in more than one area of law with some overlap as to the areas tested on the MBE.⁵⁷ Each essay question consists of a narrative

Exam'rs, *Instructions For Taking The MEE*, MUTLISTATE ESSAY EXAMINATION, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F25> (last visited Nov. 27, 2015) [hereinafter *MEE Instructions*] (identifying percentage of bar exam allocated to essays by each state).

⁵¹ See Kuechenmeister, *supra* note 24, at 29-30 (explaining structure of MEE); see also *Comprehensive Guide to Bar Admission Requirements*, *supra* note 46 (discussing states administer anywhere from three to sixteen essays in their bar exams).

⁵² See Kuechenmeister, *supra* note 24, at 29-30 (explaining options states have in structuring their essay portion of bar exam). States have flexibility in selecting from a set of seven MEEs offered by the NCBE for any one bar administration. See *id.*

⁵³ See Melli, *supra* note 15.

⁵⁴ See *id.* (explaining expectation demonstrated understanding of law rather than mere memorization).

⁵⁵ See *id.* (demonstrating structure allows applicants to show understanding of law and its application to facts).

⁵⁶ See Judith A. Gundersen, *MEE and MPT Test Development: A Walk Through From First Draft to Administration*, B. EXAMINER, 29 (June 2015) [hereinafter *Examiner June 2015*]

⁵⁷ *Id.* See also Kuechenmeister, *supra* note 24, at 29-30 (discussing substance of MEE); Nat'l Conf. of Bar Exam'rs, *Preparing For The MEE*, MULTISTATE ESSAY EXAMINATION, <http://www.ncbex.org/exams/mee/preparing/> [<https://perma.cc/5TME-UZRZ>] [hereinafter *Preparing for MEE*] (detailing areas tested on MEE). The article states that:

Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies),

description of a legal problem followed by one or more related questions.⁵⁸ The MEE requires the applicant to demonstrate an ability to communicate effectively in writing.⁵⁹ As defined by the examiners:

The purpose of the MEE, is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.⁶⁰

Bar exam essays are an exercise in critical reading.⁶¹ They test the quality and reasonableness of the fundamental skills necessary to think and write like a lawyer.⁶² This is evidenced in both the information provided by the NCBE as well as individual state boards.⁶³ The NCBE instructions for the MEE emphasize the importance of carefully reading the question.⁶⁴ An applicant's ability to reason and analyze is determined by showing an "understanding of the facts, a recognition of the issues included, a knowledge of the applicable

Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. Some questions may include issues in more than one area of law.

Preparing for MEE, supra.

⁵⁸ See Kuechenmeister, *supra* note 24, at 29-30 (discussing substance and structure of MEE).

⁵⁹ See *Examiner June 2015*; Nat'l Conf. of Bar Exam'rs, *Jurisdictions Administering The MEE*, MULTISTATE ESSAY EXAMINATION, <http://www.ncbex.org/exams/mee/> [<https://perma.cc/69YM-Y6HS>] [hereinafter *NCBE Administering MEE*] (explaining purpose of MEE in context of bar exam).

⁶⁰ See *NCBE Administering MEE, supra* note 59.

⁶¹ See *MEE Instructions, supra* note 50 (emphasizing carefully reading question).

⁶² See Derek Alphan et al., *Yes We Can, Pass the Bar. University of the District of Columbia, David A. Clarke School of Law Bar Passage Initiatives and Bar Pass Rates—From the Titanic to the Queen Mary!*, 14 U.D.C. L. REV. 9, 28 (2011) (commenting on dichotomy between law school and bar exam essay writing). An applicant is tested on her judgment in organizing and identifying issues, recognizing and analyzing key facts, and applying relevant legal principle to those facts. See *id.*

⁶³ See DeFabritiis, *supra* note 8, at 39.

⁶⁴ See *MEE Instructions, supra* note 50 (addressing need to critically read question and not make assumptions).

principles of law, and reasoning by which they arrive at their conclusion.”⁶⁵ Less value is given to the conclusion than to how the examinee arrived to the conclusion.⁶⁶ The writing must be clear, concise, and complete.⁶⁷ Applicants are discouraged from assuming facts that do not appear in the question and from volunteering irrelevant or immaterial information.⁶⁸

D. The Multistate Performance Test

Most recently, the NCBE developed the MPT using, in part, the list of fundamental skills identified in the MacCrate Report.⁶⁹ The MPT, first administered in 1997, was designed to measure an applicant’s ability to use fundamental lawyering skills by requiring the applicant to complete a task that a new lawyer should be able to perform.⁷⁰ Administered in all UBE states and the majority of other jurisdictions, the MPT generally constitutes 20% of an applicant’s overall score on the bar exam.⁷¹

The MPT is comprised of two ninety-minute tasks based on simulated case files divided into two sections, a File and a Library.⁷² Unlike the MBE, MPRE, and MEE, the MPT is an open book exam. All of the law and facts required to answer the questions are provided.⁷³ In

⁶⁵ *Id.* (setting forth what an applicant must display in their essays).

⁶⁶ *See id.* (deemphasizing conclusion reached by applicant).

⁶⁷ *See id.* (emphasizing need for organization).

⁶⁸ *See id.* (encouraging applicants to frame their answer in accordance to facts presented).

⁶⁹ *See* Kuechenmeister, *supra* note 24, at 24 (examining characteristics of MBE, MEE, and MPT and their holistic use to strengthen validity of bar exam).

⁷⁰ *See id.* at 30-33 (discussing purpose of MPT); *see also* Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”—“Do the Work!”*, 40 CAL. W. L. REV. 321, 337 (2004) (discussing bar examiner concerns). The California Bar Examiners had previously used state specific performance tests that were each three hours long. *See* Day, *supra*. The NCBE modeled the MPT after California’s Performance test but cut the time in half. *See id.*

⁷¹ *See Comprehensive Guide to Bar Admission Requirements*, *supra* note 46.

⁷² *See* Nat’l Conf. of Bar Exam’rs, *Preparing for MPT*, MULTISTATE PERFORMANCE TEST, <http://www.ncbex.org/exams/mpt/preparing/> [<https://perma.cc/2SYN-CRNM>] [hereinafter *Preparing for MPT*] (outlining testing structure).

⁷³ *See id.*

that respect, the MPT is unlike the real world where new lawyers are often expected to complete extensive legal research before writing a memorandum. To successfully complete the MPT, an applicant must, in ninety minutes or less, sort through detailed factual materials, analyze various sources of law, apply the material facts to the applicable law to resolve a client problem, and communicate the answer effectively in writing.⁷⁴ In most jurisdictions, including all UBE jurisdictions, the applicant must then do this all over again for a second MPT.⁷⁵

The specific assignment an applicant must complete is provided in memorandum format, often referred to as the Task Memo, and sent from a supervising attorney, as is common in practice.⁷⁶ The Task Memo includes instructions that inform the applicant as to how to complete the assignment.⁷⁷ The File also includes all of the facts necessary to complete the assignment.⁷⁸ The facts are generally comprised of source documents such as transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes.⁷⁹ As such, they are distinguishable from narrative fact patterns often used in law school and bar essays.⁸⁰ Relevant as well as irrelevant facts are included.⁸¹ Facts are sometimes ambiguous, incomplete, or even conflicting.⁸² As in practice, a client's or a supervising attorney's version of events may be

⁷⁴ See Kuechenmeister, *supra* note 24, at 31 (introducing process applicant must use to complete MPT).

⁷⁵ See *Preparing for MPT*, *supra* note 72 (detailing MPT consists of two ninety-minute segments).

⁷⁶ See Kuechenmeister, *supra* note 24, at 31 (explaining structure of MPT).

⁷⁷ See *Preparing for MPT*, *supra* note 72.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See DeFabritiis, *supra* note 8, at 67.

⁸¹ See *Preparing for MPT*, *supra* note 72.

⁸² See *id.*

incomplete or unreliable.⁸³ Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.⁸⁴

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task.⁸⁵ The examinees are expressly instructed that the binding law, from the state of Franklin in the Fifteenth Circuit, is fictitious and they should not presume they have previously read it.⁸⁶ The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.⁸⁷ The Library materials provide all of the substantive information to complete the task.

The MPT is not a test of substantive knowledge, rather, it is designed to evaluate certain fundamental skills new lawyers are expected to demonstrate regardless of the area of law in which the skills are applied.⁸⁸ The examiners expressly identify six skills necessary for the MPT.⁸⁹ They include the ability to:

(1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.⁹⁰

⁸³ See SARA J. BERMAN, BAR EXAM MPT PREPARATION & EXPERIENTIAL LEARNING FOR LAW STUDENTS 26-27 (2017) (discussing importance of performance testing throughout law school).

⁸⁴ See *Preparing for MPT*, *supra* note 72.

⁸⁵ See *id.*

⁸⁶ See *Multistate Performance Test Directions*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F191> (last visited Jan. 25, 2019).

⁸⁷ See *Preparing for MPT*, *supra* note 72.

⁸⁸ See Nat'l Conf. of Bar Exam'rs, *Jurisdictions Administering the MPT*, MULTISTATE PERFORMANCE TEST, <http://www.ncbex.org/exams/mpt/> [<https://perma.cc/QE2H-8DNZ>] (explaining substance and purpose of MPT).

⁸⁹ See *Preparing for MPT*, *supra* note 72.

⁹⁰ See Nat'l Conf. of Bar Exam'rs, *MPT Skills Tested*, MULTISTATE PERFORMANCE TEST, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F54> (last visited Jan. 25, 2019).

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks.⁹¹ For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.⁹²

In completing these tasks, the examiners may ask the applicant to act in various roles, including a junior associate at a private law firm, a government attorney working as a prosecutor or public defender, counsel for a non-profit organization, a mediator, or a clerk. The instructions may direct applicants to objectively analyze issues, advise or counsel clients, persuade a judge or jury, and draft or edit documents.⁹³ Just as in practice, on the MPT, applicants must pay attention to their client's needs.

Success on the MPT relies heavily on the applicants' ability to read, organize, and write a comprehensive answer to the question asked. At first glance, this can appear to be an overwhelming and insurmountable task to complete in ninety minutes or less.⁹⁴ There is a lot of material to read, synthesize, and comprehensively analyze; therefore, it is essential to master a systematic and efficient approach that an examinee can execute in routine form on the bar exam. Applicants preparing for the MPT are often encouraged to spend the first forty-five minutes reading and outlining and the last forty-five minutes producing a comprehensive answer.⁹⁵ Most applicants do well with this time allocation, but in truth this split is merely a guideline. Some

⁹¹ See *Preparing for MPT*, *supra* note 89.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See generally Suzanne Darrow-Kleinhaus, *Incorporating Bar Passage Strategies into Routine Teaching Practices*, 37 GONZ. L. REV. 17 (2001/02) (discussing MPT).

⁹⁵ See Nat'l Conf. of Bar Exam'rs, *supra* note 90.

applicants may be slow readers but fast typists (or hand writers), so they may need to spend more than forty-five minutes making their way through the Library and File, but will require less time to type their answers.⁹⁶ Others may be fast readers but slow typists.⁹⁷ Only through practice will applicants be able to adjust their time in recognition of their strengths and weaknesses.⁹⁸

Critics of the performance test argue that the artificial time constraints make them unfair and unrealistic, placing too much emphasis on finishing and not enough on the production of quality work.⁹⁹ While it is true that the practice of law does not obligate attorneys to produce a polished product in ninety minutes, equally true is that attorneys in today's fast-paced society must react quickly to client demands.¹⁰⁰ Fueled by the instant gratification of email and text, client and counsel alike are becoming more accustomed to immediate answers thereby making the MPT and other forms of time-pressured writing realistic and useful learning tools.¹⁰¹

II. The Need to Incorporate Time-Pressured Writing in Law School

One month. Two weeks. A single day. Three hours. These are common assignment deadlines in law school, yet they do not reflect realistic time constraints in practice.¹⁰² Time is a

⁹⁶ See BERMAN, *supra* note 83, at 21.

⁹⁷ *Id.*

⁹⁸ See Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, 65 B. EXAMINER 13, 14 (1996) (finding students improve their ability to pass performance test by doing more of them).

⁹⁹ See BERMAN, *supra* note 83, at 22.

¹⁰⁰ See Sinsheimer & Herring, *supra* note 7, at 72-73; Dyane O'Leary, *Legal Writing Matters: Hurry Up & Write*, SUFFOLK U. L. SCH. (May 24, 2017), http://theroadto1l.org/legal_writing_matters/legal-writing-matters-hurry-up-write/ [<https://perma.cc/B4MW-6Y5E>] (listing timing of deadlines in practice including ASAP, days, hours, or even thirty minutes).

¹⁰¹ See Sinsheimer & Herring, *supra* note 7, at 72-73.

¹⁰² See *id.*; Trujillo, *supra* note 16, at 77-78 (stating timed-essays helps bar passage, however, bar exams ignore many skills essential to practicing law).

luxury that lawyers often do not have.¹⁰³ To ensure bar and practice readiness, law schools should revisit and improve traditional curriculum to incorporate time-pressured writing required on an MPT. Take-home exams or open book exams do not replicate the bar exam or the ability to perform at a high level under stressful time pressures.¹⁰⁴ The need to prepare students for the bar as well as practice may be even more relevant today, when law schools face declining bar passage rates, a competitive job market, and a need to produce practice-ready graduates.¹⁰⁵

A. Bar Readiness

This Article does not address whether the bar exam is the best measure of a lawyer's ability to successfully practice law, as much has already been written criticizing the bar exam.¹⁰⁶ While law schools may not want to “teach to the test,”¹⁰⁷ passing the bar is a reality for the majority of students upon graduation from law school.¹⁰⁸

¹⁰³ See Sinsheimer & Herring, *supra* note 7, at 72-73; see also Trujillo, *supra* note 16, at 77-78 (emphasizing necessary skills for lawyering); O’Leary, *supra* note 100 (emphasizing time management and organizational skills).

¹⁰⁴ See Day, *supra* note 70, at 337.

¹⁰⁵ See DeFabritiis, *supra* note 8, at 69 (stating low undergraduate GPA and low LSAT scores can indicate low bar scores); see also Alphran et al., *supra* note 62, at 14 (expressing concern for declining bar passaged rates). See generally Sally Kane, *Top Legal Skills, Competitive and Attractive Legal Skills for Job Seekers*, THE BALANCE CAREERS (Aug. 27, 2018) <https://www.thebalancecareers.com/top-ten-legal-skills-2164595> [<https://perma.cc/N4Y7-Y4G6>] (listing skills employers look for in legal position candidates).

¹⁰⁶ See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 349 (2003) (labeling bar exam “misguided”); John F. Murphy, *Teaching Remedial Problem-Solving Skills to a Law School’s Underperforming Students*, 16 NEV. L.J. 173, 177 (2015) (addressing how to help bottom quarter of class succeed); Trujillo, *supra* note 16, at 73 (discussing hurdle for lawyers to take bar exam and to calm public fear); White, *supra* note 10 (questioning whether bar exam tests minimum competencies critical to current and evolving law practice); see also *supra* Part II (calling for need to implement more time-pressure writing scenarios into legal education).

¹⁰⁷ See Reeves, *supra* note 15, at 645.

¹⁰⁸ See Amabile et al., *supra* note 2; Riebe, *supra* note 15, at 282 (stating bar exam remains reality for students); see also DeFabritiis, *supra* note 8, at 38.

Declining bar passage rates is a nightmare, and in some cases a reality, of law school deans and a cause of increased anxiety for law students.¹⁰⁹ Law schools must satisfy ABA Standard 316¹¹⁰ on bar passage that requires law schools to meet minimum bar passage rates for their graduates.¹¹¹ After spending three or four years in law school, while paying expensive tuition each year, students and law schools are often surprised when students may still be unprepared and unsuccessful on the bar exam.¹¹² While numerous bar exam courses are available,¹¹³ one course at the end of law school may not be enough if students have not previously experienced time-pressured writing similar to the MPT during their law school education.

¹⁰⁹ See Alphan et al., *supra* note 62, at 14; Day, *supra* note 70, at 322 (stating after peaking in 1994, bar pass rates declined); Trujillo, *supra* note 16, at 69 (discussing national concerns regarding bar exam).

¹¹⁰ See *ABA Standards & Rules*, *supra* note 8, at 24-25 (covering Standard 316). ABA Standard 316, in pertinent part, requires law schools to demonstrate that 75% of graduates from the last five years who sat for the bar passed, or at least that during three of those calendar years 75% of graduates who sat for the bar passed. See *id.* A school is also in compliance if during three or more of the last five years, “the school’s annual first-time bar passage rate in the jurisdiction reported by the school is no more than 15 points below the average first time bar passage rate for graduates of ABA approved law schools taking the bar exam in these same jurisdictions.” See *id.*

¹¹¹ See *id.* (covering Standard 316 on bar passage rates); see also DeFabritiis, *supra* note 8, at 39 (stating law schools must better prepare their students for bar exams). See generally Linda Sheryl Greene, *Law Schools Need to Better Prepare Their Students*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/law-schools-need-to-better-prepare-their-students> [<https://perma.cc/8XGW-Y65D>] (stating law schools should examine circumstances preventing students from passing and address these issues fast). See *infra* Part IV (discussing benefits and challenges).

¹¹² See DeFabritiis, *supra* note 8, at 39 (agreeing law schools must better prepare their students); Greene, *supra* note 111 (discussing ABA requirements to prepare students for bar exam); see also White, *supra* note 10 (stating Commission on Future of Legal Education’s questioning of educational impact on practice). The Commission on Future of Legal Education states:

[M]isalignment between our institutions, licensing practices, and the practical realities of the delivery of legal services in the 21st century might be causing us to be less effective than we ought to be at achieving the fundamental goals we all share as stewards of our legal system and the rule of law.

See White, *supra*.

¹¹³ See WANDA M. TEMM, *CLEARING THE LAST HURDLE, MAPPING SUCCESS ON THE BAR EXAM* (2015); see also DENISE RIEBE & MICHAEL HUNTER SCHWARTZ, *PASS THE BAR* (2005).

While the MPT is similar to assessments in legal writing courses in law school, the time pressure on an MPT is much more intense. For example, the MPT is similar to a closed universe assignment in a legal writing course in the first year of law school, where students are not required to do any research, and are provided the facts of a client's case and the law.¹¹⁴ Similarly, an MPT provides bar exam applicants with a Library and File, but applicants have only ninety minutes to complete an MPT.¹¹⁵ The MPT tests skills taught and assessed in typical legal writing courses: problem solving, factual analysis, legal analysis, communication skills, reading comprehension, organization, time management, and following directions.¹¹⁶ The MPT is different than students' experience working on a legal memorandum in their legal writing course, however, where students may have been given the opportunity to submit and receive feedback on multiple drafts over a semester or several weeks. In addition to better preparing students for the bar exam, the incorporation of an MPT time-pressured writing assessment in a law school curriculum can help teach them critical lawyering skills introduced in a law school's legal writing course.

B. Practice Readiness

While numerous complaints exist regarding the effectiveness of the bar exam or law school to measure practice readiness or success in practice, law schools should assess whether the type of assessments in law school align with the competencies students need to pass the bar

¹¹⁴ Judith Rosenbaum, *Putting the Puzzle Together, Choice to Make When Creating a Closed-Universe Memorandum Assignment*, 17 PERSPS. 11 (Fall 2008); see also *supra* Part I (discussing MPT).

¹¹⁵ See *supra* Part I (discussing MPT); see also *Preparing for MPT*, *supra* note 72.

¹¹⁶ See *supra* Part I (discussing MPT); see also *Preparing for MPT*, *supra* note 72. The skills tested on the MPT are derived from an in-depth study conducted by an ABA Task Force. See E. Eugene Clark, *Legal Education and Professional Development—An Education Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 4 LEGAL EDUC. REV. 201, 201-02 (1993).

and practice.¹¹⁷ In addition to developing students' understanding of the theoretical foundation of the law, law schools need to incorporate assessment to provide law students with a realistic understanding of the legal profession.¹¹⁸ To prepare law students for the current practice of law, law schools should reflect on whether the time constraints for time-pressured writing in law school assessments reflect the realities of the legal profession on a daily basis.¹¹⁹ Incorporating MPT assessments into the law school curriculum can help make connections between academia and practice more explicit.¹²⁰

In law school, students are often assessed in doctrinal classes by an exam at the midterm or end of the semester, consisting of essays and/or multiple choice.¹²¹ Critics of these assessments note that they do not reflect the type of writing lawyers do¹²² – lawyers do not practice law by memorizing the law and applying it to a fact pattern on an essay or multiple-choice questions like the bar and law school exams require. Indeed, a client does not come into a lawyer's office and pose a multiple-choice question or hypothetical.

