

LAW AND POLICY IMPLICATIONS OF GARDNER'S FIVE MINDS FOR THE FUTURE¹

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INTRODUCTION

In his 2006 book Five Minds for the Future, Professor Howard Gardner identifies critical skills that we must develop to meet the challenges of the future. As he explains, our era is one of great and rapid change. We struggle to absorb massive amounts of information, select and learn new technological tools, and embrace a global vision. As individuals and as members of educational communities, we must find the best ways to equip students – and ourselves – to adapt.

Professor Gardner sets out five critical cognitive abilities that he posits are essential to meeting future challenges. In brief, these abilities are:

1. The Disciplined Mind. Mastery of a body of knowledge and a professional craft. Expertise requires at least ten years of study and experience. Sometimes referred to as the “disciplinary” mind.
2. The Synthesizing Mind. Capacity to integrate strands of knowledge into a coherent whole and to communicate the integration to others.
3. The Creating Mind. Ability to discover new questions, trends, and solutions and to make new observations.
4. The Respectful Mind. Capacity to value fully people from all groups.
5. The Ethical Mind. Fulfillment of responsibilities to society and our vocations.

To advance the positive vision that Professor Gardner sets out, one must grapple with real-world forces. These forces raise current issues in higher education law and policy. Some forces present potential obstacles to realization of his ideals, while others advance them. This paper offers informal thoughts about legal and policy implications for higher education in each of the five areas of cognitive ability. By request of the conference

¹ Howard Gardner, Five Minds for the Future, Harvard Business School Press, 2006.

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organizers, it incorporates some themes from the 2006 report of the Commission on the Future of Higher Education, convened by federal Secretary of Education Margaret Spellings (“Spellings Commission”).³

THE DISCIPLINED MIND

Mastery of a body of knowledge and a professional craft.
Expertise requires at least ten years of study and experience.
Sometimes referred to as the “disciplinary” mind.

Attendance and Degree Completion. Programs that assist students in completing their degrees enlarge the national pool of expertise. Similarly, programs that reduce student debt allow graduates more flexibility in pursuing vocations that capture their imaginations, rather than ones chosen for financial gain.

Wider access to higher education is generally regarded as a social benefit, enhancing America’s global competitiveness. The Spellings Commission called for a significant increase in the number of students who attend college:

Every student in the nation should have the opportunity to pursue postsecondary education. We recommend, therefore, that the U.S. commit to an unprecedented effort to expand higher education access and success by improving student preparation and persistence, addressing nonacademic barriers and providing significant increases in aid to low-income students.

While bringing students in the door is important, degree completion brings us even closer to producing potential experts.

The Spellings Commission also urged colleges and universities to “measure student learning through quality-assessment data...” This recommendation has proven quite controversial. Measuring student learning in higher education is a nuanced process, and measuring disciplinary mastery is even more complex. One can readily argue that a focus on college student measurement falls far short of advancing the disciplined mind.

Teaching Approaches and Faculty Issues. Professor Gardner asserts that a plurality of teaching approaches helps build students’ competence. How can we encourage more faculty to enrich the variety of their teaching styles? Student feedback on professors, campus teaching resource centers, and faculty professional development programs have grown in scope and influence in recent years. Diversity in faculties may also contribute to greater variation in teaching approaches. In law schools, for example, an increase in the proportion of female faculty members coincided with wider adoption of alternatives to the traditional Socratic teaching method.

³ The Commission’s report and related material appear at www.ed.gov/about/bdscomm/list/hiedfuture.

It is reasonable to ask whether employment status influences the variety of professors' teaching styles. The American Association of University Professors has documented that the number of part-time faculty in U.S. colleges and universities is about 48%.⁴ Part-time faculty may be less inclined than their full-time counterparts to vary their teaching approaches. We can speculate that they have less experience with teaching, less time to devote to experimentation, and fewer professional development opportunities. They may be more beholden to the people who renew their appointments, who may or may not themselves value plurality in teaching approaches.

Approximately two-thirds of all faculty are not in tenured or tenure-track positions. Without the security, or even the possibility, of tenure, they may well be less inclined to explore the frontiers of teaching or of their disciplines.

Administrative Burdens. Higher education institutions are subject to more than 200 federal laws, ranging from the Graham-Leach-Bliley Act on financial data to the Export Administration Act, which can affect overseas distribution of research results.⁵ The extent of regulation is growing. Each new development, however worthwhile in its own right, diminishes resources available to support student learning and faculty effort.

