

VALUING AND NURTURING MULTIPLE INTELLIGENCES IN LEGAL EDUCATION: A PARADIGM SHIFT

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And these tend inward to me, and I tend outward to them,
And such as it is to be of these more or less I am,
And of these one and all I weave the song of myself.¹

Because the range of intellectual capacities and activities generally valued and developed in law schools is narrower than the range needed to do the work of lawyers, students do not learn the full spectrum of intellectual activities necessary to professional excellence. The relatively narrow range of intellectual capacities and activities valued and developed in law schools also does not engage students as fully as possible. We hypothesize that if law schools are to produce graduates capable of professional excellence, they must be systematic and self-conscious about the development of a broad spectrum of relevant cognitive processes. Furthermore, if law schools presented lawyering as something that implicates a variety of relevant intellectual capacities, students would engage more fully in the development of their capacities. In particular, students whose concerns, interests, and/or practiced ways of working have been heretofore neglected will feel less alienated, perform better across the range of cognitive activities, and develop a more positive sense of professional role. As we . . . have begun to articulate, analyze, and teach the neglected capacities, we have found it useful to draw upon the work of psychologists whose efforts to explore a broader spectrum of human capacity precede and parallel our own.²

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¹ WALT WHITMAN, *Song of Myself*, in LEAVES OF GRASS 35 (Bantam Books 1983) (1892).

² Peggy Cooper Davis, *Working paper on multiple intelligences*, at <http://www.law.nyu.edu/workways/theoretical/multintell/multintel.html> (last visited on Jan. 9, 2005).

Professor Peggy Cooper Davis of the New York University School of Law has identified a³ problem of exclusivity at the fine law school at which she teaches, and together with her colleagues, has established the Workways program to begin to remedy the problem.⁴ However, such an approach has not taken hold in legal education, generally, where we law professors continue, overall, to admit, educate, evaluate, and mentor our students pursuant to very traditional notions of what it means to be bright.

The majority of law schools emphasize and measure [sic] only the logical-mathematical type because the usual method of evaluating student performance is a single exam that asks students to analyze a complex set of facts, in a limited time period, in writing. Arguably, this is a limited view of intelligence that does not adequately reflect all the types of intelligence that the successful lawyer needs. Effective teachers find ways to teach and evaluate a broader range of intelligences, and they encourage their students to master more than one type.⁵

This article explores Harvard Education Professor Howard Gardner's Theory of Multiple Intelligences (MI) and endorses the proposition that taking a new, more expansive approach to recognizing and evaluating student capabilities could help us to provide a better legal education in several arenas.

Part I of this article will explore the history and criteria of traditional intelligence theory and how Howard Gardner sought to redefine these with the 1983 inauguration of his MI theory. Part II explores the nature of each of his identified intelligences and how they could apply to the tasks of lawyering. Part III of the article commences the application of MI theory to legal education, beginning, as it is said, at the beginning with law school admissions. Part IV explores Professor Davis' hypothesis by applying MI theory to legal pedagogy and testing and proposes one alternate paradigm in advocating the use of simulations in the law school classroom. Part V of the article raises the author's own hypothesis that MI theory could play an invaluable role in the mentoring of law students regarding their career choices. Finally, the article concludes with a discussion of possible critiques to the application of MI theory to legal education and ultimately finds that, although fraught with challenge, the use of MI theory in our pedagogy provides great hope for the constructive evolution of law teaching. "There is

³ Some would say "yet another"

⁴ *Davis, supra* note 2.

⁵ Paula Lustbader, *Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. LEGAL EDUC. 448, 455 (1999).

a search to reclaim the public image and the soul of the profession. There is a search to reclaim the joy, pride, and integrity of the profession."⁶ Multiple Intelligence theory could be the "X that marks the spot."

I.

Traditional intelligence theorists see intelligence as a single, invariable faculty that is stronger in some people than in others. Its development follows a predictable pattern. The strength of one's instrument can be determined by standardized testing at a relatively young age and remains constant through a lifetime. The traditionalists held that people of high intelligence excel at a broad range of mental tasks. Testing to measure general intelligence began around the turn of the nineteenth century, when Alfred Binet and Theodore Simon developed the first modern tests in an effort to identify retarded children. There was great enthusiasm for standardized testing during the first half of the twentieth century as modernism and the lure of rational rule obeying and a scientific world dominated American culture. The assumption of a single, superordinate intelligence remains the received wisdom.⁷

It was this ethos that Howard Gardner flew in the face of with the 1983 publication of his landmark educational psychology work *Frames of Mind: The Theory of Multiple Intelligences*.⁸ Gardner conceived the work as a new theory of human intellectual competences to challenge the classical view of intelligence⁹ as embodied by the Binet IQ Test,¹⁰ "that intelligence is

⁶ Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 49 DUKE J. GENDER L. & POL'Y 119, 133 (1997).

⁷ Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 250-51 (2001); see also HOWARD GARDNER, INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY 34 (1999) [hereinafter GARDNER, REFRAMED].

⁸ HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983) [hereinafter GARDNER, FRAMES].

⁹ See GARDNER, FRAMES, *supra* note 8, at 5.

¹⁰ See GARDNER, REFRAMED, *supra* note 7, at 11-13. Prominent critical race scholar Richard Delgado asserts that the originators of the standardized testing movement, such as Binet, subscribed to eugenic theories that viewed nonwhites and people of Southern European origin to be genetically inferior. Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 595 (2001). [hereinafter Delgado, *Elitism*]. See also JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT 21 (1988). Howard Gardner himself takes perhaps a more gentle view of any prejudice that might be extant in our culture regarding this matter:

I believe that in our society we suffer from three biases, which I have nicknamed "Westist," "Testist," and "Bestist." "Westist" involves putting certain Western cultural values, which date back to Socrates, on a pedestal. Logical thinking, for example, is important; rationality is important; but they are not the only virtues.

a single faculty and that one is either 'smart' or 'stupid' across the board."¹¹ The Binet IQ test, Gardner contends, has "predictive power for success in schooling, but relatively little predictive power outside the school context."¹²

It was the Swiss psychologist Jean Piaget who actually began the modern MI movement evolving away from Binet's work by asserting that "it is not the accuracy of a child's response on an IQ test that is important, but rather the lines of reasoning the child invokes."¹³ However Piaget, unlike Gardner, characterized "the form of logical-rational thought prized in the West" to be the final and highest stage of human intellectual development.¹⁴

Gardner, through research largely with individuals afflicted with injury or on individuals who otherwise demonstrated great skill or great deficiency in particular, rather than general, intellectual capacities,¹⁵ tried to devise a theory that is more inclusive.¹⁶ "[It is] another view of intelligence, aptitudes

"Testist" suggests a bias toward focusing upon those human abilities or approaches that are readily testable. If it can't be tested, it sometimes seems, it is not worth paying attention to. My feeling is that assessment can be much broader, much more humane than it is now, and that psychologists should spend less time ranking people and more time trying to help them.

"Bestist" is a not very veiled reference to a book by David Halberstam called *The Best and The Brightest*. Halberstam referred ironically to figures such as Harvard faculty members who were brought to Washington to help President John F. Kennedy and in the process launched the Vietnam War. I think that any belief that all the answers to a given problem lie in one certain approach, such as logical-mathematical thinking, can be very dangerous. Current views of intellect need to be leavened with other more comprehensive points of view.

HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* 12 (1993) [hereinafter GARDNER, PRACTICE].

¹¹ GARDNER, REFRAMED, *supra* note 7, at 34.

¹² *See id.* at 3, 16.

¹³ *See id.* at 17.

¹⁴ *See id.* at 19. Gardner states that Piaget's theories regarding the supremacy of scientific thinking were his "targets." GARDNER, PRACTICE, *supra* note 10, at xi.

It should be noted that Piaget offers no explanation for why logical reasoning might be imperfect or break down in adults. For example, consider the following syllogism:

Premise 1: If Rupert is a dog, then Rupert walks on four legs.

Premise 2: Rupert is not a dog.

Conclusion: Rupert does not walk on four legs.

Seventy-five percent of adults in one study incorrectly answered that this logical fallacy called "denying the antecedent," IRVING M. COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 357 (9th ed. 1994), is sound. Piaget's theory does not or cannot explain this breakdown in reasoning. Thus, 75% of adults fail at the kind of logical intelligence Piaget says counts the most. CAMILLE B. WORTMAN & ELIZABETH F. LOFTUS, *PSYCHOLOGY* 276 (4th ed. 1992).

¹⁵ Davis, *supra* note 2.

¹⁶ GARDNER, *FRAMES*, *supra* note 8, at 5. Gardner's model of intellectual capacity also differs from Binet's and Piaget's in that Gardner believes an individual's intelligences can change over the span of his or her life, where the more traditional model envisions intellectual capacities that are strictly inborn. GARDNER, PRACTICE, *supra* note 10, at 9. Gardner feels that "possibly genetic factors set some kind of

or potential [where] intelligence is composed of a number of independent faculties, each of which entails a set of skills that enable the individual to resolve genuine problems or difficulties encountered in the world."¹⁷

II.

To date, over several works, Gardner has identified nine discrete intelligences:

1. Logical-Mathematical Intelligence
2. Linguistic Intelligence
3. Spatial Intelligence
4. The Personal Intelligences
5. Musical Intelligence
6. Bodily-Kinesthetic Intelligence
7. Natural Intelligence
8. Spiritual Intelligence
9. Existential Intelligence

Gardner first speaks to the "traditional intelligences," the first of which is logical-mathematical intelligence. Logical-mathematical intelligence, as defined by Gardner, alludes to "the capacity to analyze problems logically, carry out mathematical operations, and investigate issues scientifically."¹⁸ Its application to the law is straightforward:

Lawyers use logical mathematical intelligence when they construct legal or factual arguments and analyze or strategize about legal situations. Courts and other legal institutions use logic to legitimize and guide their exercise of authority Law school pays particular attention to logical-mathematical reasoning. Students are required to construct abstract, logical arguments in the classroom and in their examinations. The stress law school places on logical-mathematical reasoning is understandable for at least two reasons. First, this is the intelligence traditionally associated with the single intelligence view. It remains the skill or aptitude most widely measured in traditional intelligence testing and upon which most American educators continue to focus.

upper bound on the extent to which an intelligence may be realized or modified in the course of a human life. As a practical matter, however, it is likely to be the case that this biological limit is rarely if ever approached By the same token, no one-whatever his or her biological potential-is likely to develop an intelligence without at least some opportunities for exploration of the materials that elicit a particular intelligence. In sum, the surrounding culture plays a preponderant role in determining the extent to which an individual's intellectual potential is realized." *Id.* at 47-48.

¹⁷ Weinstein, *supra* note 7, at 254.

¹⁸ GARDNER, REFRAMED, *supra* note 7, at 42.

Second, whether or not it is the general intelligence of traditional theorists, logical mathematical reasoning plays an important role in the law [L]ogical thinking is a key aptitude every lawyer needs."¹⁹

Professor Gardner states that "there is room [in the legal profession] for the individual with highly developed logical skills: one who is able to analyze a situation, to isolate its underlying factors, to follow a torturous chain of reasoning to its ultimate conclusion."²⁰ Logical-mathematical intelligence is at the heart of traditional legal pedagogy; our entire system of *stare decisis*, which is so much the focus of law classroom discussion, is based on it.²¹

The second traditionally recognized intelligence is linguistic intelligence, which is "sensitivity to spoken and written language, the ability to learn languages, and the capacity to use language to accomplish certain goals."²² It consists of four major capacities: mastery of semantics, which is sensitivity to meaning of words and what they imply in context;²³ mastery of phonology, which is an appreciation of the sounds of words and their musical interactions with one another;²⁴ mastery of syntax, which is expertise in the rules governing the organization of words and their inflections;²⁵ and mastery of the pragmatic functions, which is superiority in the uses to which language can be put.²⁶

Professor Gardner states "[l]awyers . . . are among the people with high linguistic intelligence"²⁷ and discusses the importance of linguistic intelligence to lawyering:

There is room in (and at the top of) the legal profession for the individual who has outstanding linguistic skills: one who can

¹⁹ Weinstein, *supra* note 7, at 255-56.

²⁰ GARDNER, FRAMES, *supra* note 8, at 317.

²¹ Weinstein, *supra* Note 7, at 255; *see also* Andrea Kayne Kaufman, *The Logician Versus the Linguist—An Empirical Tale of Functional Discrimination in the Legal Academy*, 8 MICH. J. GENDER & L. 247, 251 (2002).

²² GARDNER, REFRAMED, *supra* note 7, at 41.

²³ GARDNER, FRAMES, *supra* note 8, at 76.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* It is important to note that linguistic intelligence can be either in oral or written form and an individual that has talent in one does not always have equal aptitude in the other. Weinstein, *supra* note 7, at 256, *citing* GARDNER, FRAMES, *supra* note 8, at 95. Weinstein also reflects upon the fact that, at least anecdotally, lawyers and law students frequently demonstrate that logical and linguistic intelligences are clearly distinct. "Law reviews, [sic] are rife with sophisticated analysis expressed in clumsy, awkward language and lovely, flowing prose that offers ideas that are, at base, illogical." Weinstein, *supra* note 7, at 257.

²⁷ GARDNER, REFRAMED, *supra* note 7, at 41.

excel in the writing of briefs, the phrasing of convincing arguments, [and] the recall of facts from hundreds of cases²⁸

Intrinsic to lawyering is the expression of ideas in written and oral form.²⁹ "A person with superior linguistic aptitude is able to choose and sequence words to persuade and educate others, to remember and use information"³⁰ Language is used by lawyers to "excite, stimulate, convey, and convince."³¹ Sensitivity to word choice is used in drafting and interpreting legal documents.³² Last, Professor Gardner also states that "certainly individuals are helped if they have good linguistic intelligence because so much negotiation involves speaking and listening."³³ In short, lawyers use language to educate others about the complicated legal issues we are charged to champion.³⁴

Gardner next identifies a "non-traditional intelligence"—spatial/visual intelligence—"the potential to recognize and manipulate the patterns of wide space . . . as well as the patterns of more confined areas."³⁵ "Spatial intelligence is the ability to form a mental model of a spatial world and to be able to maneuver and operate using that model. Sailors, engineers, surgeons, sculptors, and painters . . . all have highly developed spatial intelligence."³⁶

While its usefulness to the practice of law is perhaps less immediately apparent than that of logical or linguistic intelligence, spatial intelligence can also be invaluable to the practicing attorney:

A trial attorney uses this ability to create visual aids to explain complex scientific evidence to a lay jury. The ability to discern similarities across diverse domains involves the use of metaphor and the ability to perceive patterns. An attorney uses metaphor to help a jury or client understand complex information by relating it to something the jury already knows. Likewise, an attorney must also be able to perceive patterns. Like a master chess player, an attorney uses visual/spatial intelligence to 'relate a perceived

²⁸ GARDNER, FRAMES, *supra* note 8, at 317.