¹¹⁷ See *ABA Standards & Rules*, *supra* note 8, at 15-16 (discussing Standards 301 and 302 as well as aligning assessments with goals and objectives). Criticism of the bar exam includes complaints that the bar exam does not test the skills that lawyers need to practice. See Riebe, *supra* note 15, at 282; see also Andrea Anne Curcio et al., *How to Build a Better Bar Exam*, N.Y. ST. BAR ASS'N. J. 37, 37-41 (2018) (criticizing multiple-choice question portion for assessing legal knowledge and analysis in artificial, unrealistic context); DeFabritiis, *supra* note 8, at 50 (critics argue bar exam fails to test skills relevant to successful practice of law); Trujillo, *supra* note 16, at 77-78 (noting bar exam ignores skills essential for career in law). But see Day, *supra* note 70, at 322 (concluding modern bar exam provides fair assessment).

¹¹⁸ See Sinsheimer & Herring, *supra* note 7, at 125.

¹¹⁹ See *id.*

¹²⁰ See Bruce Ching, *Nonlegal Analogies in the LRW Classroom*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 26, 26-29 (1999).

¹²¹ See Stephanie Roberts Hartung & Shailini Jandial George, *Promoting In-Depth Analysis: A Three-Part Approach to Teaching Analogical Reasoning to Novice Legal Writers*, 39 CUMB. L. REV. 685, 697-698 (2008) (discussing student assignments including writing analogy-based arguments and application of analogical reasoning).

¹²² See Sinsheimer & Herring, *supra* note 7, at 64-65.

The MPT on the bar exams tests the fundamental lawyering skills that lawyers use on a daily basis.¹²³ Instead of testing the memorization of legal rules, which is unrealistic in practice, the MPT tests lawyering competencies relevant to practice, including reading, analyzing, and supporting analysis with the utilization of effective legal sources.¹²⁴ Perhaps the MPT is the best measure of the skills and competencies required for effective real-world law practice and the most realistic when compared to the MBE and essay components of the bar exam.¹²⁵ Thus, incorporating MPT assessments in law school not only prepares students for the bar exam, but also helps them become more practice ready by increasing their understanding of the competencies necessary to successfully practice law and the realistic time constraints and pressures.¹²⁶

III. Incorporating Time-Pressured Writing in a Law School Curriculum

In this part of the Article, we suggest several ways to incorporate MPT time-pressured writing assessments throughout a law school's curriculum. To be most effective, these assessments should be offered to students in each year of their legal education.¹²⁷ Instead of relegating the teaching of MPT to bar exam or academic success programs, all faculty should

¹²³ See *Jurisdictions Administering the MPT*, *supra* note 88; see also DeFabritiis, *supra* note 8, at 52 (explaining history and purpose of MPT).

¹²⁴ See Curcio et al., *supra* note 117, at 37-41.

¹²⁵ See Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747, 751 (2001); *The Learning Curve*, PUBLICATION OF AALS SEC. ON ACAD. SUPPORT (Nancy Paine Sabol ed., 2016), <http://lawschoolasp.org/docs/LearningCurve-Winter-2016.pdf> [<https://perma.cc/BHL7-2LXA>] (discussing using MPT to teach rule-based and analogical legal reasoning and reading skills); see also Day, *supra* note 70, at 337 (reporting high degree of reliability 0.87 to 0.90).

¹²⁶ See Murphy, *supra* note 106, at 181 (recommending practicing with MPT problems in law school to assess and develop lawyering skills); see also Glen, *supra* note 106, at 379 (stating bar exam creates disincentive to teach lawyering skills resulting in disservice to law practice).

¹²⁷ See DeFabritiis, *supra* note 8, at 38 (claiming skills obtained in first-year legal-writing course lay foundation for success on bar exam).

commit to incorporating MPT assessments across the curriculum each year of law school.¹²⁸ Students need this continuous exposure throughout law school to enhance their readiness for the bar and practice.¹²⁹ The silo approach sends the wrong message that these lawyering skills are separate and segregated from their other courses.¹³⁰ Although they should, students may not take them as seriously as they do doctrinal courses, perhaps due to status issues of faculty teaching skills at some schools.¹³¹ While none of the suggested approaches discussed in this section of the Article requires major revisions to the curriculum, they do require a commitment by a law school and their faculty to better prepare students for the bar and practice.

A. Bar Exam and Academic Support Classes

At orientation, law students should be made aware of the type of substance and skills needed to succeed on the bar exam and practice so they can understand its importance on their future and plan accordingly.¹³² Academic support classes are often part of a law student's orientation courses. Introducing an MPT during an academic support orientation class and connecting it to the bar exam as well as their development throughout law school courses of competencies necessary to successfully practice, will give students the context they need to succeed.

¹²⁸ See Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, U. ARK. LITTLE ROCK L. REV. (forthcoming 2019).

¹²⁹ See DeFabritiis, *supra* note 8, at 52 (explaining history and purpose of MPT test); *Jurisdictions Administering the MPT*, *supra* note 88; see also Kuechenmeister, *supra* note 24, at 31.

¹³⁰ See EDWARDS, *supra* note 130; Hartung & George, *supra* note 121, at 697-98 (discussing student application of analogical reasoning and constructive comments for improvement).

¹³¹ See EDWARDS, *supra* note 130; see also DeFabritiis, *supra* note 8, at 38 (claiming skills obtained in first-year legal-writing course lay foundation for success on bar exam); Hartung & George, *supra* note 121, at 697-98 (discussing pitfalls in students' analytical writing).

¹³² See DeFabritiis, *supra* note 8, at 66.; cf. White, *supra* note 10 (questioning required, expensive commercial bar prep courses not all can afford and replace doctrinal courses).

In addition, during the fall and/or spring semesters, some schools offer bar exam or academic support courses that focus on the MPT, discussing and reviewing MPT exams, then doing simulations in class and going over the exam afterwards.¹³³ Even if not part of a required course, academic support faculty or bar exam faculty could offer voluntary MPT simulations on a monthly or weekly basis, inviting students to take an MPT under exam-like conditions and then discuss a model answer, post or distribute a model answer, do a peer review of the exam, post or distribute a common issues/common problem handout, or if logistically possible, offer students individual feedback. Including MPT in bar exam or academic support courses alone, however, may not reach all students, depending on how those courses are structured, whether they are optional or mandatory, and which students take them. It could also stigmatize students if it is required or only offered to at-risk students.

B. Capstone Exam

Performance tests can be incorporated as early as the first year of law school “to examine students’ ability to evaluate and create because it is a closed universe examination that does not require students to have any outside substantive knowledge.”¹³⁴ Incorporating a capstone in a required first-year course also captures all students. A capstone exam, however, can be an effective way to incorporate an MPT in any course. Although the example discussed in this section involves using a capstone in a legal writing course, this type of assessment could be

¹³³ See *The Learning Curve*, *supra* note 125; Kathy Swedlow, Cooley Law School, Out of the Box Ideas, Stetson Law School (designing a Law Practice course to develop skills tested on MPT, including five MPTs); Professor Jolly-Ryan Chase College of Law-Northern Kentucky University (email on file with author) (devoting three classes to MPT). Professor Jolly first introduces instructions and strategies with short practice test, holds a second class for students to take a modified MPT, and a final class last to review MPT answers.

¹³⁴ See Renee Nicole Allen & Alicia Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 33 (2017) (discussing MPT design and evaluation of problem-solving skills).

offered in any course, at the conclusion of the course, at a midterm point, or at the conclusion of a unit or section of the course as a formative or summative assessment.¹³⁵

The Legal Practice Skills (LPS) faculty at Suffolk University Law School (Suffolk) incorporated a performance test for the first time in the spring 2017 semester, before Massachusetts adopted the UBE that includes a ninety-minute MPT component.¹³⁶ Modeled after the MPT, all first-year law students took a performance test called a capstone exam at the end of their spring semester. The capstone counted as a small portion of students' final grade and thus, functioned as a low-stakes formative assessment.¹³⁷ It was called a capstone as it represented a culmination of the skills students had been taught in the course.¹³⁸ Students were assessed on skills they learned in the first-year LPS course, to test how well students could complete an everyday lawyering task under time pressure.¹³⁹ It offered a "holistic conclusion to their first year legal writing and research course."¹⁴⁰

¹³⁵ See *ABA Standards & Rules*, *supra* note 8; see also Christopher W. Holiman, *Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, 58 HOW. L.J. 195, 232 (2014) (noting how students need multiple assessments to help them succeed); Reeves, *supra* note 15, at 647-48 (explaining increased use of formative assessments creates additional opportunities for students to receive live feedback).

¹³⁶ See Sabrina DeFabritiis & Kathleen Elliott Vinson, *How Legal Writing Matters: Preparing Students for the Bar Exam*, SUFFOLK U. L. SCH. (July 29, 2015); Sabrina DeFabritiis, *Legal Writing Matters: How Legal Writing Prepares Students for the Bar Exam*, SUFFOLK U. L. SCH. (Apr. 26, 2017). Massachusetts recently adopted the UBE; the first administration of the UBE in Massachusetts, including the MPT, was administered in July 2018. "The UBE consists of 200 multiple-choice questions; six 30-minute essay questions covering a wide range of doctrinal areas, and two 'performance' test questions in which examinees have 90 minutes to read a case file and write a client letter, memorandum, brief or other document." See Curcio et al., *supra* note 117, at 37.

¹³⁷ The capstone at Suffolk was worth 15% in 2017 and 10% in 2018. Students should have opportunities to receive live feedback. See Curcio et al., *supra* note 117, at 37-41; Reeves, *supra* note 15, at 647-48.

¹³⁸ The idea for this Article came from the incorporation of a capstone exam at the conclusion of the LPS course this past spring, to help students prepare for legal practice and the bar exam.

¹³⁹ See Kathleen Elliott Vinson, *Legal Practice Skills Student Handbook*, SUFFOLK U. L. SCH. (2018) https://www.suffolk.edu/-/media/suffolk/documents/law/academics/lps/lps-handbook-2018-to-2019_pdftxt.pdf [<https://perma.cc/DW4E-A5QT>] (identifying Course Objectives, Learning Outcomes, and Assessments). See generally DeFabritiis, *supra* note 136.

¹⁴⁰ See *id.*

While the capstone was modeled after the MPT, there were some differences. Like the MPT, LPS students were given a File (containing the facts), a Library (containing the law), and instructions on how to complete the task. The capstone was based on a real MPT question but was simplified, asking students to address one issue instead of multiple issues, and the Library consisting of legal sources was condensed as well.¹⁴¹ Students were asked to write an argument section of a memorandum.¹⁴² The most common MPT task requires students to write an objective or persuasive memo, although an MPT question can require the completion of any typical task of a lawyer, such as drafting a contract, will, letter, etc.¹⁴³ Like an MPT, facts on the capstone were culled from a variety of documents in the File, such as a transcript, reports, or notes, and a memo from a supervisor. Students had to determine relevant facts and discard the irrelevant. The instructions were one page.¹⁴⁴ Students were advised to review the instructions for what they were asked to do and what they were expressly told not to do. Students had sixty minutes to draft a portion of a memorandum instead of the ninety minutes given on an MPT.¹⁴⁵

Prior to the capstone exam, a review lecture and a simulated capstone were offered to all students. Suffolk's Director of Bar Program and Initiatives gave the review lecture. During the lecture, students were provided context for the capstone through an explanation of the similarities and differences between the MPT and capstone. Instructions for the capstone were also distributed. Then, strategies for taking the capstone were discussed. At the end of the

¹⁴¹ The capstone in 2017 was a criminal issue and the capstone in 2018 was a civil issue, one statute or rule and a few one to two-page cases.

¹⁴² In the following year, LPS students were asked to write a discussion section of an objective memo.

¹⁴³ See *supra* Part I.D (discussing MPT); see also DeFabritiis, *supra* note 8, at 52 (explaining history and purpose of MPT test); *Jurisdictions Administering the MPT*, *supra* note 88 (providing states using MPT).

¹⁴⁴ In the spring of 2018, we gave students the one-page instructions before the exam so they could review them and use the time on the exam to read the Case File and Library.

¹⁴⁵ See DeFabritiis, *supra* note 136.

review students were also given an opportunity to ask questions. The review lecture and the PowerPoint used were recorded so students could watch it again at their convenience.¹⁴⁶

During their next LPS class, students were given a practice capstone exam simulation and time to outline the answer during class. Although they did not fully write out the answer, they experienced the time pressure and saw a capstone exam prior to taking it. Then, at the end of class, LPS professors outlined a model answer.

Students then took the capstone exam under exam conditions like they would take any other exam. Proctors monitored the exam and students who receive accommodations on exams also received them for the capstone exam. Faculty graded the students' exams like a typical exam.

A capstone could be done during class time, outside of class, or during the exam period.¹⁴⁷ The use of an MPT in first-year legal writing classes range from students taking one or more graded or ungraded actual MPTs or simplified MPTs, in the middle or end of the fall semester¹⁴⁸, or at the beginning of the spring semester; or as a capstone at the end¹⁴⁹. The goal varies, from bar preparation to a diagnostic of what students remember from one semester to the

¹⁴⁶ See Peter Sankoff, *Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (for Professors and Students)*, 51 ALBERTA L. REV. 891, 900 (stating professors find recording lectures both easy and intuitive).

¹⁴⁷ See *supra* note 42 and accompanying text (discussing ways MPT is used in ASP); responses to query on LWI list serve on file with author.

¹⁴⁸ *Id.* At Ava Maria they do a capstone at the end of the fall semester and find many students struggle with the time limitation. WFU faculty member assign an MPT midway through the fall 1L semester or as a "capstone" kind of project at the end of the spring 1L semester and finds students enjoy seeing what they are able to accomplish on their own after just one year or even one semester. At CU-Portland as part of the LRW program, their students take three MPTs: one watered down MPT in the fall as their final and two MPTs in the spring as their final.

¹⁴⁹ *Id.* Numerous legal writing faculty give students some type of MPT in the beginning of the spring semester, including Texas Tech and ASU. Others give an MPT at the end of the spring semester, such as: Seattle University Law School, UNLV, UMKC, John Marshall Chicago, Vermont Law School, Texas A&M, WFU, CU-Portland, and Suffolk University Law School.

next, and to help students transfer skills and see the connection between the skills taught in the legal writing course and those tested on the bar exam.

C. Upper-level Electives

In upper-level electives, such as advanced legal writing courses or seminars, students can be assessed using MPT or similar exercises under a tight deadline, involving discrete, short prompts with a limited file. Students may complete these types of assessments during class time or outside of class.¹⁵⁰ Examples include giving students an unannounced question they must research and answer under a short time limit¹⁵¹ or sending students an emergency client email assignment asking them to analyze a legal question and draft an email to a client.¹⁵² Another example is assigning a “mini motion” time-pressured assessment.¹⁵³ Mini motions could be as short as one page.¹⁵⁴ Students could also be assigned the task of condensing a longer persuasive brief into a one or two-page filing, requiring students to zero in on the most critical facts and law.¹⁵⁵

D. Research in Practice

An MPT type of exercise can be viewed broadly and require students to complete different types of tasks lawyers do every day under realistic time constraints, such as research. For example, students can perform legal research on real legal questions in several ways. One way is through partnering with a non-profit organization. Suffolk’s LPS program and the

¹⁵⁰ See *infra* note 227 and accompanying text (discussing accommodations).

¹⁵¹ See Dyane O’Leary, *Legal “Street” Writing*, 29:2 THE SECOND DRAFT (2016).

¹⁵² See O’Leary, *supra* note 100.

¹⁵³ See O’Leary, *supra* note 151.

¹⁵⁴ See *id.* (advocating mini motions in law school to introduce students to different time-pressured writing). Short mini motions expose students to different types of time-pressured writing such as all the motions an Assistant District Attorney may draft and file in one day or a one-page motion a scrambling Big Law associate may file minutes before an oral argument. See *id.*

¹⁵⁵ See *id.*

Moakley Law Library partnered with the Massachusetts Law Reform Institute (MLRI)—a nonprofit legal services organization—to offer several such research opportunities.¹⁵⁶

MLRI has been partnering with ABA Free Legal Answers, a virtual legal assistance clinic the ABA created to provide a forum for low-income people to seek advice and counsel on civil legal questions from a volunteer lawyer within their state.¹⁵⁷ The Massachusetts legal advice website is “Mass. Legal Answers Online” (MLAO).¹⁵⁸ Essentially, Massachusetts attorney-volunteers log into the website, select questions to answer within their expertise and reply with legal information and advice.¹⁵⁹

One pro bono opportunity open to all Suffolk students was a Research Blitz.¹⁶⁰ During the Research Blitz, students and alumni gathered at the law school to answer real civil legal questions posted online by low-income Massachusetts residents on MLAO.¹⁶¹ In two short hours, the small groups worked together to select and draft answers to questions involving basic

¹⁵⁶ See Samantha A. Moppett & Kathleen Elliott Vinson, *Closing the Legal Aid Gap One Research Question at a Time*, 18 HLRE: OFF THE RECORD 15, 15-17 (2017) [hereinafter *Closing Legal Aid Gap*]; Samantha A. Moppett, *Legal Writing Matters: Addressing the Access-to-Justice Crisis*, SUFFOLK U. L. SCH. (May 1, 2017), http://theroadto11.org/legal_writing_matters/legal-writing-matters-addressing-the-access-to-justice-crisis/ [<https://perma.cc/5S26-C74F>] [hereinafter *Addressing Access to Justice*] (discussing ways to close legal aid gap); Samantha A. Moppett, *Legal Writing Matters: Research Blitz*, SUFFOLK U. L. SCH. (June 22, 2018), <https://sites.suffolk.edu/legalwritingmatters/2018/06/22/research-blitz/> [<https://perma.cc/V835-XYVU>] [hereinafter *Research Blitz*]; see also Samantha Moppett & Kathleen Elliott Vinson, *Digital Pro Bono: Leveraging Technology to Provide Access to Justice*, 92 ST. JOHN'S L. REV. 101 (forthcoming 2019) [hereinafter *Leveraging Technology*].

¹⁵⁷ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁵⁸ See generally Mass. Legal Answers Online, www.masslao.org (last visited Jan. 24, 2019).

¹⁵⁹ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁰ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶¹ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

human needs such as housing and employment.¹⁶² Students leveraged technology to increase access to justice for low-income communities and received experience researching under realistic time constraints like lawyers do on a daily basis.¹⁶³

First-year students also provided research assistance to MLAO during one of their legal writing classes, to introduce all 1L students to the role lawyers can play in closing the legal aid gap.¹⁶⁴ For this exercise, 1Ls served as research assistants for MLRI. In class, students worked in small groups on one research question that faculty preselected.¹⁶⁵ The questions covered civil matters such as child support, tenants' rights, and divorce.¹⁶⁶ The students collaboratively researched and drafted an email in response to the question posed.¹⁶⁷ At the end of the class, the student groups emailed their responses to their professor.¹⁶⁸ The best answers were shared with MLRI to review and, as appropriate, adopt and post on the website.¹⁶⁹

IV. Benefits and Challenges

As the majority of jurisdictions, including all UBE states, incorporate an MPT component, law schools are analyzing how best to prepare their students for the bar exam, including analyzing their school's bar exam passage results and devising a plan to improve their

¹⁶² See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶³ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁴ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁵ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁶ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁷ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁸ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

¹⁶⁹ See *Closing Legal Aid Gap*, *supra* note 156, at 15-17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz* *supra* note 156; see also *Leveraging Technology*, *supra* note 156 (forthcoming 2019).

students' success. Before embarking on any curriculum changes, they should review the benefits and challenges of incorporating MPT assessments in their curriculum with an eye towards not only capturing the most at risk students without stigmatizing them, but also preparing all their students for success in practice as well as the bar.

