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THINKING LIKE A LAWYER

PEGGY COOPER DAVIS*
ADERSON BELGARDE FRANCOIS**

“For God’s sake, open up the universe a little more.”¹

Our mission as educators has been to bend the legal academy toward training for intellectual versatility. Effectiveness in the law requires us to be logicians, rhetoricians, psychologists and performers all at once, so we work hard to assure that our students become skilled in each of these “workways”² and learn to integrate them in the process of solving legal problems.

Carol Gilligan’s work and her collegial support have been invaluable to us in three senses. Gilligan has been generous and brilliant in showing us how to help students develop the psychological intelligence that is necessary to successful performance of lawyering’s largely relational tasks.³ Moreover, Gilligan’s theories have helped us to understand why relational thinking is resisted in the legal academy. Finally, Gilligan’s work has deepened our understanding of why the cultivation of intellectual versatility is important to lawyers’ professional development.

In what follows, we first explain what it means to train lawyers for intellectual versatility. We then describe, and attempt to explain, the resistance this kind of training can engender. Next, we draw on post-realist legal thought to explain why training for intellectual versatility is necessary to capable and responsible legal practice. We conclude with suggestions about how continued engagement with Gilligan’s work can deepen our analysis of why training for intellectual versatility is resisted, and why it is nonetheless profoundly important.

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1. SAUL BELLOW, *THE DEAN’S DECEMBER 10* (Penguin Books 1998) (1982).
2. Workways is a term we coined in the 1990s in an effort to organize our thinking about the intellectual dimensions of lawyering. Our work in what came to be known as the Workways Project is described at <http://www.law.nyu.edu/workways/workways.html> (last visited Apr. 6, 2006).
3. See Peggy Cooper Davis, *We Can Do Better*, 14 *YALE J.L. & FEMINISM* 263 (2002) (describing collaboration between Davis and Gilligan in developing students’ psychological intelligence that is necessary to lawyers’ successful performances in relational tasks).

I. WHAT DOES IT MEAN TO TRAIN FOR INTELLECTUAL VERSATILITY?

Intelligence is a plural concept. As we work at professional or personal projects, we do not use a single capacity, measurable by an IQ test. Rather, we use a cluster of intelligences. Howard Gardner's carefully formulated and well-accepted catalogue of human intelligences includes: *linguistic intelligence*, having to do with the ordering and meaningful use of words; *logical/mathematical intelligence*, having to do with appreciation and representation of the relationships among actions or objects; *spatial intelligence*, having to do with perception and representation of the visual world; *kinesthetic intelligence*, having to do with skillfully expressive or goal-directed use of the body; *intrapersonal intelligence*, having to do with awareness and management of one's emotions; *interpersonal intelligence*, having to do with sensitivity and thoughtful response to the emotional lives of others;⁴ *naturalistic intelligence*, having to do with recognizing natural species and charting the relationships among them; and *spiritual intelligence*, having to do with comprehension of the existential rather than the material.⁵

A practicing professional necessarily uses a variety of intelligences. A heart surgeon uses spatial intelligence to visualize and plan a procedure and kinesthetic intelligence to execute the procedure. The same surgeon may also use intrapersonal intelligence to maintain a healthy emotional equilibrium and a mix of linguistic, interpersonal, intrapersonal, and kinesthetic intelligences to communicate effectively with the patient, the patient's family, and the surgical and post-operative care teams. A businessperson negotiating a deal needs both linguistic and kinesthetic intelligences to communicate effectively with existing and potential colleagues. The businessperson may also rely on logical/mathematical intelligence to make financial projections and assess alternative decision paths, intrapersonal intelligence to maintain emotional equilibrium and strategic focus, and interpersonal intelligence to assess competitive risks and prospects for productive collaboration.

As Gardner has demonstrated, each intelligence can and should be developed in each of us. Intelligences are not in the "have it or you don't" category with naturally curly hair and long legs. They blossom as they are used, and they grow best with practice in the light of critical reflection. To

4. HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES 67-69 (10th Anniversary ed. 1993).

5. HOWARD GARDNER, INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY 39-54 (1999).

train a lawyer for intellectual versatility is to assure that s/he has regular, structured opportunities to use each intelligence relevant to legal practice, to think critically about how s/he has used it, and to learn to use it better.

II. WHY IS TRAINING LAWYERS FOR INTELLECTUAL VERSATILITY SO OFTEN RESISTED?

To train lawyers for intellectual versatility is to push them beyond the domain of logical operations and insist that they think relationally—that they think about the law as a product of culture and human interaction and think about using and developing the law in the give and take of professional practice. Engagement with the relational domains of lawyering is resisted because it requires serious engagement with stereotypically feminine issues and serious attention to developing stereotypically feminine abilities. And even now, when nearly every other law student is a woman,⁶ the culture of the legal academy is irrationally averse to the stereotypically feminine and somewhat obsessed with the stereotypically masculine.

