

Slay the Three-Headed Demon!

*Peggy Cooper Davis**

An invisible demon walks the halls of all the law schools I have known, vexing the learning environment and discouraging engagement. This demon is a special breed of the Dysfunctional Hierarchy species.¹ It has three heads. The middle head, Intelligence Bias, does most of the demon's thinking. On either side are the smoky-nostriled head of Intellectual Segregation and the fire-breathing head of Tracking. My proposal for improving legal education is that we take up our swords and slay the demon. Without it, law schools could stop the much-criticized practice of sharpening minds by narrowing them, and instead cultivate the intellectual versatility that professional excellence requires.²

In what follows, I will describe the demon, head by head, and explain how it vexes learning. I will then try to imagine life without the demon.

A. Intelligence Bias and How It Skews Learning

To understand Intelligence Bias, you have to avoid the habit of thinking of intelligence as a single capacity that can be measured by a single test. You have to substitute Howard Gardner's enlightening concept of multiple intelligences for the monolithic thing that IQ tests were thought to expose. Describing an intelligence as the ability to do socially useful work, Gardner teaches that we humans have at least nine of them.³ Five of these are conspicuously important to lawyering: logical-mathematical intelligence, linguistic intelligence, kinesthetic intelligence and the complementary pair of psychological intelligences (interpersonal and intrapersonal).⁴

Once you see that intelligences are multiple, you are ready to appreciate that they may not be equally valued. Law school curricula and admissions practices honor the logical-mathematical and give respectable second place

* John S.R. Shad Professor of Lawyering and Ethics at New York University and Director of its Lawyering Program. She was an editor of this journal when it was published by an unauthorized crew of volunteers.

¹ Hierarchy is not always dysfunctional. The parent-child or expert-novice relationship can, for example, be constructively and respectfully hierarchical.

² See, e.g., SULLIVAN, COLBY, WEGNER, BOND AND SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 47-86 (2007) (describing the cognitive, practical and ethical apprenticeships of professional education and criticizing legal education for its neglect of the practical and the ethical).

³ See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 67-70 (10th Anniversary ed. 1993); HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY* 41-47 (1999).

⁴ See Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795, 796-98 (2005).

to the linguistic. The psychological intelligences are slighted, and the kinesthetic is beyond consideration.

Intelligence hierarchies are socially reinforced by their resonance with other hierarchies. For example, the intelligences are symbolically gendered. Logical-mathematical intelligence is symbolically gendered male; psychological intelligences are symbolically gendered female. Unjustified gender hierarchy contributes to and reinforces unjustified intelligence hierarchies. Although it is no longer, it was long thought that the subordination of women was natural and just. Although it is no longer, the legal profession in the United States was once exclusively male. It is no surprise, then, that logical-mathematical intelligence has been given more—and more serious—attention in professional training and practice than symbolically—or stereotypically—female intelligences.

Intelligences are also symbolically raced. Logical-mathematical intelligence is, for another example, symbolically raced white on a black/white axis (and Asian on an Asian/white axis); kinesthetic intelligence is symbolically raced black. Unjustified racial hierarchies contribute to and reinforce unjustified intelligence hierarchies. Although it is no longer, it was once respectably claimed that the subordination of blacks was natural and just. Although it is no longer, the legal profession in the United States was traditionally white, and it notoriously excluded blacks. It is no surprise, then, that the legal training has focused assiduously on logical-mathematical intelligence but ignores lawyering's performative dimensions or that written advocacy has been studied more comprehensively than oral advocacy.

The hierarchy of intelligences is also, but more subtly, reinforced by stereotypes and symbols of class hierarchy. We use the term "elite" to refer to more selective law schools. We notice that graduates of "elite" schools are overrepresented in corporate law firms, and we imagine the Wall Street or corporate lawyer as a higher-level thinker who leaves to others the nitty gritty of representing and relating to individuals. We forget that corporate lawyers, like any lawyers, interpret and work to further human desire and succeed or fail because of their skill at human interaction.