Access limitations, financial pressures, and externally imposed requirements are practical factors that impede individuals – whether students or faculty – in enhancing their deep mastery of a discipline.

THE SYNTHESIZING MIND

Capacity to integrate strands of knowledge into a coherent whole and to communicate the integration to others.

Interdisciplinary Work. Professor Gardner points to the value of working across disciplines. The ability to see connections among seemingly disparate concepts, and to develop those connections into a coherent picture, is the heart of synthesis. The Spellings Commission placed value on interdisciplinary work:

At a time when innovation occurs increasingly at the intersection of multiple disciplines (including business and social sciences), curricula and research funding remain largely contained in individual departments.

Ready steps to promote the synthesizing mind include resource allocation to interdisciplinary work and encouragement of students to pursue double majors and other interdisciplinary studies.

⁴ "Trends in Faculty Status: 1975 to 2005" available at www.aaup.org/NR/rdonlyres/9218E731-A68E-4E98-A378-12251FFD3802/0/Facstatustrend7505.pdf

⁵ See the Campus Legal Information Clearinghouse, an admirable tool maintained by the general counsel's office of The Catholic University of America. <http://counsel.cua.edu>

Faculty who hold joint appointments in multiple departments sometimes face special challenges in reappointment and tenure reviews. The criteria by which they will be judged may be uncertain, and their senior colleagues may feel unequipped to evaluate them comprehensively. As an administrative and legal matter, joint faculty appointments merit special attention so that evaluation criteria are well defined, the individuals receive appropriate mentoring and support, and they do not fall between the cracks.

Collaborations among Entities. Over the last quarter century, colleges and universities have forged many new connections outside their own walls. They collaborate readily with higher education institutions around the world, with commercial research partners, and with local groups providing internships and other service-learning opportunities for students. The number and variety of collaborations grow every year, presenting exciting new opportunities for synthesis across traditional boundaries.

The excitement, however, may deflect attention to many practical considerations. Rare is the institution that attends well to the legal details of cross-entity collaboration. Employees may be jointly hired, without clarity as to who bears supervisory responsibility for them or who must unravel problems of harassment or workplace injury. Questions of who owns what, who has ultimate control, and who bears liability are best addressed before relationships sour and collaboration unwind. Here are some recent illustrative cases. Even if the institution ultimately prevails, it has lost time and money in defending itself in court.

Are You an Employee? Dr. Diane Xie served as a research associate professor at the University of Utah. The university provided her with a shared office, shared telephone, photocopier access, and business cards. It did not provide salary, benefits, or any research supervision. A university committee reviewed her grant proposals before they were submitted. After three years the university decided not to renew Dr. Xie's contract. She filed suit for national origin and gender discrimination and retaliation. The university defended the action on the basis that Dr. Xie was not an employee. The institution argued that it had little or no control over her daily activities, paid her no salary or benefits, and imposed on her no teaching, advising, or administrative obligations. The court concluded that, despite a statement in the handbook that research associate professors were "employees," Dr. Xie was not. Her lawsuit was dismissed. Xie v. University of Utah, 243 Fed. Appx. 367 (10th Cir. 7/5/07), 101 Fair Empl. Prac.Cas. (BNA) 505, 227 Ed. Law Rep. 121.

Who Foots the Bill for a Backpay Award? James Tuttle taught two types of courses at a state correctional facility. During the day he served as a vocational instructor, and at night he taught diesel mechanics through a community college. He was dismissed from his daytime position and barred from the premises, thus losing his part-time evening post as well. He appealed his dismissal, prevailed, and was ordered reinstated with backpay. The state refused to compensate him for lost salary for the night course, because the funding came from Mississippi Delta Community College. The college also provided not only the salary but also

Tuttle's W-2 form. The appeals court found that, because the state reimbursed the college for Tuttle's part-time evening salary, the state should cover the backpay as well. The court elaborated:

“Although Tuttle's check was issued by the College, it is undisputed that MDOC [Mississippi Department of Corrections] provided the funding for the night job. The College and MDOC had an agreement whereby MDOC would send time sheets for the night school instructors to the College and the College would issue their paychecks. The payroll clerk at the College testified that MDOC reimbursed them for all night school instructors' salaries, insurance, retirement, unemployment compensation, plus a five percent administrative fee. The clerk also testified that Tuttle was not an employee of the College. MDOC argues that, although it reimbursed the College for the salaries, it was not the ultimate source of the funds – that the funds for the reimbursement came from the department of education and the inmate welfare fund.”