A. Benefits

Numerous benefits outweigh the challenges involved in incorporating MPT type assessments into a law school's curriculum. These benefits include teaching students that the skills necessary for success in practice are the same skills needed to pass the Bar exam, preparing students for realistic employer expectations, fostering grit and growth mindset while addressing the weaknesses of Generation Z, and easing the transfer of skills across different learning environments.¹⁷⁰ In addition to improving students' experience, incorporating MPT type assessments into the law school curriculum also meets the ABA goals of giving students assessments and preparing to pass the Bar exam.¹⁷¹



1. Aligns Academia with Practice and the Bar Exam

Incorporating MPTs throughout the law school curriculum aligns assessments not only with the bar exam but also with practice expectations.¹⁷² Adults learn more effectively when they can see the connection between what they are learning and their own experience and the

¹⁷⁰ See *infra* notes 174-199 and accompanying text.

¹⁷¹ See *infra* notes 200-205 and accompanying text.

¹⁷² See White, *supra* note 10 (discussing ABA Commission on Future of Legal Education goals).

The Commission, along with others, is launching a number of empirical studies designed to help bar examiners and licensing bodies think through how an optimal licensing system should function and be structured if it is to best serve the fundamental goals of our system of justice in the contemporary landscape and in the future. We must all ensure that the bar exam of the future correlates with the work it is licensing and with the entry-level skills required to do that work.

Id.

connections between practice and academia.¹⁷³ On an MPT, facts are more like a client's problem in the real world with irrelevant facts coming from different sources instead of academic fact patterns.¹⁷⁴ Interacting with a case file on a performance test is also more realistic than reading a redacted case where students assess how a judge resolved a problem at the end of a case.¹⁷⁵ While some students may get experiential learning in a clinic, not every law student may participate in a clinic during law school.¹⁷⁶

Students also experience time pressure when completing an MPT. When receiving or submitting a legal writing assignment in their legal writing courses, students often ask: "how long would we have had in the real world in legal practice to complete this memo?" They are often surprised by the answer, as it usually is a lot less time than what they were given in academia. Practicing time management on an MPT acclimates students to the type of time pressure they will experience on the bar exam and practice.

2. Enhances Students' Professional Development and Professional Identity

Incorporating MPTs in the law school curriculum can help students gain employment. Some legal employers as well as courts require applicants to complete a time-pressured writing assignment as part of a job application to better assess an applicant's ability to write without editorial assistance under a realistic, tight deadline. Conversely, an academic writing sample,

¹⁷³ See Reeves, *supra* note 15, at 654.

¹⁷⁴ See Sara J. Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way To Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEGAL PROF. 147, 151-52 (2018) (discussing ways facts presented on MPT enhance students' nuanced factual analysis more than traditional law school testing).

¹⁷⁵ See Kathleen Elliott Vinson, *What's Your Problem?*, 44 STETSON L. REV. 777, 778-79 (2015) (discussing benefits of students engaging in problem-solving methods rather than reading case law).

¹⁷⁶ See Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing: The New Approach to Practicing Like a Lawyer*, 39 J. LEGAL PROF. 135, 141 (2015) (quoting Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507, 507-08 (2005)); Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 303 (2012) (explaining extraordinary benefits of clinical education).

such as a law school assignment completed over weeks or months with the assistance of a student's professor or a law review article a student has worked on for a semester or year with several drafts and feedback at several stages by editors, is not as realistic.

Even if a job interview or application does not involve completing a performance test, students will be more marketable to employers from their experience completing tasks lawyers do every day. Students have an advantage by completing performance tests throughout their law school education and can advocate they are more practice ready than their competition who have not had this experience.

Incorporating MPTs into a law school curriculum also helps students develop their professional identity. Students are reminded of a lawyer's role to help clients solve problems. The context of every MPT sets them in the role of a lawyer.¹⁷⁷

3. Engages Generation Z

The grip of technology on Generation Z has resulted in weaker critical reading, thinking, and writing skills.¹⁷⁸ The learning characteristics of Generation Z students include being saturated with technology which hinders their learning, rewiring their brains that causes their attention span to become shorter, with an average attention span of eight seconds for a

¹⁷⁷ See Berman, *supra* note 174, at 150; see also Sara Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEG. PROF. (2018).

¹⁷⁸ See Graham, *supra* note 128 (discussing adverse effects of technology addiction) (forthcoming 2019); Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 134, 135 (2015); Cathaleen A. Roach, *Is the Sky Falling? Ruminations On Incoming Law Student Preparedness (and Implications for the Profession) In the Wake of Recent National and Other Reports*, 11 J. LEGAL WRITING INST. 295, 320-322 (2005); see also Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41, 63-65 (2013) (addressing similar issues with Millennial students).

Generation Z student.¹⁷⁹ Generation Z also grew up with a focus in school on STEM classes (science, technology, engineering, and math) and with a de-emphasis on classes on critical thinking, writing, and problem solving.¹⁸⁰ Thus, incorporating MPTs where students have to utilize their critical reading, writing, and analysis skills, helps law students further develop these critical skills.¹⁸¹

4. Promotes Student Grit, Growth Mindset, and Self-Awareness

Taking an MPT in law school courses may foster grit and a growth mindset in students as they practice and learn from their mistakes before the bar exam.¹⁸² Students with a growth mindset believe their skills can improve with effort while students with a fixed mindset think their intelligence is based on their innate ability.¹⁸³ Having a growth mindset may help prevent students from giving up when facing challenges like the MPT on the bar exam or challenges when practicing law.¹⁸⁴ Students will have practice maintaining their focus and managing their stress.¹⁸⁵ Having been exposed to practice performance tests throughout their law school curriculum, students will gain grit and confidence about their success on the bar exam and their

¹⁷⁹ See generally COREY SEEMILLER & MEGHAN GRACE, GENERATION Z GOES TO COLLEGE (2016) (showcasing findings from in-depth study on Generation Z students' education mindsets and goals). See Graham, *supra* note 128 (discussing adverse effects of technology addiction) (forthcoming 2019); Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies are Altering the Millennials Generation's Brain and Impacting Legal Education*, 16 SMU SCI. & TECH. L. REV. 409, 419 (2013).

¹⁸⁰ See Graham, *supra* note 128 (discussing adverse effects of technology addiction) (forthcoming 2019); Sinsheimer & Herring, *supra* note 7, at 125 (advocating for law schools to spend more time teaching critical reading skills).

¹⁸¹ See Bratman, *supra* note 42, at 602, n.69 (citing articles addressing incorporation of MPT in law school classes); Graham, *supra* note 128 (discussing adverse effects of technology addiction) (forthcoming 2019); Sinsheimer & Herring, *supra* note 7, at 123.

¹⁸² Grit has been found to better account for success than I.Q. See generally ANGELA L. DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE (2018).

¹⁸³ See CAROL S. DWECK, MINDSET (2007) (discussing fixed versus growth mindset).

¹⁸⁴ See *id.*

¹⁸⁵ See White, *supra* note 10 (asking whether preparing and taking bar exam imposes undue level of stress). At a time when legal education and practice face mental wellness challenges, it is important to ask questions about the wellness costs associated with bar exam licensure. See *id.*

future legal practice.¹⁸⁶ It can also help students realize how efficiently a lawyer in practice would complete the task.¹⁸⁷ This appreciation can induce some humility and self-awareness.¹⁸⁸

5. Eases Transference of Skills

Students often struggle with transferring knowledge and skills from their law school courses that help prepare them for the bar and practice.¹⁸⁹ Yet students often struggle with transferring skills from one legal problem to a different problem in a new context and demonstrate “legal-writing atrophy.”¹⁹⁰ Incorporating MPTs into the law school curriculum can foster the transfer of learning to new contexts, such as the bar exam and legal practice, by helping students make connections and cueing them to previously learned skills.¹⁹¹

The transfer of skills taught in legal writing courses can be amplified by drawing a closer connection between the closed universe objective memorandum often used as the first assignment in a legal writing course and the MPT. Context is specific so when a student learns to write a memorandum in a legal-writing course, they are likely to connect that knowledge to the specific circumstances and factors surrounding that particular learning experience,

¹⁸⁶ See DeFabritiis, *supra* note 8, at 68; Holiman, *supra* note 135, at 232; see also Reeves, *supra* note 15.

¹⁸⁷ See Murphy, *supra* note 106, at 181 (discussing idea to start semester with MPT exercise). Providing an MPT exercise on the first day of class followed by a demonstration of how lawyers would attack the problem reduces resentment. See *id.* (avoiding student attitudes about wasting their time).

¹⁸⁸ See *id.*

¹⁸⁹ Cf. Mary Bowman & Lisa Ellen Brotoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, CLINICAL L. REV. (forthcoming 2019); Shaun Archer et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. Legal Educ. (November 2014) (discussing transference of skills in legal writing courses to clinics in law school).

¹⁹⁰ See Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing*, 39 J. LEGAL PROF. 135, 162 (2015); see also Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 289-90 (2010).

¹⁹¹ See DeFabritiis, *supra* note 8, at 63; see also Tamra Alexander et al., *Two Professors, Three Opinions, One Lesson Plan?*, 6 CAN. LEGAL EDUC. ANN. REV. 63, 77 (2011); Trujillo, *supra* note 16, at 111 (discussing how learning in different contexts helps build skills for bar passage and future lawyering).

assignment, class, and perhaps even professor.¹⁹² When a student is then tasked with a new assignment, unless cued to recognize the similarity in the first-year experience, they may be unable to recognize that the information previously learned is equally applicable to this new task.¹⁹³ By organizing the objective memo into a file that contains the memo giving the assignment from the supervising attorney, facts from the client's case, and a library containing the case law legal writing faculty can create a near transfer making it easier to apply the skills they developed in the first year to success on the Bar exam.¹⁹⁴

Deeper learning occurs when students can make explicit connections of skills and time pressure learned in law school to what they may encounter in practice, on the bar exam, or in an application for employment.¹⁹⁵ Thus, students will be more likely to be able to take what they learned in one context and apply it to a new legal problem in practice or on the MPT on the bar exam. Without explicit practice on MPTs throughout the law school curriculum, it is unrealistic to expect law students to transfer the skills needed to pass the bar.¹⁹⁶

6. Emphasizes the Importance of the Bar Exam and Competencies Needed to Practice

¹⁹² Tamra Alexander, Julia Hughes & Rebekah Culberson, *Two Professors, Three Opinions, One Lesson Plan?*, 6 CAN LEGAL EDUC. ANN. REV. 63, 77 (2011) (noting changed environment, subject matter, format, or classroom, makes writing memoranda in another class difficult).

¹⁹³ Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 324 (2010) (explaining how faculties can help students make connections to previously learned skills).

¹⁹⁴ David N. Perkins & Gavriel Salomon, *Transfer of Learning*, in INT'L ENCYCLOPEDIA OF EDUC., 4 (2nd ed. 1992), <http://jaymctighe.com/wordpress/wp-content/uploads/2011/04/Transfer-of-Learning-Perkins-and-Salomon.pdf>. (explaining near and far transfer).

¹⁹⁵ See DeFabritiis, *supra* note 136 (discussing MPT similarity with closed memo assignment in legal writing class); Goldfarb, *supra* note 176, at 289-90 (stating clinical education improves, deepens, and changes skills because of lawyering assistance).

¹⁹⁶ See DeFabritiis, *supra* note 8, at 39 (discussing how law faculty can facilitate transfer of skills from student to lawyer).

Incorporating an MPT in a required course exposes all students to the benefits and sends a message that the law school places a priority on success on the bar exam and practice. The earlier the better as students are usually more eager, motivated, and impressionable in their first year than in upper-level years. While one concern may be that students will not be invested in the course if it occurs too early in their legal education, such as the first year, if the MPT assessment is graded, students will take it seriously. Students value what is tested.¹⁹⁷

Incorporating MPTs throughout the law school curriculum also avoids students feeling like they need to make a choice between taking bar exam courses at the expense of clinical or other experiential courses or non-bar courses, such as health law, environmental law, and others.¹⁹⁸ Many students focus on taking courses where the doctrinal subject of the course is tested on the bar exam and are overconfident of their ability to complete practice-ready, time-pressured practical legal documents.¹⁹⁹ They are more concerned with how to answer essays and multiple-choice questions on the bar and thus, focus most of their efforts on those areas instead of continuously practicing taking performance tests. Through continuous practice on performance tests throughout law school courses, students will value the importance of the MPT on the bar exam as well as its representation of the minimum skills a new lawyer needs to be successful in legal practice.

7. Satisfies ABA Standards

¹⁹⁷ See generally Gerald F. Hess & Sophie B. Sparrow, *What Helps Law Professors Develop as Teachers? -- An Empirical Study*, 14 WIDENER L. REV. 149 (2008).

¹⁹⁸ See Trujillo, *supra* note 16, at 77 (discussing how bar exam drives curriculum decisions).

¹⁹⁹ See *The Learning Curve*, *supra* note 125 (discussing courses utilizing MPT).

Incorporating MPTs into the curriculum at law schools would satisfy several ABA Standards regarding bar readiness.²⁰⁰ The ABA considers actions by the law school to address bar passage and its efforts to address bar passage problems in the law school's favor.²⁰¹ ABA Standard 301(a) states that the goal of legal education is to prepare students for bar admission and legal profession.²⁰² ABA Standard 316 requires law schools to meet a minimum bar passage rate.²⁰³ ABA Standard 314 requires law schools to give students formative and summative assessments.²⁰⁴ Giving students sustained practice in MPTs in different contexts in different

²⁰⁰ See *supra* Part II.A (discussing students and “bar readiness”); Sara Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEG. PROF. (2018).

²⁰¹ See *ABA Standards & Rules*, *supra* note 8, at 24. Standard 316(c)(3) states: “Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school’s favor.” *Id.*

²⁰² See *ABA Standards & Rules*, *supra* note 8, at 15 (capturing Standard 301).

²⁰³ See *ABA Standards & Rules*, *supra* note 8, at 24 (stating law school bar passage rate must pass test under Standard 316). Standard 316(a) states:

- (a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests: (1) That for students who graduated from the law school within the five most recently completed calendar years:
 - (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or
 - (ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

Id.

²⁰⁴ See *ABA Standards & Rules*, *supra* note 8, at 23 (discussing Standard 314). Standard 314 states the following interpretations:

Interpretation 314-1

Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.

Interpretation 314-2

A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.

courses throughout law school can “improve student learning and provide meaningful feedback to students by providing opportunities for assessments.”²⁰⁵

B. Challenges

There can be challenges when initially incorporating MPT type assessments into a law school’s curriculum. Both faculty and students may be pushed beyond their comfort zone in creating and tackling the MPT.²⁰⁶ Its incorporation may give the impression that speed and teaching to the test are valued over the traditional skills of editing and presenting a polished final product.²⁰⁷ Integrating an MPT type assessments will also take time and effort in its creation and administration.²⁰⁸

1. Pushes Students Beyond their Comfort Zone

Some students may experience “cognitive paralysis,” frustration, and less creativity when experiencing time pressure to perform on an MPT assessment in law school, while others may feel more energized, more focused, and more challenged under time pressure.²⁰⁹ While students may initially resist having to complete performance tests, they will realize their value when taking the bar exam and entering the legal profession. Similarly, sometimes in legal writing courses students do not appreciate the instruction received until after the course is over and they apply the skills when working. Curriculum in legal education should not be dictated by law

Id.; see also Allen & Jackson, *supra* note 134, at 2.

²⁰⁵ See *ABA Standards & Rules*, *supra* note 8, at 23. Standard 314 states: “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.” See *id.*; Holiman, *supra* note 135, at 235 (noting incorporation of test-taking strategies and substantive practical learning will prepare students for bar exam).

²⁰⁶ See *infra* notes 212, 228 and accompanying text.

²⁰⁷ See *infra* notes 213-227 and accompanying text.

²⁰⁸ See *infra* notes 228-231 and accompanying text.

²⁰⁹ See Amabile et al., *supra* note 2 (asking employees of U.S. companies how they experience time pressures day-to-day).

students who have never taken a bar exam and may not yet know or appreciate the skills needed in the legal profession.

2. Values Speed

While in practice a client's problem may not be solved in ninety minutes or with a file of all the sources or facts you may need like on an MPT, a performance test is a good starting point to acclimate students to what they will face on the bar exam and an illustration of a typical task a new lawyer may undertake in practice.²¹⁰ Some of the best students may initially struggle satisfactorily completing a performance test as they are not accustomed to the "time famine" and they struggle to thoroughly edit and proofread their work, skills they may excel at when they have more time to complete an assignment.²¹¹ "While lawyers must do their work efficiently and sometimes under time pressure, 'speediness' in test-taking is a different skill."²¹² Having multiple opportunities to take performance tests throughout law school will help students be more successful than if they struggled for the first time during the bar exam. In addition, students may get a reality check "that sometimes, it is necessary (and, frankly, ok) to sacrifice depth and detail in a written work product in favor of an accurate, clear bottom line answer."²¹³ Finally, students in need can receive accommodations on the MPT as they do on any law school exam.²¹⁴

²¹⁰ See Curcio et al., *supra* note 117, at 37-41.

²¹¹ See Amabile et al., *supra* note 2; (discussing more than half of Americans want more time, even if it means less money and have more problems with time management than money management).

²¹² See Curcio et al., *supra* note 117, at 37-41.

²¹³ See O'Leary, *supra* note 151.

²¹⁴ See Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 365 (codified as amended at 42 U.S.C. § 12189 (2012)). "Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade 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." *Id.*

3. Teaches to the Test

Incorporating MPTs into the law school curriculum may have a negative perception of “teaching to the test” in contrast to teaching students how to “think like a lawyer.”²¹⁵ Millennials grew up with 2002 No Child Left Behind (NCLB), including criticism that teachers teach to the test at the expense of critical thinking and writing skills.²¹⁶ Law schools are wary of having the reputation that they teach to the bar exam.²¹⁷

Schools express trepidation at being labeled a “bar review” school.²¹⁸ Such criticism is often based on the view that academically rigorous schools do not need to focus on bar passage because the quality of their legal instruction ensures bar passage.²¹⁹ With declining bar rates, law schools may not have the luxury of being concerned with the possible perception of teaching to the test.²²⁰

Critics argue that the bar exam should not drive curriculum decisions.²²¹ Others argue that the answer is to raise admissions standards or attrition to improve the bar pass rate.²²² Both strategies for selectivity, however, can have financial implications.²²³

4. Takes Time and Effort

²¹⁵ See Reeves, *supra* note 15, at 645 (discussing pejorative label, “teaching to the test,” synonymous with bad teaching). The idea of “teaching to the test” and incorporating bar exam preparation into the core curriculum is an anathema. *See id.*

²¹⁶ See Allen & Jackson, *supra* note 134, at 6-8.

²¹⁷ See Reeves, *supra* note 15, at 645-46 (discussing how “teaching to the test” can be useful with other teaching enhancements).

²¹⁸ See Trujillo, *supra* note 16, at 72 (addressing law school concerns about bar passage rates).

²¹⁹ *See id.*

²²⁰ See Allen & Jackson, *supra* note 134, at 7 (noting declining bar passage began in 2014).

²²¹ See Trujillo, *supra* note 16, at 77 (stating critics also believe bar exam misses mark on crucial lawyer topics and skills).

²²² See Day, *supra* note 70, at 337 (describing solution to bar passage problem). One suggestion to solve the low bar passage rates is to limit admissions enrollment to those students with high LSAT scores, but that solution could have financial implications for law schools. *See id.*

²²³ *See id.*

Another challenge of incorporating MPTs may be the time and effort required. Such time and effort could include: planning and preparing materials, devoting class time to explain the assessment, incorporating it into a syllabus, providing feedback, and/or grading the assessments, providing accommodations and proctors.²²⁴ Incorporating MPTs into a law school curriculum as well as the preparation and feedback of it, can take one of many forms, some being more labor intensive than others.

Utilizing a law school's resources and experts can decrease the work involved. For example, work with your school's bar director to develop the assessment and provide a review prior to the exam for the students. Other resources professors can consult include using previous MPT questions the NCBE provides, adapting previous exercises or assessments into an MPT format, or using already assigned cases or concepts from their course.²²⁵ Assigning a performance test can act as a review of content, preparing students for a final exam or could be ready to be used if the school has a snow day, a make-up class, or a substitute instead of canceling a class. Although incorporating an MPT will involve some time and effort initially, MPT assessments could then be recycled and used again in the future. Finally, a performance test may result in deeper learning so quality increases even if it takes time away from covering more content.²²⁶

Numerous options can be explored regarding feedback and grading. Individual feedback is not necessarily required. For example, a professor could provide a sample answer, checklist, or rubric. Performance tests also do not have to be graded. It could be an ungraded, formative assessment. Conversely, performance tests could be graded with no feedback like any other

²²⁴ See Graham, *supra* note 128 (forthcoming 2019).