²⁹ Weinstein, *supra* note 7, at 256; *see also* Abiel Wong, Note, "Boalt-ing" Opportunity?: *Deconstructing Elite Norms in Law School Admissions*, 6 GEO. J. ON POVERTY LAW & POL'Y 199, 209 (1999).

³⁰ Weinstein, *supra* note 7, at 256, *citing* GARDNER, FRAMES, *supra* note 8, at 77-78.

³¹ Kaufman, *supra* note 21, at 253.

³² *Id.*

³³ Howard Gardner, *Using Multiple Intelligences to Improve Negotiation Theory and Practice*, 16 NEG. J. 321, 321-22 (2000) [hereinafter Gardner, *Negotiation*].

³⁴ *Id.*

³⁵ GARDNER, REFRAMED, *supra* note 7, at 42.

³⁶ GARDNER, PRACTICE, *supra* note 10, at 9.

pattern to past patterns, and to develop the present position into an overall game plan.³⁷

Professor Joyce Martin adds that visual intelligence can aid the lawyer in the visualization of end products and the steps toward their achievement, thus minimizing "dead time."³⁸ She further adds that the intelligence can aid in witness verification, the grasping of technology, and the niche legal practice of intellectual property.³⁹ Those gifted in manipulating visuals could excel in the "seeing is believing" school of persuasion.

The next group of intelligences Gardner discusses is what he dubs the personal intelligences;⁴⁰ the first of which is interpersonal intelligence—"the ability to notice and make distinctions among other individuals, and, in particular, among their moods, temperaments, motivations, and intentions."⁴¹ It is the "capacity to understand intentions, motivations, and desires of other people and, consequently to work effectively with others."⁴² Therefore, it is a skill possessed by political and religious leaders, skilled parents and teachers, and by other individuals enrolled in the helping professions.⁴³

"A lawyer uses interpersonal intelligence to interact with clients, judges, adversaries, witnesses, experts, and law enforcement. The lawyer relies on interpersonal intelligence to be an effective counselor who communicates, listens, and empathizes with a client. A lawyer then uses interpersonal intelligence to negotiate, mediate, persuade and otherwise advance her client's interests."⁴⁴ An attorney who has insight into others' emotional states is better able to collaborate with colleagues, work with or against adversaries and persuade others. Professor Gardner himself lauded the interpersonally gifted lawyer—"one who can speak eloquently in the courtroom, skillfully interview witnesses and prospective jurors, and display an engaging personality."⁴⁵ We can use interpersonal intelligence to reverse the public's poor conceptions of lawyers by displaying "empathy, caring and concern for the needs of others."⁴⁶ "Interpersonal intelligence is arguably the

³⁷ Kaufman, *supra* note 21, at 255, *citing* GARDNER, FRAMES, *supra* note 8, at 192-95.

³⁸ Joyce Martin, *Multiple Intelligences and the Practice of Law: A New Framework*, at http://www.abanet.org/lpm/newsletters/articles/newsarticle12305_front.shtml (last visited July 24, 2004).

³⁹ *Id.*

⁴⁰ GARDNER, FRAMES, *supra* note 8, at 237.

⁴¹ *Id.* at 239.

⁴² GARDNER, REFRAMED, *supra* note 7, at 43.

⁴³ GARDNER, FRAMES, *supra* note 8, at 239.

⁴⁴ Kaufman, *supra* note 21, at 255-56, *citing* GARDNER, FRAMES, *supra* note 8, at 239, and Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 59-61 (1992); *see also* Wong, *supra* note 29, at 209, and Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 366 (1998). Howard Gardner himself has identified the importance of interpersonal intelligence in negotiation. Gardner, *Negotiation*, *supra* note 33, at 522.

⁴⁵ GARDNER, FRAMES, *supra* note 8, at 317.

⁴⁶ Martin, *supra* note 38.

most important skill for a lawyer whose practice setting involves client contact, group work, or oral advocacy."⁴⁷

The other personal intelligence is intrapersonal intelligence. This intelligence alludes to the "capacity to understand oneself, to have an effective working model of oneself—including comprehending one's own desires, fears, and capacities—and to use such information effectively in regulating one's own life"⁴⁸ through self-awareness, self-confidence, self-discipline, and motivation.⁴⁹ At least one scholar states that "discipline, intelligence, commitment, and motivation to succeed . . . may be more important to success in [law] school [than a high score on the LSATs.]"⁵⁰ Another concurs that "[l]awyers and law students must have the motivation, self discipline and insight required to carry out complex, long term projects."⁵¹

Other commentators focus on the moralistic aspect of the intelligence, finding that "[a] lawyer must use intrapersonal intelligence to listen to her conscience as she has a unique responsibility to be ethical and to exercise good judgment."⁵² Still others embrace the significance of the maxim, "know thyself" in asserting that, "[s]elf-knowledge can also be a powerful tool in making predictions and interpreting the motivations and actions of others. As we better understand ourselves, we can use that knowledge to interpret others."⁵³ Professor Gardner tells us that this ability to "know one's own needs and desires and modes of operation"⁵⁴ can be invaluable in the negotiation tasks that most lawyers are called upon, at one

⁴⁷ Weinstein, *supra* note 7, at 258.

⁴⁸ GARDNER, REFRAMED, *supra* note 7, at 43; *see also* GARDNER, PRACTICE, *supra* note 10, at 9.

⁴⁹ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 99 (2002). [hereinafter Hess, *Heads*]. *See also id.* at 75-80. Of course, other scholars have legitimately pointed out that one's intrapersonal intelligence can be affected by external factors. For instance, Cathleen A. Roach has posited that, "[t]he segregation felt by minority law students can affect motivation which in turn affects self-esteem and the necessary sense of confidence required to survive." Cathleen A. Roach, *A River Runs Through It: Tapping Into The Informational Stream to Move Students From Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 675 (1994). There is also the question of the prevalence of mental illness, especially depression, among law students. One 1986 study put the figure of first-year law students afflicted by depression to be at 40%. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246-47. Professor Glesner also discusses the higher than average rate of drug and alcohol abuse among lawyers. B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 629 (1991). Professor Martin states that "conservative estimates [state] that one lawyer in six is a problem drinker." Martin, *supra* note 38.

⁵⁰ Wong, *supra* note 29, at 208.

⁵¹ Weinstein, *supra* note 7, at 257.

⁵² Kaufman, *supra* note 21, at 256, *citing* Schultz, *supra* note 44, at 59-61. *See also* Weinstein, *supra* note 7, at 257, and Wong, *supra* note 29, at 209, *citing* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1076-78 (1997).

⁵³ Weinstein, *supra* note 7, at 257.

⁵⁴ Gardner, *Negotiation*, *supra* note 33, at 322.

time or another, to do. Additionally, a lawyer can use intrapersonal intelligence to aid her in coping with the stresses, psychological and otherwise, that inhere in the legal profession⁵⁵ and in law school.⁵⁶ Perhaps most significant is the fact that "[t]here are many in the law who succeed more by regular and steady effort than by brilliance."⁵⁷ To whatever extent the old chestnut that "the A students end up working for the C students" proves true, the domination is probably due to intrapersonal intelligence.

The next non-traditional intelligence identified by Gardner is musical intelligence, "which alludes to skill in the performance, composition, and appreciation of musical patterns,"⁵⁸ specifically pitch, rhythm, and timbre.⁵⁹ Gardner singled music intelligence out as a discrete intelligence because it is almost parallel structurally to linguistic intelligence—Gardner asserts it is neither scientifically nor logically sound to call the former a talent and the latter an intelligence.⁶⁰

⁵⁵ Weinstein asserts that intrapersonal intelligence is significant in aiding lawyers in avoiding "self-defeating" behaviors. Weinstein, *supra* note 7, at 257.

⁵⁶ See Glesner, *supra* note 49. Professor Glesner explains the pernicious effects of stress on law school learning:

Stress interferes with learning in a number of ways. Stress can cause students to worry more than they work. This distraction ... interferes with the processing of information by reducing the ability to receive information and to store that information in working memory.

Id. at 636. Professor Glesner cites the striking results of a study that concluded that "only one-quarter of the variance in achievement could be accounted for by cognitive ability. That study concluded: 'In stressful situations, therefore, non-cognitive intrapersonal variables may become predominant determinants of learning, irrespective of actual ability levels.'" *Id.* at 637, citing Boyle, *The Role of Intrapersonal Psychological Variables in Academic School Learning*, 25 J. SCHOOL PSYCHOL. 389, 390 (1987). See also Hess, *Heads*, *supra* note 49, at 80.

⁵⁷ Weinstein, *supra* note 7, at 257. Of course, it should be noted that, since the personal intelligences both have many facets, not every trait associated with the intelligence might be of benefit to lawyers or law students. William Kidder cites two studies that, while based on the Myers-Briggs Type Indicator as opposed to Howard Gardner's work, might indicate that not every interpersonal or intrapersonal character trait might work to a law student's advantage. In one of these studies, "[l]aw students rated as being friendly, tactful, sympathetic, and concerned with harmonious human contacts are four times more likely to drop out of law school than students characterized as decisive, logical, and able to absorb and recall many facts." William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 201 (2000), citing Paul VanR. [sic] Miller, *Personality Differences and Student Survival in Law School*, LSAC 65-1, in LSAC, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME I: 1949-1969 302 (1976). A follow-up indicated that "law students self-rated as preferring conspicuous originality to inconspicuous conventionality, enthusiasm to less excitability, and mercy to justice, all had significantly higher drop-out rates. The study's author concluded that the student ideally suited for the study of law was one 'whose judgments are relatively uninfluenced by sympathy' and whose 'makeup is tough-minded.'" Kidder, *Testocracy*, at 201, citing Paul VanR. [sic] Miller, *A Follow-Up Study of Personality Factors as Predictors of Law Student Performance*, LSAC 67-2, in LSAC, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME I: 1949-1969 403, 411-412 (1976).

⁵⁸ GARDNER, REFRAMED, *supra* note 7, at 42.

⁵⁹ *Id.* See also GARDNER, FRAMES, *supra* note 8, at 104-05.

⁶⁰ GARDNER, REFRAMED, *supra* note 7, at 42.

The relationship between musical intelligence and the practice of law, at first glance, might appear oblique,⁶¹ but parallels can be drawn. Certainly, musical intelligence could be useful in niche practices, such as entertainment law. But more significantly, a certain understanding of rhythm, cadence, pitch, and timbre could be an invaluable asset to an oral advocate—an element frequently described as eloquence. Moreover, the use of mnemonics, or memorizing legal materials by rote, could be facilitated by musical intelligence.⁶²

Next, Gardner talks of the use of the body as an instrument. "Bodily-kinesthetic intelligence is the ability to solve problems or fashion products using one's whole body, or parts of the body."⁶³ "Characteristic of such an intelligence is the ability to use one's body in highly differentiated and skilled ways, for expressive as well as goal-directed purposes."⁶⁴ Bodily-kinesthetic intelligence could manifest in gross motor skills,⁶⁵ fine motor skills,⁶⁶ facial expressions,⁶⁷ and body language/posture.⁶⁸

Kinesthetic intelligence is applicable to the acting skills that are required of all attorneys, including how we use facial expressions, posture, gestures, eye contact, and our voices.⁶⁹ How we position ourselves in front of a client, a judge, a jury, or a classroom involves gross motor skills and is crucial to how persuasive we are.⁷⁰ Next time we see a charming moot court participant enchant their judge or jury, credit their bodily-kinesthetic intelligence.⁷¹

After sixteen years of ruminating over his theory, Gardner decided in 1999 that the list of intelligences he had originally identified was incomplete

⁶¹ Professor Gardner himself states that the relationship of musical intelligence to the practice of law is "less obvious." GARDNER, FRAMES, *supra* note 8, at 318.

⁶² Professor Patton recounts an example of how he taught his students the element of duty in the tort of negligence by the mnemonic "CURSE," which stands for custom, undertaking, relationship, statute, or emergency. William Wesley Patton, *Opening Students' Eyes: Visual Learning Theory in the Socratic Classroom*, 15 L. & PSYCHOL. REV. 1, 11 (1991). As for the power of music, I still amuse my students annually by singing to them the preamble to the Constitution, memorized by me at the tender age of seven, due to the musical stylings of ABC's "Schoolhouse Rock."

⁶³ GARDNER, PRACTICE, *supra* note 10, at 9; *see also* GARDNER, REFRAMED, *supra* note 7, at 42.

⁶⁴ GARDNER, FRAMES, *supra* note 8, at 206.

⁶⁵ *Id.* at 206, 209. Professor Martin also raises the benefit that superior kinesthetic intelligence can lead to greater physical fitness, an asset to any lawyer in our stressful profession. Martin, *supra* note 38.

⁶⁶ GARDNER, FRAMES, *supra* note 8, at 206, 209.

⁶⁷ *See id.* at 206.

⁶⁸ *Id.*; *see also* Martin, *supra* note 38.

⁶⁹ *See* GARDNER, FRAMES, *supra* note 8, at 226-230.

