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HIDDEN MESSAGES IN THE REQUIRED FIRST-YEAR LAW SCHOOL CURRICULUM[1]

LESLIE BENDER[2]

The traditional required first-year law school curriculum transmits powerful hidden messages. Law school curricula have changed significantly in the last decade, adding more variety, more interdisciplinary courses, more clinical experiences, more theory and skills-oriented courses, but most of these changes have been in upper-level elective choices or elective clinical programs. Although I will touch on the upper-level curriculum, my primary focus will be on the first-year curriculum, because in most law schools it is filled with required courses. The hidden messages contained within this required core tell students what is most important for all lawyers to know. Why else would we require them?

My arguments about the hidden messages in the curriculum are not new or original. Yet, despite frequent pleas in multiple fora about needs for transformation or revision, little of moment has been done in established law schools to restructure the core. Usually the best you get is minor tinkering—altering the number of hours devoted to each first year course or adding one new course to the first-year package. Efforts in some newer or alternative law schools, like CUNY, are exceptional, but they run up against severe professional resistance. I do not believe that calls for curricular revision wear thin for the repeating (in part because so little has yet changed).

Sometimes we are blind to subtle patterns or hidden messages in what is familiar to us, whereas we see more clearly those kinds of patterns in something that is new. We often come to see what is familiar as appropriate, neutral, and the natural order of things—the familiar establishes our norms. By stepping back from those norms and looking at alternatives, we can see the choices we make and the messages we send when we reproduce the core curriculum as it is. I am going to suggest a proposed required first year curriculum as a heuristic model for examining hidden messages in curricula generally. It is just one of many possibilities. I selected it because it helps me make my points about hidden messages, but I also suggest it because I believe it would improve and refocus legal education. It is intended to be a stimulus for further discussions about curriculum, and not "the right answer" or a "finished product."

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[2] Professor of Law, Syracuse University College of Law. This essay is dedicated to the memory of F. Gerard Plater, who was a member of our ad-hoc "Rump" group on issues of justice in the first-year curriculum until his sudden death in November, 1992. Legal education suffers a great loss with Professor Plater's death.

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In an appendix to this paper I have included a chart outlining this proposed curriculum and the Syracuse University law school's required curriculum, which is innovative compared to others, but which also tracks traditional law school curricula in its form and most of its courses. The left-hand column of the Appendix outline contains the Syracuse required curriculum as it exists currently. Because these courses are familiar to people in legal education I will not describe their content, unless Syracuse uses a different form:

1. Torts;
2. Contracts;
3. Civil Procedure;
4. Property;
5. Constitutional Law;
6. Syracuse has an innovative class on "Public Law Processes" that studies the legislative and administrative processes of law-making and enforcement; and
7. A research and writing course called "Law Firm" that is taught in smaller sections with faculty and third year student teaching assistants. This course is a variation on traditional legal writing courses and focuses on memo and brief writing, oral advocacy and some lawyering skills like interviewing and counselling.
8. Our core curriculum also includes two additional required courses that can be taken by students any time before they graduate—Criminal Law and Professional Responsibility.

In the right hand column of the Appendix outline, I have offered an alternative, proposed required curriculum. These courses are less familiar to law faculty because I made them up. This is a very tentative and incomplete working proposal, offered for purposes of argument and to open up dialogue.

1. The first course is "Justice, Law, and Truth-Finding." This course will expose students to differing perspectives on Justice, Truth and Law. It would explore questions like: What is law and how does it work? What is justice and where do concepts of justice come from? What is and ought to be the relationship between justice and law? What values are embedded in our legal system, legal processes and legal doctrines? What are the best and fairest means for searching out "truths" and resolving disputes? Students would read classic and contemporary writings on justice and law and compare them with current examples of the workings of law and the justice system (whether cases, news stories, trial transcripts, legislative hearings, etc.). They would be required to discuss these writings and their applications in seminar-size groups and write introspective and reflective essays linking their readings to their own ideas on the subjects being considered.
2. The second course is, "Interpreting and Writing Legal Texts." In the first semester of this full-year course, students will learn methods for reading and interpreting all kinds of legal

texts—such as constitutions, statutes, regulations, trial transcripts and testimony, contracts and court documents, and appellate opinions. They will compare legal interpretive techniques with those used to read literature, history or scientific data. The second semester will hone legal research skills and writing, including drafting of such materials as pleadings, contracts, and discovery questions; and teaching students how to write memos, briefs, client letters, and judicial opinions. The second semester will contain a required clinical component that links with other first year, second semester required courses mentioned below. This will provide students with real problems in which to apply and develop their learning.