When Lani Guinier famously described the Yale Law School professor who began each class with the salutation, “Good Morning, Gentlemen,” she captured something important about the law school environment. *Becoming Gentlemen*, the Guinier, Fine, and Balin study of the University of Pennsylvania Law School, established what subsequent studies have confirmed: law schools tend to encourage top-down, emotionally detached reasoning and antagonistic interactive strategies and to discourage contextual and relational reasoning and collaborative interactive strategies.⁷ As Guinier, Fine, and Balin explained, women law students often embrace and excel at the disfavored ways of working, and are disadvantaged and discomforted by their suppression.⁸

In New York University’s Lawyering, Lawyering Theory, and Workways projects, we have worked self-consciously to give equal attention and respect to the syllogistic and the relational dimensions of legal thought and

6. Law School Admission Council Volume Summary by Ethnic & Gender Group, <http://members.Isacnet.org/> (roll over data button to expand menu; then follow “LSAC Ethnic/Gender Volume Summary” hyperlink; then follow “Volume Summary Matriculants by Ethnic and Gender Group” hyperlink) (last visited May 26, 2006).

7. See LANI GUINIER, MICHELLE FINE, & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 27-29* (Beacon Press 1997) (providing an overview of the study’s results); see also Sarah Berger, Angela Olivia Burton, Peggy Cooper Davis, Elizabeth Ehrenfest-Steinglass, & Robert Levy, “Hey! There’s Ladies Here!!” 73 N.Y.U. L. REV. 1022 (1998) (noting subsequent research); Working Group on Student Experiences, Study of Women’s Experiences at Harvard Law School, <http://www.law.harvard.edu/students/experiences/ExecutiveSummary.pdf> (detailing more recent research reaching similar conclusions) (last visited May 25, 2006).

8. *BECOMING GENTLEMEN*, *supra* note 7, at 53-56.

practice.⁹ We have not done this to address the disadvantages and discomfort that many women feel in the law school environment (although that is a valued by-product). Nor have we done it with the thought that “Becoming Gentlewomen” is the path to professional excellence (although there is much to be said for gentility as well as for stereotypically feminine values in professional practice). We have done it because it is crucial to fostering professional excellence.

We asked ourselves, “What do lawyers actually do?” We noticed that we interpret laws and facts; we counsel; we represent clients who are involved in disputes or charged with wrongdoing; and we represent clients who have projects they want to pursue or relationships they want to forge. We asked ourselves, “What does it take to do these things?” We concluded that it takes attention to legal and non-legal norms, to facts, to human desires and to dynamic, and often strategic interactions. We refer to these as the four lawyering dimensions. Finally, we asked ourselves, “How must lawyers think in order to do these things well?” We concluded that lawyering requires the use of linguistic, logical/mathematical, kinesthetic, intrapersonal, and interpersonal intelligences. Collapsing inter- and intrapersonal intelligences under the label psychological intelligences, we refer to these as the lawyering intelligences.

We set about to understand the lawyering dimensions and intelligences and to use that understanding as a basis for our teaching. We redesigned our Lawyering Program to create a year-long course of study in which students work under the supervision of expert and critically conscious practitioners to hone the lawyering intelligences. In each of seven increasingly complex exercises, students learn concepts and vocabularies for thinking and talking about discrete lawyering tasks; plan collaboratively to take on a lawyering activity that implicates those tasks; execute their plans; and engage in painstaking critique of their planning and execution. At each phase of each exercise, the work of lawyering is analyzed as the exercise of linguistic, logical/mathematical, kinesthetic, and psychological intelligences to manage norms, facts, desires and interactive dynamics. This method of study is illustrated by a grid, designed by Aderson Francois, when he was faculty director of our Lawyering Program:

9. See, e.g., Workways Overview, <http://www.law.nyu.edu/workways/workways.html> (last visited Apr. 6, 2006) (providing an overview of the New York University “Workways” project); The Lawyering Program, <http://www.law.nyu.edu/lawyeringprogram/> (last visited Apr. 6, 2006) (describing the program).

	Norms	Facts	Desires	Interactive Dynamics
Linguistic Intelligence				
Logical/Mathematical Intelligence				
Kinesthetic Intelligence				
Psychological Intelligences				

Our goal of intellectual versatility requires that top-down and bottom-up analysis, logical and relational reasoning, and collaborative and self-interested strategies be equally valued as tools to be used, often in surprising combinations, for doing the work of lawyering. This means that we must work against the traditional flow of legal culture to undo the suppression of relational, contextual, and collaborative thinking. And working against the traditional flow of a culture is likely to engender resistance.