⁷⁰ *Id.*

⁷¹ Although it should be noted that, as with musical intelligence, Professor Gardner deemed the relationship between bodily-kinesthetic intelligence and the practice of law to be "less obvious." *Id.* at 318.

and he supplemented it in *Intelligences Reframed*.⁷² The first of these new intelligences was natural intelligence, which alludes to "the core capacities to recognize individuals as members of a group (specifically, a species); to distinguish among members of a species; to recognize the existence of other, neighboring species; and to chart out the relationships among the several different species."⁷³ This intelligence has evolutionary significance, both for predators and prey⁷⁴ and is typified by such historical and public figures as Charles Darwin, John James Audubon, and Stephen Jay Gould.⁷⁵

To apply naturalistic intelligence to the law, one might accept that the same gifts that aided our ancestors in the game of evolutionary roulette would aid the lawyer in the modern battles that he or she faces. The intelligence could aid the lawyer in detecting patterns,⁷⁶ "making and justifying distinctions,"⁷⁷ perceiving relationships,⁷⁸ and making and understanding analogies, such as classifying materials.⁷⁹ Professor Martin also touts the benefits of naturalistic intelligence in the practice of environmental law, as well as the benefits in stress reduction we can all gain from communing with nature.⁸⁰

The next intelligence discussed in *Intelligence Reframed* is spiritual intelligence,⁸¹ which refers to "concern with cosmic or existential issues"⁸² and "a desire to know about experiences and cosmic entities that are not readily apprehended in a material sense but that, nonetheless, are important to human beings."⁸³ Individuals who ask and are gifted in answering the big questions of existence and who relate handily to the supernatural world or larger cosmos have this gift,⁸⁴ as well as the rare individuals throughout human history who are reputed to have achieved a higher spiritual state of being or consciousness, such as meditation or salvation.⁸⁵ Included too are

⁷² GARDNER, REFRAMED, *supra* note 7, at 34.

⁷³ *Id.* at 49.

⁷⁴ *See id.*

⁷⁵ *Id.* at 48.

⁷⁶ *Id.* at 50.

⁷⁷ *Id.* at 49.

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ Martin, *supra* note 38.

⁸¹ Gardner himself lately acknowledges that, by his own standards, this intelligence and the next, existential intelligence, have not been as fully established; thus, Gardner has referred to his having only "8 ½ intelligences." Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 118 n.91, quoting Howard Gardner, *Keynote Address at the Hewlett Center Conference 2000: Focus on Negotiation Pedagogy* (March 10, 2000).

⁸² GARDNER, REFRAMED, *supra* note 7, at 54.

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See id.* at 55-56.

those who have helped others to a spiritual experience.⁸⁶ Among these individuals, Gardner numbers Jesus, Mother Theresa, Buddha, and Confucius.⁸⁷

Certainly, few, if any of us, aspire to such lofty goals through the pursuit of our legal avocation. However, it is not absurd to assert that being at peace with oneself would be an asset to anyone in our profession. Equally beneficial to attorneys is the capability of deep thought and the leadership and charisma embodied by great spiritual leaders.⁸⁸ Perhaps, most significantly, true understanding of moral concepts that are applicable to the law, such as justice, mercy, liberty, and truth, should be valued by our profession.

The final intelligence described by Gardner is existential intelligence,⁸⁹ which represents "concern with ultimate issues"⁹⁰ and the "capacity to locate oneself with respect to the furthest reaches of the cosmos and existence."⁹¹ The existentially gifted are able to imagine and contemplate the infinite.⁹² This is the cognitive side of spiritual intelligence,⁹³ as embodied by such figures as Albert Einstein⁹⁴ and Mahatma Gandhi.⁹⁵

As with spiritual intelligence, the capability for "big picture thinking," or for looking beyond the present imbroglio to future ramifications, is an asset for any lawyer. The ability to grasp philosophy and cosmology aids one in determining the proper placement and order of individuals and concepts in the universe. Additionally, understanding chaos theory and the ripple effect are important concepts for the lawyer to grasp in her role as a social engineer.⁹⁶ Professor Gardner himself provides a fascinating exegesis of how existential intelligence could benefit the attorney engaged in a negotiation:

Existential intelligence helps us to ask and answer the biggest questions of life: Who are we? What are we trying to achieve? What is going to become of us? Often a negotiation that seems to be about something trivial is actually about some fundamental issue (e.g. Am I being taken seriously?). Thus, a dollop of

⁸⁶ *See id.* at 57-58.

⁸⁷ *See* GARDNER, REFRAMED, *supra* note 7, at 57-58.

⁸⁸ *See* Wong, *supra* note 29, at 209.

⁸⁹ GARDNER, REFRAMED, *supra* note 7, at 60.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *Id.* at 62.

⁹⁵ GARDNER, REFRAMED, *supra* note 7, at 62.

⁹⁶ Certainly, every lawyer could benefit from a superior sense of priority!

existential intelligence can be very precious in a successful negotiation.⁹⁷

Indeed, that dollop would help the lawyer in all that she does. In addition to the discrete intelligences recognized by Gardner, he also suggests several higher-level cognitive operations that cut across multiple intelligences, such as common sense, originality, capacity to make and perceive metaphors and analogies, wisdom, and morality.⁹⁸

Certainly, in its twenty-one years of existence, MI theory has been subject to criticism. First, there are those who prefer the status quo: that logical and linguistic intelligences should be valued above others or that the other identified intelligences are talents and not intelligences at all.⁹⁹ Gardner himself addressed a criticism that his theory was arbitrary in limiting his theory to then seven intelligences.¹⁰⁰ He posed the hypothetical question, "What prevents the ambitious theoretician from constructing a new 'intelligence' for every skill found in human behavior? In that case, instead of seven intelligences, there might be 700!"¹⁰¹

Gardner also speaks to the art lovers, in justifying why he has identified a musical intelligence, but not an artistic one.¹⁰² Similarly, he refuses to carve out leadership as a discrete intelligence.¹⁰³ Perhaps the biggest conundrum of all in Gardner's work is that Gardner's theory will perhaps for all times remain a theory because it cannot be tested.¹⁰⁴ By its

⁹⁷ Gardner, *Negotiation*, *supra* note 33, at 322.

⁹⁸ GARDNER, *FRAMES*, *supra* note 8, at 286-94. Given the influx of cognitive and development psychology into popular culture and, to a lesser extent, into interdisciplinary legal studies, various legal scholars have suggested "intelligences" for inclusion into Gardner's scheme. For instance, Professor Davis advocates for the inclusion of narrative, strategic and metacognitive, practical, and social intelligences. Davis, *supra* note 2. I personally would plump for the inclusion of wit and humor. Of course, Professor Gardner would likely respond that these capabilities are already subsumed under one or more of his identified intelligences.

⁹⁹ Gardner responds that he is not wedded to the term:

I would be satisfied to substitute such phrases as 'intellectual competences,' 'thought processes,' 'cognitive capacities,' 'cognitive skills,' 'forms of knowledge,' or other cognate mentalistic terminology. What is crucial is not the label but, rather, the conception: that individuals have a number of domains of potential intellectual competence which they are in a position to develop, if they are normal and if the appropriate stimulating factors are available.

GARDNER, *FRAMES*, *supra* note 8, at 284.

¹⁰⁰ GARDNER, *PRACTICE*, *supra* note 10, at 45.

¹⁰¹ *Id.* Gardner answers the criticism by explaining the methodology he used to come up with the distinct intelligences. *See id.*

¹⁰² Gardner responds that many, if not all, of his identified intelligences can be used artistically, but that it is cultural mores that determine aesthetics. *Id.* at 46; *see also* GARDNER, *REFRAMED*, *supra* note 7, at 108.

¹⁰³ GARDNER, *REFRAMED*, *supra* note 7, at 115.

¹⁰⁴ *See id.* at 80.

very nature, Gardner's work is attacking intelligence testing and "having a battery of MI tests is not consistent with the major tenets of the theory."¹⁰⁵

However, despite its flaws, Gardner has served notice that his theory is here to stay and increasingly commentators, particularly those on education, are taking notice. For at least one, the failure of legal pedagogy to take greater cognizance of multiple intelligences is tantamount to discrimination. "Law school creates an artificial hierarchy of intelligences that unfairly rewards those traditional students who think with logical intelligence at the expense of those nontraditional students who think with other intelligences."¹⁰⁶ Gardner himself concurs that "[S]chool (including law school) focuses particularly on linguistic and logical-mathematical intelligences. But the other intelligences, ranging from musical to naturalist, are important as well."¹⁰⁷ As such, Gardner warns that "when one or two intelligences reflect the standards of competence, 'it is virtually inevitable that most students will end up feeling incompetent.'"¹⁰⁸ Given the high stakes, it behooves us to examine whether any of those feelings of incompetence are unnecessary and unjustified.

III.

According to noted feminist legal scholar Susan P. Sturm, legal education, alpha to omega, is bent on the creation of just one kind of lawyer:

Legal education plays a pivotal role in socializing lawyers to the primacy of the gladiator model. Law schools' pedagogy, curriculum, and placement tend to be structured around this one-size-fits-all gladiator model of lawyering. The gladiator model channels who is accepted into law school: those predicted to be analytically rigorous, as measured by performance on law school entrance exams. It frames the content of the curriculum, which is organized around an adversarial, litigation model aimed at using tools of analytic reasoning to advance a claim and win an argument. It structures how students are taught: in large, hierarchical classes emphasizing quickness and performance, as opposed to deep thinking and communication. It emerges in the prevailing system of evaluation: issue spotting, timed exams, and an emphasis on abstract analytical reasoning. All of these aspects of dominant law school culture are highly individualistic in their mode of learning, performance, and evaluation. Determining

¹⁰⁵ *Id.*

¹⁰⁶ Kaufman, *supra* note 21, at 262.

¹⁰⁷ Gardner, *Negotiation*, *supra* note 33, at 321.

¹⁰⁸ Davis, *supra* note 2, *citing* GARDNER, PRACTICE, *supra* note 10, at 74.

winner and loser defines the pattern of interaction, both substantively and pedagogically.¹⁰⁹

It is time to entertain the notion that not all of our students need be warriors in the kind of zero-sum battle Professor Sturm describes. By omega, "[a]fter three years of battle with law school, "fighting" students often are left dispirited about learning and cynical about the law, the legal profession, and most especially law school."¹¹⁰

But we must begin our discussion of the battle with the alpha of admissions. The traditional admissions model at most schools is weighted heavily toward the index—a number derived from the student's LSAT score combined with their undergraduate GPA. Under the current regime, the Harvard Plan, this index score reigns supreme with "plusses" given for other factors: such as a strong essay, impressive extracurricular activities or work experience, minority status, and being a "legacy" or the child of an alumnus.¹¹¹ The Harvard Plan is near and dear to us, not only because it is the model we have all lived under for twenty-five years, but because, almost by definition, everyone employed as a law professor thrived under this system. We all got high LSAT scores, impressive grades, and the kinds of prestigious jobs that led us into academia, where, of course, we are going to be favorably disposed to admitting law students like us.¹¹²

So what's wrong with that?

Intuitively, it seems fair to focus on undergraduate grades. The students could select their own coursework, presumably in areas that accentuate their strengths, and the grades they earn speak as much to their work ethic as their capabilities.¹¹³ However, several scholars have identified lingering concerns with the LSATs, the factor identified by several scholars

¹⁰⁹ Sturm, *supra* note 6, at 128-29. Although Professor Sturm's focus was on the damage the gladiator model does to women, she notes that it is "problematic for others who learn differently, embrace different values, or pursue their role in different ways. The one-size-fits-all approach to teaching and evaluation silences and undervalues those with different learning styles and visions of themselves as lawyers." *Id.* at 132.

¹¹⁰ Glesner, *supra* note 49, at 628.

¹¹¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

¹¹² Delgado, *supra* note 10, at 597. See also *id.* at 609. We and our alumni also have a vested interest in keeping our school's median reported LSAT score as high as possible to bolster those *U.S. News* rankings. See Wong, *supra* note 29, at 210.

¹¹³ It should be noted, however, that several commentators have raised concerns about the reliability of the UGPA (Undergraduate Grade Point Average) as a predictor. "UGPA carries its own set of limitations, including the influence of factors such as leniency of grades, rigor of the curriculum represented by the grades, and students' motivation and application." Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor In Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 31 (1997). See also Wong, *supra* note 29, at 210, citing Wightman, *Diversity*, at 15 ("[U]sing UGPA as a primary index for admission would still result in the disproportionate exclusion of minorities, although the disparate impact would be lessened.").

as the one most determinative of an applicant's fate in the admissions process.¹¹⁴

The LSATs were inaugurated in 1948 to determine which returning GIs would go to law school and which would not.¹¹⁵ Psychometrically, it is not unlike a traditional IQ test, and like traditional IQ test, only two intelligences are worthy of assessment: "[S]tandardized tests such as the LSAT measure individual ability only through the 'narrow lens' of 'linguistic and logical . . . domains.'¹¹⁶ Also, like a standard IQ test, the LSAT is administered in a multiple-choice format which could penalize creative or unorthodox thinking, not necessarily traits we want to discourage in aspiring lawyers.¹¹⁷

Perhaps even more significantly, there is controversy about the ability of the LSATs to predict success in law school. Several law review articles, by such esteemed scholars as Lani Guinier and Richard Delgado, have pointed to statistical studies supporting the assertion that LSATs are not very good at doing what they profess to do, namely predict first year

¹¹⁴ William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 6 (2000) [hereinafter Kidder, *Portia*], citing Linda F. Wightman, *An Examination of Sex Differences in LSAT Scores From the Perspective of Social Consequences*, 11 APPLIED MEASUREMENT IN EDUC. 255, 272 (1998) [hereinafter Wightman, *Sex Differences*]. Kidder explains well the relevance of Wightman's work:

[It finds] that for 1991 applicants to ABA schools, LSAT scores and UGPAs jointly have a correlation coefficient with actual admit/deny decisions of .71 for both male and female applicants . . . A correlation coefficient is a measure of the strength of association between two variables. A common statistical procedure is to square the correlation coefficient to calculate the total amount of variation accounted for by the relationship of these two variables. Thus, a correlation of .71 means that just over half of all the differences in admission decisions are accounted for by a combination of LSAT scores and UGPAs. Since LSAT scores are weighted more heavily than UGPA (usually 60/40) in admission indices, the test is the single most decisive factor in determining who will be admitted to law school.

Kidder, *Portia*, at 6 n.27.

¹¹⁵ Panel Discussion, *Affirmative Action and Standardized Testing*, 4 TEX. HISP. J.L. & POL'Y 85, 87 (1998) [hereinafter Panel Discussion].

¹¹⁶ Wong, *supra* Note 29, at 208, quoting Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 976 (1996). "Particular test items aside, many ETS tests do not test all relevant skills. The LSAT, for example, only requires verbal and reasoning fluency, not the ability to command probability, scientific reasoning, humanistic thought, historical thought, or knowledge of human motivation and psychology – all skills important for lawyers. Multiple choice test taking under severe time constraints, as one critic put it, 'is a specialized kind of game which rewards certain kinds of people and penalizes others for reasons apart from their ability to handle words [concepts] and numbers.'" Delgado, *Elitism*, *supra* note 10, at 598, quoting ALLAN NAIRN, *THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS* 220, 283-84 (1980).

