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USING THE MULTISTATE PERFORMANCE TEST IN AN LRW COURSE

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The advent of the Multistate Performance Test (MPT) caused me to consider giving a final examination in Howard's first-year Legal Reasoning, Research, and Writing (LRRW) course.² As I investigated the MPT and learned its aims and content, I decided that it, or an exam like it, could be an effective teaching tool. This article retraces my thinking about it, starting with a short summary of the MPT and Howard's version of it in the Legal Research and Writing (LRW) Program, continuing with an articulation of the educational and political justifications for giving an MPT-like exam in an LRW course, and concluding with an analysis of Howard's experience with the test in spring 1999,³ the first time it was administered, and with some assessment of the results from the administration of the spring 2000 exam.

The MPT

The Multistate Performance Test was created in part to respond to concerns of the bar and bar examiners that traditional multiple-choice and

essay questions do not adequately test certain kinds of skills important to being a competent lawyer.⁴ As described by the National Conference of Bar Examiners (NCBE), the “Multistate Performance Test is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish.”⁵ It is being adopted quickly—in merely three years, at least 27 states have adopted the MPT or an MPT-type test as part of the bar exam and even more are considering adopting it.⁶

The MPT is quite different from traditional multiple-choice and essay tests. While there is some inevitable overlap in the skills tested (e.g., reasoning and issue spotting), for the most part the skills targeted by the MPT are different from those required to do well on the other parts of the bar exam. These include some of the skills necessary for the effective practice of law, particularly some that are taught in effective, modern LRW courses. As described by the NCBE:

The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for relevant 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; (6) complete a lawyering task within time constraints.⁷

On the MPT, test takers review a fact file and a small “law library” and then perform one of a variety of lawyering tasks. The NCBE's

¹ I wish to thank the LRW faculty at Howard—Jala A. Amsellem, Gregory A. Berry, Arnette L. Georges, Marvin H. Lett, and Gwen Roberts Majette—for contributing data and insights, and further I wish to thank Professor Nancy L. Schultz for her helpful comments on an earlier draft.

² LRRW is a four-credit, year-long, graded first-year course. To review the syllabus and course handbook, see Legal Res. & Writing Program, Howard Univ. Sch. of Law, *Legal Reasoning, Research & Writing Course Home Page* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/LRRWindex.html>>.

³ Steven D. Jamar, Howard Univ. Sch. of Law, Legal Res. & Writing Program, *LRRW 1999 Final Exam* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/LRRW1999FinalExam.html>> (Includes “the 1999 Final Exam given in Legal Reasoning, Research, and Writing, HUSL's LRW program's first-year course. ... The exam booklet is divided into four sections: general instructions, record, law library, and briefs filed by the attorneys representing the parties.”).

⁴ See National Conference of Bar Examiners, *Why the NCBE Developed the MPT* (visited May 6, 2000) <http://www.ncbex.org/Tests/mpt_be1.htm> [hereinafter NCBE, *Why the NCBE Developed the MPT*].

⁵ National Conference of Bar Examiners, *The MPT Multistate Performance Test, Description of the Examination* (visited May 6, 2000) <<http://www.ncbex.org/Tests/mpt.htm>> [hereinafter NCBE, *Description of the Examination*].

⁶ National Conference of Bar Examiners, *Multistate Examination Use* (visited May 6, 2000) <<http://www.ncbex.org/Tests/testuse.html>> (chart). The first MPT was given in 1997, although both California and New Jersey gave practical skills-type tests prior to 1997.

⁷ NCBE, *Description of the Examination*, *supra* note 5. The MPT list of skills was “based in part on the ‘Statement of Fundamental Lawyering Skills’ from the Report of The Task Force on Law Schools and the Profession, ABA, July 1992 (the MacCrate Report).” National Conference of Bar Examiners, *Skills Tested by the MPT* (Dec. 22, 1999) <<http://www.ncbex.org/Tests/mptspecs.htm>>.

description of the fact file also works as a good description of the materials for a typical first-year LRW closed-memo⁸ problem:

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include, for example, transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, and lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.⁹

The library consists of two or three cases and, if appropriate, a statute, rule, or Restatement section. The cases are not necessarily real ones, though they are often adapted from reported decisions.

The NCBE describes the written document to be produced as follows:

Although it is not feasible to list all possibilities, examples of tasks applicants might be instructed to complete include writing 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; a closing argument.¹⁰

The Howard LRRW final exam was modeled

after the MPT, but with some significant differences derived from my sense of what is needed for an effective evaluative and teaching tool. By placing the problem in a real jurisdiction, the exam could use actual statutes and court decisions, not fictitious ones. I also wanted a test that was harder than the MPT and that would spread the class more, so Howard's LRRW exam had a somewhat more complex set of documents from which facts had to be extracted and a larger library than is typical for the MPT. In order to be able to work through the materials thoughtfully, students were given four hours for the exam, as contrasted with the MPT's 90 minutes.¹¹ The LRRW final exam was essentially an LRW closed-memo assignment to be done in four hours instead of the typical two or three weeks. The final exam counted for 10 percent of the final grade.¹² This was approximately the same weight given to each of the main LRW writing projects for the year.