Please note that I spoke in the preceding paragraphs of symbols and stereotypes, not of human capacity. I have *not* said that men or Asians have a greater capacity for logical-mathematical thinking, that men have a greater capacity for linguistic thinking, that women have a greater capacity for psychological thinking, or that white men can't jump or dance. I have simply said that these stereotypes persist in our culture and help to determine which intelligences will be valued and which will be devalued in professional practice. The president of a respected university might still wonder whether women are inherently inept at math and science. Within our memory, the iconic doctor is male and the iconic nurse is female, and doctors and nurses still are not equally encouraged to develop psychological intelligence or equally apt to be forgiven a lack of "bedside manner." The advertising industry launched itself in the United States by depicting African Americans as intel-

lectually inept, physically sturdy, entertaining, and appropriately servile,⁵ and it hasn't completely shed the tendency.⁶ We function in a public culture that induces us to prize logical-mathematical thinking and neglect psychological, kinesthetic and, to a lesser extent, linguist thinking.

B. Segregation and How It Distorts Learning

Prizing the logical-mathematical is right and good. Orderly thinking is a necessary condition of competent lawyering. However, the neglect of other intelligences has led to an unhealthy intellectual segregation between the so-called "analytic" work of understanding the law and the so-called "practical" work of using it.

The Socratic classroom is the iconic law school setting, and quick-witted Socratic discussion of appellate opinions is the iconic law school experience. These discussions can be wonderful fun and a wonderfully beneficial mental exercise for the all important work of legal interpretation and argument.⁷ Moreover, these discussions are not as narrow as they once were. Legal realism's recognition that the life of the law is not all logic has made law school Socratic discourse all the more exciting by expanding it. Discussion in law school lecture halls now goes beyond the terms and logic of precedent and statutory text to incorporate insights from many disciplines, like economics and psychology, that can properly inform judicial decision-making in a post-realist world.

But the Socratic classroom does not usually address, and is not often the best setting in which to address, the work of fact-development or persuasion. Nor is it the ideal setting for acquiring the judgment that should be brought to understanding, shaping, furthering, or frustrating a client's desires. These matters are best left to simulation and clinical courses, and so they are. But herein lies a problem.

The separation of "analytical" and "practical" training has been too acute. Students have not been guided toward an understanding of the intricate relationships among doctrinal, strategic, interpersonal, and ethical analysis. Matters have been made worse by two false, and suspiciously hierarchical, assumptions.

First, we too often assume that doctrinal study primarily involves logical-mathematical intelligence and that the study of practice primarily involves interpersonal and linguistic intelligence. Legal education found a home in United States universities when law was treated as a science and

⁵ GRACE HALE, *MAKING WHITENESS* 125, 151-68 (1999).

⁶ See Jeremy Peters, *An Image Popular in Film Raises Some Eyebrows in Ads*, N.Y. TIMES, Aug. 1, 2006 (describing uses of stereotypical images of black women in contemporary film).

⁷ See SULLIVAN ET AL., *supra* note 2, at 47-86; Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue about Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249, 251 (1997).

scientific inquiry was understood as a process “for testing — and correcting — claims to [a pre-existing and knowable] truth.”⁸ Although we now understand legal reasoning as an indeterminate process of “interpretation and adaptation,” we have not fully put aside — or even kept pace with — the methodologies of the physical sciences.⁹

Second, we too often assume that “thinking like a lawyer” about doctrinal interpretation is something that requires guidance and careful study but that “thinking like a lawyer” about interviewing, counseling, fact development, problem-solving, and advocacy is appropriately picked up on the job by those who have the knack. All law schools require that students repeatedly take courses focused on the development and interpretation of doctrine. But, although the American Bar Association now requires that law school curricula address a comprehensive set of lawyering skills, it does not require that law students take a single simulation or clinical course.¹⁰ The result is that we think too narrowly about what doctrinal principles are and too little about how doctrine evolves as it is used.