¹¹⁷ "Standardized tests punish takers who deviate from the path the designer has in mind. . . . It also punishes those who think outside the box." Delgado, *supra* note 10, at 599.

grades.¹¹⁸ Even scholars who do not share Professor Guinier and Delgado's dim view of the LSAT's predictive value note its limitations:

Legal academia's reliance on written exams raises questions at all stages of the process from student selection through graduation. Although the LSAT is a valid statistical predictor, it has serious limitations. The test can only predict a portion of the variation in grades. Like any statistical tool, its predictions are most powerful for the large group. The test offers progressively less information about smaller subgroups and is not equally valid for all subgroups. It tends to overpredict the success of white males and underpredict the performances of women and people of color. As with any predictive examination, its use must be informed by a good understanding of what it can and cannot do. The LSAT offers a prediction about the grades a student, or group of students, will receive in law school, particularly in the first year. One of its virtues is that it has been, and continues to be, carefully studied and critiqued. Those who are inclined to use it with care may do so by accounting for its weaknesses and combining it with other assessment methods.¹¹⁹

¹¹⁸ "The LSAT, for example, correlates with first year grades with a coefficient of about .4 meaning that it predicts only about sixteen percent of the variation in those grades. Other factors which we could focus on, but do not because the test is so simple and convenient, account for the other eighty-four percent." *Id.* at 600. More specifically, "[t]he LSAT's correlation coefficient with first year grades ranges from .01 to .62, depending on the law school, with a median correlation with .41. When the LSAT is used in conjunction with undergraduate GPA, predictive validity increases (ranging from .11 to .68), with a median correlation coefficient of .49." Wong, *supra* note 29, at 208, citing LAW SCHOOL ADMISSION COUNCIL, LSAT/LSDAS REGISTRATION AND INFORMATION BOOK 121 (1998-1999 ed., 1998). Counsel for the student interveners in *Grutter v. Bollinger*, 539 U.S. 306 (2003), asserts that "at the University of Michigan, when you combine undergraduate grades and LSAT scores, what you get is the ability to predict twenty-seven percent of the variation in first year grades. Try selling tires or coffee makers with those numbers. That is a preposterously low correlation to try to base something as life-altering as an admissions decision on." Miranda K.S. Massie, *Standing on the Promise of Brown and Building a New Civil Rights Movement: The Student Intervention in Grutter v. Bollinger*, 66 ALB. L. REV. 505, 512 (2003), citing Defendant-Intervenors' Appeal Brief at 5, *Grutter v. Bollinger*, 288 F.3d 732, 746 (6th Cir. 2002) (No. 01-1516) [hereinafter *Grutter* Brief].

See also Kidder, *Testocracy*, *supra* note 51, at 187; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1264 n.39 (1995); and Sturm, *supra* note 116, at 971.

But see Philip D. Shelton, *Admissions Tests: Not Perfect, Just the Best Measures We Have*, CHRON. HIGHER EDUC, July 6, 2001 ("[T]hose who cite the 16% variance fail] to place this statistic in any context or acknowledge that, while not perfect, no other measurement of academic talent or preparedness for law school comes close to matching the predictive qualities of the LSAT.") According to Shelton, who is the president and executive director of the Law School Admission Council, the LSAT is the measure that is most predictive of law school success, much more so than UGPA. *Id.*

¹¹⁹ Weinstein, *supra* note 7, at 247-49, citing Lisa C. Anthony et al., *Predictive Validity of the LSAT: A National Summary of the 1995-1996 Correlation Studies*, LAW SCHOOL ADMISSIONS COUNCIL LSAT TECHNICAL REPORT 97-01, LAW SCHOOL ADMISSIONS REPORT SERIES (1999); Donald E. Powers, *Predicting Law School Grades for Minority and Nonminority Students: Beyond the First-Year Average*, in LAW SCHOOL ADMISSION COUNCIL, IV REPORTS OF LSAC SPONSORED RESEARCH (1978-1983) 261, 275 (1984); Kidder, *Testocracy*, *supra* note 51 at 167, 187, 206 (2000); Kidder, *Portia*, *supra* note 114;

Many of these scholars assert that, as a student moves beyond the first year of law school into the second and third years, and after graduation, the correlation to success becomes even lower.¹²⁰ Professor Weinstein proffers a reason why this might be so:

Although first year grades are somewhat predictive of third year grades, the relationship is not as strong as might first be expected, perhaps because the most successful students in the first year already have most of the benefits of high grades and so have little incentive to work for higher grades, while those who did less well are still in the hunt for jobs and have a strong incentive to improve their grades.¹²¹

The LSATs have also been criticized as unjust and arbitrary, in that small errors on the test can take on what is, in at least one scholar's mind, an inflated significance:

Women's and minorities' diminished opportunities to attend ABA law schools are all the more alarming because a two-point gender gap on the LSAT lacks statistical significance when comparing any two individual applicants. This lack of significance will be illustrated by pointing out what two points means to the average LSAT test-taker The median score on the LSAT is a 151. Starting with an example of two students, suppose that Michelle obtained a 150 on a recent LSAT and Michael scored a 152 on the same test. In practical terms, this means that Michael answered only two more questions correctly out of the 101 scored questions on the test. In the high-stakes contest of law school admissions, these two questions will place Michael at the 54th percentile of applicants and Michelle at the 46th percentile. Because there have been as many as 100,000 law school applicants in recent years, the

Wightman, *Diversity*, *supra* note 113, at 1; William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 *ASIAN L.J.* 29 (2000).

¹²⁰ Delgado, *Elitism*, *supra* note 10, at 600. See also Wightman, *supra* note 113, at 30. ("The LSAT is valid for a limited use and has a clearly defined narrow focus: it is a test of acquired reading and verbal reasoning skills that have been shown to correlate with academic successes in the first year of law school. When it is used for a different and/or for broader purpose, not only is the use inappropriate, but calling on the test to do more than it was intended to do damages its validity.") Abiel Wong, in fact, interprets Wightman's data to state that "the LSAT generally does not correlate with actual graduation rates." Wong, *supra* note 29, at 208, *citing* Wightman, *Diversity*, *supra* note 113, at 35-36. Studies of Ivy League legacies have found that legacies admitted with far lower test scores than their peers go on to do just as well. Delgado, *Elitism*, *supra* Note 10, at 601, *citing* *Prime Numbers*, *CHRON. HIGHER EDUC.*, Sept. 15, 2000 at A12 (although certainly one might argue that life, or their parents, provide these students with other compensatory advantages).

¹²¹ Weinstein, *supra* note 7, at 248 n.2.

two additional questions that Michelle missed can rank her several thousand places behind Michael in the national applicant pool Given the possibility that adverse consequences can result from seemingly miniscule test score differences, does Michelle's slightly lower score signify that she possesses less academic potential?¹²²

The plight of Kidder's poor Michelle has also been lamented by Professor Weinstein and others, who have alleged an inherent race and gender bias in the LSAT and other ETS tests.¹²³ Certainly, whether the test is biased or not, the discrepancy in LSAT scores between black and white test-takers is well documented:

For the 1997-98 academic year, 71,726 students took the Law School Admission Test. Of these, 8,216, or 11.5 percent, were black. The median score on the LSAT for black test takers was 142.7 The median white score was 153.5. Thus, on average, black scores are about 18 percent lower than white scores.¹²⁴

¹²² Kidder, *Portia*, *supra* note 114, at 18-19. Kidder answers his own rhetorical question by turning to the field of educational measurement and the indices of standard error of measurement, concluding that the Standard Error of Measurement for the LSATs at a two-thirds confidence level is plus or minus 2.6 points. If one wants 95% confidence, the range of error expands to plus or minus 5.2 points. "Thus, it could only be concluded with ninety-five percent confidence that Michelle's true score is between a 145 and a 155." *Id.* See also Wong, *supra* note 29, at 210.

Even the Law School Admissions Council, the administrator of the LSATs, cautions against overreliance on small differences in LSAT scores. Kidder, *Portia*, *supra* note 114, at 20. "It is likely that small differences in scores are due to measurement error rather than to meaningful differences in ability Thus, a test score should be regarded as a useful but approximate measure of a test taker's abilities as measured by the test, not as an exact determination of his or her standing." LAW SCHOOL ADMISSION COUNCIL, LSAT/LSADAS REGISTRATION AND INFORMATION BOOK, *supra* note 118, at 121. However, Wong asserts that, due to the significance of the *U.S. News* rankings and the fact that the publication reports the median score for each school, an "arms-race" had ensued, Wong, *supra* note 29, at 210, with all the irrationality that the Cold War entailed. Law school deans have also conceded that the rankings war was forcing schools to turn away qualified minorities. *Id.*, citing Roger Parloff, *Who's Number One? And Who's Number 52, 91, and 37?*, AMERICAN LAWYER, Apr. 1998, at 5, 8 (featuring Dean Hasl of St. John's University School of Law discussing the pressure to admit candidates who will bolster the school's *U.S. News* rankings).

¹²³ Weinstein, *supra* Note 7, at 248 n.4. It is important to note that, according to President Shelton, UGPAs show a significance performance gap across racial and ethnic groups as well. Shelton, *supra* note 118. However, William Kidder, relying on the statistics compiled by Linda Wightman, concludes that "more than twice as many African Americans would be admitted to law school under a UGPA model compared to an LSAT/UGPA model." Kidder, *Portia*, *supra* note 114, at 9, citing Wightman, *Diversity*, *supra* note 113, at 18. Puerto Ricans and other minorities are also adversely affected by these criteria. *Id.* Women of color are hardest hit of all. Kidder, *Portia*, *supra* note 114, at 36-37. Conversely, of course, whites are the only group advantaged by the present model. *Id.*

¹²⁴ The Law School Admission Council, *A Hundred-Million-Dollar Investment Fund that Does Law School Testing on the Side*, J. BLACKS IN HIGHER EDUC., Spring 2000 [hereinafter, *Hundred-Million-Dollar*]. The Journal asserts that, in light of these facts, a move to a race-blind admission system "will surely have the effect of resegregating blacks into lower-ranked law schools." *Id.* Consider its point that in 1997-98, only twenty black students in the country scored a 170 or above on the LSAT, putting them in range of the 171 that is the median reported LSAT score for Yale Law School. *Id.* Consider also that

At best, assuming *arguendo*, that the score discrepancy is not due to any discriminatory aspect of the test, several studies have questioned the effectiveness of the LSAT and its cousin, the SAT, as an indicator for the success of black students. For instance, recent studies by Derek Bok, former president of Harvard University; his colleague William G. Bowen; and four professors of University of Michigan law school indicate that minorities admitted to college with SAT scores lower than those of their classmates go on, as a group, to perform well after graduation as measured by such indices as high activity in civic affairs,¹²⁵ publishing books, winning prizes, and earning Ph.Ds at rates exceeding those of their higher testing peers.¹²⁶ Anecdotally, an article by Richard Delgado noted an interesting example of a standardized test failure, Martin Luther King, who could not get into graduate school because he "flunked" the GRE and enrolled instead in theological school.¹²⁷

However, at worst, many scholars have asserted that there is discrimination at play on the test. For instance, LSAT scores, like all standardized test scores, are highly correlated with socioeconomic status.¹²⁸ "An SAT taker can expect an extra thirty points for every ten thousand

"even the poorest White LSAT takers score higher on the LSAT than the wealthiest Black LSAT taker." Massie, *supra* note 118, at 524. Grutter Brief, *supra* note 118, at 6.

¹²⁵ Wong, *supra* note 29, at 209, citing Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite Colleges*, N.Y. TIMES, Sept. 9, 1998, at B10 (reviewing the Bowen & Bok study).

¹²⁶ Delgado, *Elitism*, *supra* note 10, at 601, citing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998), and Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395, 398-400 (2000). Another study of University of Michigan Law School alumni found that LSAT scores and UGPAs did not have a relationship to measures of success for practicing lawyers, such as income or career satisfaction. David L. Chambers et al., *Doing Well & Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School*, L. QUADRANGLE NOTES 60, 70 (Summer 1999). Abiel Wong states that the LSAT has "little or no correlation with respect to the important long-term goal of admitting persons who will competently serve the community." Wong, *supra* note 29, at 208, citing Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 384 (1991) (pointing out that *Defunis v. Odegard*, 416 U.S. 312 (1974), contains an admission from Rutgers University that the LSAT "has not been validated as a criterion reasonably related to legal job performance.").

¹²⁷ Delgado, *Elitism*, *supra* note 10, at 608, citing Kidder, *Testocracy*, *supra* note 51, at 192 n.116.

¹²⁸ Delgado, *supra* note 10, at 601, citing Nairn, *supra* note 116, at 197-219; Peter Sacks dubs this the "Volvo Effect." PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 8 (1999); Sturm, *supra* note 116, at 957; Wong, *supra* note 29, at 209, 231-34; citing Wightman, *Diversity*, *supra* note at 4. See also CROUSE, *supra* note 10, at 124. Consider also the interesting statistic cited by Professor Daria Roithmayr that 50% of law students have at least one lawyer parent and the potentially staggering advantage that that half of the class could have. Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 784-85 (2000).

dollars of parental income."¹²⁹ Among other reasons, part of this discrepancy might be due to the access of affluent students to standardized test crash/prep courses, some of which cost more than \$1200, which have documented success in raising student standardized test scores.¹³⁰

¹²⁹ SACKS, *supra* note 128, at 8, 27. Professor Delgado asserts, in a 1998 speech to the University of Alabama Law School, that "zip codes predict LSAT scores better than those scores predict law school grades." Richard Delgado, *Hugo L. Black Lecture: Ten Arguments Against Affirmative Action: How Valid?*, 50 *Ala. L. Rev.* 135, 140 (1998) [hereinafter Delgado, *Affirmative Action*]. Part of the irony in this phenomenon is that one of the original reasons the LSAT was embraced in the law school admissions process:

[W]as increasing societal dissatisfaction with the elite, exclusionary selection processes of the time. As American society became increasingly racially and socioeconomically diverse, the elite, white students in the law school stood out in stark and disturbing contrast. To address such concerns, law schools utilized the LSAT as a device for extending opportunities to students from lesser-known institutions (provided that they scored respectably on the test), thus supplementing their practice of selecting students from the 'known,' elite institutions . . . In fact, Thurgood Marshall himself relied on standardized testing to undermine the segregationist assertion that black children were so behind white children that it would be senseless for them to be educated together – he remarked that students should be judged by their test scores, rather than by the color of their skin."