Justifications for Giving an MPT-Type Exam in LRW

The question is not whether teaching practical lawyering skills, including the MPT-tested skills, is appropriate—the unequivocal answer is yes. Rather, the question is whether preparing students to do these same tasks in a time-pressured setting is valuable not only to help students prepare for the MPT,¹³ but also as a way to teach the content of the LRW course. Again, my answer is yes. Although the existence of the MPT makes the decision to give an MPT-type final easier, giving such a timed skills test is justifiable for other educational and political reasons.

One educational justification relates to the importance in the practice of law of being able to

“While certainly not the full measure of a lawyer, being able to analyze situations quickly, read and understand unfamiliar law quickly, and develop reasoned and reasonable responses to problems quickly are attributes of the most effective lawyers.”

⁸ In the LRW community a “closed memo” problem refers to one in which the sources of law that the students are to use have been restricted to a closed set of materials chosen by the professor. Among the reasons to use a limited universe of legal sources are to allow the student to focus on analysis and synthesis in a controlled way and to make class or small-group workshops easier since all of the students will have read the same material at the same time. The adoption of the closed-universe-based MPT adds another reason to use closed-universe problems in LRW courses, i.e., to familiarize students with this sort of problem.

⁹ NCBE, *Description of the Examination*, *supra* note 5.

¹⁰ NCBE, *Why the NCBE Developed the MPT*, *supra* note 4.

¹¹ The 2000 LRRW exam was shortened to three hours with a 16-page booklet, compared with four hours and a 22-page booklet used in the 1999 LRRW exam.

¹² Sixty-five percent of the grade was based on writing assignments, 5 percent on an oral argument, 5 percent on an objective test (which included some citation questions), 10 percent on a collection of research exercises not tied to the writings, and 5 percent on class participation and other discretionary factors.

¹³ See Nancy L. Schultz, *There's a New Test in Town: Preparing Students for the MPT*, 8 *Perspectives: Teaching Legal Res. & Writing* 14 (1999).

“Thinking through the skills they have learned in a holistic fashion and then developing their own strategies for employing the skills quickly can help students integrate and internalize their learning.”

work quickly and accurately. While certainly not the full measure of a lawyer, being able to analyze situations quickly, read and understand unfamiliar law quickly, and develop reasoned and reasonable responses to problems quickly are attributes of the most effective lawyers. Lawyers who are masters of their craft, just like other masters of their respective arts, be it playing the guitar, cooking, playing soccer, or performing surgery, are able to perform not only better, but faster. A limited-time exam tests students on their level of mastery as well as on their basic ability to use the tested skills.

Giving a timed exam not only allows assessment of mastery, but also may help bring about greater mastery. After students complete a semester or year of learning the skills, a test may induce them to review the course. Thinking through the skills they have learned in a holistic fashion and then developing their own strategies for employing the skills quickly can help students integrate and internalize their learning. Knowing that the test is time-limited may induce students to go beyond merely learning the skills to reach a level of mastery that allows them to use the skills quickly and instinctively.

There is some anecdotal evidence supporting this expectation. After the 1999 LRRW final exam, a few students reported that they felt they finally understood what was expected when they reread the textbook and their notes in preparation for the test. They would not have done this end-of-course review without a test looming. One student stated that the advice sheet (concerning how to take the test)¹⁴ distributed before the exam helped him crystallize the legal reasoning paradigm and the problem-solving approach to lawyering.¹⁵

¹⁴ See Steven D. Jamar, *Tips for Taking the Multistate Performance Test* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/MPBExamTips.html>>. The list, which covers “general skills being tested . . . competencies required for answering an MPT-type exam question . . . [and] recommended process for taking an MPT-type exam,” was created from various sources, including the MacCrate Report, the NCBE Web site, and a presentation made to Howard faculty by Elliot Milstein and Ann Shalleck, both professors at American University Washington College of Law who serve on the committee that drafts MPT problems.

¹⁵ See Richard K. Neumann, *Legal Reasoning and Legal Writing* § 20.3 (3d ed. 1998); Stefan H. Krieger et al., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis*, ch. 2 & § 4.1 (1999).

In addition to inducing review, the test can also help students master the material because taking a well-crafted skills test can itself be instructive. Since the students need to analyze the facts, analyze and synthesize the law, and produce an end product in an intense, short burst of effort, students may see relationships between the facts and the law and problem solving in ways they may have missed before.