²²⁵ See Graham, *supra* note 128 (forthcoming 2019); *see also* *Preparing for MPT*, *supra* note 72.

²²⁶ See Goldfarb, *supra* note 176, at 289-90 (stating clinical education improves, deepens, and changes skills because of lawyering assistance).

exam. Even if they are graded or feedback is provided, it is much less time intensive compared to critiquing students' memoranda assignments or grading a typical three-hour exam.

Finally, work with your law school's dean of students' office or academic services office to provide proctors and accommodations.²²⁷ With enough lead time and prioritization of the law school to prepare students for the bar and practice, everyone can work together towards this goal.

V. How Time-Pressured Writing Assignments Can Inform Law School Curriculum and Bar Passage Initiatives

"If a law school can't prepare three-quarters of its graduates who take the bar exam to pass, it shouldn't exist."²²⁸ Law schools have a duty to not only enhance their teaching to achieve the objectives of a traditional law school education, but also to better prepare their students for the bar exam.²²⁹ Assuring success on the bar exam should not require students to have to choose between taking courses that align with their chosen careers versus those that will help them on the bar exam.²³⁰ Law schools can and should deliver courses that impart future lawyers with the skills they need to compete in the legal marketplace as well as those necessary to pass the bar exam.²³¹ Law schools preparing students to pass the bar exam need not shift "into

²²⁷ Students that receive accommodations in law school are not guaranteed accommodations on the bar exam. States can set requirements in granting accommodations. *See* Mass. Board of Bar Exam'rs, *Applying for Nonstandard Testing Accommodations for the Bar Exam in Massachusetts*, COMMONWEALTH OF MASS., <https://www.mass.gov/how-to/applying-for-nonstandard-testing-accommodations-for-the-bar-exam-in-massachusetts> [<https://perma.cc/U2SA-CUZW>] (identifying materials applicants must submit to assess if applicant has demonstrated need for reasonable accommodations).

²²⁸ *See* Sara Randazzo, *New Test for Law Schools: Do Enough Graduates Pass the Bar Exam?*, WALL ST. J. (Jan. 14, 2019), https://www.wsj.com/articles/new-test-for-law-schools-do-enough-graduates-pass-the-bar-11547391600?shareToken=ste4433eec568e49c49871419dac5304c7&ref=article_email_share [<https://perma.cc/NPH7-96N6>] (stating law schools should not exist if most graduates cannot pass bar).

²²⁹ *See* Reeves, *supra* note 15 (explaining how incorporating elements of bar exam into curriculum makes law school more efficient).

²³⁰ *See* Randazzo, *supra* note 228 (claiming students who take more rigorous upper-level bar courses more likely to pass bar).

²³¹ *See id.*

bar exam schools” but rather should serve to enhance the preparedness of legal professionals of the future.²³² This directive is all the more relevant at a time when the ABA has renewed its intention to condition accreditation on law schools meeting a 75% bar passage rate.²³³

Incorporating performance test type assessments into the law school curriculum allows students to practice skills they will need in their future careers.²³⁴ This early exposure subsequently allows them to maximize their post-graduation bar studies as a true bar review period rather than a “bar learning” cram session.²³⁵ The immediate benefits of affording students the opportunity to practice time-pressured writing throughout their law schools careers has been discussed in Part IV of this Article.²³⁶ Beyond the immediate benefits, by progressively building the muscle memory necessary to succeed on the bar exam throughout law school, applicants can approach bar review as a positive and empowering experience rather than a plunge into the unknown.²³⁷

A coordinated effort in incorporating such assessment across the curriculum may also provide invaluable data to law schools informing them on how to best prepare future law students. Currently, LSAT score and first year GPA are the most cited indicators of bar

²³² See Holiman, *supra* note 135, at 235 (noting incorporating test-taking strategies and substantive, practical learning into law school will prepare students for bar exam); Riebe, *supra* note 15, at 289 (explaining bar preparation in law school prepares students to become effective attorneys)

²³³ See *ABA Standards & Rules*, *supra* note 8, at 24 (addressing sufficient bar passage rates in Standard 316); see also Randazzo, *supra* note 228 (discussing ABA push to toughen requirements).

²³⁴ See Diane F. Bosse, *The MPT: Assessment Opportunities Beyond the Traditional Essay* 18, B. EXAMINER (2011) (discussing MPT grading experience). “For the first time, I felt I knew whether or not a candidate was going to be a good lawyer.” See *id.*; see also Joseph Kimble, *The Best Test of a New Lawyer’s Writing*, 80 MICH. B.J. 62, 62-64 (2001) (describing performance test-type assignments test lawyer’s ability to analyze and apply law clearly and coherently).

²³⁵ See BERMAN, *supra* note 83, at 5.

²³⁶ See *supra* Part IV (discussing benefits behind incorporating MPT into legal education).

²³⁷ See *id.* at 3-5.

passage.²³⁸ Law schools use this data to design and implement early intervention programs for upper-level law students to improve their chances of passing the bar exam.²³⁹ Tracking student performance on time-pressured writing assignments may provide law schools with additional guidance on how to better prepare their students. Comparisons between performance on the first year capstone and performance on traditional bar passage indicators such as LSAT scores and first year GPAs could be drawn. While LSAT scores and first year GPAs already provide law schools with valuable data, a consistent finding in capstone performances could further inform the type of courses and assessments that law schools provide in a guided curriculum designed to improve bar passage.²⁴⁰

Beyond traditional indicators, data reflecting student performance on time-pressured writing assignments would give law schools the opportunity to explore numerous comparisons and determine if any evidence of positive impact exist between performance on time-pressured writing assignments, performance in other law school courses or assessments, and ultimate performance on the bar exam.²⁴¹

The most direct comparison could be made between student performance on time-pressured writing assignments administered in law school and performance on the MPT portion

²³⁸ See DeFabritiis, *supra* note 8, at 69 (stating low undergraduate GPA and low LSAT scores can indicate low bar scores); Murphy, *supra* note 106, at 174 (identifying students in bottom quarter of their class face greater hurdles passing bar after graduation).

²³⁹ See DeFabritiis, *supra* note 8, at 69 (claiming schools with lower LSAT scores and GPAs students can expect weaker critical thinking skills).

²⁴⁰ See <https://citl.indiana.edu/teaching-resources/assessing-student-learning/authentic-assessment/> (discussing the need for authentic assessments which require application of what students have previously learned to a new situation because they are likely to be more valid than conventional tests, particularly for learning outcomes that require higher-order thinking skill).

²⁴¹ Brame CJ and Biel R (2015) Test-enhanced learning: The potential for testing to promote greater learning in undergraduate science courses. CBE-Life Science Education 14, 1-12 (explaining testing that enhances learning as low-stakes retrieval practice and suggesting that the benefits of testing are not tied to a specific type of retrieval practice, but rather retrieval practice in general).

of the bar exam.²⁴² The expectation may be to find that students who had the opportunity to practice closed universe time-pressured writing throughout their law school careers would score higher on the MPT portion of the bar exam than those students who did not have similar opportunities.²⁴³ A broader relationship could also be explored by comparing performance on law school time-pressured writing assignments and performance on the overall bar exam.²⁴⁴

The MPT tests the same essential lawyering skills that legal writing courses cultivate throughout the first-year curriculum: the ability to read, organize information, logically separate the relevant from the irrelevant, write clearly, and above all else follow direction.²⁴⁵ Based on the similarity in format of the closed universe writing assignment that first-year legal writing programs use as their first objective memorandum and the closed universe materials that comprise the MPT, performance on the first-year first legal writing assignment could be compared to students' performance on closed universe time-pressured writing assignments. More specifically, performance of the first objective memorandum could be compared to performance on a capstone, modeled on the MPT, and administered at the end of the first year.²⁴⁶

Performance on the capstone could also be compared to performance on other legal writing assignments, including objective and persuasive memoranda, where students are required

²⁴² See Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 118, 122 (2000) (finding close correlation between poor performance on first-year simulated MPT and failure on actual MPT).

²⁴³ See Klein, *supra* note 98, at 14 (finding students improve their ability to pass performance test by doing more of them).

²⁴⁴ See Murphy, *supra* note 106, at 183 (finding students underperforming on MPT also underperform on bar exam). In Texas, the MPT has historically comprised only 10% of the Texas Bar Exam, however, performance of one Texas law school's graduates "on the bar exam as a whole has shown a strong correlation to their performance on the MPT." See *id.*; see also John D. Schunk, *Can Legal Writing Programs Benefit From Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized Performance-Type Assignment?*, 29 Hamline L. Rev. 308, 317 (2006) (discussing candidates' results on performance test correlated well with performance on parts of bar exam).

²⁴⁵ See Darrow-Kleinhaus, *supra* note 94, at 19; DeFabritiis, *supra* note 8, at 39.

²⁴⁶ See Schunk, *supra* note 244, at 317.

to conduct their own research. In addition to having substantially more time to complete these assignments, students often receive significant feedback on their memoranda and have the opportunity to re-write them. Although both assessments require students to use similar skill sets, the expectation here may be that there exists a stronger evidence of positive impact between performance on the capstone and ultimate performance on the bar exam than performance on traditional memoranda and ultimate performance on the bar exam.²⁴⁷ Such information may help inform why some top students fail the bar exam.²⁴⁸ In some instances, student who earn high grades on legal writing assignments do so, at least in part, because of the significant feedback and one-on-one guidance that they receive from their professor.²⁴⁹ If a student becomes reliant on this guidance, they may not develop the independence necessary for success on the bar exam and in the practice of law.²⁵⁰

VI. Conclusion

Law schools and students are under pressure to gain the competencies needed to gain licensure to practice law and be successful at it. Law schools have an ethical and professional responsibility to best prepare their law students for success on the bar and in practice.

Incorporating performance tests into a law school curriculum gives law schools an opportunity to serve a dual role of providing students much-needed practice on bar exam skills and preparing students for practice, as the performance tests assess the lawyering skills required to successfully practice law. This Article offers examples of how law schools can do a better job of increasing

²⁴⁷ See *id.* (discussing rewrite submissions had effect of narrowing qualitative difference between higher and lower scoring students).

²⁴⁸ See Murphy, *supra* note 106, at 175 (addressing reasons why top students underperform on MPT).

²⁴⁹ See Schunk, *supra* note 244, at 314 (proposing single-submission writing assignments may have secondary effect of students taking other assignments seriously).

²⁵⁰ See *id.* (discussing importance of incorporating single-submission assignments into legal writing curriculum).

students' minimum competencies to pass the bar, gain employment, and practice law effectively while not requiring a major overhaul of law school curriculum or demanding the expenditure of a huge amount of time and effort by faculty.

UNDER PRESSURE: HOW INCORPORATING TIME-PRESSURED PERFORMANCE TESTS PREPARES STUDENTS FOR THE BAR EXAM AND PRACTICE

*Sabrina DeFabritiis and Kathleen Elliott Vinson **

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I. INTRODUCTION

*Houston, we have a problem.*¹ In 1970, an explosion on board the Apollo 13 spacecraft's flight to the moon damaged the air filtration system, causing carbon dioxide to build up in the cabin.² The astronauts on board would be dead in a few hours if the system could not be fixed or replaced.³ NASA's mission control in Houston, Texas called for engineers, scientists, and technicians to work with a set of materials identical to those on the spacecraft to build a filtration system under extreme time pressure.⁴ The result may have been "ugly, inelegant, and far from perfect," but it saved the astronauts' lives.⁵ The Apollo 13 situation may be a dramatic example of problem solving, creativity, and completing a task under extreme time pressure with life or death consequences; however, lawyers also work in stressful environments, under time pressure, while juggling multiple tasks involving life, liberty, or millions of dollars.⁶ How do recent law school graduates perform when facing a time-sensitive task when the stakes are high, when they are accustomed from law school of having several weeks or more, with feedback along the way, to complete that type of assignment?

¹ Teresa M. Amabile et al., *Creativity Under the Gun*, 80 HARV. BUS. REV. 52 (2002).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63, 72–73 (2016) (providing a study of lawyers and areas for improvement in legal education).

Preparing students for admission into the bar and “effective, ethical, and responsible participation” in the legal profession is the goal of legal education.⁷ Yet preparing students to pass the bar exam and teaching law students fundamental lawyering may be viewed as mutually exclusive, rather than symbiotic.⁸ This Article does not advocate simply teaching to the bar exam, but recognizes that the skills needed for the performance test portion of the bar are also the lawyering skills needed to successfully practice law.⁹ Thus, this Article offers a way to satisfy these goals and helps students succeed on both the bar exam and in practice by incorporating performance tests or time-pressured writing into the law school curriculum.

Part II of the Article provides a brief history of the bar exam, including its incorporation of the Multistate Performance Test.¹⁰ Part III addresses why a law school curriculum should include performance tests or time-pressured writing assessments.¹¹ Part IV offers ways to incorporate these types of assessments throughout the law school curriculum.¹² Part V discusses the benefits and challenges of incorporating these assessments in law school curriculum.¹³ Finally, Part VI reviews ways in which scores on performance tests may inform law school curriculum and positively impact other assessments, including success on the bar exam and law school grades.¹⁴

⁷ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018, at 15 [hereinafter ABA STANDARDS & RULES]. Standard 301(a) states the following: “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” *Id.*; see also Sabrina DeFabritiis, *1L Is the New Bar Prep*, 51 CREIGHTON L. REV. 37, 39 (2017) (commenting on goal of legal education with ABA rules).

⁸ See DeFabritiis, *supra* note 7, at 39–40 (observing symbiotic relationship when teaching lawyer skills with bar exam success).

⁹ See Patricia D. White, *Essential Questions: What to Ask About the Bar Exam*, N.Y. ST. B. ASS’N J. (2018), http://www.nysba.org/Journal/2018/Sep/Essential_Questions__What_to_Ask_About_the_Bar_Exam/ [https://perma.cc/ZS9S-C8YQ] (calling for greater uniformity to achieve fundamental legal education goals). “In these parlous times for our legal system and the rule of law, it is essential that our educational institutions, our licensing system, and our many means of delivering legal services and access to justice are all working together, rowing in the same direction as it were.” *Id.*

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See *infra* Part VI.

II. HISTORY OF THE BAR EXAM

Administered over two days; comprised of four, three-hour long segments; generally including 200 multiple-choice questions spanning seven subject matters with as many as two multistate performance tests and/or 16 essays; the bar exam is a daunting reality for the majority of law school graduates.¹⁵ Self-proclaimed as an exam of minimal competency, the bar exam is intended to provide the public with assurances that those entrusted with a law license meet a minimum threshold.¹⁶ The exam is intended to “measure minimum competence for entry-level lawyers in a wide range of areas.”¹⁷ Despite this broad goal, the bar exam does not test, nor would it be realistic for it to test, all

¹⁵ See Emmeline Paulette Reeves, *Teaching to the Test: The Incorporation of Elements of Bar Exam Preparation in Legal Education*, 64 J. LEGAL EDUC. 645, 646 (2015) (accepting majority of law students sit for bar exam); Denise Riebe, *A Bar Review for Law Schools: Getting Students On Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 282 (2007) (noting regardless of effectiveness, bar exam remains reality for students); cf. Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, 21 U. WIS. L. SCH. F. GARGOYLE 3, 3–4 (1990), <http://gargoyle.law.wisc.edu/wp-uploads/2014/02/volume21issue1.pdf> [<https://perma.cc/5WCR-UBWT>] (identifying the only state, Wisconsin, not requiring bar exam for in-state applicants); see also AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2015 LAW GRADUATE EMPLOYMENT DATA (Apr. 26, 2016), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_law_graduate_employment_data.authcheckdam.pdf [<https://perma.cc/U2A6-4PWK>] [hereinafter 2015 LAW GRADUATE EMPLOYMENT DATA]. (reporting graduate data from 2015). In 2015, 39,984 students graduated law school. 2015 LAW GRADUATE EMPLOYMENT DATA, *supra*. In that same year, 39,955 first-time applicants sat for the July 2015 bar exam. 2015 Statistics, NAT’L CONF. BAR EXAMINERS (Mar. 2016), <http://www.ncbex.org/dmsdocument/195.infra>.

¹⁶ See Riebe, *supra* note 15, at 273 (explaining purpose of bar exam for consumer protection); Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 74 (2007) (noting that if the bar exam tests too narrowly, the public is not protected from incompetent lawyers); see also *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975) (acknowledging bar exam tests minimal competency to practice). “Both the essay and MBE portions of the bar exam are designed solely to assess the legal competence of bar examinees.” *Id.* at 1102. While the passing score standing alone might have no significance, it represents the examiners’ considered judgment as to “minimal competence required to practice law,” the precise quality the examination attempts to measure. *Id.*

¹⁷ Trujillo, *supra* note 16, at 74; see also NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2016 (Erica Moesher & Claire J. Guback eds., 2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Comprehensive_GuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf [<https://perma.cc/SJY5-MC8A>] [hereinafter NCBE & ABA GUIDE 2016] (explaining purpose of MBE questions). The Code of Recommended Standards for Bar Examiners recommends that the selection of subjects for bar examination questions “should be upon the basic and fundamental subjects that are regularly taught in law schools.” NCBE & ABA GUIDE 2016, *supra*, at ix.

of the skills associated with the practice of law.¹⁸ In order to avoid the risk of narrowing the skills tested and thereby precluding applicants from sufficient opportunities to demonstrate their competence, the bar exam focuses on testing a broad base of legal knowledge and skills that are the foundation for success in legal practice.¹⁹

Critics of the bar exam argue that the exam fails to test the skills relevant to the successful practice of law, as well as the skills that effectively measure competence.²⁰ They argue that the exam focuses on memorization and that the artificial conditions do not represent the practice of law.²¹ Conversely, proponents of the bar exam believe that the exam properly tests minimal competency in terms of lawyering skills, tests general or broad rather than specific areas of law, and focuses on application rather than memorization.²² This dichotomy should come as no surprise when we consider that we are discussing an exam whose written form is over 200 years old.²³

Presently, the various forms of the bar exam employ the use of various exams, including state-developed essay and multiple choice questions, the Multistate Bar Examination (“MBE”), the Multistate Professional Responsibility Examination (“MPRE”), the Multistate Performance Test (“MPT”), and the

¹⁸ Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 442 (2004) (discussing testing competencies on bar exam); Riebe, *supra* note 15, at 281 (explaining not all lawyering skills tested on bar exam); Trujillo, *supra* note 16, at 85–86 (explaining examiners identified skills accurately tested in standardized tests and test those skills on bar exam); *see also* Tyler, 517 F.2d at 1102 (reasoning criticism on range of bar tested materials shows room for improvement, not elimination).

¹⁹ Riebe, *supra* note 15, at 279 (listing fundamental skills essential to practice of law, all tested on bar exam); Trujillo, *supra* note 16, at 74 (noting competencies necessary for effective legal practice tested).

²⁰ Trujillo, *supra* note 16, at 77–78 (noting bar exam ignores skills essential for career in law); *see also infra* notes 106–108, 116, and accompanying text (discussing assessment of student success and incorporation of the MPT).

²¹ Trujillo, *supra* note 16, at 78.

²² *Id.* at 85–86; *see also* NCBE & ABA GUIDE 2016, *supra* note 17 (setting forth aspirational goals for guidance towards uniform practice of bar admission). The Code of Recommended Standards for Bar Examiners recognizes that the exam should test an applicant’s ability:

“[T]o identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues, and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory, or experience. Its purpose is to protect the public, not to limit the number of lawyers admitted to practice.”

NCBE & ABA GUIDE 2016, *supra* note 17, at ix.

²³ *See* Robert M. Jarvis, *An Anecdotal History of The Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996) (setting forth history of bar exam from first administration in 1800s); Riebe, *supra* note 15, at 273 (noting bar exam dates back to mid-1800s).