Wong, *supra* note 29, at 208, *citing* Adrian Wooldridge, *In Defense of the SAT*, NEW REPUBLIC, June 15, 1998, at 21. Of course, it seems likely that the detractors of the LSAT would retort that it is natural that the new leading index for admission would be coopted by the majority.

¹³⁰ Delgado, *Elitism*, *supra* note 10, at 602, *citing* Wong, *supra* note 29, at 236-37; *Sex and Race Differences on Standardized Tests: Before the Subcomm. on Civil and Constitutional Rights of the House Comm. On the Judiciary*, 100th Cong., 1st Sess. 299 (1987) [hereinafter, *Subcomm. Hearing*]; Sturm, *supra* note 116, at 991 n.164; *Hundred-Million-Dollar*, *supra* note 124, at 96.

Professor Delgado further asserts, "[t]he SAT is eminently coachable. The director of one of the prominent test-coaching companies, which charges nearly \$1000 for its services, boasted that his organization was able to boost the score of the average test taker by 185 points [on the SAT]. Thirty percent improved by 250 or more. Because of the high price charged, the children of the wealthy naturally are more likely to be able to take the course." Delgado, *Affirmative Action*, *supra* note 129, at 144.

An article in the *Wall Street Journal* cited a test prep course claiming it could raise LSAT scores by six or seven points. Frances A. McMorris, *Test-Prep Fees Deter Black Law Applicants*, WALL ST. J., Mar. 23, 1998, at B1. The same article quotes the director of Kaplan Educational Centers as saying that "someone who went to prep school in the Northeast and is at Brown has been trained to rely on educational resources. But someone from a public high school may not know about these resources." *Id.* Finally, the article notes that both Kaplan and Princeton Review offer scholarships to needy minority students.

Abiel Wong asserts that the LSAT was "substantially revised" in 1989 because the test was "embarrassingly coachable." Wong, *supra* note 29, at 210, *citing* H. Eric Semler, *Law School Admission Exam is Revised*, N.Y. TIMES, June 9, 1989, at B5 (quoting the president of the Princeton Review, with input from Linda Wightman). Wong asserts that the existence of an advantage in the coached students is intuitively logical, due to, at a minimum, the familiarity with the test format the courses provide. *Id.* A law school aspirant might spend fifteen minutes of precious test time just reading the instructions. *Id.* It is also intuitive that, as the old adage goes, that the practice provided by the courses makes perfect. *See id.* In the end, the test may, at least in part, be measuring differences in innate "test-taking skills," rather than aptitude for law school. *Id.*

Of course, one might respond to Wong that test-taking is an aptitude necessary to being a lawyer. Certainly, passing the bar exam is. In the alternate, the notion itself that the LSATs are coachable is

Another reason why minorities in particular might have difficulty on the LSAT is that the test content itself might be discriminatory, where many of the test questions "presuppose knowledge that is only common in middle or upper class white communities."¹³¹ The ETS test creators, although trained, are not immune from cultural and socioeconomic influences:

Test writers do not write test questions as culturally and socio-economically stripped, neutral beings. Rather, test writers, like all humans, reflect the culture and surroundings in which they were raised. The situations and circumstances they incorporate into test questions, and, more importantly, the meanings and thought patterns they deem 'right' will inevitably favor test takers who share those meanings and thought patterns.¹³²

One examination of the SATs of the not-too-distant past found questions requiring knowledge of golf, tennis, pirouettes, property taxes, minuets, kettle drums, tympani, polo, and horseback riding, subjects not necessarily common knowledge in many minority communities.¹³³ Another study of the LSAT showed reading passages disparaging W.E.B. Du Bois, Cesar Chavez, and Harriet Tubman.¹³⁴ The effect of such items might extend beyond the

"hotly contested." Wong, *supra* note 29, at 209 n.157. The LSAC actually issued a rebuttal to the *Wall Street Journal* article, questioning the survey data on which the article relies and stating that its own study has found a much smaller discrepancy between users of test-prep services and non-users. *Id.*, citing John Gulino, Jr., *LSAT Testing Group Rebutts Report of Test Prep Bias*, LEGAL INTELLIGENCER, May 18, 1998, at 7. See also Carolyn Mooney, *Test Preparation Courses Have a Negligible Effect on Scores*, *Study Concludes*, CHRON. HIGHER EDUC., Mar. 26, 2001, <http://chronicle.com/daily/2001/03/2001032601n.htm>.

My own experience with ETS testing persuades me that the test results are coachable and otherwise subject to the vagaries of the circumstances under which one takes the test. My first foray into ETS testing was with the PSAT, which ETS holds out as an accurate predictor of one's future performance on the SAT. My respectable, but not stellar, score shattered any pretensions to grandeur I may have entertained at the time. Some years later, I took the SATs. The day of my father's wedding, attired in a cotton candy pink satin Jessica McClintock dress, I improved my PSAT score by close to 100 points. Five months later, comfortably swaddled in sweats and having spent weeks pouring over the Princeton Review book, I sat for the SATs again and improved my first SAT score by 130 points. Five years later again, when it was time to face the LSATs, I was fortunate enough to have had a generous aunt, who gave me the Kaplan review course as a college graduation present. The course was invaluable in unfogging the mysteries of the logic games section of the examination, which had hithertofore been the bane of my existence. I am firmly convinced that, without the course, I never would have attained an LSAT score sufficient to gain admission to my law school alma mater. Not every applicant to Columbia Law School is as fortunate in their aunts.

¹³¹ Delgado, *Elitism*, *supra* note 10, at 605; see also Kidder, *Portia*, *supra* note 114, at 25.

¹³² Delgado, *Elitism*, *supra* note 10, at 605-06.

¹³³ *Id.* at 605, citing *Subcomm. Hearing*, *supra* note 130, at 298; see also Kidder, *Portia*, *supra* note 114, at 38-42.

¹³⁴ Kidder, *Portia*, *supra* note 114, at 38-42. Kidder as well lists numerous examples of LSAT questions that could be viewed as biased or offensive, including one test item regarding "Joan [who] would like to meet anyone with money," *Id.* at 38, and items portraying Asian Americans as hard-working, which might contribute to the "model minority myth." *Id.* at 38-39. See FRANK H. WU, *YELLOW*

single question involved. "[O]ne can imagine that offensive items or items entirely foreign to an examinee's experience could harm motivation and attention on later test questions."¹³⁵

Sociologist Claude Steele of Stanford University posited yet another troubling phenomenon, which he labeled "stereotype threat"—an "inhibiting anxiety." Dr. Steele found that white students outperformed equally qualified African-American students when told that a test was a measure of verbal ability but not when told that the test was unrelated to ability. It also occurred when the test applicant was asked to provide background information, including race, before commencing the test.¹³⁶ There is at least evidence of a gender discrepancy as well on the LSATs. William Kidder reported that "women trail men on the LSAT by an average of approximately one-tenth of a standard deviation."¹³⁷ Perhaps stereotype threat is also at play here; Claude Steele found that, on a difficult math test, men outperformed women, except for the session where test-takers were told that men and women performed equally well on the test.¹³⁸ If not conclusive, the data emerging regarding the impact of the supremacy of the LSATs on women and minorities is troubling.¹³⁹ One scholar goes so far as to caution law schools against overreliance on the LSATs in admissions decisions,

(2003). Still another item assigns the name "Maria" to a fictional woman described as "poor" and "uneducated." Kidder, *Portia*, *supra* note 114, at 39. See also Panel Discussion, *supra* note 115, at 90.

¹³⁵ Kidder, *Portia*, *supra* note 114, at 35, citing Lorrie A. Shepard, *Definitions of Bias*, in HANDBOOK OF METHODS FOR DETECTING TEST BIAS 9, 22 (Ronald A. Berk ed. 1982).

On a related matter, consider that a portion of every LSAT administered contains an "experimental" section, where ETS is trying out questions for use in future LSAT administrations. The student is unaware which section is the ungraded section and, while his or her performance on that section is not computed in the student's reported score for the examination, it is more than conceivable that a poor performance on that section, for example, if the student who perpetually struggles with Logical Reasoning is presented with additional section of it, could pull down the grade for the entire examination.

¹³⁶ Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); see also Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 279 (1999), citing Claude M. Steele & Joshua Aronson, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997) [hereinafter Steele & Aronson, *Air*]. Texas State Senator Rodney Ellis lent credence to Steele's findings with a heartrending remark reflecting on his experience of being denied admission at the University of Texas Law School: "For some reason I didn't score well on tests. Maybe I was just nervous. There's a lot of pressure on you, knowing that if you fail, you fail your race." Panel Discussion, *supra* note 115, at 82.

¹³⁷ Kidder, *Portia*, *supra* note 116, at 6, citing Wightman, *Sex Differences*, *supra* note at 256. Kidder reports that since 1991, the gender gap has only spread, increasing to two-tenths of a standard deviation in 1995-96. *Id.* However, it is important to note that Wightman's own study concluded that the LSAT does not cause gender bias and that indeed there is a paucity of reliable studies to demonstrate such bias. *Id.* at 7-8, citing Wightman, *Sex Differences*, *supra* note 114, at 257.

¹³⁸ Farber & Rickenberg, *supra* note 136, at 279, citing Steele, *Air*, *supra* note 116, at 620.

¹³⁹ Another significant issue regarding the use of LSAT scores by law schools is that many law schools use LSAT scores as the principal criterion for allocating merit based scholarship money, money that can significantly impact on a student's ability to matriculate at a particular school. Kidder, *Portia*, *supra* note 116, at 23, citing LSAC, *Law School Links*, <http://www.lsac.org> (last visited Feb. 21, 2000).

intimating that such a move would be tantamount to actionable disparate impact discrimination.¹⁴⁰

Recent Supreme Court decisions at least suggest that that august body holds a complex view regarding discrimination in law school admissions, and the need for redress thereof. Now we in academe must scramble to adapt to its edicts, and to some extent, anticipate those of the future. The decision of the Court in *Gratz v. Bollinger*,¹⁴¹ which struck down the use of a point system as a means of taking cognizance of racial diversity, is reality for us. And, even though in its law school companion case, *Grutter v. Bollinger*,¹⁴² the Court upheld an admissions model that made minority status a plus, in light of a compelling interest in attaining a "critical mass" of minorities, the Court signaled that it might not always continue to countenance such a form of affirmative action. Justice O'Connor indicated in dicta in *Grutter* that the remedy permitted there was necessarily time-limited and that the Court expected twenty-five years from now that race consciousness in admissions should no longer be necessary.¹⁴³

That gives us twenty-five years or perhaps less¹⁴⁴ to cast about for new lawful ways to create a diverse student body. In light of the fact that there is some indication that different cultural groups in society might have pronounced strengths in different intelligences,¹⁴⁵ MI theory could offer a valid index for promoting diversity. After all, "Surrounding [individual students] with students of different backgrounds who may have different kinds of intelligences enables them to grow and develop so that they can overcome their erroneous misconceptions and acquire the depth they will

¹⁴⁰ Kidder, *Portia*, *supra* note 116, at 21; *see also* Wong, *supra* note 29, at 208. *But see* Washington v. Davis, 426 U.S. 229 (1976).

¹⁴¹ 539 U.S. 244 (2003).

¹⁴² 539 U.S. 306 (2003).

¹⁴³ *Id.* at 343.

¹⁴⁴ The future may now be here, particularly in light of the new "race blind" admission standards now mandated by law in such states as Texas and California. Kidder, *Portia*, *supra* note 116, at 36-37.

¹⁴⁵ It should be noted that Gardner himself deemed the examination of multiple intelligences across racial, ethnic, and gender boundaries to be "a potentially explosive question," GARDNER, PRACTICE, *supra* note 10, at 47, and he has declined to undertake such an examination, first, because he does not believe a scientifically sound psychometric instrument exists to make such a measure and, second, that even if one did, "[i]n the still recent past, apparent group differences on psychological instruments have been exploited for politically dubious ends." *Id.* He further states that, "should any investigator demonstrate differences among groups, I would regard those differences as the starting point for remediation efforts, rather than as any kind of proof of inherent limitations within a group." *Id.* Furthermore, it is crucial to note that several studies have found, as Wong states, "that there is no proxy for race, and that unless race is taken into account, minorities will be underrepresented in law school admissions." Wong, *supra* note 29, at 201 n.16. For instance, Professor Wightman analyzed the efficacy of socioeconomic status, selectivity of undergraduate school, and undergraduate major, as proxies for race and found that none of them are good surrogates. *Id.*, *citing* Wightman, *Diversity*, *supra* note 113, at 52-53.

need to be effective attorneys who can use other intelligences besides logical intelligence."¹⁴⁶

In light of the fact that there is already "intellectual movement to understand and explain the fundamental value of diversity and pluralism in our society,"¹⁴⁷ MI theory could provide part of the framework for an alternate admissions scheme. Increased weight could be given to such factors as "community service, overcoming adversity, recommendation letters, personal interviews, and unusual life experiences,"¹⁴⁸ which are factors that are more likely to be reflective of student talents in areas other than logic and language. Gardner suggests that portfolios of projects completed by the applicant could be a principal part of a student dossier.¹⁴⁹ To assuage concerns that adopting such an admissions practice would admit law students who would be unable to pass the bar, Professor Linda Wightman's exhaustive 1998 study on bar passage concluded that "these data provide positive support both for admission practices that look beyond LSAT and UGPA to define merit, and for a legal education system that adequately services students whose needs and preparations vary."¹⁵⁰

Evaluation of multiple intelligences can provide a new, unarbitrary rubric for creating a talented and diverse entering class. Such a policy may also have the effect of reversing what Wong terms the "perverse" effect of *U.S. News* rankings compelling law schools to "accept students with high LSAT scores, even though their other qualifications may be disturbingly lacking."¹⁵¹ It could be the new frontier of affirmative action in law school admissions. However, traversing such a frontier would require us in legal education to alter our very definition of what talent is:

Consider . . . how contingent ideas of merit are. LSAT scores do predict law school first-year grades. But they also reflect the backgrounds and training and advantages of those who thrive under them, as well as correspond to the law firm jobs and prestigious clerkships come of the students will hold after they graduate. Identifying the LSAT as a predictor of grades, or even

¹⁴⁶ Kaufman, *supra* note 21, at 263-64.