3. "Resolving Disputes." This course will teach students methods for resolving disputes and solving problems. Students will study techniques for de-escalating conflicts; investigating facts; spotting issues; identifying common ground and points of dispute; planning how to avoid conflict and strategizing about how to structure legal disputes; methods for negotiation, mediation, arbitration, conciliation, compromise, settlement, and institutional grievance procedures. Students will also study litigation as one of many processes for dispute resolution. Course work will evaluate juries as decisionmakers; look at fact-finding in public hearings and through community processes; and examine comparative techniques from other cultures. During the first semester, through simulation and role-playing, students will attempt to apply the newly learned skills and methods to resolve hypothetical problems. In the second semester, they will practice using these skills and methods with clients and real problems in clinical settings.
4. A fourth new course during the first year is "Development and Change in Common Law Doctrine." This class introduces students to our common law system, how it works, judges' and lawyers' roles in a common law system, the histories, contexts, and substance of doctrines in many of the traditional common law areas—property, contracts, torts, and criminal law. Primary attention will be on the factors that influence common law development and the means through which the common law changes. Students will learn some major themes and doctrines from all traditional common law courses, but doctrinal mastery will be secondary to learning about the mechanisms of common law development and change.
5. The next course is "Equality and Freedom—Civil and Political Rights and Remedies." This course is devoted to how ideals like equality and freedom have been understood in our American legal system and in our jurisprudence, the sources of our civil and political rights, and available remedies to fight their denials (constitutional, political, statutory,

administrative, and civil and criminal litigation). Materials will also examine patterns of power and privilege in legal doctrine, legal process, and constitutional law, with special attention to issues of race and national origin, gender, economic status, religious beliefs, and speech rights.

6. The sixth course is "Processes and Relationships of Law-Creation and Enforcement." Students will learn about process and structure issues in the legislative, judicial, executive and administrative branches. How are laws made and enforced by each of these branches? What are the procedures and processes in administrative agencies and in courts? What is the relationship among branches of government and between the states and federal governmental branches? Students will study how these structural and process dynamics impact upon dispute resolution, access to justice, and development of doctrine.
7. "Interpersonal and Communication Skills." This course focuses on lawyering as being people-oriented. It encourages students to learn how to listen to multiple perspectives, how to foster dialogue, and how to express ideas and convey emotions. Students will study rhetorical and oral advocacy techniques, learn interviewing and counseling, and discover the techniques of reading eye contact and body language as forms of interpersonal communication. This class will examine group dynamics and group psychology, as well as models of cooperation, empathy and care in interpersonal interactions. Students will learn about developing and deserving trust. Like the "Resolving Disputes" course, much of this course will be learned through role playing, simulations, and moot problems. The second semester's clinical requirement will offer students opportunities to utilize these skills in clinical contexts through work with actual clients. This course is the third link in the second semester clinical component of the required curriculum.
8. The final course is "Lawyering" which will teach students about different available career paths, roles, and experiences lawyers may choose; lawyers' public service and ethical responsibilities; public perceptions of lawyers; the processes of professionalization and regulation of lawyers; lawyers as members of groups—Firms, Corporations, Families, Communities; integrating family and social lives with professional careers; and the quality of lawyers' lives in different career options. Last but not least, this course should include time and stress management techniques.

After students take these required courses, they may pick and choose among elective courses in their second and third years.

This concludes my proposed required curriculum. It is enough of a foundation to determine what are the hidden messages in each curriculum.

What does each tell us about what law schools think is important for all future lawyers to know and consider? Since I proposed the curriculum on the right, let me start there. What are its hidden messages?