A related educational justification derives from how people learn. When a person is learning a piece of music, a technique sometimes used is to play it slowly (to learn the notes and fingering), then very quickly (to cement and internalize the learning), and then at the right tempo. After playing it too fast, it seems easy at the right speed. This same phenomenon exists with video games—after playing one at a higher, faster level, one finds that the lower, slower levels are easy. Similarly, the intense, pulsed experience of a test can help cement the knowledge learned over the year.

Another educational justification relates to giving feedback to the students after the exam is taken. Some mistakes may show up more clearly on a timed exam than on an out-of-class effort. For example, a student who has difficulty stating the law clearly and simply will almost certainly have the same difficulty on the exam and it may be even more visible to the student in the exam context.

Reviewing students’ work to help them see their writing and reasoning strengths and weaknesses is not unique to reviewing exams—the value of review exists for all written work. What gives the timed-exam review special value is that the student may find the feedback on exam writing itself to be more readily and obviously transferable to other essay exams. Furthermore, exam-writing feedback from LRW faculty members may have across-the-board value that will be transferable to exams in other courses because they know each student’s writing and reasoning intimately, having worked with the student throughout the year, and are specially skilled at providing specific feedback on writing problems per se.

The exam has educational value not only for the students who take it, but also for future students. LRW faculty members can incorporate

it into their teaching in the following year. Something as simple as being able to say to the students, “Look at the final exam from last year. By the end of this year you should be able to do in just three hours what we are teaching this year” will motivate some students. Furthermore, using a past year’s exam for in-class exercises—perhaps timed ones—will also reinforce the relationship between class sessions, writing assignments, and the final exam.¹⁶

Another educational justification relates not so much to the students directly as it does to the information that the LRW faculty member receives. The test can serve as a diagnostic tool both for assessing individual student performance and for assessing the effectiveness of the course itself. Although the primary means to assess student accomplishment and course effectiveness properly remains the regular writing assignments, useful information can be learned from student performance on an MPT-type examination. The final exam provides a useful, unique window because, unlike most LRW assignments in which students can discuss the problem among themselves and even in class workshops, on the exam each student must do all of the reading, thinking, and writing completely on his or her own.

There are at least two other educational justifications for giving the test. One is that it is legitimate to help students prepare for the bar exam by familiarizing them with the sort of exam questions they will face. A student should not fail the bar exam because of a lack of familiarity either with the skills and knowledge being tested or with how they are being tested. The bar exam should distinguish on the basis of who knows the law and possesses the necessary skills and who does not, rather than on the basis of unfamiliarity with the form of the test. Familiarizing students with the MPT by giving them one or more MPT-style tests in law school helps make the bar exam a more fair test of what it is seeking to test.

The final educational justification relates to the personal accountability of the individual

students. Many LRW programs (including Howard’s) use cooperative learning techniques and provide a large amount of help through class workshops, individual conferences, and modeling processes of analysis and synthesis for regular writing projects. These approaches are sound when focusing on learning the skills. However, they have a weakness—the degree of mastery by a particular student can be masked by the amount of help the student received in preparing the writings.¹⁷ The timed exam may help identify the students who need to develop their ability to do the work more independently.

In addition to educational justifications, there are political reasons for giving such a test. Giving a final exam as in other courses makes LRW seem less different, less outside the curriculum, than LRW may otherwise seem. Another political justification is that by giving an MPT-type exam, the LRW program is doing the students and the law school a service that it is well positioned, even ideally positioned, to provide. Law schools are expected to prepare students for the practice of law and, often less explicitly (except from the student’s perspective), are also expected to prepare students to pass the bar exam. With the advent of the MPT, law schools must adapt their curricula to ensure that graduates possess the skills necessary to practice law and, to the extent that the MPT tests what it purports to test, to pass the MPT. Having an MPT-style test given through a mandatory LRW program ensures that all students will have had at least one exposure to such a test. These political justifications are not sufficient grounds in themselves to give these sorts of tests, but they add some weight to the scales.

Howard’s Experience with the LRW Final Exam

Based on Howard’s first year’s experience with an MPT-style final exam, I consider the exam to be a valuable addition to the program. As discussed in the previous section, I expect it to

“The test can serve as a diagnostic tool both for assessing individual student performance and for assessing the effectiveness of the course itself.”

¹⁶ The value of past exams does not have to be limited to future LRW students. If past exams are made generally available to all students, they can use them to become familiar with such tests and can use them as study aids.

¹⁷ This concern is one reason that some programs have strict rules prohibiting collaboration. However, our experience at Howard has been that intensive guidance from LRW faculty and teaching assistants as well as the ability to work with peers significantly improves the pace and quality of learning for most students.

“Other than the grades on the exam being generally a few points lower than on end-of-year papers, the scores on the test correlated fairly well with student performance in the course overall.”

become a valuable teaching and learning tool. As discussed below, I also expect it to be helpful to LRW faculty as a diagnostic tool not only for particular student problems, but also for the course as a whole.