C. *Tracking and How It Discourages Learning*

It may not be true everywhere, but in my experience classes of law students are tightly clustered, both in terms of actual ability and in terms of the predictive measures used in the admission process. My students have different learning styles and different levels of comfort and motivation. Each has a different mix of intellectual strengths and weaknesses. But it almost never happens that I have a student who is incapable of doing excellent work. Nonetheless, I am required to grade students on a fixed curve. It is decreed that in every term half of them will receive grades that seem to signal mediocre or poor performance.

The fixed curve interferes with learning. It motivates students to work for grades rather than for comprehension or skill development. A treatise or a law review outline may improve a student’s grade while allowing the student to skip the generative step of independent analysis. At the end of a first semester or year, the fixed curve sets students on rank-ordered tracks. Track mobility is always possible, but it is not easy. Ranking well in the first year boosts confidence and provides easier access to mentoring and to collegial learning on journal boards and in selective courses. Ranking poorly reduces confidence and inhibits access to important forums of collegial learning.

The disadvantages of the fixed curve are multiplied by the one-shot nature of the typical law school exam. Not only are students rigidly ranked, but they are ranked on the basis of end-of-term, written examinations. This

⁸ SULLIVAN ET AL., *supra* note 2, at 5.

⁹ See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (describing the interpretive and creative aspects of scientific inquiry).

¹⁰ See AMERICAN BAR ASSOCIATION, *ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS* Standard 302 (2007).

means that the examination process is summative rather than formative; as assessment specialist Lloyd Bond brilliantly puts it, it “provides no navigational assistance . . . until the voyage is over.”¹¹ Unlike the periodic, criterion-based systems used in most professional training, the law school exam serves virtually no pedagogic function; its only function is ranking.

The fixed curve works in combination with Segregation to reinforce Intelligence Bias. Very few law schools have graded simulation or clinical courses in the first year. First-year grades are determined on the exclusive basis of end-of-term assessment in Socratic classes. These assessments more easily address the logic of precedent than the context of decision-making or matters of communication, strategy, and problem-solving. Those who come to law school with highly developed logical-mathematical intelligence are more likely to perform well on these examinations. Those who come to law school with highly developed psychological intelligences are not often able to ride these strengths in the race for rank, and typically they have *no* opportunity to do so until their second and third years of training.

D. *Slaying the Demon*

What we need is respectful integration of a variety of teaching methods, all dedicated to producing *intellectually versatile* professionals. Every aspect of practice draws on multiple intelligences and has multiple dimensions. Every aspect of legal study should reflect this. Socratic discourse should acknowledge the psychological, rhetorical, and cultural dimensions of doctrinal interpretation and consider interpretation in the contexts of counseling and advocacy as well as in the context of judicial decision-making. Clinical and simulation work should guide students to think critically about the interplay of logic, psychology, and culture in a world in which interpretation is motivated by clients', lawyers', and judges' individual or institutional interests and desires. And all work should be dedicated to skill development rather than to rank ordering.

How do we achieve this? I am unsure. But we are dealing with a Dysfunctional Hierarchy. Racism, sexism, homophobia, and classism are other exemplars of this species. These Hierarchies are dysfunctional because they are rooted in bias rather than in function. Segregation and Tracking live because Intelligence Bias causes certain skills (and certain people) to be irrationally belittled. So, I will bet that if we snuff out Intelligence Bias, the whole demon will disappear in a sizzling cloud of foul smoke.

Practicing lawyers do not just play logic games. We serve our clients and the larger society in quests that test us in logic, psychology, public policy judgment, self-awareness, performativity, and ethics. Freed of the demon, law schools could take up the good work of producing well-rounded

¹¹ SULLIVAN ET AL., *supra* note 2, at 164-65.

professionals. And well-roundedness would make us healthier, happier, and more useful.