The court required the state, rather than the college, to provide the backpay for the night course. Mississippi Department of Corrections v. Tuttle, No. 2006-CC-01485-COA, Miss. App. 8/9/06.

Globalization. Linkages across borders provide opportunities for synthesis. Several features of the strong trend toward globalization of higher education merit comment. First, the number of foreign students studying in the U.S. is about 583,000. About 224,000 U.S. students studying abroad annually. U.S. faculty travel abroad in much greater numbers. The University of Texas, for example, estimates that 20 faculty travel internationally for each student who does. Second, the federal government is moving toward the prospect of recognizing dual degrees from U.S. and foreign institutions, so that a student who studies at, for example, both the University of Oregon and the University of Edinburgh could receive degrees from both institutions. The credentials would provide notice that the individual has functioned successfully in different environments, which can provide a leg up in efforts at synthesis.

Third, the European Union is currently engaged in a major initiative to enable (or require) its member countries to recognize the academic credentials from other countries. Through the so-called Bologna Process, the E.U. is identifying the common ground between, for example, an accounting degree from a Belgian University and an accounting degree from a Latvian University. The result, once achieved, will be unprecedented cooperation among national higher education systems and increased mobility of students, faculty, and researchers. Opportunities to cultivate the synthesizing mind will expand.

Professor Gardner describes greater globalization as an inevitable process. This is highly likely, although factors such immigration restrictions, gross income inequities between nationals, and fears about health and safety in other countries and their products could conceivably impede or even halt progress.

THE CREATING MIND

Ability to discover new questions, trends,
and solutions and to make new observations.

Professor Gardner describes the creating mind as closely linked to the disciplined mind. Creativity rests on a disciplinary foundation. The creating mind sees beyond recognized disciplinary content and challenges orthodoxy. In so doing, it also sparks academic freedom challenges. The university's role is to protect, rather than punish, forays into the unknown. Privileged institutions often can maintain this stance more easily than less privileged institutions. The less privileged rely more heavily on their funding sources. These may include student tuition, state or local government appropriations, monies from a religious denomination, or regular gifts from a few wealthy patrons.⁶ Art displays, theater productions, and class discussions from English to religion have generated recent intense opposition.

Practical Limits. Real world forces may constrain creativity. A dean may grow weary of a tenured professor's decade-long, and unending, project to write a monumental tome. While the professor will not face dismissal, her salary increases may suffer. An art student's plan to erect a sculpture on campus may be scotched by an administrator concerned about physical hazards that the piece would create. Issues such as money, space, and insurance coverage can limit realization of the fruits of the creating mind.⁷

Speech Codes. In the early 1990's, institutions began a new struggle to define boundaries for acceptable speech on campus. Speech that targeted and demeaned women and members of minority groups became the subject of campus regulation. In a nutshell, the most narrowly drafted prohibitions have had the best chance of surviving legal challenges. The lawsuits over speech codes have targeted public institutions, which must respect the First Amendment rights of students, faculty, and others. (The Constitution constrains *government* action. Public universities are arms of government, while private universities are not.) Speech codes straddle the uncertain ground between the creating mind and the respectful mind.⁸

⁶ See Ann Franke, "How Strong Is Academic Freedom in Community Colleges?," *Chronicle of Higher Education*, 10/27/06, p. B19.

⁷ The artists Christo and Jeanne-Claude address liability insurance, among many other issues, in planning their huge fabric landscape installations. See, e.g., www.christojeanneclaude.net/otr

⁸ The Foundation for Individual Rights in Education is the most ardent opponent of campus speech codes. They recently released a report asserting that, of 256 institutions surveyed, 75% had speech codes that "both clearly and substantially" restrict free speech. "Spotlight on Speech Codes: 2007," available at www.thefire.org.