Multistate Essay Examination (“MEE”).²⁴ Bar exam standards developed from a set of oral questions, administered and determined by a local court, to a professionally developed test on a national level.²⁵ In the 19th century, bar admission was mostly based on an oral exam, administered under the jurisdiction of the local court, without any guidelines.²⁶ In the 1880s, states began to create central boards of bar examiners with state-wide jurisdiction.²⁷ By 1889, 12 states had established state-wide boards, and by 1931, all states, except for Indiana, had such boards.²⁸

Massachusetts was the first state to move from an oral to a written exam.²⁹ The Massachusetts Court of Common Pleas required candidates who could not show three years of legal study to pass a written exam.³⁰ Shortly

²⁴ See Marcia Kuechenmeister, *Admission to the Bar: We’ve Come a Long Way*, B. EXAMINER, Feb. 1999, at 33–36 (explaining choices examiners have in constructing their state’s bar exam). Uniform Bar Examination (“UBE”) states use the MBE, MPT, and MEE. *Jurisdictions that Have Adopted the UBE*, NAT’L CONF. BAR EXAMINERS (2019), <http://www.ncbex.org/exams/ube/>. Non-UBE states, along with the MBE, can choose to use one or two MPTs, the MEE, as well as essays that test state-specific law. See Trujillo, *supra* note 16, at 74 (analyzing different purposes of MBE, MEE, and MPT). The MBE measures an applicant’s ability to apply broad knowledge; the MEE measures depth of knowledge on a specific topic and the ability to synthesize that knowledge; the MPT measures practical skills; and the MPRE measures an applicant’s understanding of ethical and professional responsibilities. *Id.*; see also Tyler v. Vickery, 517 F.2d 1089, 1101 (5th Cir. 1975) (acknowledging bar exam tests skills necessary for practice). States have a legitimate and substantial interest in excluding from the practice of law those persons who do not meet its standards of minimal competence. *Id.* at 1101–02. The bar exam, consisting of multiple choice and essay questions, tests skills and knowledge which have a “logical, apparent relationship” to those necessary for the practice of law. *Id.* at 1101.

²⁵ Melli, *supra* note 15, at 3 (discussing history behind development of bar exam standards).

²⁶ *Id.* (observing minimal standards for bar admission). “Prior to the mid-1800s, there were no written bar exams. Instead, the path to becoming a lawyer led hopefuls through ‘apprenticeships, self-directed reading, and oral examinations.’” Lauren Schroeder, *The Bar Exam: Some History & Comparison*, U. HOUS. L. CTR. BLOG (July 28, 2010), <http://notabeneuh.blogspot.com/2010/07/bar-exam-some-history-comparison.html> [<https://perma.cc/C6YW-QJPS>].

²⁷ Melli, *supra* note 15, at 3–4 (discussing gradual state move to centralized system).

²⁸ *Id.* at 4 (shifting to central board with state-wide jurisdiction).

²⁹ See Riebe, *supra* note 15, at 273 (noting Massachusetts started written bar exam in 1855); see also Jarvis, *supra* note 23 (discussing shift from oral to written bar); Melli, *supra* note 15 (discussing oral exams historically conducted before judge or admitted lawyers of court where admission sought).

³⁰ Jarvis, *supra* note 23 (explaining structure of early bar exam); see also Riebe, *supra* note 15, at 273 (explaining no more diploma privilege). “In the 1920s, the ABA rejected the diploma privilege, stating that every candidate should be subject to an exam by a public authority.” Riebe, *supra* note 15, at 273. This position has been consistently reaffirmed. Riebe *supra* note 15, at 273. But see *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS. (Dec. 17, 2018), <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/26D8-TEE9>] (maintaining diploma privilege for admission to practice law in Wisconsin). The University of Wisconsin Law School and Marquette University Law School certify their graduates’ legal competence under the

thereafter, several states began to experiment with a written bar exam.³¹ Early in the twentieth century, the American Bar Association (“ABA”), concerned with the existing low and inconsistent standards, began looking into a national structure to unify bar examiners.³² As a result, the National Conference of Bar Examiners (“NCBE”) was founded in 1931 to provide a national organization through which state boards of bar examiners could cooperate with each other, the law school community, and the organized bar.³³

Following its creation, the NCBE focused on helping states strengthen the quality of their bar exams.³⁴ To further the goal of creating “uniformity of objectives and practices in bar admission throughout the United States,” the ABA, NCBE, and the Association of American Law Schools promulgated the Code of Recommended Standards for Bar Examiners.³⁵ The Code provides recommendations to state authorities in their execution of duties relating to admission to the bar.³⁶ Through these recommendations, the Code reflects one of the first instances where the purpose of the bar exam was expressly stated:

[to] test the applicant’s ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory or experience.³⁷

To date, the NCBE remains the principal national organization concerned with the quality of the bar exam and the standards for admission to the bar.³⁸

diploma privilege and allow their graduates to practice in-state without sitting for bar exam. *See id.*

³¹ Jarvis, *supra* note 23 (delineating national shift from oral to written bar).

³² Melli, *supra* note 15, at 4–5 (explaining reasons for move to national standardized exam).

³³ Jarvis, *supra* note 23, at 378 (discussing creation of NCBE); *see also* NCBE & ABA GUIDE 2016, *supra* note 17, at vii (outlining inception of the Code of Recommended Standards of Bar Examiners). The Code provides recommendations to state authorities in their execution of duties relating to admission to the bar. *See id.*

³⁴ Melli, *supra* note 15, at 4–5 (commenting on NCBE contributions to bar exam process). State examiners were discouraged from using definition style questions. *Id.* Instead, the NCBE promoted the use of hypothetical questions that required legal analysis rather than rote memorization. *Id.* at 4. This style of questions remains in use in the modern bar exam. *Id.*

³⁵ NCBE & ABA GUIDE 2016, *supra* note 17, at vii.

³⁶ *Id.* (reaffirming need for hypothetical questions requiring written answers).

³⁷ NAT’L CONF. OF BAR EXAM’RS, THE BAR EXAMINERS’ HANDBOOK 25 (1968).

³⁸ Melli, *supra* note 15, at 3.

A. *The Multistate Bar Exam*

What is now known as the modern-day bar exam is less than fifty years old.³⁹ In the 1970s, following the evolution from an oral to written essay examination, the NCBE dramatically changed the bar exam, when, for the first time, it administered the MBE.⁴⁰ This change resulted, in part, from the growing number of applicants and in recognition that most other professions, including medicine, accounting, and engineering, require their members to meet minimum national standards, at least in part through multiple choice exams.⁴¹

The MBE, sometimes referred to as the anchor of the bar exam, is now administered in every state except for Louisiana.⁴² The MBE provides a uniform test, but allows the jurisdictions to retain control by setting their own passing grades.⁴³ The MBE is a six-hour, 200-multiple-choice-question exam with the stated purpose of assessing “the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.”⁴⁴ Most recently updated in February 2015, the MBE is comprised of seven subject areas including: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.⁴⁵ Applicants have approximately 1.8 minutes to complete each question. In addition to the MBE, a small minority of states administer their own local multiple-choice questions.⁴⁶

³⁹ See Jarvis, *supra* note 23, at 378 (discussing transition for oral state specific bar exams to national standardized exam); Melli, *supra* note 15 (explaining creation of national standardized exam).

⁴⁰ Melli, *supra* note 15 (recounting inception of multiple-choice questions into bar exam).

⁴¹ *Id.* at 4 (identifying other professional standardized exams and noting ease in grading many multiple-choice exams).

⁴² *Jurisdictions Administering the MBE*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mbe/> [<https://perma.cc/YR9H-7L7P>] (highlighting jurisdictional information for MBE). The term “anchor” refers to the MBE’s psychometric value measuring competence with reliability and validity. Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 573 (2015) (discussing validity of bar exam criticism).

⁴³ Bratman, *supra* note 42, at 574.

⁴⁴ *Jurisdictions Administering the MBE*, *supra* note 42. Presently, the MBE is administered in all states and territories except for Louisiana and Puerto Rico. *Id.*

⁴⁵ *Preparing for the MBE*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mbe/preparing/> [<https://perma.cc/YB6Q-JGE7>] (introducing general areas of law tested on MBE).

⁴⁶ See generally NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2018 (Judith A. Gundersen & Claire J. Guback eds., 2018), <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> [<https://perma.cc/7VVE-FG7C>] [hereinafter NCBE & ABA GUIDE 2018] (outlining guide for recommended standards).

B. *The Multistate Professional Responsibility Exam*

Less than ten years after the introduction of the MBE, the NCBE, in response to a desire by state bar examiners to test applicants' broad knowledge of ethics, introduced the MPRE.⁴⁷ The MPRE is a two-hour, 60-question multiple-choice examination designed to measure an applicant's knowledge and understanding of established standards related to the professional conduct of lawyers.⁴⁸ While not administered as part of the bar exam, every jurisdiction except Wisconsin and Puerto Rico requires its applicants to pass the MPRE.⁴⁹

C. *The Multistate Essay Exam*

Despite the continuing evolution of the bar exam, essays have remained a principle component of the exam as they have served the examiners well in assessing an applicant's ability to analyze facts, reason logically, and apply principles of law.⁵⁰ As such, they remain a significant component of the bar exam and are administered in all jurisdictions.⁵¹ While many states continue to test state specific laws, since 1988, states have also had the option to adopt the MEE

⁴⁷ Melli, *supra* note 15, at 5 (explaining purpose for incorporating ethics component into national standardized exam).

⁴⁸ *Jurisdictions Requiring the MPRE*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/W2XR-BLNX>] (discussing the structure of the MPRE).

⁴⁹ *Id.* In lieu of a passing score on the MPRE, Connecticut and New Jersey accept successful completion of a law school course on professional responsibility. *Id.* Conversely, in Massachusetts and Rhode Island, receiving a passing score on the MPRE is a prerequisite to sitting for the bar exam. See *Comprehensive Guide to Bar Admission Requirements 2019*, NAT'L CONF. BAR EXAMINERS (2019), <http://www.ncbex.org/pdfviewer/?file=%2Fassets%2FBarAdmissionGuide%2FNCBE-CompGuide-2019.pdf#page=34>.

⁵⁰ See *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964 (9th Cir. 1967) (holding state bar examiners had right to use essay examination as qualification standard). The court stated the essay examinations, as a qualification standard, may show that applicants have the "capacity to analyze general legal situations" and to apply such general legal knowledge as graduates of accredited law schools are expected to possess. *Id.*; see also Kuechenmeister, *supra* note 24, at 29 (explaining the purpose of the MEE). While the bar exam varies by jurisdiction, each tests the candidate's ability to write. See Kuechenmeister, *supra* note 24, at 29 (some states weigh the essays more heavily than multistate); see also *Instructions for Taking the MEE*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mee/preparing/> (click link to "Instructions for Taking the MEE") (last visited Sept. 1, 2019) (identifying percentage of bar exam allocated to essays by each state).

⁵¹ See Kuechenmeister, *supra* note 24, at 29–30 (explaining structure of MEE); see also NCBE & ABA GUIDE 2018, *supra* note 46 (explaining that states administer anywhere from 3 to 16 essays in their bar exams).

in whole or in part.⁵² In recognition of the challenges state examiners faced in drafting good essay questions, the MEE was an attempt to improve the quality of the essay portion of the bar exam.⁵³ The NCBE has consistently discouraged states from administering exams focusing on mere memorization of the law.⁵⁴ Instead, it has promoted the use of written exams that use hypothetical fact patterns, test multiple interrelated legal problems, and require an analysis of law and fact.⁵⁵ The MEE offers states the opportunity to incorporate essays into their bar exam that have been vetted by two groups with expertise in the areas of law covered by the question.⁵⁶

The MEE consists of six 30-minute questions covering 12 areas of law that vary from exam to exam, and some questions may include issues in more than one area of law with some overlap as to the areas tested on the MBE.⁵⁷ Each essay question consists of a narrative description of a legal problem followed by one or more related questions.⁵⁸ The MEE requires the applicant to demonstrate an ability to communicate effectively in writing.⁵⁹ As defined by the examiners:

The purpose of the MEE, is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not;

⁵² See Kuechenmeister, *supra* note 24, at 29–30 (discussing options states have in structuring their essay portion of bar exam). States have flexibility in selecting from a set of seven MEEs offered by the NCBE for any one bar administration. *Id.*

⁵³ Melli, *supra* note 15.

⁵⁴ *Id.* (explaining expectation of demonstrated understanding of law rather than mere memorization).

⁵⁵ *Id.* (demonstrating structure allows applicants to show understanding of law and its application to facts).

⁵⁶ See Judith A. Gundersen, *MEE and MPT Test Development: A Walk Through from First Draft to Administration*, B. EXAMINER 29 (June 2015).

⁵⁷ *Id.*; see also Kuechenmeister, *supra* note 24, at 29–30 (discussing the substance of the MEE); *Preparing for the MEE*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mee/preparing/> [<https://perma.cc/5TME-UZRZ>] (detailing areas tested on MEE). The article states the following:

Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. Some questions may include issues in more than one area of law.

Preparing for the MEE, supra.

⁵⁸ See Kuechenmeister, *supra* note 24, at 29–30 (discussing substance and structure of MEE).

⁵⁹ Gundersen, *supra* note 56; see also *Jurisdictions Administering The MEE*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mee/> (explaining the purpose of the MEE in context of bar exam).

(3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.⁶⁰

Bar exam essays are an exercise in critical reading.⁶¹ They test the quality and reasonableness of the fundamental skills necessary to think and write like a lawyer.⁶² This is evidenced in both the information provided by the NCBE as well as individual state boards.⁶³ The NCBE instructions for the MEE emphasize the importance of carefully reading the question.⁶⁴ An applicant's ability to reason and analyze is determined by showing an "understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and reasoning by which [they] arrive at [their] conclusion."⁶⁵ Less value is given to the conclusion than to how the examinee arrived to the conclusion.⁶⁶ The writing must be clear, concise, and complete.⁶⁷ Applicants are discouraged from assuming facts that do not appear in the question and from volunteering irrelevant or immaterial information.⁶⁸

D. The Multistate Performance Test

Most recently, the NCBE developed the MPT using, in part, the list of fundamental skills identified in the MacCrate Report.⁶⁹ The MPT, first administered in 1997, was designed to measure an applicant's ability to use fundamental lawyering skills by requiring the applicant to complete a task that a

⁶⁰ *Jurisdictions Administering The MEE*, *supra* note 59.

⁶¹ *See Instructions for Taking the MEE*, *supra* note 50 (emphasizing carefully reading questions).

⁶² *See* Derek Alphan et al., *Yes We Can, Pass the Bar*, *University of the District of Columbia, David A. Clarke School of Law Bar Passage Initiatives and Bar Pass Rates—From the Titanic to the Queen Mary!*, 14 UDC/DCSL L. REV. 9, 28 (2011) (commenting on dichotomy between law school and bar exam essay writing). An applicant is tested on her judgment in organizing and identifying issues, recognizing and analyzing key facts, and applying relevant legal principle to those facts. *Id.*

⁶³ *See* DeFabritiis, *supra* note 7, at 39.

⁶⁴ *Instructions for Taking the MEE*, *supra* note 50 (addressing need to critically read question and not make assumptions).

⁶⁵ *Id.* (setting forth what an applicant must display in their essays).

⁶⁶ *Id.* (deemphasizing conclusion reached by applicant).

⁶⁷ *Id.* (emphasizing need for organization).

⁶⁸ *Id.* (encouraging applicants to frame their answer in accordance to facts presented).

⁶⁹ *See* Kuechenmeister, *supra* note 24, at 24 (examining characteristics of the MBE, MEE, and MPT and their holistic use to strengthen validity of the bar exam).

new lawyer should be able to perform.⁷⁰ Administered in all UBE states and the majority of other jurisdictions, the MPT generally constitutes 20% of an applicant's overall score on the bar exam.⁷¹

The MPT is comprised of two 90-minute tasks based on simulated case files divided into two sections, a File and a Library.⁷² Unlike the MBE, MPRE, and MEE, the MPT is an open-book exam. All of the law and facts required to answer the questions are provided.⁷³ In that respect, the MPT is unlike the real world where new lawyers are often expected to complete extensive legal research before writing a memorandum. To successfully complete the MPT, an applicant must, in 90 minutes or less, sort through detailed factual materials, analyze various sources of law, apply the material facts to the applicable law to resolve a client problem, and communicate the answer effectively in writing.⁷⁴ In most jurisdictions, including all UBE jurisdictions, the applicant must then do this all over again for a second MPT.⁷⁵

The specific assignment an applicant must complete is provided in memorandum format, often referred to as the Task Memo, and sent from a supervising attorney, as is common in practice.⁷⁶ The Task Memo includes instructions that inform the applicant as to how to complete the assignment.⁷⁷ The File also includes all of the facts necessary to complete the assignment.⁷⁸ The facts are generally comprised of source documents such as transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes.⁷⁹ As such, they are distinguishable from narrative fact patterns often used in law school and bar essays.⁸⁰ Relevant, as well as irrelevant, facts are included.⁸¹ Facts are sometimes ambiguous, incomplete, or even

⁷⁰ See *id.* at 30–33 (discussing purpose of MPT); Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—"Do the Work!"*, 40 CAL. W. L. REV. 321, 337 (2004) (discussing bar examiner concerns).

⁷¹ See NCBE & ABA GUIDE 2018, *supra* note 46, at 33.

⁷² *Preparing for the MPT*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mpt/preparing/> [<https://perma.cc/2SYN-CRNM>] (outlining testing structure).

⁷³ *Id.*

⁷⁴ See Kuechenmeister, *supra* note 24, at 31 (introducing process applicant must use to complete MPT).

⁷⁵ See *Preparing for the MPT*, *supra* note 72 (explaining that the MPT consists of two 90-minute segments).

⁷⁶ See Kuechenmeister, *supra* note 24, at 31 (explaining structure of MPT).

⁷⁷ *Preparing for the MPT*, *supra* note 72.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See DeFabritiis, *supra* note 7, at 67.

⁸¹ *Preparing for the MPT*, *supra* note 72.

conflicting.⁸² As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable.⁸³ Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.⁸⁴

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task.⁸⁵ The examinees are expressly instructed that the binding law, from the state of Franklin in the Fifteenth Circuit, is fictitious and they should not presume they have previously read it.⁸⁶ The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.⁸⁷ The Library materials provide all of the substantive information to complete the task.

The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate certain fundamental skills new lawyers are expected to demonstrate regardless of the area of law in which the skills are applied.⁸⁸ The examiners expressly identify six skills necessary for the MPT.⁸⁹ They include the ability to:

- (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.⁹⁰

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks.⁹¹ For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract

⁸² *Id.*

⁸³ See SARA J. BERMAN, BAR EXAM MPT PREPARATION & EXPERIENTIAL LEARNING FOR LAW STUDENTS 26–27 (2017) (discussing importance of performance testing throughout law school).

⁸⁴ *Preparing for the MPT*, *supra* note 72.

⁸⁵ *Id.*

⁸⁶ *Multistate Performance Test Directions*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mpt/preparing> (click the link to "Instructions for Taking the MPT") (last visited Sept. 1, 2019).

⁸⁷ *Preparing for the MPT*, *supra* note 72.

⁸⁸ *Jurisdictions Administering the MPT*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mpt/> [<https://perma.cc/QE2H-8DNZ>] (last visited Nov. 19, 2019) (explaining substance and purpose of MPT).

⁸⁹ *Preparing for the MPT*, *supra* note 72.

⁹⁰ *Id.*

⁹¹ *Id.*

provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.⁹²

In completing these tasks, the examiners may ask the applicant to act in various roles, including a junior associate at a private law firm, a government attorney working as a prosecutor or public defender, counsel for a non-profit organization, a mediator, or a clerk. The instructions may direct applicants to objectively analyze issues, advise or counsel clients, persuade a judge or jury, and draft or edit documents.⁹³ Just as in practice, on the MPT, applicants must pay attention to their client's needs.

Success on the MPT relies heavily on the applicants' ability to read, organize, and write a comprehensive answer to the question asked. At first glance, this can appear to be an overwhelming and insurmountable task to complete in 90 minutes or less.⁹⁴ There is a lot of material to read, synthesize, and comprehensively analyze; therefore, it is essential to master a systematic and efficient approach that an examinee can execute in routine form on the bar exam. Applicants preparing for the MPT are often encouraged to spend the first 45 minutes reading and outlining and the last 45 minutes producing a comprehensive answer.⁹⁵ Most applicants do well with this time allocation, but in truth this split is merely a guideline. Some applicants may be slow readers but fast typists (or hand writers), so they may need to spend more than forty-five minutes making their way through the Library and File, but will require less time to type their answers.⁹⁶ Others may be fast readers but slow typists.⁹⁷ Only through practice will applicants be able to adjust their time in recognition of their strengths and weaknesses.⁹⁸

Critics of the performance test argue that the artificial time constraints make them unfair and unrealistic, placing too much emphasis on finishing and not enough on the production of quality work.⁹⁹ While it is true that the practice of law does not obligate attorneys to produce a polished product in 90 minutes, equally true is that attorneys in today's fast-paced society must react quickly to client demands.¹⁰⁰ Fueled by the instant gratification of email and text, client and

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See generally Suzanne Darrow-Kleinhaus, *Incorporating Bar Passage Strategies into Routine Teaching Practices*, 37 GONZ. L. REV. 17 (2002) (discussing MPT).