THE HIDDEN MESSAGES OF THE ALTERNATIVE CURRICULUM

The proposed curriculum tells students from the day they receive their registration packets that issues of justice, truth, equality and freedom are important to all lawyers. By devoting the first year required courses to the study of those ideals and the ways these values are incorporated in our legal system, legal doctrine and procedures, this proposed curriculum informs students that lawyering is about seeking justice and remedying injustice, about achieving equality and freedom for all, about searching for fairness and truths. By the organization of the curriculum, we tell them that these values (or their absence) animate doctrine and process, rather than the reverse.

Students are told by this alternative curriculum that all lawyers ought to study common law doctrine and civil rights struggles as concrete manifestations of what the law has been and how it changes. The importance of doctrine comes not so much in memorizing discrete categories or rules of law, although those are included in the courses, but as evidence of where law comes from and how it responds to differing social, economic and political contexts. Messages about the need to study the mechanisms of change in law enable students to see the law as in flux, rather than as a static system of fixed rules, as responsive to contexts and persuasive arguments, as a system of organization, rather than as a code book. Through this alternative construction of the curriculum, students will see lawyers' roles as much more than repositories of memorized information about doctrine. They will see lawyers as active participants in shaping law. With this perspective, they will have a deeper understanding of how to make changes when they find injustices in the law. This proposed curriculum also emphasizes that all lawyers must understand the processes of law-making, the structure and processes of government, and the procedures of each arena in which they might work. But those are not all the messages contained in the alternative curriculum.

The alternative curriculum notifies students that lawyering is about people—interrelating with people through conversations and written documents, working with clients and other attorneys, support staff and judges. There are many skills lawyers must master to be effective—written skills, research skills, interpersonal skills, advocacy skills, and methods for successfully resolving disputes and solving problems. The required alternative curriculum emphasizes the centrality of learning these skills in their legal studies, rather than making skills-training an upper-level elective or an invisible component of the first year that depends upon the approach of particular professors.

My alternative curriculum also recognizes that many students are not aware of the full panoply of career options for lawyers or what the lives of lawyers are like. It makes an effort to help students understand what they are committing themselves to and what their options are, while it also requires all students to think about their public obligations and ethical responsibilities as lawyers. Students learn in all classes that lawyering is doing their best and

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giving their most to help real people solve real problems and remedy actual injustices.

Finally, the proposed curriculum features learning through doing—through supervised clinical experiences. In the first year, students get hands-on experience doing the things they are learning about—seeing how their skills can be used to help others in need, applying their substantive learning directly to real problems. They will be struggling for justice from the start of their legal education. Lawyering will not be a pure abstraction for them—it will be concretized through practical experiences, doing lawyering work, dealing with problems and developing skills.

THE HIDDEN MESSAGES OF THE TRADITIONAL CURRICULUM

Needless to say, this proposed curriculum, and its messages, differ significantly from what we do traditionally. The traditional curriculum, on the left in the Appendix, stresses the importance of learning doctrine and the division of legal problems into seemingly fixed doctrinal categories. We send students contradictory messages when we tell them in class that we are trying to teach them analytic skills and about justice, but name the courses after specific doctrinal categories. No wonder students think we are hiding the ball from them. No matter how many times individual professors claim to be teaching analytical skills, issue spotting, or legal theories, students are led by the almost absolute curricular focus on doctrinal categories and rules to the inevitable belief that the most important thing they should be learning is specific doctrinal knowledge—whether substantive doctrine as in torts, property, contracts, or constitutional law, or procedural doctrine as in civil procedure.

The organization of the traditional curriculum emphasizes particularized substantive content more than processes of reasoning, argumentation and law-making; classifications of legal thought more than the values contained within it; and abstractions more than practical lawyering skills. Because the courses are named in ways that focus on categories of law, particularly categories of private civil law, those categories seem definitive, fixed, and crucial to any analysis. Even if we believe that learning doctrine or "the rules of law," rather than skills and theory, is the core of what lawyers need to know, we can see how powerful the categorization of doctrine we use is, by imagining a doctrine-oriented curriculum organized around courses like laws of the workplace, laws of the family, laws of business and commerce, environmental laws and health care laws. These track the conceptual schemes of many of our elective upper level courses, but we maintain our first year curriculum's focus on categories like property, torts and contracts. The hidden messages of the first year curriculum about categories of organizing legal problems and doctrinal analysis probably limit our students' creative impulses more than anything else we do.