¹⁴⁷ Weinstein, *supra* note 7, at 283.

¹⁴⁸ Delgado, *Elitism*, *supra* note 10, at 612; *see also* Wong, *supra* note 29, at 210 (supporting "commitment to social justice" as a criterion for admission), and Sturm, *supra* note 6, at 145 (advocating that law schools give "greater weight to experience in other settings prior to coming to law school" and indicating that our professional counterparts, business schools, already do so).

¹⁴⁹ GARDNER, PRACTICE, *supra* note 10, at 184.

¹⁵⁰ Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study* 1, 80 (LSAC Research Report, 1998) [hereinafter Wightman, *Bar Passage*] (Although the study also concludes that "law school grades and LSAT scores are strong predictors of bar examination outcomes," she concludes that, although there are risks associated with admitting applicants with below average LSATs and UGPAs, such applicants can "enter and succeed in the profession.")

¹⁵¹ Wong, *supra* note 29, at 212.

of later job performance, tells us only that this narrow test picks people who thrive in particular types of environment—the ones that rely on the test to do their selection for them. Yet those situations are contingent, not necessary. Change the rules, and any test becomes more, or less, valid. Raise or lower the hoop in a basketball game six inches, and you radically change the definition of who has merit Change the legal curriculum, or the way law is practiced, so that it becomes more cooperative or empathetic, and half the current first-year class might not get in. The current arrangement rewards people like us and so seems natural and right; the idea that a school might let in a few students with lower test scores seems radical and dangerous¹⁵²

IV.

Scholars like Professor Richard Delgado advocate a change in the legal curriculum as another necessary part of the drive toward inclusivity for racial minorities and women. But such a change might service those and other students gifted with multiple intelligences as well.

A change would almost certainly have to entail a reevaluation of the Socratic Method. "Langdell's Socratic Case Method¹⁵³ is the predominant teaching methodology used in law schools today for doctrinal courses."¹⁵⁴

This method "require[s] students to learn by reading appellate decisions, answering questions about the holding and reasoning of those appellate decisions, and applying the rules of those appellate decisions to new fact patterns,"¹⁵⁵ and it can be quite successful in engaging linguistic, but especially logical,¹⁵⁶ intelligences.

However, some possible drawbacks to the Socratic Method have been raised. For instance, women tend not to perform as well as men, due to its emphasis on logical intelligence, which, according to a 2002 study by Professor Andrea Kayne Kaufman is more strongly self-identified by men, as opposed to linguistic intelligence, which is more strongly self-identified by women.¹⁵⁷ Some studies have found that women can be intimidated by the

¹⁵² Delgado, *Affirmative Action*, *supra* note 129, at 144-45.

¹⁵³ Otherwise known as the "Harvard Method."

¹⁵⁴ Kaufman, *supra* note 21, at 252. See also Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 351 (1998).

¹⁵⁵ Kaufman, *supra* note 21, at 252.

¹⁵⁶ *Id.* at 251.

¹⁵⁷ *Id.* at 257. Other scholars have also suggested that African-Americans suffer under the Socratic Method. See Stephen R. Ripps, *A Curriculum Course Designed for Lowering the Attrition Rate for the Disadvantaged Law Student*, 29 HOW. L.J. 457, 467 (1986). Some studies suggest that African-Americans may thrive in situations that support group learning, such as simulations. See Weinstein, *supra* note 7, at 282 n.100. Learning styles, or learning theory, is a subject related to multiple intelligences and

Socratic Method.¹⁵⁸ Although probably springing from professors' desire to "toughen up" students and prepare them for the rigors of legal practice, "tough law" as one commentator has deemed it,¹⁵⁹ there is ample evidence that the Socratic Method has "unquestionably left numerous students in tremendous distress."¹⁶⁰ "Certainly, when abused, the method can have devastating effects."¹⁶¹ Finally, the Socratic Method is heavily dependent on a lecture style of teaching, which in turn requires a listening form of learning from the students, and "[w]hile most students have had extensive experience with aural learning, it usually is not the dominant mode for absorbing information."¹⁶² In fact, as one commentator cleverly pointed out, for all but the one person in the class actually being questioned, the Socratic Method is an exercise in listening,¹⁶³ resulting in, at best, "vicarious participation."¹⁶⁴

is also highly illustrative as a means of improving student learning. Gardner himself has spoken to relationship between the theories. See GARDNER, PRACTICE, *supra* note 10, at 44. Although too voluminous a subject to be covered in more than a cursory manner in the present article, there has been much fascinating work done on the subject of learning styles or theories. For instance, Professor Jacobson has speculated that the appearance in African American students of primary learning styles which are oral and relational in greater frequency than in the general population may "have roots in West African culture." M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 154 n.60 (2001). But see Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 484 (1996):

Critics have charged that the Langdellian method has an especially harsh effect on minority, women, and other non-traditional law students. Although it is true that the Langdellian method derives its origins from white men, it is not true that only white men master the technique. Moreover, it is racist and sexist to suggest that people other than "white men" cannot master the art of intellectual dialogue.

¹⁵⁸ Professor Kaufman speaks of the "muting" of female and other "outsider" voices in law school. Kaufman, *supra* note 21, at 267, citing Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 17-20 (1998). She cites anecdotes garnered from several colleagues: "One colleague told me that her criminal law professor silenced her when she said she felt 'uncomfortable talking about rape as a sex crime.' Another colleague told me the professor rolled his eyes when she spoke of her personal experiences as an adoptee. A third colleague told me she never participated in class after being reprimanded by a professor because she requested that he refer to the female students as 'women' rather than 'gals.'" Kaufman, *supra* note 21, at 267; see also James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 402 (1997).

¹⁵⁹ Glesner, *supra* note 49, at 644.

¹⁶⁰ Roach, *supra* note 49, at 670; see also Hess, *supra* note 49, at 92.

¹⁶¹ Stropus, *supra* note 157, at 457.

¹⁶² Jacobson, *supra* note 157, 155 n.61. In discussing this matter, Professor Munro too cites an apt ancient Chinese proverb, "I hear, and I forget; I see, and I remember; I do, and I understand." GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 70 (2000).

¹⁶³ Eagar, *supra* note 158, at 401, citing Peter B. Maggs & Thomas D. Morgan, *Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience*, 27 J. LEGAL EDUC. 138, 140 (1975).

¹⁶⁴ *Id.*, citing Frank R. Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226, 235 (1973).

The Socratic Method is an important and often effective teaching device.¹⁶⁵ Additionally, for the experienced law professor, conducting a class in the Socratic format might be the least labor intensive method of teaching¹⁶⁶ and certainly law professors' scant time should be valued at a premium. The method should not be jettisoned entirely. "The study of litigated disputes not only teaches the rules of law, but provides the reasoning to show how and why the cases were won."¹⁶⁷ But not only does its exclusive use jeopardize cognizance of multiple intelligences and raise concerns for the psychological well-being of students, at least one scholar asserts, "[I]t does not teach law students to think like lawyers; it teaches them to think like judges—with all the constraints that role implies."¹⁶⁸ In light of the foregoing concerns increasingly raised in the legal academy, it should not be relied upon exclusively as the means of educating law students.¹⁶⁹

In addition to teaching, most law schools emphasize logical intelligence in the evaluation of students as well. Many first-year courses evaluate students using standard bluebook examinations. These times tests require students to 'issue spot' and apply the holdings of appellate decisions from their case books to a complex set of facts and to use the logic of precedential reasoning to predict possible legal outcomes.¹⁷⁰

The dominant method of law teaching is the case method; the prevailing method of evaluating students is a comprehensive final

¹⁶⁵ Professor Hess interviewed several students regarding their views of the Socratic Method and concluded that it can work if we the law professors play nice:

I think there is a place for the Socratic method. It's a question of whether it's applied with some humanity and whether you allow the student to maintain some dignity If this professor is a nice person and treats people well, I'm going to work extra hard in that class just because I have that kind of relationship with that person not only in class but outside of class.

Hess, *supra* note 49, at 92.

¹⁶⁶ Patton, *supra* note 62, at 1.

¹⁶⁷ Kerper, *supra* note 154, at 370-71.

¹⁶⁸ *Id.* at 371. ("This is not a bad thing. In order to be competent advisors, lawyers must understand how judges think. But they also need to understand that, as lawyers, their available options are greater, and therefore their own thought processes can be much broader. They will be much more effective in representing their clients if they think more as creative problem solvers, and less like the ultimate decision maker.").

¹⁶⁹ "It is time for law school teaching to relegate the case method to its appropriate position—as only one analytical tool among many which can be employed in the resolution of a client's problem." *Id.* at 352; *see also* Eagar, *supra* note 158, at 403.

¹⁷⁰ Kaufman, *supra* note 21, at 252-53.

examination What interests me is that, almost without exception, legal education = case method + final exam.¹⁷¹

Like the Socratic Method, traditional law school testing is very effective in evaluating certain intelligences, such as logical.¹⁷² However, several possible drawbacks to bluebook examination have been identified. First, the grades in many courses hinge on a single examination, which takes on a disproportionate significance, according to some critics.¹⁷³ That single examination could be have been created, administered, or graded on what might be a "bad day," for either the student or the professor.¹⁷⁴ Moreover, the bluebook examination provides a more restrictive format than some alternate forms of evaluation. Bluebook examinations can be lacking in context and are disconnected from the method of learning the students have been exposed to all semester.¹⁷⁵ Professors often "teach by the case method and actually test by the problem method."¹⁷⁶ Moreover, students receive

¹⁷¹ John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL EDUC. 447, 448 (1992).

¹⁷² Kaufman, *supra* note 21, at 252-53.

¹⁷³ "[T]he present system is guaranteed to create artificial categories and classes of students, which, in turn, stigmatize and dramatically affect their lives." Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L. REV. 723, 724 (1986). See also MUNRO, *supra* note 173, at 34. Law professor commentators have also noted, at least anecdotally, that they are "consistently surprised at the unpredictability of student performance [on Blue Book examinations]. Students whom we expected to do well did poorly, and some silent, barely known soul usually receives one of the highest grades in the class." Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 881 (1985).

¹⁷⁴ See Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463, 470 (2001). Of course, the pernicious effects of this eventuality could be ameliorated if we legal educators agreed that part of what we are assessing is the ability of budding lawyers to perform in spite of the bad day. However, I believe there is, by no means, such a consensus. See Burman, *supra* note 171, at 450 (raising the argument that "a student who cannot perform well under the stress of taking an exam will not be able to perform well under the stress of practicing law," but debunking it with an anecdote of a student who performed poorly on his exams, but was very successful in a student clinic acting as lead counsel at a hearing on a child custody issue).

¹⁷⁵ See Roach, *supra* note 49, at 673. Howard Gardner himself has urged the promotion of "assessment" over "testing" for reasons relating to this. While acknowledging that assessment is necessary in an educational context, he states, "[w]hat distinguishes assessment from testing is the former's favoring of techniques that elicit information in the course of ordinary performance and its general uneasiness with the use of formal instruments administered in a neutral, decontextualized setting." GARDNER, PRACTICE, *supra* note 10, at 174.

¹⁷⁶ Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 260 (1992). Professor Moskowitz likens the situation to the following: "Your teenage son has just signed up for a tennis class at high school. 'The class seems kind of weird,' he says. 'The teacher told us that we will spend every class watching videotapes of tennis players playing matches, and he will lead us in a discussion of what they are doing right and wrong, and what the rules of tennis are. But we won't actually play any tennis ourselves until the final exam. Then our entire grade will depend on how we play during that exam. Does that make any sense to you?'" *Id.* at 259. The most pessimistic view of this phenomenon might bring to mind the pedagogy of Dolores Umbridge, the villain of the latest Harry Potter book, who, in forbidding the practice of counterurses in Defense Against the Dark Arts class, proclaims, "As long as you have studied the theory hard enough, there is no reason why you should not be

little, if any, feedback after their performance.¹⁷⁷ Still other scholars have lamented that the bluebook examination squelches creativity in law students, which is an important asset these students will need as lawyers.¹⁷⁸

Other scholars have raised concerns that law school examinations have little predictive value for eventual success in actual lawyering tasks. Professor Weinstein notes, "[T]here is very little data supporting or analyzing the presumed predictive relationship between law school exam performance and lawyering. The studies that have been done are at best equivocal, and some show no correlation between success in law school as measured by grades and success in the profession."¹⁷⁹ Certainly, at least anecdotally, we all know of successful lawyers who were law school mediocrities, as well as law school prodigies who did not excel in the profession.¹⁸⁰ Finally, Professor Kaufman notes that bluebook examination does not adequately assess multiple intelligences, which "are integral to the varied and multifaceted roles of lawyering."¹⁸¹ "The law school examination system, with its focus on issue spotting and quickness, devalues other aspects of successful performance that may be as or more important to successful performance as a lawyer."¹⁸²

In the final analysis, just as we tend to admit law students who were just like we were, so too do we evaluate them in the way we were evaluated. We all got high grades in law school on bluebook examinations¹⁸³ and now we "reward [students] who [think] like law professors."¹⁸⁴ Perhaps we should not hold ourselves out as the exclusive paradigm for "how to think

able to perform the spells under carefully controlled examination conditions." J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 244 (2003).

¹⁷⁷ See Roach, *supra* note 49, at 673; see also Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 438 (1989).

¹⁷⁸ Kaufman, *supra* note 21, at 252-53.

¹⁷⁹ Weinstein, *supra* note 7, at 249, citing James R.P. Ogloff et al., *More than 'Learning To Think Like A Lawyer: The Empirical Research On Legal Education*, 34 CREIGHTON L. REV. 73, 203-20 (2000); Ogloff, at 395; and Kidder, *Testocracy*, *supra* note 57, at 197-98. Of course, Weinstein also notes that "[a]ssessing success in the profession is problematic for many reasons, including the difficulties inherent in defining success so that it can be measured." Weinstein, *supra* note 7, at 249 n.9. Kidder concurs that "it is far from established that law school grades are an acceptable measure of performance in the legal profession." Kidder, *Testocracy*, *supra* note 57, at 198. He cites a thirty-year retrospective study by a major New York City law firm that found that, beyond the top 1% of law school graduates, there was little correlation between law school grades and likelihood of ascending to partner. *Id.* at 198, citing Sturm & Guinier, *supra* note 116, at 991 n.167 (1996) (describing the study done by Fried, Frank, Shriver & Jacobson). *But see* Wightman, *Bar Passage*, *supra* note 150, at 79 (1998) (finding a "significant relationship between LGPA and bar examination outcome," although stating that high GPAs do not cause bar exam passage).