⁹⁵ *Preparing for the MPT*, *supra* note 72.

⁹⁶ See BERMAN, *supra* note 83, at 21.

⁹⁷ *Id.*

⁹⁸ See Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, 65 B. EXAMINER 13, 14 (1996) (finding students improve their ability to pass performance test by doing more of them).

⁹⁹ See BERMAN, *supra* note 83, at 22.

¹⁰⁰ See Sinsheimer & Herring, *supra* note 6, at 72–73; Dyane O'Leary, *Legal Writing Matters: Hurry Up & Write*, SUFFOLK U. L. SCH. (May 24, 2017),

counsel alike are becoming more accustomed to immediate answers thereby making the MPT and other forms of time-pressured writing realistic and useful learning tools.¹⁰¹

III. THE NEED TO INCORPORATE TIME-PRESSURED WRITING IN LAW SCHOOL

One month. Two weeks. A single day. Three hours. These are common assignment deadlines in law school, yet they do not reflect realistic time constraints in practice.¹⁰² Time is a luxury that lawyers often do not have.¹⁰³ To ensure bar and practice readiness, law schools should revisit and improve traditional curriculum to incorporate time-pressured writing required on an MPT. Take-home exams or open book exams do not replicate the bar exam or the ability to perform at a high level under stressful time pressures.¹⁰⁴ The need to prepare students for the bar as well as practice may be even more relevant today, when law schools face declining bar passage rates, a competitive job market, and a need to produce practice-ready graduates.¹⁰⁵

A. Bar Readiness

This Article does not address whether the bar exam is the best measure of a lawyer's ability to successfully practice law, as much has already been written criticizing the bar exam.¹⁰⁶ While law schools may not want to "teach to

http://theroadto11.org/legal_writing_matters/legal-writing-matters-hurry-up-write/ [<https://perma.cc/B4MW-6Y5E>] (listing timing of deadlines in practice including ASAP, days, hours, or even 30 minutes).

¹⁰¹ See Sinsheimer & Herring, *supra* note 6, at 72–73.

¹⁰² See *id.*; Trujillo, *supra* note 16, at 77–78 (stating timed-essays helps bar passage, however, bar exams ignore many skills essential to practicing law).

¹⁰³ See Sinsheimer & Herring, *supra* note 6, at 72–73; see also O'Leary, *supra* note 100 (emphasizing time management and organizational skills); Trujillo, *supra* note 16, at 77–78 (emphasizing necessary skills for lawyering).

¹⁰⁴ See Day, *supra* note 70, at 337.

¹⁰⁵ See DeFabritiis, *supra* note 7, at 69 (stating low undergraduate GPA and low LSAT scores can indicate low bar scores); see also Alphan et al., *supra* note 62, at 14 (expressing concern for declining bar passage rates). See generally Sally Kane, *Top Legal Skills, Competitive and Attractive Legal Skills for Job Seekers*, BALANCE CAREERS (Jan. 4, 2019) <https://www.thebalancecareers.com/top-ten-legal-skills-2164595> [<https://perma.cc/N4Y7-Y4G6>] (listing skills employers look for in legal position candidates).

¹⁰⁶ See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 349 (2003) (labeling bar exam "misguided"); see also John F. Murphy, *Teaching Remedial Problem-Solving Skills to a Law School's Underperforming Students*, 16 NEV. L.J. 173, 177 (2015) (addressing how to help bottom quarter of class succeed); Trujillo, *supra* note 16, at 73 (discussing hurdle for lawyers to take bar exam and to calm public fear); White, *supra* note 9 (questioning whether bar exam tests minimum

the test,”¹⁰⁷ passing the bar is a reality for the majority of students upon graduation from law school.¹⁰⁸

Declining bar passage rates is a nightmare, and in some cases a reality, of law school deans and a cause of increased anxiety for law students.¹⁰⁹ Law schools must satisfy ABA Standard 316¹¹⁰ on bar passage that requires law schools to meet minimum bar passage rates for their graduates.¹¹¹ After spending three or four years in law school, while paying expensive tuition each year, students and law schools are often surprised when students may still be unprepared and unsuccessful on the bar exam.¹¹² While numerous bar exam courses are available,¹¹³ one course at the end of law school may not be enough if students have not previously experienced time-pressured writing similar to the MPT during their law school education.

While the MPT is similar to assessments in legal writing courses in law school, the time pressure on an MPT is much more intense. For example, the

competencies critical to current and evolving law practice); *supra* Part III (calling for need to implement more time-pressure writing scenarios into legal education).

¹⁰⁷ Reeves, *supra* note 15, at 645.

¹⁰⁸ Amabile et al., *supra* note 1; Riebe, *supra* note 15, at 282 (stating bar exam remains reality for students); *see also* DeFabritiis, *supra* note 7, at 38.

¹⁰⁹ *See* Alphan et al., *supra* note 62, at 14; Day, *supra* note 70, at 321 (stating after peaking in 1994, bar pass rates declined); Trujillo, *supra* note 16, at 69 (discussing national concerns regarding bar exam).

¹¹⁰ *See* ABA STANDARDS & RULES, *supra* note 7, at 24–25 (covering Standard 316). ABA Standard 316, in pertinent part, requires law schools to demonstrate that 75% of graduates from the last five years who sat for the bar passed, or at least that during three of those calendar years 75% of graduates who sat for the bar passed. *Id.* A school is also in compliance if during three or more of the last five years, “the school’s annual first-time bar passage rate in the jurisdiction reported by the school is no more than 15 points below the average first time bar passage rate for graduates of ABA approved law schools taking the bar exam in these same jurisdictions.” *Id.*

¹¹¹ *Id.* (covering Standard 316 on bar passage rates); *see also* DeFabritiis, *supra* note 7, at 39 (stating law schools must better prepare their students for bar exams). *See generally* Linda Sheryl Greene, *Law Schools Need to Better Prepare Their Students*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/law-schools-need-to-better-prepare-their-students> (stating law schools should examine circumstances preventing students from passing and address these issues fast); *infra* Part V (discussing benefits and challenges).

¹¹² *See* DeFabritiis, *supra* note 7, at 39 (agreeing law schools must better prepare their students); Greene, *supra* note 111 (discussing ABA requirements to prepare students for bar exam); *see also* White, *supra* note 9 (stating Commission on Future of Legal Education’s questioning of educational impact on practice). The Commission on Future of Legal Education states that “misalignment between our institutions, licensing practices, and the practical realities of the delivery of legal services in the 21st century might be causing us to be less effective than we ought to be at achieving the fundamental goals we all share as stewards of our legal system and the rule of law.” White, *supra* note 9.

¹¹³ *See* WANDA M. TEMM, *CLEARING THE LAST HURDLE, MAPPING SUCCESS ON THE BAR EXAM* (2015); *see also* DENISE RIEBE & MICHAEL HUNTER SCHWARTZ, *PASS THE BAR* (2005).

MPT is similar to a closed universe assignment in a legal writing course in the first year of law school, where students are not required to do any research, and are provided the facts of a client's case and the law.¹¹⁴ Similarly, an MPT provides bar exam applicants with a Library and File, but applicants have only 90 minutes to complete an MPT.¹¹⁵ The MPT tests skills taught and assessed in typical legal writing courses: problem solving, factual analysis, legal analysis, communication skills, reading comprehension, organization, time management, and following directions.¹¹⁶ The MPT is different than students' experience working on a legal memorandum in their legal writing course, however, where students may have been given the opportunity to submit and receive feedback on multiple drafts over a semester or several weeks. In addition to better preparing students for the bar exam, the incorporation of an MPT time-pressured writing assessment in a law school curriculum can help teach them critical lawyering skills introduced in a law school's legal writing course.

B. Practice Readiness

While numerous complaints exist regarding the effectiveness of the bar exam or law school to measure practice readiness or success in practice, law schools should assess whether the type of assessments in law school align with the competencies students need to pass the bar and practice.¹¹⁷ In addition to developing students' understanding of the theoretical foundation of the law, law schools need to incorporate assessment to provide law students with a realistic understanding of the legal profession.¹¹⁸ To prepare law students for the current practice of law, law schools should reflect on whether the time constraints for time-pressured writing in law school assessments reflect the realities of the legal

¹¹⁴ See generally Judith Rosenbaum, *Putting the Puzzle Together, Choices to Make When Creating a Closed-Universe Memorandum Assignment*, 17 PERSP. 11 (2008). See also *supra* Part II (discussing the MPT).

¹¹⁵ See *supra* Part II (discussing the MPT); see also *Preparing for the MPT*, *supra* note 72.

¹¹⁶ See *supra* note 115. The skills tested on the MPT are derived from an in-depth study conducted by an ABA Task Force. See E. Eugene Clark, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 4 LEGAL EDUC. REV. 201, 201–02 (1993).

¹¹⁷ ABA STANDARDS & RULES, *supra* note 7, at 15–16 (discussing Standards 301 and 302 as well as aligning assessments with goals and objectives). Criticism of the bar exam includes complaints that the bar exam does not test the skills that lawyers need to practice. See Riebe, *supra* note 15, at 282; see also Andrea A. Curcio et al., *How to Build a Better Bar Exam*, N.Y. ST. B.J. 37, 37–41 (2018) (criticizing multiple-choice question portion for assessing legal knowledge and analysis in artificial, unrealistic context); DeFabritiis, *supra* note 7, at 50 (critics argue bar exam fails to test skills relevant to successful practice of law); Trujillo, *supra* note 16, at 77–78 (noting bar exam ignores skills essential for career in law). But see Day, *supra* note 70, at 322 (concluding modern bar exam provides fair assessment).

¹¹⁸ See generally Sinsheimer & Herring, *supra* note 6.

profession on a daily basis.¹¹⁹ Incorporating MPT assessments into the law school curriculum can help make connections between academia and practice more explicit.¹²⁰

In law school, students are often assessed in doctrinal classes by an exam at the midterm or end of the semester, consisting of essays and/or multiple choice.¹²¹ Critics of these assessments note that they do not reflect the type of writing lawyers do¹²²—lawyers do not practice law by memorizing the law and applying it to a fact pattern on an essay or multiple-choice questions like the bar and law school exams require. Indeed, a client does not come into a lawyer's office and pose a multiple-choice question or hypothetical.

The MPT on the bar exams tests the fundamental lawyering skills that lawyers use on a daily basis.¹²³ Instead of testing the memorization of legal rules, which is unrealistic in practice, the MPT tests lawyering competencies relevant to practice, including reading, analyzing, and supporting analysis with the utilization of effective legal sources.¹²⁴ Perhaps the MPT is the best measure of the skills and competencies required for effective real-world law practice and the most realistic when compared to the MBE and essay components of the bar exam.¹²⁵ Thus, incorporating MPT assessments in law school not only prepares students for the bar exam, but also helps them become more practice ready by increasing their understanding of the competencies necessary to successfully practice law and the realistic time constraints and pressures.¹²⁶

¹¹⁹ *Id.*

¹²⁰ See Bruce Ching, *Nonlegal Analogies in the LRW Classroom*, 8 *PERSP.* 26, 26–29 (1999).

¹²¹ See Stephanie Roberts Hartung & Shailini Jandial George, *Promoting In-Depth Analysis: A Three-Part Approach to Teaching Analogical Reasoning to Novice Legal Writers*, 39 *CUMB. L. REV.* 685, 697–98 (2008) (discussing student assignments including writing analogy-based arguments and application of analogical reasoning).

¹²² See Sinsheimer & Herring, *supra* note 6, at 63–65.

¹²³ See *Jurisdictions Administering the MPT*, *supra* note 88; see also DeFabritiis, *supra* note 7, at 52 (explaining history and purpose of MPT).

¹²⁴ See Curcio et al., *supra* note 117, at 37–41.

¹²⁵ See Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 *U. PITT. L. REV.* 747, 751 (2001); Nancy Paine Sabol, *Using the MPT to Teach Rule-Based Legal Reasoning and Analogical Legal Reasoning*, *THE LEARNING CURVE*, Winter 2016, at 2, <http://lawschoolasp.org/docs/LearningCurve-Winter-2016.pdf> (discussing using the MPT to teach rule-based and analogical legal reasoning and reading skills); see also Day, *supra* note 70, at 338 (reporting a high degree of reliability—0.87 to 0.90).

¹²⁶ See Murphy, *supra* note 106, at 181 (recommending practicing with MPT problems in law school to assess and develop lawyering skills); see also Glen, *supra* note 106, at 379 (stating bar exam creates disincentive to teach lawyering skills resulting in disservice to law practice).

IV. INCORPORATING TIME-PRESSURED WRITING IN A LAW SCHOOL CURRICULUM

In this part of the Article, we suggest several ways to incorporate MPT time-pressured writing assessments throughout a law school's curriculum. To be most effective, these assessments should be offered to students in each year of their legal education.¹²⁷ Instead of relegating the teaching of MPT to bar exam or academic success programs, all faculty should commit to incorporating MPT assessments across the curriculum each year of law school.¹²⁸ Students need this continuous exposure throughout law school to enhance their readiness for the bar and practice.¹²⁹ The silo approach sends the wrong message that these lawyering skills are separate and segregated from their other courses.¹³⁰ Although they should, students may not take them as seriously as they do doctrinal courses, perhaps due to status issues of faculty teaching skills at some schools.¹³¹ While none of the suggested approaches discussed in this section of the Article require major revisions to the curriculum, they do require a commitment by a law school and its faculty to better prepare students for the bar and practice.

A. Bar Exam and Academic Support Classes

At orientation, law students should be made aware of the type of substance and skills needed to succeed on the bar exam, practice so they can understand its importance for their future, and plan accordingly.¹³² Academic support classes are often part of a law student's orientation courses. Introducing an MPT during an academic support orientation class and connecting it to the bar exam, as well as their development throughout law school courses of competencies necessary to successfully practice, will give students the context they need to succeed.

¹²⁷ See DeFabritiis, *supra* note 7, at 52 (claiming skills obtained in first-year legal-writing course lay foundation for success on bar exam).

¹²⁸ See Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, U. ARK. LITTLE ROCK L. REV. (forthcoming 2019).

¹²⁹ See DeFabritiis, *supra* note 7, at 52 (explaining history and purpose of the MPT test); *Jurisdictions Administering the MPT*, *supra* note 88; see also Kuechenmeister, *supra* note 24, at 31.

¹³⁰ See Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181 (2014); Hartung & George, *supra* note 121, at 697–98 (discussing student application of analogical reasoning and constructive comments for improvement); see also DeFabritiis, *supra* note 7, at 38 (claiming skills obtained in first-year legal-writing course lay foundation for success on bar exam).

¹³¹ See Edwards, *supra* note 130; see also, e.g., Jo Anne Durako, *Second Class Citizens in the Pink Ghetto*, 50 J. LEGAL EDUC. 562 (2000).

¹³² See DeFabritiis, *supra* note 7, at 66; cf. White, *supra* note 9 (presenting questions that law schools need to consider about bar exam preparation).

In addition, some schools offer bar exam or academic-support courses that focus on the MPT—discussing and reviewing MPT exams, doing simulations in class, and going over exams afterwards.¹³³ Even if not part of a required course, academic support or bar exam faculty could offer voluntary MPT simulations on a monthly or weekly basis. They could invite students to take an MPT under exam-like conditions and discuss a model answer, post or distribute a model answer, do a peer review of the exam, post or distribute a common issues or common problems handout, or if logically possible, offer students individual feedback. Including MPT in bar exam or academic support courses alone, however, may not reach all students, depending on how those courses are structured, whether they are optional or mandatory, and which students take them. It could also stigmatize students if it is required or only offered to at-risk students.

B. Capstone Exam

Performance tests can be incorporated as early as the first year of law school “to examine students’ ability to evaluate and create because it is a closed universe examination that does not require students to have any outside substantive knowledge.”¹³⁴ Incorporating a capstone in a required first-year course also captures all students. A capstone exam, however, can be an effective way to incorporate an MPT in any course. Although the example discussed in this section involves using a capstone in a legal writing course, this type of assessment could be offered in any course at the conclusion of the course, at a midterm point, or at the conclusion of a unit or section of the course as a formative or summative assessment.¹³⁵

The Legal Practice Skills (“LPS”) faculty at Suffolk University Law School (“Suffolk”) incorporated a performance test for the first time in the spring 2017 semester, before Massachusetts adopted the UBE that includes a 90-minute

¹³³ See Sabol, *supra* note 125; E-mail from Professor Jolly-Ryan Chase, College of Law-Northern Kentucky University, to author (on file with author) (devoting three classes to MPT). Professor Jolly first introduces instructions and strategies with a short practice test, holds a second class for students to take a modified MPT, and conducts a final class last to review the MPT answers.

¹³⁴ See Renee Nicole Allen & Alicia Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 33 (2017) (discussing the MPT design and evaluation of problem-solving skills).

¹³⁵ See ABA STANDARDS & RULES, *supra* note 7; see also Christopher W. Holiman, *Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, 58 HOW. L.J. 195, 232 (2014) (noting how students need multiple assessments to help them succeed); Reeves, *supra* note 15, at 647–48 (explaining increased use of formative assessments creates additional opportunities for students to receive live feedback).

MPT component.¹³⁶ Modeled after the MPT, all first-year law students took a performance test called a capstone exam at the end of their spring semester. The capstone counted as a small portion of students' final grade and thus, functioned as a low-stakes formative assessment.¹³⁷ It was called a capstone as it represented a culmination of the skills students had been taught in the course.¹³⁸ Students were assessed on skills they learned in the first-year LPS course to test how well students could complete an everyday lawyering task under time pressure.¹³⁹ It offered a "holistic conclusion to their first year legal writing and research course."¹⁴⁰

While the capstone was modeled after the MPT, there were some differences. Like the MPT, LPS students were given a File (containing the facts), a Library (containing the law), and instructions on how to complete the task. The capstone was based on a real MPT question but was simplified, asking students to address one issue instead of multiple issues, and the Library consisting of legal sources was condensed as well.¹⁴¹ Students were asked to write an argument section of a memorandum.¹⁴² The most common MPT task requires students to write an objective or persuasive memo, although an MPT question can require the completion of any typical task of a lawyer, such as drafting a contract, will,

¹³⁶ See Sabrina DeFabritiis, *Legal Writing Matters: How Legal Writing Prepares Students for the Bar Exam*, SUFFOLK U. L. SCH. (Apr. 26, 2017), https://theroadto1l.org/legal_writing_matters/legal-writing-matters-how-legal-writing-prepares-students-for-the-bar-exam/; Sabrina DeFabritiis & Kathleen Elliott Vinson, *Legal Writing Matters: Preparing Students for the Bar Exam*, SUFFOLK U. L. SCH. (July 29, 2015), https://theroadto1l.org/legal_writing_matters/legal-writing-matters-preparing-students-for-the-bar-exam/. Massachusetts recently adopted the UBE; the first administration of the UBE in Massachusetts, including the MPT, was administered in July 2018. "The UBE consists of 200 multiple-choice questions; six 30-minute essay questions covering a wide range of doctrinal areas, and two 'performance' test questions in which examinees have 90 minutes to read a case file and write a client letter, memorandum, brief or other document." See Curcio et al., *supra* note 117, at 37.

¹³⁷ The capstone at Suffolk was worth 15% in 2017 and 10% in 2018. Students should have opportunities to receive live feedback. See Curcio et al., *supra* note 117, at 37–41; Reeves, *supra* note 15, at 647–48.

¹³⁸ The idea for this Article came from the incorporation of a capstone exam at the conclusion of the LPS course this past spring to help students prepare for legal practice and the bar exam.

¹³⁹ See Kathleen Elliott Vinson, *Legal Practice Skills Student Handbook*, SUFFOLK U. L. SCH. (2018), https://www.suffolk.edu/-/media/suffolk/documents/law/academics/lps/lps-handbook-2018-to-2019_pdf.txt [https://perma.cc/DW4E-A5QT] (identifying Course Objectives, Learning Outcomes, and Assessments). See generally DeFabritiis, *supra* note 136.