Although not explicit in the titles of the doctrinal courses, we know that most of the course work of the traditional curriculum emphasizes private disputes and litigation. Most first-year courses are taught through appellate cases, exposing students to only extremely marginal examples of law application and the most skewed renditions of facts. As a matter of fact, the devotion to appellate cases underscores the traditional curriculum's hidden messages,

about the near irrelevance of attention to specific facts, contexts, and the people involved, by stressing the search for abstract rules of law and governing principles. It also sends the message that litigation is the best way to solve legal disputes. First-year students are rarely exposed to other options when they learn law through litigated cases.

If first-year required classes do veer from the ancient Langdellian curriculum and methodology of teaching from appellate cases, they usually move to statutes and codes. This move just re-emphasizes the underlying message that "law" is more about general rules abstracted from the people and contexts than about the practical effectuation of ideals and problem-solving. Our core curriculum repeats an ancient curriculum developed for nineteenth century lawyers to meet nineteenth century concerns and contexts. While students read newer cases and learn how the law has changed since then, they do that so they can know the newest permutations of the doctrine, not to challenge the categories or to question the underlying worldviews reflected in that century-old system. The hidden message this transmits is about reproducing the status quo, even in the face of doctrinal change.

The subliminal messages embedded in the traditional curriculum encourage students to assign intellectual priority to doctrinal categories over processes of law, of change, and over practical skills; to privilege litigation and courts over other methods and places for the resolution of disputes; to learn specific rules rather than reasoning techniques; and that the core of what all lawyers should learn is mostly private common law regulating economic relationships. Even in public law courses, like constitutional law, students are often taught more about constitutional doctrine and litigation, than about constitutional ideals, values, political contexts, and the consequences worked by different models of constitutional interpretation on all the citizens of this country.

The traditional curriculum fails to send students messages about the practice of law, as if practice were not important. It obfuscates the reality that law is about interactions among individuals in families, in neighborhoods, workplaces, schools, and communities; between groups of people, and between people and institutions, like corporations, churches and governments. In the traditional first-year required curriculum, students are rarely taught the practical skills they will need to practice law effectively (except perhaps legal research and writing of memos, briefs and oral advocacy). It is as if those practical skills are not fundamental to all lawyers and lawyering. They are seldom taught the skills of interpersonal communication (particularly how to work with people different from themselves, with clients, and support staff). They are not taught effective means of interviewing or of framing questions to find facts. Nor are they taught about counselling, advising, and developing strategies. Rarely are law students required to learn how to draft pleadings, file papers, or fill out time sheets. How can we expect them to go out and fight injustices, if we do not give them even the most basic tools? The traditional required curriculum does not tell them anything about what the practice of law is like, what career options are available to trained lawyers, what lawyers' responsibilities to society are, and how to resolve ethical dilemmas in legal practice (although professional responsibility classes teaching the "rules" are now required in most schools). The absence of these skills and issues from the

traditional required first-year curriculum sends messages to students that they are peripheral, not core, to lawyering.

Other messages in the traditional curriculum are that courts are the center of legal activity, not legislatures, government or administrative agencies; not law enforcement, not corporations or community centers. Most painful of all—law students receive no messages from the required curriculum that law is about a search for justice. They are never required to question the relationships among law and justice and truth, or among equality and rights and fairness. The traditional curriculum leaves out the *heart and soul* of lawyering. Students may or may not get these messages from individual professors, but even if they do, they also figure out that come exam time, they will be asked about contracts, not justice; about torts, not truths; about constitutional doctrine, not substantive equality. The messages are that these other discussions are dessert, but the doctrine is the main course. The required curriculum platter is so full, that even if students are not on a diet, they rarely have room for dessert.

