

THE HIDDEN CURRICULUM

Hannah R. Arterian*

I. INTRODUCTION

WHEN we develop curriculum, where does it live? Legal education may be coherent, chaotic, thematic, experiential, experimental, basic, theoretical, or all of that and more. The traditional concept of legal education is for-credit work facilitated and owned by the law school faculty members. A majority of the legal educators, however, fully understand that legal education is not confined to the classroom. But we educators sometimes ignore the reality that law schools are manifestly and completely educational institutions: our students are educated all the time, not just through their credited academic or experiential learning in faculty-approved courses.

We are currently experiencing a fresh wave of concern about how the “traditional” law school curriculum succeeds at inculcating professionalism and values. While this concern has fostered much needed discussion, it tends to focus on what can be broadly placed under the umbrella of curriculum, making space for some additional programmatic initiatives beyond academic courses or projects. Increased focus on professionalism and values messages delivered through legal education might have a number of salutary effects. Such intentional training might improve the profession as well as the professional life satisfaction of law school graduates.

Whether law schools can deliver appropriate professionalism and values messages through education is debatable,¹ but not much of the debate focuses on students’ education outside of credited learning, or the “hidden curriculum.”² Inevitably, as faculty, staff, and deans provide the hidden curriculum in the law school, we must consider what professionalism and values messages this curriculum sends to the students. Unless we are capable of making radical changes in the inappropriate human behavior that teaches unprofessionalism, I fear we cannot expect much progress in the professionalism and values of our

* Dean and Professor of Law, Syracuse University College of Law. These opinions are strictly my own. The examples are all real. My particular views of them are not likely to be held by a majority of legal academics. And lest I be a glass-house dweller throwing stones, I have been “guilty” of some of the behavior I criticize in this essay.

1. Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 199 (2001).

2. I use “hidden curriculum” to encompass all aspects of a law school experience not manifestly evident in the traditional concept of curriculum—courses and other endeavors overseen by law school faculty or faculty proxy.

students. Instead, all we can expect is the status quo or worse. Such behavior, some of it beyond the academy's ability to monitor, needs attention because it provides the subtext for everything we "teach" explicitly.

Behavior models for students; curriculum does not. I devote most of this short moment in print to what some inappropriate faculty behavior teaches students. I will add some comments about inappropriate staff behavior and also add my views on why the deaconate in legal education is so often simply an independent perpetrator of negative modeling, in ways not directly noted or deftly addressed.³

Before addressing "professionalism" in the context of the hidden curriculum, let us quickly consider the concept of professionalism in the legal environment as a whole.⁴ In some instances, professionalism can be a heuristic encompassing change in the makeup of the legal profession. The danger in this shortcut is a nostalgia for an era when the legal profession was male, white, and neither ethnically nor religiously diverse. It is critical that we do not allow that image to obliterate the complicated and nuanced issues of professionalism that confront us in our law schools and in the world. I have heard judges and lawyers bemoan the passing of the day when a handshake was enough to seal the deal with the other side. As we long for the "professionalism" of the past, we better remember some hands were not there to be shaken. We have to ensure that our values are not defined by a past that was more homogenous and, perhaps, not as professional as some may believe.

II. WHO ARE YOU? YOU ARE THE HIDDEN CURRICULUM

People learn from their environments, and in the delightfully hermetically sealed world of legal education, there are not many actors to deliver the hidden

3. I served on a State Bar of Arizona Committee on Professionalism. Every lawyer in the state was required to take mandatory education in professionalism. I also served for a very short time on the ABA Section on Legal Education Subcommittee on Professionalism. During that brief time, I had an opportunity to learn a little about the trend in medical education to assess residents on professionalism criteria, and I had the privilege to talk to Maxine Papadakis, M.D., Associate Dean for Student Affairs, University of California, San Francisco School of Medicine, who has written about and spoken widely on medical professionalism. That led to an opportunity to speak on a panel at the Association of American Law Schools ("AALS") annual meeting in January 2008. The panel focused on professionalism evaluation for law students. As I thought about my participation for that panel, I wrote the first version of this essay.

At the AALS New Teachers Workshop in June 2008, I delivered a modified version to new law teachers, hoping to convey the weight of what they do, as opposed to what they teach and write, as they begin their academic careers. Later, one of the conference organizers shared the view that the remarks were more suited for faculty members after they receive tenure. I strongly disagree with that view. I recognize that there will be many dissenters to my opinions on this as on all points.

4. Many schools do some kind of survey of their incoming students. I had the opportunity to read through the anonymous answers to the question "what is a lawyer" for our class of 2011. Many of the students had a visceral sense of what was "professional" in a lawyer. That visceral sense may not be full, well developed, or accurate, but students do come with ideas about the concept.

curriculum, the secret handshake, or the role model.⁵ The primary institutional deliverers of professional standards and values are faculty members. Faculty members are the subject of endless scrutiny; whether beloved or detested, or both simultaneously, their behavior is the medium and the message.⁶

In law schools, professionalism is something to which we expect our students to aspire and understand.⁷ Many law schools have programs, beginning

5. The AALS addresses the issue of professionalism in a chapter in the *2008 Handbook* entitled “Statement of Good Practices by Law Professors in the Discharge of Their Ethical Duties.” AALS, 2008 HANDBOOK 91-97 (2008) [hereinafter Statement of Good Practices], available at http://www.aals.org/about_handbook_sgp_eth.php.