¹⁴⁰ Vinson, *supra* note 139 (identifying Course Objectives, Learning Outcomes, and Assessments).

¹⁴¹ The 2017 capstone involved a criminal issue, and the 2018 capstone concerned a civil issue. Each included one statute or rule and a few one-to-two page cases.

¹⁴² In the following year, LPS students were asked to write a discussion section of an objective memo.

letter, etc.¹⁴³ Like an MPT, facts on the capstone were culled from a variety of documents in the File, such as a transcript, reports, or notes, and a memo from a supervisor. Students had to determine relevant facts and discard the irrelevant. The instructions were one page.¹⁴⁴ Students were advised to review the instructions for what they were asked to do and what they were expressly told not to do. Students had 60 minutes to draft a portion of a memorandum instead of the 90 minutes given on an MPT.¹⁴⁵

Prior to the capstone exam, a review lecture and a simulated capstone were offered to all students. Suffolk's Director of Bar Program and Initiatives gave the review lecture. During the lecture, students were provided context for the capstone through an explanation of the similarities and differences between the MPT and capstone. Instructions for the capstone were also distributed. Then, strategies for taking the capstone were discussed. At the end of the review, students were also given an opportunity to ask questions. The review lecture and the PowerPoint used were recorded so students could watch it again at their convenience.¹⁴⁶

During their next LPS class, students were given a practice capstone exam simulation and time to outline the answer during class. Although they did not fully write out the answer, they experienced the time pressure and saw a capstone exam prior to taking it. Then, at the end of class, LPS professors outlined a model answer.

Students then took the capstone exam under exam conditions like they would take any other exam. Proctors monitored the exam and students who receive accommodations on exams also received them for the capstone exam. Faculty graded the students' exams like a typical exam.

A capstone could be done during class time, outside of class, or during the exam period.¹⁴⁷ The use of an MPT in first-year legal writing classes range from students taking one or more graded or ungraded actual MPTs or simplified MPTs in the middle or end of the fall semester,¹⁴⁸ at the beginning of the spring

¹⁴³ See *supra* Section I.D (discussing the MPT); see also DeFabritiis, *supra* note 7, at 52 (explaining history and purpose of the MPT test); *Jurisdictions Administering the MPT*, *supra* note 88 (providing states using MPT).

¹⁴⁴ In the spring of 2018, we gave students the one-page instructions before the exam, so they could review them and use the time on the exam to read the Case File and Library.

¹⁴⁵ See DeFabritiis, *supra* note 136.

¹⁴⁶ See Peter Sankoff, *Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (for Professors and Students)*, 51 ALTA. L. REV. 891, 900 (stating professors find recording lectures both easy and intuitive).

¹⁴⁷ See *supra* note 42 and accompanying text (discussing ways the MPT is used in ASP) (responses to query on Legal Writing Institute list serve on file with author).

¹⁴⁸ *Id.* At Ava Maria, they do a capstone at the end of the fall semester and find many students struggle with the time limitation. WFU faculty members assign an MPT midway through the fall 1L semester or as a "capstone" kind of project at the end of the spring 1L semester and find students enjoy seeing what they are able to accomplish on their own after just one year or even one semester.

semester, or as a capstone at the end.¹⁴⁹ The goal varies, from bar preparation to a diagnostic of what students remember from one semester to the next, and to help students transfer skills and see the connection between the skills taught in the legal writing course and those tested on the bar exam.

C. Upper-level Electives

In upper-level electives, such as advanced legal writing courses or seminars, students can be assessed using MPT or similar exercises under a tight deadline, involving discrete, short prompts with a limited file. Students may complete these types of assessments during class time or outside of class.¹⁵⁰ Examples include giving students an unannounced question they must research and answer under a short time limit¹⁵¹ or sending students an emergency client email assignment asking them to analyze a legal question and draft an email to a client.¹⁵² Another example is assigning a “mini motion” time-pressured assessment.¹⁵³ Mini motions could be as short as one page.¹⁵⁴ Students could also be assigned the task of condensing a longer persuasive brief into a one or two-page filing, requiring students to zero in on the most critical facts and law.¹⁵⁵

D. Research in Practice

An MPT type of exercise can be viewed broadly and require students to complete different types of tasks lawyers do every day under realistic time constraints, such as research. For example, students can perform legal research on real legal questions in several ways. One way is through partnering with a non-profit organization. Suffolk’s LPS program and the Moakley Law Library

At CU-Portland as part of the LRW program, their students take three MPTs: one watered down MPT in the fall as their final and two MPTs in the spring as their final.

¹⁴⁹ *Id.* Numerous legal writing faculty give students some type of MPT in the beginning of the spring semester, including Texas Tech and ASU. Others give an MPT at the end of the spring semester, such as: Seattle University Law School, UNLV, UMKC, John Marshall Chicago, Vermont Law School, Texas A&M, WFU, CU-Portland, and Suffolk University Law School.

¹⁵⁰ *See infra* note 227 and accompanying text (discussing accommodations).

¹⁵¹ *See* Dyane O’Leary, *Legal “Street” Writing*, 29:2 SECOND DRAFT, Fall 2016, at 3, 5.

¹⁵² *See* O’Leary, *Legal Writing Matters: Hurry Up & Write*, *supra* note 100.

¹⁵³ *See* O’Leary, *Legal “Street” Writing*, *supra* note 151, at 5.

¹⁵⁴ *See id.* (advocating mini motions in law school to introduce students to different time-pressured writing). Short mini motions expose students to different types of time-pressured writing, such as all the motions an Assistant District Attorney may draft and file in one day or a one-page motion a scrambling Big Law associate may file minutes before an oral argument. *Id.*

¹⁵⁵ *See id.*

partnered with the Massachusetts Law Reform Institute (“MLRI”)—a nonprofit legal services organization—to offer several such research opportunities.¹⁵⁶

MLRI has partnered with ABA Free Legal Answers, a virtual legal assistance clinic the ABA created to provide a forum for low-income people to seek advice and counsel on civil legal questions from a volunteer lawyer within their state.¹⁵⁷ The Massachusetts legal advice website is Massachusetts Legal Answers Online (“MLAO”).¹⁵⁸ Essentially, Massachusetts attorney-volunteers log into the website, select questions to answer within their expertise, and reply with legal information and advice.¹⁵⁹

One pro bono opportunity open to all Suffolk students was a Research Blitz.¹⁶⁰ During the Research Blitz, students and alumni gathered at the law school to answer real civil legal questions posted online by low-income Massachusetts residents on MLAO.¹⁶¹ In two short hours, the small groups worked together to select and draft answers to questions involving basic human needs such as housing and employment.¹⁶² Students leveraged technology to increase access to justice for low-income communities and received experience researching under realistic time constraints like lawyers do on a daily basis.¹⁶³

First-year students also provided research assistance to MLAO during one of their legal writing classes to introduce all 1L students to the role lawyers can play in closing the legal aid gap.¹⁶⁴ For this exercise, 1Ls served as research assistants for MLRI. In class, students worked in small groups on one research question that faculty preselected.¹⁶⁵ The questions covered civil matters such as

¹⁵⁶ See Samantha A. Moppett & Kathleen Elliott Vinson, *Closing the Legal Aid Gap One Research Question at a Time*, 18 HLRE: OFF THE RECORD 15, 15–17 (2017) [hereinafter *Closing Legal Aid Gap*]; Samantha A. Moppett, *Legal Writing Matters: Addressing the Access-to-Justice Crisis*, SUFFOLK U. L. SCH. (May 1, 2017), http://theroadto1l.org/legal_writing_matters/legal-writing-matters-addressing-the-access-to-justice-crisis/ [https://perma.cc/5S26-C74F] [hereinafter *Addressing Access to Justice*] (discussing ways to close legal aid gap); Samantha A. Moppett, *Legal Writing Matters: Research Blitz*, SUFFOLK U. L. SCH. (June 22, 2018), <https://sites.suffolk.edu/legalwritingmatters/2018/06/22/research-blitz/> [https://perma.cc/V835-XYVU] [hereinafter *Research Blitz*]; see also Samantha Moppett & Kathleen Elliott Vinson, *Digital Pro Bono: Leveraging Technology to Provide Access to Justice*, 92 ST. JOHN’S L. REV. 101 (forthcoming 2019) [hereinafter *Leveraging Technology*].

¹⁵⁷ See *Closing Legal Aid Gap*, *supra* note 156, at 15–17; *Addressing Access to Justice*, *supra* note 156; *Research Blitz*, *supra* note 156; see also *Leveraging Technology*, *supra* note 156.

¹⁵⁸ See generally *Massachusetts Free Legal Answers*, AM. BAR ASS’N, <https://mass.freelegalanswers.org> (last visited Oct. 21, 2019).

¹⁵⁹ See *Research Blitz*, *supra* note 156.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

child support, tenants' rights, and divorce.¹⁶⁶ The students collaboratively researched and drafted an email in response to the question posed.¹⁶⁷ At the end of the class, the student groups emailed their responses to their professor.¹⁶⁸ The best answers were shared with MLRI to review and, as appropriate, adopt and post on the website.¹⁶⁹

V. BENEFITS AND CHALLENGES

As the majority of jurisdictions, including all UBE states, incorporate an MPT component, law schools are analyzing how best to prepare their students for the bar exam, including analyzing their school's bar exam passage results and devising a plan to improve their students' success. Before embarking on any curriculum changes, they should review the benefits and challenges of incorporating MPT assessments in their curriculum with an eye towards not only capturing the most at-risk students without stigmatizing them, but also preparing all their students for success in practice as well as the bar.

A. *Benefits*

Numerous benefits outweigh the challenges involved in incorporating MPT type assessments into a law school's curriculum. These benefits include teaching students that the skills necessary for success in practice are the same skills needed to pass the bar exam, preparing students for realistic employer expectations, fostering grit and growth mindset while addressing the weaknesses of Generation Z, and easing the transfer of skills across different learning environments.¹⁷⁰ In addition to improving students' experience, incorporating MPT type assessments into the law school curriculum also meets the ABA goals of giving students assessments and preparing them to pass the bar exam.¹⁷¹

1. Aligns Academia with Practice and the Bar Exam

Incorporating MPTs throughout the law school curriculum aligns assessments not only with the bar exam but also with practice expectations.¹⁷²

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See infra* notes 174–199 and accompanying text.

¹⁷¹ *See infra* notes 200–205 and accompanying text.

¹⁷² *See White, supra* note 9 (discussing ABA Commission on Future of Legal Education goals). The Commission, along with others, is launching a number of empirical studies designed to help bar examiners and licensing bodies think through how an optimal licensing system should function and be structured if it is to best serve the fundamental goals of our system of justice in the

Adults learn more effectively when they can see the connection between what they are learning and their own experience and the connections between practice and academia.¹⁷³ On an MPT, facts are more like a client's problem in the real world with irrelevant facts coming from different sources instead of academic fact patterns.¹⁷⁴ Interacting with a case file on a performance test is also more realistic than reading a redacted case where students assess how a judge resolved a problem at the end of a case.¹⁷⁵ While some students may get experiential learning in a clinic, not every law student may participate in a clinic during law school.¹⁷⁶

Students also experience time pressure when completing an MPT. When receiving or submitting a legal writing assignment in their legal writing courses, students often ask: "How long would we have had in the real world in legal practice to complete this memo?" They are often surprised by the answer, as it usually is a lot less time than what they were given in academia. Practicing time management on an MPT acclimates students to the type of time pressure they will experience on the bar exam and practice.

2. Enhances Students' Professional Development and Professional Identity

Incorporating MPTs in the law school curriculum can help students gain employment. Some legal employers as well as courts require applicants to complete a time-pressured writing assignment as part of a job application to better assess an applicant's ability to write without editorial assistance under a realistic, tight deadline. Conversely, an academic writing sample, such as a law school assignment completed over weeks or months with the assistance of a student's professor or a law review article a student has worked on for a semester

contemporary landscape and in the future. We must all ensure that the bar exam of the future correlates with the work it is licensing and with the entry-level skills required to do that work. *Id.*

¹⁷³ See Reeves, *supra* note 15, at 654.

¹⁷⁴ See Sara J. Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way To Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEGAL PROF. 147, 151–52 (2018) (discussing ways facts presented on the MPT enhance students' nuanced factual analysis more than traditional law school testing).

¹⁷⁵ See Kathleen Elliott Vinson, *What's Your Problem?*, 44 STETSON L. REV. 777, 778–79 (2015) (discussing benefits of students engaging in problem-solving methods rather than reading case law).

¹⁷⁶ See Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing: The New Approach to Practicing Like a Lawyer*, 39 J. LEGAL PROF. 135, 141 (2015) (quoting Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507, 507–08 (2005)); see also Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 303 (2012) (explaining extraordinary benefits of clinical education).

or year with several drafts and feedback at several stages by editors, is not as realistic.

Even if a job interview or application does not involve completing a performance test, students will be more marketable to employers from their experience completing tasks lawyers do every day. Students have an advantage by completing performance tests throughout their law school education and can advocate that they are more practice ready than their competition who have not had this experience.

Incorporating MPTs into a law school curriculum also helps students develop their professional identity. Students are reminded of a lawyer's role to help clients solve problems. The context of every MPT sets them in the role of a lawyer.¹⁷⁷

3. Engages Generation Z

The grip of technology on Generation Z has resulted in weaker critical reading, thinking, and writing skills.¹⁷⁸ The learning characteristics of Generation Z students include being saturated with technology, which hinders their learning, and rewiring their brains that causes their attention span to become shorter, with an average attention span of eight seconds for a Generation Z student.¹⁷⁹ Generation Z also grew up with a focus in school on STEM classes (science, technology, engineering, and math) and with a de-emphasis on classes on critical thinking, writing, and problem solving.¹⁸⁰ Thus, incorporating MPTs, where students have to utilize their critical reading, writing, and analysis skills, helps law students further develop these critical skills.¹⁸¹

¹⁷⁷ See Berman, *supra* note 174, at 150.

¹⁷⁸ See Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 134, 135 (2015); Graham, *supra* note 128 (discussing adverse effects of technology addiction); Cathaleen A. Roach, *Is the Sky Falling? Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 J. LEGAL WRITING INST. 295, 320–22 (2005); see also Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41, 63–65 (2013) (addressing similar issues with Millennial students).

¹⁷⁹ See generally COREY SEEMILLER & MEGHAN GRACE, *GENERATION Z GOES TO COLLEGE* (2016) (showcasing findings from in-depth study on Generation Z students' education mindsets and goals). See Graham, *supra* note 128 (discussing adverse effects of technology addiction).

¹⁸⁰ See Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies Are Altering the Millennials Generation's Brain and Impacting Legal Education*, 16 SMU SCI. & TECH. L. REV. 409, 419 (2013); Graham, *supra* note 128 (discussing adverse effects of technology addiction); Sinsheimer & Herring, *supra* note 6, at 125 (advocating for law schools to spend more time teaching critical reading skills).

¹⁸¹ See Bratman, *supra* note 42, at 574 n.69, 602 (citing articles addressing incorporation of the MPT in law school classes); Graham, *supra* note 128 (discussing adverse effects of technology addiction); Sinsheimer & Herring, *supra* note 6, at 123.

4. Promotes Student Grit, Growth Mindset, and Self-Awareness

Taking an MPT in law school courses may foster grit and a growth mindset in students as they practice and learn from their mistakes before the bar exam.¹⁸² Students with a growth mindset believe their skills can improve with effort while students with a fixed mindset think their intelligence is based on their innate ability.¹⁸³ Having a growth mindset may help prevent students from giving up when facing challenges like the MPT on the bar exam or challenges when practicing law.¹⁸⁴ Students will have practice maintaining their focus and managing their stress.¹⁸⁵ Having been exposed to practice performance tests throughout their law school curriculum, students will gain grit and confidence about their success on the bar exam and their future legal practice.¹⁸⁶ It can also help students realize how efficiently a lawyer in practice would complete the task.¹⁸⁷ This appreciation can induce some humility and self-awareness.¹⁸⁸

5. Eases Transference of Skills

Students often struggle with transferring knowledge and skills from their law school courses that help prepare them for the bar and practice.¹⁸⁹ Yet students often struggle with transferring skills from one legal problem to a different problem in a new context and demonstrate “legal-writing atrophy.”¹⁹⁰ Incorporating MPTs into the law school curriculum can foster the transfer of

¹⁸² Grit has been found to better account for success than I.Q. *See generally* ANGELA L. DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2018).

¹⁸³ *See generally* CAROL S. DWECK, *MINDSET* (2007) (discussing fixed versus growth mindset).

¹⁸⁴ *See id.*

¹⁸⁵ *See* White, *supra* note 9 (asking whether preparing and taking bar exam imposes undue level of stress). At a time when legal education and practice face mental wellness challenges, it is important to ask questions about the wellness costs associated with bar exam licensure. *See id.*

¹⁸⁶ *See* DeFabritiis, *supra* note 7, at 68; Holiman, *supra* note 135, at 232; *see also* Reeves, *supra* note 15.

¹⁸⁷ *See* Murphy, *supra* note 106, at 181 (discussing idea to start semester with an MPT exercise). Providing an MPT exercise on the first day of class followed by a demonstration of how lawyers would attack the problem reduces resentment. *See id.* (avoiding student attitudes about wasting their time).

¹⁸⁸ *See id.*

¹⁸⁹ *Cf.* Shaun Archer et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. Legal Educ. 258 (2014) (discussing transference of skills in legal writing courses to clinics in law school); Mary Bowman & Lisa Ellen Brotoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, CLINICAL L. REV. (forthcoming 2019).

¹⁹⁰ *See* Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing*, 39 J. LEGAL PROF. 135, 162 (2015); *see also* Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 289–90 (2010).

learning to new contexts, such as the bar exam and legal practice, by helping students make connections and cueing them to previously learned skills.¹⁹¹

The transfer of skills taught in legal writing courses can be amplified by drawing a closer connection between the closed universe objective memorandum often used as the first assignment in a legal writing course and the MPT. Context is specific so when a student learns to write a memorandum in a legal-writing course, they are likely to connect that knowledge to the specific circumstances and factors surrounding that particular learning experience, assignment, class, and perhaps even professor.¹⁹² When a student is then tasked with a new assignment, unless cued to recognize the similarity in the first-year experience, they may be unable to recognize that the information previously learned is equally applicable to this new task.¹⁹³ By organizing the objective memo into a file that contains the memo giving the assignment from the supervising attorney, facts from the client's case, and a library containing the case law, legal writing faculty can create a near transfer making it easier to apply the skills they developed in the first year to success on the Bar exam.¹⁹⁴

Deeper learning occurs when students can make explicit connections of skills and time pressure learned in law school to what they may encounter in practice, on the bar exam, or in an application for employment.¹⁹⁵ Thus, students will likely be more able to take what they learned in one context and apply it to a new legal problem in practice or on the MPT on the bar exam. Without explicit practice on MPTs throughout the law school curriculum, it is unrealistic to expect law students to transfer the skills needed to pass the bar.¹⁹⁶

¹⁹¹ See DeFabritiis, *supra* note 7, at 63; see also Tamra Alexander et al., *Two Professors, Three Opinions, One Lesson Plan?*, 6 CAN. LEGAL EDUC. ANN. REV. 63, 77 (2011); Trujillo, *supra* note 16, at 111 (discussing how learning in different contexts helps build skills for bar passage and future lawyering).

¹⁹² Alexander et al., *supra* note 191, at 77 (noting changed environment, subject matter, format, or classroom, makes writing memoranda in another class difficult).

¹⁹³ Kowalski, *supra* note 190, at 325 (explaining how faculties can help students make connections to previously learned skills).

¹⁹⁴ David N. Perkins & Gavriel Salomon, *Transfer of Learning*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 1, 4 (2d ed. 1992), <http://jaymctighe.com/wordpress/wp-content/uploads/2011/04/Transfer-of-Learning-Perkins-and-Salomon.pdf> (explaining near and far transfer).

¹⁹⁵ See DeFabritiis, *supra* note 136 (discussing the MPT similarity with closed memo assignment in legal writing class); Goldfarb, *supra* note 176, at 289–90 (stating clinical education improves, deepens, and changes skills because of lawyering assistance).