POLITICAL MESSAGES IN THE FIRST-YEAR CURRICULUM

Is it fair of me to read these messages from the traditional curriculum, particularly from its absences? I think so. Does the traditional curriculum, through its use of doctrinal categories, contain a hidden agenda and bias? I think it does. Does the alternative curriculum I offer also contain a bias and a hidden agenda? Yes, of course, but I would like to suggest, in response to what some of you might be thinking, that it is not a "politically biased" message in the traditional meaning of those words. I purposefully tried to make my proposed curriculum "politically neutral" in the same way the traditional curriculum claims to be. My curriculum does not have required first-year courses called "relationships between wealth, power and privilege in law"; "mechanisms of oppression through law"; "the legal commodification of injury and labor"; or "law as conservator of the status quo." Nor have I proposed required classes on critical theories, post-modernism, and feminist, anti-racist analyses. There are no required courses entitled "race, gender, sexuality and class biases in law." I have not required course work on "laws about hunger, homelessness and illiteracy," on "poverty and social injustice," "government secrecy law", "political repression through law", "media and corporate control of the legal system", "laws of military and environmental terrorism", or "the politics of judging". My proposal is "politically neutral" because it merely shifts the emphasis from learning doctrine, pre-set categories of legal thinking, and appellate court analyses to studying justice, legal values, legal systems, and skills. The courses can be taught from any perspective—from ultra-right to moderate to ultra-left. The political or ideological perspectives within the courses can vary enormously depending upon the teachers. To conservative libertarian law professors, injustice can be the study of taxation, whereas to feminist professors, injustice can be political and legal power distributions that disadvantage all women and traditionally subordinated men and children. What is important about this proposed curriculum is that it places questions of justice at the center of the discourse in law schools. It puts interactions with people and active practice at the center of lawyering. That is a political choice, but not in the conservative, liberal or radical sense.

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While doctrine is a secondary component of my proposed required curriculum courses, and therefore ever present, it can be studied more in depth in upper level courses if students so elect. Doctrine is what is at the core of our traditional curriculum. To assuage those of you concerned about students' mastery of doctrine, and until such time as we transform the bar exam (which I urge us to do), I would propose one additional requirement to my curriculum—that all third-year students in their last semester take a large block, multi-credit "bar review"-type course offered by the law schools rather than private businesses, where all the "black letter law" and test-taking skills can be taught.

In concluding I ask: Does my proposal contain hidden messages? Of course it does. All curricula do, because they make choices about what is important. The question is not whether a curriculum can be devised that is neutral and does not convey messages, but what messages do you as law faculty want to convey about lawyering and the law to your first-year students, and what ought to be required learning for people who will be the lawyers of the future?

APPENDIX

HIDDEN MESSAGES IN REQUIRED LAW SCHOOL CURRICULA

Law school curricula are designed to "train" and "professionalize" lawyers. What does the traditional first-year curriculum tell us about what legal educators think law students ought to master to become competent lawyers? What hidden messages does the organization of the curriculum give to students about what is important for lawyers to know? What different messages does the proposed alternative curriculum convey?

SYRACUSE REQUIRED CURRICULUM	ALTERNATIVE REQUIRED CURRICULUM
1. Torts	1. Justice, Law and Truth-Finding (classic and contemporary readings,seminar-sized discussions and regular essays)
2. Contracts	2. Interpreting and Writing Legal Texts (with second semester clinical component)
3. Civil Procedure	3. Resolving Disputes (with second semester clinical component)
4. Property	4. Development and Change in Common Law Doctrine
5. Constitutional Law	5. Equality and Freedom—Civil and Political Rights and Remedies

(continued)

6. Public Law Processes*	6. Processes and Relationships of Law-Creation and Law Enforcement (legislative, judicial, administrati structures and state/federal issues)
7. Law-Firm* a. Research & Writing b. Lawyering Skills c. Oral Advocacy	7. Interpersonal and Communications Skills (with seco semester clinical component)
8. Criminal Law & Professional Ethics are required upper level courses at Syracuse	8. Lawyering—Lawyers' career choices and public responsibilities; the quality of lawyers' lives

*Innovations at Syracuse.