¹⁸⁰ See Weinstein, *supra* note 7, at 249-50.

¹⁸¹ Kaufman, *supra* note 21, at 253.

¹⁸² Sturm, *supra* note 6, at 131.

¹⁸³ See Kissam, *supra* note 177, at 462.

¹⁸⁴ Burman, *supra* note 171, at 448.

like a lawyer."¹⁸⁵ Law professors are but a narrow, and one might argue, not very representative, segment of the overall lawyering population.

[L]et us consider the metaphor of community and the ethics of our responsibilities to different communities. The law professor, intentionally or not, assumes responsibilities to one or more of several personal or professional communities. These communities include our students; sectors of the legal profession such as corporate firms, small general practices, or the criminal defense bar; the law school or university; and broader social groups as well [A]nalysis of Blue Book exams suggests that there is a serious and inappropriate imbalance in professorial service to these various communities, and that this imbalance has been constructed by our unthinking adherence to a conservative examination system. The present Blue Book system serves mainly corporate law firms and their clients, and it may serve these interests in less than optimal fashion. Perhaps we can change this system if we try to think more as teachers than scholars and attend to our proximate community—the community of all students, their interests, and the varied social groups to which our students, their interests, and the varied social groups to which our students and our profession can and must relate.¹⁸⁶

To make our pedagogy more representative, our current techniques should be supplemented¹⁸⁷ in the hopes of reaching and rewarding law students gifted with non-traditional intelligences. There should be movement away from legal education as a spectator sport, where students are relegated to the role of onlooker, while the instructor performs before the class.¹⁸⁸ Under such a model, the more students are actively engaged in the learning process, the better they retain the knowledge.¹⁸⁹ "Law teachers will

¹⁸⁵ Indeed, we must avoid thinking ourselves and teaching our students that there is but one unique way to "think like a lawyer." See Kurt M. Saunders & Linda Levine, *Learning to Think Like A Lawyer*, 29 U.S.F. L. REV. 121 (1994).

¹⁸⁶ Kissam, *supra* note 177, at 504.

¹⁸⁷ See Burman, *supra* note 171, at 453 (concluding that his students performed better on final examinations when they were supplemented with other forms of assessment throughout the semester due to the fact that the students had learned the material better and the exam was not as pressure packed.)

¹⁸⁸ F. L. Dembowski, *The Use of the Rigor/Relevance Framework in the Training of School Administrators*, THE AASA PROFESSOR 23, 23 (1999); see also MUNRO, *supra* note 173, at 70.

¹⁸⁹ "By actually experiencing something, one learns it better than she would if simply told about it." William Shepard McAninch, *Experiential Learning in a Traditional Classroom*, 36 J. LEGAL EDUC. 420, 420 (1986); see also Eagar, *supra* note 158, at 403; June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1017-19 (1989), and Robert Charles Clark, *The Rationale for Computer-Aided Instruction*, 33 J. LEGAL EDUC. 459, 460 (1983). But see Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 954 (critiquing Clark's sources and concluding that passive

become facilitators, and students will become initiators of their learning."¹⁹⁰ The legal instructor could create and evaluate activities structured around Gardner's Multiple Intelligences and while an instructor may not know the intelligences of each of his or her students, he or she could provide varied assignments that cut across different intelligences¹⁹¹ and invoke stimulating, real-world experiences.¹⁹²

For instance, to engage linguistic intelligence, we professors could encourage student participation in class discussion and assign the writing of student narratives or even traditional research papers. We could urge our students to get out and interview legal experts or stretch their own pedagogical muscles by interpreting a chapter of text or otherwise lecturing their classmates on a legal topic.¹⁹³ To create opportunities for our spatially and visually gifted students,¹⁹⁴ we could assign them to paint, draw, or create a mockup of an evidentiary exhibit or chart a legal issue. Those whose spatial gifts give them a computerized bent could learn with computer programs or even design a software program as a study aid.¹⁹⁵ For our part,

learning cannot be totally abandoned until a cadre of students comes to law school who have not received their previous education through that methodology).

¹⁹⁰ MUNRO, *supra* note 173, at 72. See also Hess, *Heads*, *supra* note 49, at 943 (speaking of law professors as "collaborators" with students).

¹⁹¹ Gardner speaks of providing "multiple entry points" to learning. GARDNER, PRACTICE, *supra* note 10, at 203.

¹⁹² Dembowski, *supra* note 188, at 23. See also Jacobson, *supra* note 157, at 156. This kind of experiential learning is nothing new in our profession. It is interesting to recall that, before the Socratic Method revolutionized law teaching in the late nineteenth century, many law professors were practicing lawyers, who became "lecturers" on the law and many lawyers gained admission to the bar by "reading" the law—essentially apprenticing themselves to practicing attorneys. Kerper, *supra* note 154, at 356-57. In fact, part of Christopher Columbus Langdell's intention in developing law school's Socratic Method was to move legal education away from the apprenticeship model. Kaufman, *supra* note 21, at 251. However, Howard Gardner, for one, urges a return to greater utilization of an apprenticeship model in formal education. GARDNER, PRACTICE, *supra* note 10, at 162. One innovative model is the mandatory mentorship program at the University of St. Thomas law school where students under the supervision of a practicing attorney mentor to engage in five real-world lawyering experiences per year, such as attending a motion hearing, a deposition, or a legislative or regulatory hearing. Patrick J. Schlitz, *Making Ethical Lawyers*, 45 S. TEX. L. REV. 875, 881 (2004).

¹⁹³ Turning momentarily to learning theory, such linguistic exercises could capture a cadre of law students who are oral learners. "Students who are oral learners need to talk out their ideas. These are the students who frequently contribute to class discussion as their way of processing information or developing ideas. They are the students who get a D on their appellate brief but win the oral competition. For oral learners to thrive, they need to have opportunities to talk." Jacobson, *supra* note 157, at 154.

¹⁹⁴ Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL. EDUC. 402, 412 (1998).

¹⁹⁵ For a general discussion of Computer-Aided Instruction, or CAI, see Eagar, *supra* note 158, at 412-13; see also Margaret M. Hazen & Thomas Lee Hazen, *Simulation of Legal Analysis and Instruction on the Computer*, 59 IND. L.J. 195 (1984). An interactive computer program could work well for the teaching of such subjects as citation. Indeed, several of the major electronic research computers already have created such programs.

we instructors could utilize the chalkboard, multimedia, and audiovisual equipment as much as possible in our teaching.¹⁹⁶

To promote the bodily/kinesthetic intelligence of the actors in our student ranks, the professor could assign students to perform in mock oral argument or moot court,¹⁹⁷ participate in simulations,¹⁹⁸ play games such as charades or jeopardy,¹⁹⁹ create skits demonstrating a legal principle or scenario, or use their feet to get out into the community to travel to courts and other legal institutions to witness lawyering tasks firsthand.²⁰⁰ For those whose gifts run to music, students could be given the opportunity to write songs to demonstrate legal principles and we could reward our students when they exhibit musicality in the form of eloquence into their oral class performances. Those interpersonally intelligent could interview legal professionals, team teach a legal concept with other students or the instructor, participate in team-oriented simulations, projects, and externships, engage in regular class participation, or assume the role of a legal stakeholder within the context of the utilization of the problem method.²⁰¹

Those whose gifts turn inward could be given the chance to earn credit for writing a journal reflecting on a legal experience,²⁰² for discussing the ethics relating to a legal argument,²⁰³ and earn extra credit for being diligent in setting and attaining goals regarding the quality and timeliness of work product.²⁰⁴ The effort grade need not be reserved to elementary school. Our legal Steven Jay Goulds gifted with naturalistic intelligence could be called on in class to compare and contrast legal situations and master the art of the analogy, and our spiritual and existential leaders could be recognized in a tangible way when they act as leaders in the law school community or speak up in class about the moral and philosophical content of a legal debate.²⁰⁵

¹⁹⁶ Eagar, *supra* note 158, at 410-11. Also under learning theory, such techniques when employed by an instructor would be effective in engaging those students who learn best visually, which is important, as Professor Jacobson asserts, that such learners may be disproportionately represented in the bottom of the class. Jacobson, *supra* note 157, at 151-52. For a fascinating example of how visually diagramming a black letter tort case can work, see Paton, *supra* note 62, at 13.

¹⁹⁷ Lustbader, *supra* note 193, at 411.

¹⁹⁸ See *infra* pp. 27-31.

¹⁹⁹ Lustbader, *supra* note 193, at 411.

²⁰⁰ This intelligence also correlates to a category under learning theory – tactile and kinesthetic learners. Although these learners are the least prevalent in the law school ranks, Professor Jacobson notes that many students whose primary learning style falls in another category could benefit from having their teaching complemented by tactile or kinesthetic techniques. Jacobson, *supra* note 157, at 155.

²⁰¹ See Eagar, *supra* note 158, at 404-05.

²⁰² Paul S. Ferber, *Adult Learning Theory and Simulation—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 425 (2002).

²⁰³ See Kaufman, *supra* note 21, at 256.

²⁰⁴ See Weinstein, *supra* note 7, at 257.

²⁰⁵ See Wong, *supra* note 29, at 209.

One vehicle we professors could utilize to promote many of these opportunities is the classroom simulation. "An effective method to promote student learning and shift the focus from the teacher to the student is the 'situation method,'"²⁰⁶ or simulation—"the performance of a lawyering task . . . using a hypothetical situation which emulates reality."²⁰⁷ According to Professor Ferber, "simulations allow law students to develop more of [their multiple intelligences] than does traditional legal education."²⁰⁸

Simulations can vary in time duration and scope. One possible category is the simple simulation.²⁰⁹ This type of simulation is usually one class in length, where part of the class session is used to plan, then perform the simulation, then reflect upon it. An example of simple simulation I use in my legal writing classes is to give my students instruction on the drafting of questions presented and argument points for a hypothetical appellate brief, breaking them out into groups to draft these materials, and then diagramming their examples on the chalkboard at the end of class. Another commonplace example in our law schools is the practice of oral arguments, where other classmates serve as judges.

Another category of simulation that can be utilized is the extended simulation, which "involves the creation of a complex world and . . . runs over a significant period of time, seeking to approximate the same duration as in the real world, and requiring students to engage in multiple tasks."²¹⁰ At Howard Law School, the Legal Writing program makes extensive use of extended simulation. My Legal Writing colleagues and I teach a yearlong 1L course entitled Legal Reasoning, Research, and Writing. The fall semester is much in the traditional mold, where I lecture, trying to intersperse as much as possible visual aids, group projects, and class participation. My students are evaluated on several case briefs and interoffice memos they turn in during the course of the semester.²¹¹

²⁰⁶ MUNRO, *supra* note 173, at 147, quoting John E. Sexton, *The Preconditions of Professionalism: Legal Education For The Twenty-First Century*, 52 MONT. L. REV. 331, 336 (1991).

²⁰⁷ Ferber, *supra* note 202, at 418. The importance of "learning by doing" has also been recognized by two additional movements in legal pedagogy: clinical legal education, *see* Kovach, *supra* note 44, at 378, and process-based legal writing. Additionally, a central tenet of andragogy, or adult learner, pioneered by Malcolm Knowles is that "learning must be experiential for adults, because adults accumulate a growing reservoir of experience that is a resource for learning." *Id.* at 374, citing M. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION* 50 (1970).

²⁰⁸ Ferber, *supra* note 202, at 438.

²⁰⁹ *Id.* at 419.

²¹⁰ *Id.* at 423.

²¹¹ Another simulation program that draws heavily on Howard Gardner's work, as well as Claude Steele's work on stereotype threat is the Peggy Cooper Davis' Workways Project at the New York University School of Law. For a description of the workings of that program, *see* Davis, *supra* note 2; *see also* Farber & Rickenberg, *supra* note 136, at 271.

However, the bulk of the second semester is conducted in the extended simulation model.²¹² From the first day back from winter break, my students are divided up into two equal-sized law firms.²¹³ They maintain that role, including the obligations of confidentiality, for the entire semester. For the last three years, I have used a simulation problem derived from basic first-year tort law; for instance, this year's issue was a medical malpractice claim.

On the first day of class, they receive a letter from their client detailing a legal problem. The problem is articulated in lay language, requiring the students to spot the legal issue and exercise their traditional intelligences. The next week, the students formulate law firm strategy and conduct an intake interview of an actual "client"—tapping into their linguistic, kinesthetic, interpersonal, intrapersonal, spiritual, and existential intelligences. Next, the students do additional factual and legal research and memorialize their impressions of the case in a traditional memo to the file, again working their traditional intelligences. Then the students are required to communicate those impressions in an understandable way through a client letter, particularly tapping into their linguistic and interpersonal intelligences.²¹⁴

Following that, the students are paired with a lawyer from the other side to negotiate a settlement. They are required to meet in multiple sessions, really putting their kinesthetic intelligence on display through demeanor and body language. This settlement session ends in the drafting of a contract, an exacting test of their linguistic and logical skills. The students are also required to turn into me a detailed, thoughtful "Negotiation Journal"

²¹² My experience with extended simulations has been confined to the teaching of legal writing; however, as the subject matter of the extended simulations I have utilized has always been derived from a first year doctrinal course, I believe this method could be successfully employed in many doctrinal courses. For instance, Professor Marjorie Silver describes her successful use of simulations during the teaching of her Professional Responsibility Course. Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1195 n.127 (1999). Professors Phyllis G. Coleman and Robert M. Jarvis employ simulations in their first year Contracts class because they want to "correct what [they] believe is a critical flaw in the typical Contracts class: students complete the course without ever negotiating, drafting, or even seeing a contract." Phyllis G. Coleman & Robert M. Jarvis, *Using Skills Training to Teach First-Year Contracts*, 44 DRAKE L. REV. 725, 725 (1996).