III. WHY IS TRAINING LAWYERS FOR INTELLECTUAL VERSATILITY SO IMPORTANT?

There are at least four answers to this question. Two of them are easy and well-rehearsed; the other two are at the growing edge of our thinking. First, as we have already said, intellectual versatility is necessary to competent practice. Although law schools in the United States traditionally have given too little attention to the art of practice,¹⁰ there is reason to think

10. See Robert MacCrate, *Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 3-4 (discussing the gap between what law schools traditionally teach and the expectations of practitioners for new attorneys when they enter the workforce); Roger Cramton, *Lawyer Competence: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO

that we will mend our “praxiphobic” ways. The early legal realists demanded this when they called for a “lawyer school” rather than a law school.¹¹ The American Bar Association’s 1992 MacCrate Commission made the same call, and the ABA has followed through with requirements that law schools offer clinical education to at least some of their students¹² and skills training of some sort to all.¹³ The more care we take to prepare students for practice, the more we will need to train them to be intellectually versatile.

Second, lawyers who are intellectually narrow tend to skew the legal system toward approaching problems in formalistic and agonistic ways. To understand how and why this is so, consider the Francois grid again. The traditional law school curriculum emphasizes the application of logical/mathematical intelligence to the interpretation of legal norms and facts.

	Norms	Facts	Desires	Interactive Dynamics
Linguistic Intelligence				
Logical/Mathematical Intelligence				
Kinesthetic Intelligence				
Psychological Intelligences				

Every competent lawyer must be skilled at logical manipulation of legal norms and facts. But lawyers who rely exclusively on this set of skills tend

THE BAR 15-17 (urging law schools to place additional emphasis on practical skills such as teamwork and oral communication).

11. See, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

12. *Standards: Rules of Procedure for Approval of Law Schools*, 2006 A.B.A. SEC. LEGAL EDUC. ADMISSIONS TO THE BAR 27, available at <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>.

13. *Id.*

to gravitate to the problem-solving strategies for which it is most appropriate: litigation and positional bargaining. They will litigate and bargain less well for their lack of intellectual versatility. This is so because a litigation or negotiation is as likely to turn on psychologically mindful advocacy, strategic linguistic choices, or artful and culturally appropriate presentation as on solid logical analyses of law and fact. But they will nonetheless be more comfortable litigating or bargaining positionally than counseling to avoid conflict or mediating conflict when it arises. On the other hand, lawyers who layer on linguistic, kinesthetic, and psychological competence are able to work comfortably not only in litigation or positional bargaining, but also in interest bargaining, mediation, collaborative problem-solving, and in-depth counseling to avoid or manage conflict and risk.

The third value of a lawyer's intellectual versatility is that it improves performance in every dimension of practice. We alluded to this when we said that litigation and positional bargaining are better done from a position of versatility—using logical/mathematical intelligence in the analysis of facts and governing law, and linguistic, kinesthetic, and psychological intelligences in investigation, case-building and argumentation. But the point runs deeper. As we have been told since the dawn of legal realism, the operations of legal analysis that have been at the center of the traditional law school curriculum are not matters of simple logic. They are indeterminate and necessarily subjective. They mix logic with policy judgment and justice concerns. They depend on lawyers' intrapersonal capacities to calm biases in order to hear all that can be reasonably said on each side of a question. They are discursive operations and therefore affected by our responses to narrative, to rhetoric, and to the quality of an interactive performance. This means that we can use every bit and kind of intelligence to interpret and argue legal norms.

	Norms	Facts	Desires	Interactive Dynamics
Linguistic Intelligence				
Logical/Mathematical Intelligence				
Kinesthetic Intelligence				
Psychological Intelligences				

Finally, to see lawyering as a mix of logical, linguistic, performative, and psychological work is to see its ethical requirements more richly. If law were nothing more than competitive logic games, we lawyers would do well enough if we argued honestly and zealously. To argue the law honestly and zealously is a challenge, to be sure. But responsible lawyering requires more. It requires that we attend to how bias and emotion affect our reasoning; that we attend to the integrity of our relationships with clients, colleagues, opposing counsel and decision-makers; and that we attend to the immediate and long term effects of our language and performances.

IV. DEEPENING THE ANALYSIS

The sum of our analysis of legal practice is that lawyering, like many professions and more so than most, is *relational* rather than all in the head. It involves language, performance, and the management of emotion and desire as much as it involves logic and numbers. We have observed that members of the legal academy are likely to resist this difficult but important message. In our ongoing efforts to promote professional training for intellectual versatility, we look to Gilligan's work to deepen our analysis, both of the resistance to training for intellectual versatility and of the value of doing so.