THE RESPECTFUL MIND
Capacity to value fully people from all groups

Respect is a value that guides successful faculty, students, and administrators.⁹

Diversity. Professor Gardner's comprehensive view of diversity embraces all people and groups. We must respect, he suggests, those who differ from ourselves on any basis. The law protects personal characteristics including age, disability, ethnicity, gender, race, religion, and veteran's status.¹⁰ Gardner's approach to diversity reaches characteristics such as socioeconomic status, dress, and educational achievement. His conception of respect is a voluntary personal quality, nurtured over time, rather than a legal mandate. Laws against discrimination and campus speech codes seek to legislate respect by forbidding bias and prohibiting hurtful words. Gardner's more elevated goal would be to inspire people to be respectful without externally imposed regulation.

Respect and Ethics. There is a connection between the respecting mind and the ethical mind. The American Association of University Professors' *Statement on Professional Ethics* emphasizes the concept of respect.¹¹ It calls upon faculty to respect students as individuals, to respect the confidential nature of the faculty-student relationship, to respect the free inquiry of their associates, and to show "due respect for the opinions of others." Gardner focuses the respectful mind on relationships between groups, while AAUP applies the concept convincingly to ideas as well.

Retaliation. In American workplaces today, including colleges and universities, an individual may lose the respect of colleagues upon raising a discrimination problem. As a legal matter, we should be free to challenge discrimination, or to exercise our free speech rights, without fear that we may lose our positions, salary, and other benefits. As a practical matter, a complainant does risk the condemnation of colleagues and the erosion of responsibilities or status. Examples from higher education of retaliation for speaking out are plentiful. Here are but a few examples:

- A Florida professor who sued her university for gender discrimination was denied the opportunity to teach summer courses. A jury awarded her \$150,000 for retaliation.

⁹ Darby Dickerson, "Professor Dumbledore's Advice for Law Deans," *University of Toledo Law Review*, vol. 39, no. 1, pp. 101-113, 2008. Available at <http://ssrn.com/abstract=1088056>. ("Law deans can draw many lessons from Dumbledore's choice of magic, and his core values. First, respect can be a key to our ultimate success. By celebrating differences and valuing each person based on talent, not titles, we can conjure our collective strengths to create a strong and vibrant educational environment.")

¹⁰ In the arena of ethnicity alone, there are more than 2000 distinct ethnic and indigenous groups which are minorities in the nations where they live.

¹¹ Available at www.aaup.org under Issues in Higher Education, Ethics.

- A wrestling coach in California claimed that the university did not renew his contract in retaliation for his support for the discrimination claims of female wrestlers. The parties settled the dispute for \$725,000.
- A Kentucky professor was awarded \$600,000 in damages and legal fees after his college took his history of complaints of racial discrimination and retaliation into account in deciding to remove him from the faculty.
- In 2007 the Rhode Island Supreme Court affirmed that a university denied tenure to an engineering professor in 1993 in retaliation for his opposition to the “sham” interview of a minority candidate for a faculty position that the department had already offered to someone else.

Colleges and universities must match their commitment to free speech with respect for those who challenge the institution.

Respect in the Student Body. A successful college experience exposes students to people who differ from themselves. The city dweller’s roommate comes from a farming family. The professor was born overseas. Community service activities bring students into contact with people from other socioeconomic, ethnic, or racial groups. Positive experiences with different groups help build respect.

Yet the picture is clouded. From a student affairs perspective, alcohol and drugs pose the greatest threats to respect among students. Alcohol and drug abuse leads to decreased inhibition, which may in turn lead to unkind words and deeds. The scale of the problem is massive. The National Institute for Alcohol Abuse and Alcoholism has estimated that, on campus, alcohol is involved in 600,000 assaults and 70,000 cases of acquaintance rape and sexual assault *annually*.¹² Such crimes show a fundamental, albeit perhaps temporary, lack of respect.

Apology. In recent years, lawyers and legal scholars have devoted a fair amount of attention to the important topic of apologies. There is a growing consensus that artful, heartfelt apologies can reduce the sting of mistreatment, insult, and injury. They can reduce the risk of litigation or help settle existing disputes. A good apology reinforces the respect that the more powerful party has for the injured party. The elements of a good apology are simple:

- Acknowledge your error clearly and in detail
- Show through your words and tone that you are genuinely sorry
- Listen patiently and respectfully to the other party’s reaction
- Confirm that you will avoid repeating the mistake

¹² NIAAA, “A Call to Action: Changing the Culture of Drinking at U.S. Colleges.” Available at www.collegedrinkingprevention.gov. The report also offers the data that more than 100,000 students between the ages of 18 and 24 report having been too intoxicated to know if they consented to having sex.