The exam answers for both the 1999 and 2000 exams showed some positive things. For example, nearly all of the students demonstrated at least basic ability to use the general Neumann paradigm we teach for structuring legal arguments (state the conclusion, state the rule, develop and explain the rule, apply the rule).¹⁸ In addition, most of the students demonstrated at least basic competence in analyzing the facts and law and in explaining how they fit together in the assigned task.

Nonetheless, the students performed overall somewhat less well than I had hoped. The 1999 exam will be considered first and in some detail. Assuming that a score of 70 would be a passing grade on the bar exam, and assuming that the grading by Howard's LRW faculty approximates that of the bar examiners, 12 percent (nine of 77 students for whom the data are being examined) would not have passed. Another 10 percent (eight students) were uncomfortably close to the 70 mark. This means that approximately one-fifth of the class is performing at a level below what is acceptable for the bar exam and well below the level we target for the course. This sobering number may be helpful in motivating students to work more diligently on their LRW skills and may encourage the LRW faculty to develop exercises that target the lower end of the class for work on these skills.

The students who performed poorly generally did so in one or more of the following ways: (1) using factual details, (2) providing complete explanations, or (3) understanding the legal issue and law. In addition to those weaknesses, too many of the students still had (and have) writing weaknesses that were more visible on the exam than in drafts they could write and rewrite outside of class. These writing weaknesses adversely affect student performance on all law school essay tests.

Not too surprisingly, the students did less

well overall on the exams than they did on the out-of-class assignments. Indeed, the number who did poorly (12 percent received a D or F on the exam) far exceeds the number receiving comparable grades in the regular written assignments by the end of the year (3 percent). This suggests to me that too many students are dependent upon help from others (both LRW faculty members and classmates) for analysis of the law for their regular LRW papers and that they still need substantial time to reflect on and recheck their work. (I should note that most of the students felt that four hours was more than sufficient for the exam; some finished in under three hours—but a few students felt that the four hours was not enough.) They have not yet learned to analyze and synthesize the law quickly and well enough on their own.

Other than the grades on the exam being generally a few points lower than on end-of-year papers, the scores on the test correlated fairly well with student performance in the course overall. Nonetheless, fewer scores corresponded with the overall coursework than I had expected. To determine the extent to which the exam scores were consistent with the rest of the graded material, I initially set a limit of plus or minus five points as a measure. That is, if the adjusted exam grade¹⁹ was within five points ($\frac{1}{2}$ grade) of the final course grade, I considered them to be consistent. On this standard, 53 percent (41 of 77) of the grades on the exam were consistent with the final grade. Using nine points (just under a full grade difference) as the consistency measure cut-off point results in 74 percent of the exam grades being within one letter grade of the overall grade.

The number of exams that deviated by a full grade or more (10 points or more) from the final grade was 20 of 77, or 26 percent. Four of the grades (5 percent) deviated by two full grades or more (20 points or more). Of this last category, three of the grades on the exam were higher (A instead of C) and one was lower (C instead of the

¹⁹ I adjusted the exam grades so that the average of the exam grades and the average of the non-exam grades were the same. This reduced the effect of potential differences in grading standards across sections and reduced the differences based upon the type of project.

¹⁸ Neumann, *supra* note 15, §10.1.

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overall A). The extremely divergent lower grade seems to me to be explainable by simple exam panic. The three other extremely divergent higher grades are more puzzling.

Performance on the 2000 final exam was similarly somewhat disappointing, as reported by the Howard LRW faculty.²⁰ Though students grasped the problem and the law, they did not address the problem with sufficient sophistication and attention to detail. Part of this is related to their lack of actual practice experience, but the bulk of it seems to show that we as faculty have some additional work to do to inculcate certain attitudes and values toward this sort of legal work if our students are to succeed at the level at which they are capable. The students took the test seriously and diligently applied themselves, but were not as attuned to the need for attention to fine distinctions as they need to be. This year we also required them to draft a contract paragraph. We introduce contract drafting in the first year, but do not expect them to master it. My hope is that when students know they may be tested on drafting, at the end of the year and on the bar exam, they will be motivated to work harder on learning some basic principles of drafting.

Conclusion

Testing students in a timed setting is a legitimate means of assessment and instruction in LRW courses, provided, of course, that it is not the sole means of assessment. I believe that over time, as students come to expect the test and to prepare for it, their performance on it and, I would expect, on the MPT will improve. To the extent the exam actually tests a student's ability to analyze and pull together facts and law quickly, and I believe it does, improvement on the test should reflect improvement by students in mastering these very important lawyering skills.

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²⁰ I do not yet have statistics on, nor have I personally reviewed, the 2000 exams. The information about student performance contained in this paragraph is based on conversations with the LRW faculty who graded the 2000 LRRW final exam.