²¹³ This type of group learning may somewhat fly in the face of a law school culture that has "a tradition of individual performance and competition among students." MUNRO, *supra* note 173, at 71. However, the work of Richard Delgado, among others, supports the notion that doing more to support group learning might be valuable. "[L]aw practice today is much more cooperative than it was in the past, emphasizing a team approach, use of paralegals, and negotiation." Delgado, *Elitism*, *supra* note 10, at 599 n.41. See also Thomas L. Shaffer, *Collaboration in Studying Law*, 25 J. LEGAL EDUC. 239, 240 (1973). "[T]he benefits of collaborative exercises are multiple. They give students an opportunity to form social bonds that decrease their feelings of alienation," as well as giving them an opportunity to learn from one another. Lustbader, *Context*, *supra* note 193, at 415, *citing* DAVID W. JOHNSON ET AL., *ACTIVE LEARNING: COOPERATION IN THE COLLEGE CLASSROOM* (1991).

²¹⁴ Farber & Rickenberg, *supra* note 136, at 282.

reflecting on the negotiation process, including discussion of their strategy and reducing their outcome, an exercise more intrapersonal than most they will perform in law school.²¹⁵

Then, always through some *deus ex machina* on my part, the contracts ultimately are not signed, the negotiations break down, and the students end with writing a traditional memorandum in support of, or in opposition to, a litigation motion, usually a motion to dismiss. The motion is then orally argued in court, putting linguistic, kinesthetic, and interpersonal skills once again on display. Throughout the semester, we debrief and reflect on the process in class, sometimes the entire class, sometimes in law firm teams.

The entire exercise requires the intrapersonal intelligence of stamina, discipline, and insight. It also requires intelligences in the vein of naturalistic, spiritual, and existential thinking, such as the ability to prioritize and put matters in context, the ability to grasp far-reaching consequences, leadership skills, and demonstration of morality and diplomacy.²¹⁶

The endeavor is extremely engaging and the students are most enthusiastic.²¹⁷ Students have reported that the simulation makes the law relevant to them and that they are inspired by seeing a real world application to the principles they are learning in class.²¹⁸ "[S]tudents like to participate,

²¹⁵ The use of journals in the simulation context has also been described by Professor Ferber, who states, "The journal can enhance learning in at least three ways. First, by requiring the students to reflect on the action they will take, including analyzing the problem, considering the alternatives, evaluating the pros and cons of each alternative, deciding which alternative to adopt and then implementing it, students learn how to engage in a planning process. Second, by requiring students to record the results of their planning and implementation and to evaluate their planning and implementation, students learn to engage in self-evaluation. Third, by requiring the students to articulate their understanding of the applicable law in connection with their planning and implementation, students learn how to use legal analysis in solving real problems." Ferber, *supra* note 202, at 425. Professor Paula Lustbader has also encouraged the use of journalwriting in legal education. Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 849 (1997). See also James R. Elkins, *Rites de Passage: Law Students "Telling Their Lives"*, 35 J. LEGAL EDUC. 27, 27 (1985).

²¹⁶ For the purposes of law school, there are negative consequences for those students who call each other names, engage in *ad hominem* attacks, or make their opponents cry, which, unfortunately, happens every year.

²¹⁷ My experience with student enthusiasm in participating in simulations, as evidenced anecdotally by such indicia as 11:00 PM phone calls from students excitedly filling me in on the next day's strategy, has been borne out by the observations of other instructors. "Many instructors, especially clinical teachers, have found that simulations provide students with 'greater motivation to learn than methods such as lectures, discussions and case studies.'" Patton, *supra* note 62, at 9 n.25, citing Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 538 (1987). Professors Coleman and Jarvis report that "[a]nother reason to use simulations is that for the vast majority of students simulations help to lessen boredom, particularly once the novelty of law school has worn off." Coleman & Jarvis, *supra* note 212, at 727 n.3. See also Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, in CLINICAL LEGAL EDUCATION: REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 191, 203 (1980).

²¹⁸ "Role-playing exercises in which students put into context what they are learning help them understand why they will need the information and how they will use it." Lustbader, *Context*, *supra* note 193, at 412.

and they will learn in order to able to be participate; and . . . active participation and identification with a problem or role encourages relevant study."²¹⁹

As an added fringe benefit to counter some of the possible prejudices inhering in traditional legal pedagogy and testing, Professor Weinstein has posited that "the life experiences of students of color have given them more experience with negotiation and they are better at it than their classmates,"²²⁰ thus narrowing the grade gap between students of color and Caucasians.²²¹ Additionally, at least one study has indicated that women tend to perform better in simulations than they do in the traditional evaluation model, perhaps reflecting the simulation's increased emphasis on linguistic and interpersonal skills.²²² Perhaps, most significantly, using simulations to provide "more varied evaluation formats,"²²³ can encourage and value an entire cadre of promising lawyers who might otherwise be overlooked:

The over-reliance on exams fails to identify the group of students whose simulation performance provides evidence of their indication of probable success in many lawyer roles If, for example, we accept that the personal intelligences are really independent valuable abilities in the world, we might begin to prize skillful client counseling more than we do. If we coupled that awareness with an effort to identify our students [sic] aptitudes in the personal intelligences, we could help students develop a professional role around their strengths. Students with those strengths might more often see direct client service as an important and challenging career, rather than a path for those who did not get jobs at the biggest law firms. They could make better informed decisions about whether or not to work to improve in some areas and how to plan and prepare for their particular careers as lawyers. Students with traditionally recognized strengths might also be a little more humble and learn that writing high scoring exams is one valuable aptitude among a constellation of abilities.

²¹⁹ Eagar, *supra* note 158, at 403.

²²⁰ Weinstein, *supra* note 7, at 282 n.100.

²²¹ As a teacher at a historically black law school, with a student body approximately 85% African-American, at least anecdotally I have appreciated a flair and level of engagement in my students while doing simulations that is sometimes lacking in the more traditional lecture format. Other instructors, as well, have reported experiences similar to mine with successful simulations and have noted that students that performed poorly on Blue Book examinations thrived under this model. See MUNRO, *supra* note 173, at 145-46. In the context of the clinic, Professor Burman has reported that "class rank appears to have little correlation with students' performance." Burman, *supra* note 171, at 449.

²²² It should be noted that Professors Farber and Rickenberg did find that women felt less competent during the simulation, although the measurable outcomes were equally successful. Farber, *supra* note 136, at 302. *But see* Weinstein, *supra* note 7, at 281-82 (concluding that men outperform women in simulations).

²²³ *Id.* at 285.

We do our students, and the profession, a disservice by graduating many students who feel unrecognized and were in fact not educated as well as they could have been, by their law schools.²²⁴

V.

Professor Weinstein's observations are commensurate with my own experiences with the potential of utilizing MI theory as a potential career counseling device. My experiences with seeing students who struggled with office memos trounce the competition in a negotiation, light up in front of a courtroom, or impress with the sensitivity and perceptiveness displayed in a journal persuade me that an appreciation of a student's particular intelligences could be invaluable in the student career counseling in which we all engage.²²⁵

Perhaps surprisingly, there is a paucity of scholarship applying the Gardner theory to the legal employment context. We law professors might argue that career counseling in any capacity is the realm of the law school career counseling offices set up for that purpose and certainly the hardworking people in those offices could benefit from a thorough understanding of the principles of multiple intelligences. Probably some of the career services officers are already versed in the theory. However, we law professors would be remiss if we did not step in to mentor as well,²²⁶ as we are uniquely situated to see these intelligences in action.²²⁷

It is an open secret in law schools, despite administrative and faculty rhetoric about social engineering and the commonweal, which the traditional law firm model still prevails as the Holy Grail of employment for students at many law schools. Despite efforts of many law schools to offer public interest advisors and programs to educate about employment alternatives, students, particularly our top-ranked students, gravitate toward the big firm

²²⁴ *Id.* at 285-86.

²²⁵ Apparently, my views are shared by consumer advocate and presidential aspirant Ralph Nader, who, in 1991, told an audience at Hofstra Law School that "[b]y use of [standardized] tests, we ignore all kinds of other multiple intelligences that people develop in one form or the other, and we make our career choices based upon our performance on a multiple choice exam So we go through all of this while these tests do not test the most important features of our personalities; those that will spell success in our lives. Nor do they purport to. They do not test our judgment, experience, wisdom, creativity, imagination, idealism, stamina or determination. Otherwise, they test everything." Ralph Nader, *Leadership and the Law*, 19 HOFSTRA L. REV. 543, 550-551 (1991).

²²⁶ Indeed, Professor Patrick J. Schlitz of St. Thomas Law School laments that we do too little mentoring of any kind, as law professors are placed under increased pressure to devote their time to scholarship and student mentoring is perceived as not beneficial for careers. Schlitz, *supra* note 192, at 879.

²²⁷ Legal Writing professors are particularly well-suited, as legal writing pedagogy usually incorporates more one-on-one interaction and conferencing than is usually possible in a large section, doctrinal course.

and the big paycheck. We also all know that, for many reasons that I assert pertain to a student's constellation of strengths and weaknesses in multiple intelligences, not every student is destined for success in the law firm context.

As a professor, it is gratifying to be able to tell the student who is feeling like a square peg in a round hole because, for whatever reason, they are not drawn to or do not fit into the law firm mold, "You are gifted in dealing with others. Consider mediation." "You have a profound grasp of the spiritual and ethical. Consider public interest work." Again, by broadening our definition of what constitutes talent and success, we ennoble career options for our students that might previously have been regarded as failure.

Even within the law firm context, an appreciation of a student's multiple intelligences, while not locking the student into anything, can help you steer them in the right direction. "You have superior linguistic and kinesthetic skills. Consider litigation." "Your personal intelligence makes you an unstoppable negotiator. Consider a transactional practice." Any knowledge we can bring to bear to demystify the student's elusive process of finding their life's work is one of the greatest services we can perform for our students and for the profession.²²⁸

VI.

One could argue that law school is functioning just fine in its traditional mold, and those that have difficulty with that model should either not attend law school or just "learn to adapt better to its rigors."²²⁹ Professor Sturm tells us that "[o]ne possible response to [the] critique of the gladiator model of legal education is to locate the problem with those who do not fare well within it, rather than on the model itself. This response rests on the assumption that this model dominates the profession, and thus it is crucial that students be socialized to operate within it."²³⁰ However, to paraphrase Professor Lani Guinier, it is law school, not the non-traditional law student, that should change, and "indeed that changes to the existing structure of law school might improve the quality of legal education for all students."²³¹ As

²²⁸ Of course, such a campaign could inspire a provocative examination of what kind of lawyers we legal educators are trying to produce in the first place. "Defining what kind of lawyer that would be presents an interesting problem, requiring study of law school curricula and culture. Most law schools, and particularly elite schools, aspire to train judges and policy makers. In fact, they turn out many transactional lawyers and civil litigators." Weinstein, *supra* Note 7, at 285 n.106.

²²⁹ Lani Guinier et al., *Becoming Gentlemen: Women's Experiences At One Ivy-League Law School*, 143 U. PA. L. REV. 1, 29 (1994).

²³⁰ Sturm, *supra* note 6, at 132.

²³¹ Guinier, *supra* note 229, at 29.

we are a diverse and pluralistic society, it can only help the academy to produce well-trained lawyers with a diversity of gifts.²³²

We must remember, "[L]aw students are adult learners. As such, they learn best when they are treated as adults. A significant aspect of adult learning methodology is that adult learners should be treated with the respect that is often missing from traditional law school teaching practices."²³³ It is important that, for our adult law students, their law school experiences should be placed in the context of their larger life.²³⁴ This goal of respectful legal education is increasingly being accomplished for the struggling student through academic support programs.²³⁵ Our challenge is to accomplish this for the average student, or even for the student who may be extraordinary in a way that may have gone unrecognized in the past.²³⁶

I have been working at Howard Law School adopting its credo that it is important to turn out well-educated African-American attorneys for reasons including maximizing the effectiveness of representation for the African-American community.²³⁷ I think this same logic can apply to individuals with a diversity of intellectual gifts. Professor Sturm has stated that "It may be that the profession has diversified to the point that no single, central, organizing paradigm will be adequate. At the least, the overarching concept of professionalism may need to be one that is inclusive, if not integrative, of a variety of roles and functions."²³⁸ When new voices are heard, "[t]his, in turn, will provide an opportunity for non-diverse students to

²³² Consider the following statistics as to how much the gender and racial composition of our profession has changed over the last thirty years. "In academic year 1971-72, the law student [population was 91% male, 9% female, 94% white and 6% minority. In academic year 1999-2000, the law student population was 53% male, 47% female, 81% white, and 19% minority. In 28 years, female enrollment increased nearly 700% and minority enrollment increased 450%." Jacobson, *supra* note 157 n.3, *citing American Bar Association Data*, at <http://www.abanet.org/legaled/astatistics/stats.html> (last visited June 30, 2000).

²³³ Lustbader, *supra* note 215, at 856; *see also* KNOWLES, *supra* note 207, at 41; Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. Rev. 941, 942 (1997); and Hess, *Heads*, *supra* note 49, at 87.

²³⁴ Jacobson, *supra* note 157, at 170, *citing* KNOWLES, *supra* note 207, at 9-12.

²³⁵ *See* Lustbader, *supra* note 215.

²³⁶ Another concern for law students is the problem of isolation, which might disproportionately affect students of color, older students, and other non-traditional students and stand in the way of their success in law school, regardless of their qualifications coming in. Roach, *supra* note 49, at 675. The incorporation of multiple intelligence theory in our pedagogy could work toward alleviating such problems. *See id.* at 679.

²³⁷ Professor Lustbader has noted the significance of the ability of lawyers to "traverse between their communities and the legal system." Lustbader, *supra* note 215, at 858. Certainly this was one of the concerns of Charles Hamilton Houston in the 1930s in his leadership of the Howard University School of Law. Citing the 1930 census, Houston pointed out that at the time there were only 1,230 black lawyers in the United States, compared with 159,735 white lawyers. Wong, *supra* note 29, at 206 n.101, *citing* Charles H. Houston, *The Need for Negro Lawyers*, J. NEGRO. EDUC., Jan. 1935, at 49, 51; *see also* Simeon, *supra* note 126, at 369.

²³⁸ Sturm, *supra* note 6, at 135.

learn about and understand the experiences, values, and voices of many of their future clients."²³⁹

Thus, along with a vote for inclusivity, I conclude with an entreaty for integrity. The best thing we can do for our students is to value and nurture their unique potential. So, for all you linguistic geniuses out there:

This above all: to thine own self be true.
And it must follow, as the night the day,
Thou canst not then be false to any man.²⁴⁰

²³⁹ Lustbader, *supra* note 215, at 859.

²⁴⁰ WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 3.