¹⁹⁶ See DeFabritiis, *supra* note 7, at 39 (discussing how law faculty can facilitate transfer of skills from student to lawyer).

6. Emphasizes the Importance of the Bar Exam and Competencies Needed to Practice

Incorporating an MPT in a required course exposes all students to the benefits and sends a message that the law school places a priority on success on the bar exam and practice. The earlier the better, as students are usually more eager, motivated, and impressionable in their first year than in upper-level years. While one concern may be that students will not be invested in the course if it occurs too early in their legal education, such as the first year, if the MPT assessment is graded, students will take it seriously. Students value what is tested.¹⁹⁷

Incorporating MPTs throughout the law school curriculum also avoids students feeling like they need to make a choice between taking bar exam courses at the expense of clinical or other experiential courses or non-bar courses, such as health law, environmental law, and others.¹⁹⁸ Many students focus on taking courses where the doctrinal subject of the course is tested on the bar exam and are overconfident of their ability to complete practice-ready, time-pressured, practical legal documents.¹⁹⁹ They are more concerned with how to answer essays and multiple-choice questions on the bar and thus, focus most of their efforts on those areas instead of continuously practicing taking performance tests. Through continuous practice on performance tests throughout law school courses, students will value the importance of the MPT on the bar exam as well as its representation of the minimum skills a new lawyer needs to be successful in legal practice.

7. Satisfies ABA Standards

Incorporating MPTs into the curriculum at law schools would satisfy several ABA Standards regarding bar readiness.²⁰⁰ The ABA considers actions by the law school to address bar passage and its efforts to address bar passage problems in the law school's favor.²⁰¹ ABA Standard 301(a) states that the goal of legal education is to prepare students for bar admission and the legal

¹⁹⁷ See generally Gerald F. Hess & Sophie B. Sparrow, *What Helps Law Professors Develop as Teachers?—An Empirical Study*, 14 WIDENER L. REV. 149 (2008).

¹⁹⁸ See Trujillo, *supra* note 16, at 77 (discussing how bar exam drives curriculum decisions).

¹⁹⁹ See Sabol, *supra* note 125 (discussing courses utilizing MPT).

²⁰⁰ See *supra* Section II.A (discussing students and “bar readiness”); Berman, *supra* note 174.

²⁰¹ See ABA STANDARDS & RULES, *supra* note 7, at 24. Standard 316(c)(3) states the following: “Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school’s favor.” *Id.*

profession.²⁰² ABA Standard 316 requires law schools to meet a minimum bar passage rate.²⁰³ ABA Standard 314 requires law schools to give students formative and summative assessments.²⁰⁴ Giving students sustained practice in MPTs in different contexts in different courses throughout law school can “improve student learning and provide meaningful feedback to students by providing opportunities for assessments.”²⁰⁵

B. Challenges

There can be challenges when initially incorporating MPT type assessments into a law school’s curriculum. Both faculty and students may be pushed beyond their comfort zone in creating and tackling the MPT.²⁰⁶ Its incorporation may give the impression that speed and teaching to the test are valued over the traditional skills of editing and presenting a polished final

²⁰² See *id.* at 15 (capturing Standard 301).

²⁰³ See *id.* at 24 (stating law school bar passage rate must pass test under Standard 316). Standard 316(a) states the following:

(a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests: (1) That for students who graduated from the law school within the five most recently completed calendar years: (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or (ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

Id.

²⁰⁴ See *id.* at 23 (discussing Standard 314). Standard 314 provides the following interpretations:

Interpretation 314-1

Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.

Interpretation 314-2

A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.

Id.; see also Allen & Jackson, *supra* note 134, at 2.

²⁰⁵ See ABA STANDARDS & RULES, *supra* note 7, at 23. Standard 314 states the following: “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.” *Id.*; see also Holiman, *supra* note 135, at 235 (noting incorporation of test-taking strategies and substantive practical learning will prepare students for bar exam).

²⁰⁶ See *infra* note 209 and accompanying text.

product.²⁰⁷ Integrating MPT type assessments will also take time and effort in their creation and administration.²⁰⁸

1. Pushes Students Beyond their Comfort Zone

Some students may experience “cognitive paralysis,” frustration, and less creativity when experiencing time pressure to perform on an MPT assessment in law school, while others may feel more energized, more focused, and more challenged under time pressure.²⁰⁹ While students may initially resist having to complete performance tests, they will realize their value when taking the bar exam and entering the legal profession. Similarly, sometimes in legal writing courses students do not appreciate the instruction received until after the course is over and they apply the skills when working. Curriculum in legal education should not be dictated by law students who have never taken a bar exam and may not yet know or appreciate the skills needed in the legal profession.

2. Values Speed

While in practice a client’s problem may not be solved in 90 minutes or with a file of all the sources or facts you may need like on an MPT, a performance test is a good starting point to acclimate students to what they will face on the bar exam and is an illustration of a typical task a new lawyer may undertake in practice.²¹⁰ Some of the best students may initially struggle satisfactorily completing a performance test, as they are not accustomed to the “time famine” and they struggle to thoroughly edit and proofread their work, skills they may excel at when they have more time to complete an assignment.²¹¹ “While lawyers must do their work efficiently and sometimes under time pressure, ‘speediness’ in test-taking is a different skill.”²¹² Having multiple opportunities to take performance tests throughout law school will help students be more successful than if they had to struggle for the first time during the bar exam. In addition, students may get a reality check “that sometimes, it is necessary (and, frankly, ok) to sacrifice depth and detail in a written work product in favor of an accurate,

²⁰⁷ See *infra* note 213 and accompanying text.

²⁰⁸ See *infra* notes 224–227 and accompanying text.

²⁰⁹ See Amabile et al., *supra* note 1 (asking employees of U.S. companies how they experience time pressures day-to-day).

²¹⁰ See Curcio et al., *supra* note 117, at 37–41.

²¹¹ See Amabile et al., *supra* note 1 (discussing more than half of Americans want more time, even if it means less money, and have more problems with time management than money management).

²¹² Curcio et al., *supra* note 117, at 41.

clear bottom line answer.”²¹³ Finally, students in need can receive accommodations on the MPT as they do on any law school exam.²¹⁴

3. Teaches to the Test

Incorporating MPTs into the law school curriculum may have a negative perception of “teaching to the test” in contrast to teaching students how to “think like a lawyer.”²¹⁵ Millennials grew up with 2002 No Child Left Behind Act (NCLB), which received criticism that teachers teach to the test at the expense of critical thinking and writing skills.²¹⁶ Law schools are wary of having the reputation that they teach to the bar exam.²¹⁷

Schools express trepidation at being labeled a “bar review” school.²¹⁸ Such criticism is often based on the view that academically rigorous schools do not need to focus on bar passage because the quality of their legal instruction ensures bar passage.²¹⁹ With declining bar rates, law schools may not have the luxury of being concerned with the possible perception of teaching to the test.²²⁰

Critics argue that the bar exam should not drive curriculum decisions.²²¹ Others argue that the answer is to raise admissions standards or attrition to improve the bar passage rate.²²² Both strategies for selectivity, however, can have financial implications.²²³

²¹³ O’Leary, *Legal “Street” Writing*, *supra* note 151, at 5.

²¹⁴ See Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12189 (West 2019). “Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade 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.” *Id.*

²¹⁵ See Reeves, *supra* note 15, at 645 (discussing pejorative label, “teaching to the test,” synonymous with bad teaching). The idea of “teaching to the test” and incorporating bar exam preparation into the core curriculum is an anathema. *See id.*

²¹⁶ See Allen & Jackson, *supra* note 134, at 6–8.

²¹⁷ See Reeves, *supra* note 15, at 645–46 (discussing how “teaching to the test” can be useful with other teaching enhancements).

²¹⁸ See Trujillo, *supra* note 16, at 72 (addressing law school concerns about bar passage rates).

²¹⁹ *See id.*

²²⁰ See Allen & Jackson, *supra* note 134, at 7 (noting declining bar passage began in 2014).

²²¹ See Trujillo, *supra* note 16, at 77 (stating critics also believe bar exam misses mark on crucial lawyer topics and skills).

²²² See Day, *supra* note 70, at 337 (describing solution to bar passage problem). One suggestion to solve the low bar passage rates is to limit admissions enrollment to those students with high LSAT scores, but that solution could have financial implications for law schools. *See id.*

²²³ *See id.*

4. Takes Time and Effort

Another challenge of incorporating MPTs may be the time and effort required. Such time and effort could include: planning and preparing materials, devoting class time to explain the assessment, incorporating it into a syllabus, providing feedback, possibly grading the assessments, providing accommodations, and providing proctors.²²⁴ Incorporating MPTs into a law school curriculum, as well as the preparation and feedback of it, can take one of many forms, some being more labor intensive than others.

Utilizing a law school's resources and experts can decrease the work involved. For example, work with your school's bar director to develop the assessment and provide a review prior to the exam for the students. Other resources professors can consult include using previous MPT questions the NCBE provides, adapting previous exercises or assessments into an MPT format, or using already assigned cases or concepts from their course.²²⁵ Assigning a performance test can act as a review of content, preparing students for a final exam, or could be used if the school has a snow day, a make-up class, or a substitute instead of canceling a class. Although incorporating an MPT will involve some time and effort initially, MPT assessments could then be recycled and used again in the future. Finally, a performance test may result in deeper learning, so quality increases even if it takes time away from covering more content.²²⁶

Numerous options can be explored regarding feedback and grading. Individual feedback is not necessarily required. For example, a professor could provide a sample answer, checklist, or rubric. Performance tests also do not have to be graded. It could be an ungraded, formative assessment. Conversely, performance tests could be graded with no feedback like any other exam. Even if they are graded or feedback is provided, it is much less time intensive compared to critiquing students' memoranda assignments or grading a typical three-hour exam.

Finally, work with your law school's dean of students' office or academic services office to provide proctors and accommodations.²²⁷ With

²²⁴ See Graham, *supra* note 128.

²²⁵ See *id.*; *Preparing for the MPT*, *supra* note 72.

²²⁶ See Goldfarb, *supra* note 176, at 289–90 (stating clinical education improves, deepens, and changes skills because of lawyering assistance).

²²⁷ Students that receive accommodations in law school are not guaranteed accommodations on the bar exam. States can set requirements in granting accommodations. See *Applying for Nonstandard Testing Accommodations for the Bar Exam in Massachusetts*, MASS.GOV, <https://www.mass.gov/how-to/applying-for-nonstandard-testing-accommodations-for-the-bar-exam-in-massachusetts> [<https://perma.cc/U2SA-CUZW>] (last visited Oct. 21, 2019) (identifying materials applicants must submit to assess if applicant has demonstrated need for reasonable accommodations).

enough lead time and prioritization of the law school to prepare students for the bar and practice, everyone can work together towards this goal.

VI. HOW TIME-PRESSURED WRITING ASSIGNMENTS CAN INFORM LAW SCHOOL CURRICULUM AND BAR PASSAGE INITIATIVES

“If a law school can’t prepare three-quarters of its graduates who take the bar exam to pass, it shouldn’t exist.”²²⁸ Law schools have a duty to not only enhance their teaching to achieve the objectives of a traditional law school education, but also to better prepare their students for the bar exam.²²⁹ Assuring success on the bar exam should not require students to have to choose between taking courses that align with their chosen careers versus those that will help them on the bar exam.²³⁰ Law schools can and should deliver courses that impart future lawyers with the skills they need to compete in the legal marketplace, as well as those necessary to pass the bar exam.²³¹ Law schools preparing students to pass the bar exam need not shift into “bar exam schools,” but rather should serve to enhance the preparedness of legal professionals of the future.²³² This directive is all the more relevant at a time when the ABA has renewed its intention to condition accreditation on law schools meeting a 75% bar passage rate.²³³

Incorporating performance test type assessments into the law school curriculum allows students to practice skills they will need in their future careers.²³⁴ This early exposure subsequently allows them to maximize their

²²⁸ Sara Randazzo, *New Test for Law Schools: Do Enough Graduates Pass the Bar Exam?*, WALL ST. J. (Jan. 13, 2019, 10:00 AM), https://www.wsj.com/articles/new-test-for-law-schools-do-enough-graduates-pass-the-bar-11547391600?shareToken=ste4433eec568e49c49871419dac5304c7&ref=article_email_share [<https://perma.cc/NPH7-96N6>] (stating law schools should not exist if most graduates cannot pass bar).

²²⁹ See Reeves, *supra* note 15 (explaining how incorporating elements of bar exam into curriculum makes law school more efficient).

²³⁰ See Randazzo, *supra* note 228 (claiming students who take more rigorous upper-level bar courses more likely to pass bar).

²³¹ See *id.*

²³² See Holiman, *supra* note 135, at 235 (noting incorporating test-taking strategies and substantive, practical learning into law school will prepare students for bar exam); Riebe, *supra* note 15, at 289 (explaining bar preparation in law school prepares students to become effective attorneys).

²³³ See ABA STANDARDS & RULES, *supra* note 7, at 24 (addressing sufficient bar passage rates in Standard 316); see also Randazzo, *supra* note 228 (discussing ABA push to toughen requirements).

²³⁴ See Diane F. Bosse, *The MPT: Assessment Opportunities Beyond the Traditional Essay*, B. EXAMINER, Dec. 2011, at 17 (discussing the MPT grading experience) (“For the first time, I felt I knew whether or not a candidate was going to be a good lawyer.”); see also Joseph Kimble, *The*

post-graduation bar studies as a true bar review period rather than a “bar learning” cram session.²³⁵ The immediate benefits of affording students the opportunity to practice time-pressured writing throughout their law school careers has been discussed in Part IV of this Article.²³⁶ Beyond the immediate benefits, by progressively building the muscle memory necessary to succeed on the bar exam throughout law school, applicants can approach bar review as a positive and empowering experience rather than a plunge into the unknown.²³⁷

A coordinated effort in incorporating such assessment across the curriculum may also provide invaluable data to law schools informing them on how to best prepare future law students. Currently, LSAT score and first-year GPA are the most cited indicators of bar passage.²³⁸ Law schools use this data to design and implement early intervention programs for upper-level law students to improve their chances of passing the bar exam.²³⁹ Tracking student performance on time-pressured writing assignments may provide law schools with additional guidance on how to better prepare their students. Comparisons between performance on the first-year capstone and performance on traditional bar passage indicators such as LSAT scores and first-year GPAs could be drawn. While LSAT scores and first-year GPAs already provide law schools with valuable data, a consistent finding in capstone performances could further inform the type of courses and assessments that law schools provide in a guided curriculum designed to improve bar passage.²⁴⁰

Beyond traditional indicators, data reflecting student performance on time-pressured writing assignments would give law schools the opportunity to explore numerous comparisons and determine if any evidence of positive impact exists between performance on time-pressured writing assignments, performance in other law school courses or assessments, and ultimate performance on the bar exam.²⁴¹ The most direct comparison could be made between student

Best Test of a New Lawyer's Writing, 80 MICH. B.J. 62, 62–64 (2001) (describing performance test type assignments test lawyer's ability to analyze and apply law clearly and coherently).

²³⁵ See BERMAN, *supra* note 83, at 5.

²³⁶ See *supra* Part V (discussing benefits behind incorporating the MPT into legal education).

²³⁷ See BERMAN, *supra* note 83, at 3–5.

²³⁸ See DeFabritiis, *supra* note 7, at 69 (stating low undergraduate GPA and low LSAT scores can indicate low bar scores); Murphy, *supra* note 106, at 174 (identifying students in bottom quarter of their class face greater hurdles passing bar after graduation).

²³⁹ See DeFabritiis, *supra* note 7, at 69 (claiming schools with lower LSAT scores and GPAs students can expect weaker critical thinking skills).

²⁴⁰ See *Authentic Assessment*, IND. U. BLOOMINGTON, <https://citl.indiana.edu/teaching-resources/assessing-student-learning/authentic-assessment/> (last visited Sept. 18, 2019) (discussing the need for authentic assessments which require application of what students have previously learned to a new situation because they are likely to be more valid than conventional tests, particularly for learning outcomes that require higher-order thinking skill).

²⁴¹ Cynthia J. Brame & Rachel Biel, *Test-Enhanced Learning: The Potential for Testing to Promote Greater Learning in Undergraduate Science Courses*, 14 CBE–LIFE SCI. EDUC., Summer

performance on time-pressured writing assignments administered in law school and performance on the MPT portion of the bar exam.²⁴² The expectation may be to find that students who had the opportunity to practice closed-universe, time-pressured writing throughout their law school careers would score higher on the MPT portion of the bar exam than those students who did not have similar opportunities.²⁴³ A broader relationship could also be explored by comparing performance on law school time-pressured writing assignments and performance on the overall bar exam.²⁴⁴

The MPT tests the same essential lawyering skills that legal writing courses cultivate throughout the first-year curriculum: the ability to read, organize information, logically separate the relevant from the irrelevant, write clearly, and, above all else, follow direction.²⁴⁵ Based on the similarity in format of the closed universe writing assignment that first-year legal writing programs use as their first objective memorandum and the closed universe materials that comprise the MPT, performance on the first-year first legal writing assignment could be compared to students' performance on closed universe time-pressured writing assignments. More specifically, performance on the first objective memorandum could be compared to performance on a capstone, modeled on the MPT, and administered at the end of the first year.²⁴⁶

Performance on the capstone could also be compared to performance on other legal writing assignments, including objective and persuasive memoranda, where students are required to conduct their own research. In addition to having substantially more time to complete these assignments, students often receive significant feedback on their memoranda and have the opportunity to re-write them. Although both assessments require students to use similar skill sets, the expectation here may be that there exists a stronger evidence of positive impact

2015, at 1–12 (explaining testing that enhances learning as low-stakes retrieval practice and suggesting that the benefits of testing are not tied to a specific type of retrieval practice, but rather retrieval practice in general).

²⁴² See Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 118, 122 (2000) (finding close correlation between poor performance on first-year simulated MPT and failure on actual MPT).

²⁴³ See Klein, *supra* note 98, at 14 (finding students improve their ability to pass performance tests by doing more of them).

²⁴⁴ See Murphy, *supra* note 106, at 183 (finding students underperforming on the MPT also underperform on bar exam). In Texas, the MPT has historically comprised only 10% of the Texas Bar Exam, however, performance of one Texas law school's graduates "on the bar exam as a whole has shown a strong correlation to their performance on the MPT." See *id.*; see also John D. Schunk, *Can Legal Writing Programs Benefit From Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized Performance-Type Assignment?*, 29 HAMLINE L. REV. 308, 317 (2006) (discussing candidates' results on performance test correlated well with performance on parts of bar exam).

²⁴⁵ See Darrow-Kleinhaus, *supra* note 94, at 19; DeFabritiis, *supra* note 7, at 39.

²⁴⁶ See Schunk, *supra* note 244, at 317.

between performance on the capstone and ultimate performance on the bar exam than performance on traditional memoranda and ultimate performance on the bar exam.²⁴⁷ Such information may help inform why some top students fail the bar exam.²⁴⁸ In some instances, students who earn high grades on legal writing assignments do so, at least in part, because of the significant feedback and one-on-one guidance that they receive from their professor.²⁴⁹ If a student becomes reliant on this guidance, they may not develop the independence necessary for success on the bar exam and in the practice of law.²⁵⁰

VII. CONCLUSION

Law schools and students are under pressure to gain the competencies needed to gain licensure to practice law and be successful at it. Law schools have an ethical and professional responsibility to best prepare their law students for success on the bar and in practice. Incorporating performance tests into a law school curriculum gives law schools an opportunity to serve a dual role of providing students much-needed practice on bar exam skills and preparing students for practice, as the performance tests assess the lawyering skills required to successfully practice law. This Article offers examples of how law schools can do a better job of increasing students' minimum competencies to pass the bar, gain employment, and practice law effectively while not requiring a major overhaul of law school curriculum or demanding the expenditure of a huge amount of time and effort by faculty.

²⁴⁷ See *id.* (discussing how rewrite submissions had effect of narrowing qualitative difference between higher and lower scoring students).

²⁴⁸ See Murphy, *supra* note 106, at 175 (addressing reasons why top students underperform on MPT).

²⁴⁹ See Schunk, *supra* note 244, at 314 (proposing single-submission writing assignments may have secondary effect of students taking other assignments seriously).

²⁵⁰ See *id.* (discussing importance of incorporating single-submission assignments into legal writing curriculum).