An apology can restore the sense of respect and trust that is often lost in the midst of bitter conflict. Campus dispute resolution systems may help facilitate communication and even apologies. Some institutions have found apologies helpful in legal matters.¹³

Respect for people from all groups and respect for ideas are complementary concepts. Respect does not mean universal agreement but rather interest and common decency.

The Ethical Mind
Fulfillment of responsibilities to society
and our vocations

We conclude with two major challenges in higher education today to the ethical mind: (i) cheating and plagiarism and (ii) financial conflicts of interest. While the Spellings Commission addressed “transparency and accountability,” it applied those concepts mainly to student learning outcomes rather than issues of ethics.

Cheating and Plagiarism. Media coverage of cheating and plagiarism incidents abounds. Among graduate students, for example, in the spring of 2007 34 graduate students in Duke University’s business school faced penalties for cheating on a take-home exam. A month later, the dental school at Indiana University expelled 9 students and imposed lesser sanctions on 25 others for dishonesty, also in connection with an exam. The mechanical engineering department at Ohio University has been investigating possible plagiarism by 55 masters-level students on their theses, as well as the possible complicity of faculty and administrators. Over a two-year period, 56% of M.B.A. students, 74% of undergraduate business majors, and 68% of other undergraduates reported on a survey that they had cheated.¹⁴ Preventive and remedial measures do exist. Faculty can give explicit directions to students about academic honesty. Students from other cultures may come with different norms on appropriate academic practice. Oral exams, and interviews with students about papers they have submitted, provide a check on the authenticity of learning. Assignments and tests may be modified to limit opportunities for cheating, and the system for sanctions should be visible and robust. Cheating and plagiarism (including plagiarism by faculty and administrators) do not appear to be waning.

Conflicts of Interest. Another current ethical challenge, outside the academic realm, is the quiet financial arrangements that vendors make with campus entities such as student financial and study abroad offices. The core problem is that money received from

¹³ The president of Duke University, for example, apologized for failing to support the lacrosse players and their families after the players were accused of sexual assault. The University of Iowa apologized for research it conducted 60 years earlier that led to speech problems among orphans who were taught to stutter. Bennington College issued a statement of apology in settling litigation brought by faculty members who had been dismissed.

¹⁴ Elia Powers, “Cheating on a Different Level,” *Inside Higher Education*, May 10, 2007. Available at <http://insidehighered.com/news/2007/05/10/cheating>.

vendors may influence the institution in ways that work to the disadvantage of students, families, employees, or other constituencies. One must look to dollars that make a “round trip” from the institution to the vendor and then back to the institution. These may be termed “revenue sharing” or, less charitably, “kick backs.” The growth of such arrangements might be tied to funding decreases and calls, such as in the Spellings Report, for more an entrepreneurial approach in higher education.

New York Attorney General Cuomo has pursued side arrangements in the student loan arena and recently broadened his inquiry to study abroad programs. The problem is not, however, confined to these areas. From multipurpose identification cards to faculty research, the presence of outside funding raises the specter of conflict of interest. If a researcher receives corporate funding or has a personal stake in research outcomes, apparent conflicts of interest must be addressed.

Key protective measures for institutions and individuals include: (a) adoption of conflict of interest and ethics statements, (b) authorization by institutional authorities of side arrangements, and (c) disclosure to the students, readers of research results, and other interested constituencies. Ethical faculty, administrators, and institutions protect the interests of third-parties who might otherwise be misled or harmed by a conflict of interest.

SELECTED RESOURCES

Campus Legal Information Clearinghouse
The Catholic University of America
<http://counsel.cua.edu>

Central Intelligence Agency, “Global Trends 2015: A Dialogue about the Future with Nongovernment Experts,” NIC 2000-02. December 2000. Available at
www.loyola.edu/dept/politics/intel/globaltrends2015.pdf

Commission on the Future of Higher Education
U.S. Department of Education
www.ed.gov/about/bdscomm/list/hiedfuture

Meyer Eisenberg & Ann Franke, “Financial Scandals and Student Loans,” *Chronicle of Higher Education*, June 29, 2007, B16.

Ann Franke & Meyer Eisenberg, “Ten Rules for Avoiding Conflicts of Interest,” *Chronicle of Higher Education*, October 12, 2007, B20.

Gardner, Howard. Five Minds for the Future. Harvard Business School Press, 2006.