A. THE RESISTANCE

Gilligan's research shows that inhibitions about relational thinking are likely to develop in the preschool years for boys and in adolescence for girls as a hierarchical order that has its foundation in the family-separates, nurturers and providers.¹⁴ In this order, women are seen as nurturers who must be self-denying. Relational thinking is not suppressed, but it is compromised as attention to the self is suppressed. The compromise occurs because a complete relational analysis must involve an analysis of a self in relation to others. Men, on the other hand, are seen in the hierarchical order as protector-providers who must have an aloof toughness. Development for the protector-provider is defined as separation from the relational intimacy of infancy and early childhood. Relational thinking is likely to be suppressed because it is identified with that intimacy and with the (usually maternal) caregiver with whom it was shared.¹⁵

This developmental story helps us to see why a historically male profession might embrace the logical/mathematical and neglect the linguistic, kinesthetic, and psychological work without which parsing the logic of cases is an empty exercise. Linguistic, kinesthetic and psychological analyses are most often relational. An argument, for example, is crafted to appeal to a decision maker; body language is interpreted by an observer or controlled with an audience in mind; mood and motivation are read to assess relational possibilities or consequences. If our capacity for relational thinking is suppressed, it is natural that we will attempt to confine our professional practice to the psychologically safer domain of the equation or syllogism. This is not to say that relational thinking is significantly suppressed in all men or in all members of the legal profession. It is simply to say that where cultural forces contribute to the suppression of relational thinking among men, a historically male profession is likely to privilege non-relational aspects of its work.

The developmental story also helps us to see how professional women's relational thinking might be compromised or suppressed. Some women will resist or overcome social pressures to leave the self out of the relational equation, just as some men will resist social pressures to suppress the relational altogether. But some will assume a self-denying stance that

14. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 8-9 (Harvard Univ. Press 1993) (1982).

15. See Peggy Cooper Davis and Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice* 32 MCGEORGE L. REV. 895, 897-900 (2001) (describing Gilligan's developmental theories).

compromises sound relational analysis, and others will assimilate, at least in their professional lives, to anti-relational norms.

Gilligan's work also helps us understand the intensity of inhibitions that suppress or compromise relational work. She describes the boy's suppression of the relational and the girl's suppression of the relational self as dissociations—as examples of a psychological “splitting” that leaves us unable to “know what we know.” Dissociation is an extreme act of psychological self-defense. It is most commonly understood as a reaction to trauma, as when victims of physical abuse carry subconscious memories of the violence they have suffered. For Gilligan, the injunction that little boys suppress the relational altogether and the injunction that adolescent girls suppress the relational self are acts of psychic violence, and the resultant dissociation is as intense as that of any trauma victim.¹⁶ To understand dissociation in this way is to understand more deeply why it is hard to persuade developing lawyers to engage the relational dimensions of their work.

B. THE IMPORTANCE

In her more recent writing, Gilligan has argued that overcoming dissociation and entering the relational world with open eyes is necessary, not only to the emotional health of individuals, but also to the health of any democratic society.¹⁷ Her premise is that hierarchy threatens the health of both personal and political relationships. Applying Gilligan's theories of relational psychology to the political sphere would be hugely consequential, and we have only begun to mine the implications of doing so. But some things seem clear at this early stage of our thinking. An anti-hierarchical approach to lawyering in a democratic society would require that we mitigate the hierarchical effects of professional status. This would require in turn more extensive and more comprehending communication between lawyers and their clients. An anti-hierarchical approach to private problem-solving would require that we place less faith in hierarchy-enhancing, winner-take-all solutions. This would require in turn more extensive and comprehending communication between the principals and lawyers on each side of a dispute or transaction. And an anti-hierarchical approach to the development and application of law would require that we be sensitive at all times to the law's hierarchical or egalitarian effects. This would require in turn that we probe with care the individual and social consequences of the interpretations we argue and laws for which we lobby. If any of these

16. See CAROL GILLIGAN, *THE BIRTH OF PLEASURE: A NEW MAP OF LOVE* 20-24 (Vintage Books 2003) (2002).

17. *Id.* at 16, 229-31.

approaches is warranted, then the need for intellectually versatile lawyering is all the more urgent.

Thinking like a lawyer is all the more interesting once we recognize its multiple dimensions. With the great benefit of Gilligan's presence and support, we have been able at New York University School of Law to understand and mitigate resistance to serious study of the relational dimensions of legal thought. In the resulting climate of openness and intellectual breadth, we are able to pursue with optimism the deeply important work of educating lawyers, not only to be proficient, but also to practice in ways that improve the character of our legal system.