[I]t is intended to provide both general guidance to law professors concerning ethical and professional standards both because of the intrinsic importance of those standards and because law professors serve as important role models for law students. In the words of the American Bar Association’s Commission on Professionalism, since “the law school experience provides the student’s first exposure to the profession and ... professors inevitably serve as important role models for students, ... the highest standards of ethics and professionalism should be adhered to in law schools.”

Id. at 91 (citing ABA COMM’N ON PROFESSIONALISM, “...IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 19 (1986)). The Statement of Good Practice provides, “As teachers, scholars, counselors, mentors and friends [in my view it is wrong headed to describe a law professor as “friend to students”] law professors can profoundly influence student’s attitudes concerning professional competence and responsibility.” *Id.* at 92. The Statement then constrains that to the responsibility to advance individual and social justice. *Id.*

These introductory paragraphs do not talk beyond being guided by “the most sensitive ethical and professional standards.” *Id.* at 92. The AALS Statement of Good Practices covers both more and less than I do in this article, *id.* (specifically noting responsibilities outside the classroom), and while I believe most of what I write should be clearly unacceptable to anyone who reads the Statement with care, I recognize that other readers will have a different view. One of the problems with the Statement is it is an abstraction, which is what it has to be, but I also disagree with its contradictory messages. Because it includes some areas of behavior and not others, and by seeming to permit or sanction “friendships” in such power and influence disparity, among other shortcomings, it cannot be effective even as a precatory matter.

6. Faculty members sometimes deny this, but after thirty years in legal education I have the impression that the law school environment can sometimes best be compared to the environment of a high school or a junior high school. Faculty members are the primary actors in the day-to-day drama of the students. For some faculty members, it is uncomfortable to realize the full extent of the power of the podium to produce an aura, while other faculty members relish and may abuse it knowingly. Having spent about eighteen years in jobs that required reviewing student evaluations of tenured and tenure-track faculty members at two institutions, I can vouch for the level of intensity of student reactions.

7. Professor Angela Mae Kupenda of Mississippi College of Law gave a presentation at the June 2008 Association of American Law Schools Workshop for New Law Teachers. Her presentation was entitled “Converting Challenging Conversation in the Classroom into Learning Opportunities for Your Students (and for Yourselves).” As part of her presentation, and included as an appendix to her materials, was the list of goals she reproduces on “heavy” colored paper and refers to with her students as the “Green Sheet” for them to work on in the class. She has four goals with directives under each goal. One of the goals for her students is “to model professional behavior” with an accompanying list of directives. When there are behaviors in class that are, in her view, incompatible with the goals, she will direct her students to take the Green Sheet out in class and ask them to reread part of it. In a conversation with Professor Kupenda, I told her we as faculty need a Green Sheet of our own. Perhaps if the AALS Statement of Good Practices was better, we could develop a bullet point version for ourselves. See Angela Mae Kupenda, Prof.,

with orientation, to assist students in achieving professionally appropriate goals.⁸ If students do not achieve the goals or effectively understand them, they are at a disadvantage. Whatever our institutional tolerance for “unprofessional” behavior in law students, graduates with a modicum of professional comportment have an advantage in the legal market.

Professionalism is not exactly an easy thing to teach or explain. It is certainly difficult to define, and it must have grounding in some values.⁹ Every faculty member, regardless of whether he or she believes in value-laden instruction, actually provides instruction in professionalism through the hidden curriculum.

Before law school faculties take off on the pursuit of value-embedded professional education, we should determine what unprofessional values we currently communicate and assess whether those are the values we believe should be in our curriculum. Each negative lesson has a positive cohort that most faculty members demonstrate, thereby delivering a different positive hidden curriculum. Unfortunately, much as one devastatingly negative student evaluation overshadows many positive ones, negative faculty behavior often outlasts positive behavior as part of the hidden curriculum.

Faculty members will always shoulder the primary burden of the hidden curriculum in legal education. Because the grumbling in law schools about professionalism is usually directed at student attitudes, behaviors, and commitments, faculty members do not do much group examination of the hidden curriculum that we deliver.

This curriculum is “hidden” metaphorically but is readily apparent. If not the most powerful part, it is certainly the most insidious part of the legal education we deliver to our students.¹⁰ For three years, the faculty members are the most powerful exemplars students have before them. Many faculty members would like to deny the importance of role modeling, but such denial may suggest that the faculty member is deeply uncomfortable with the extra burden, or the faculty member is too far from his or her days as a law student to recognize the power the podium vests in all of us and how much our demeanor and behavior inside and outside the classroom influences our students.

Faculty members have the power in developing students. As faculty members, we can be careful and responsible with it, or we can lack the self-awareness and self-discipline necessary to recognize what we are actually teaching.¹¹

Miss. Coll. of Law, Presentation at AALS Workshop (June 26-28, 2008), *available at* <http://www.aals.org/documents/2008nlt/KupendaAngelaMae.pdf>.

8. Some law schools include an oath of professional conduct in their orientation.

9. I know it when I see it? Or when it is absent? Even the AALS Statement of Good Practices isn't quite ready to define it.

10. Because this topic is the legal education of our students, I have not included a variety of behavior that is, in my opinion, as inappropriate as that described if it is not the hidden curriculum for students. Certainly the list would be much longer otherwise.

11. Deans themselves can abuse their positions and set an unhealthy hidden curriculum in all the ways faculty and staff can, of course. For example, I am unforgivably and inexcusably late with this essay. Yet the student editor, for some reason, gives me time to complete it. What

I have been a faculty member at four different law schools, an academic dean at one of those schools, and the dean at another. The following examples come from both my own direct experience and the annals of recent history at schools other than those at which I have served. In putting together this compendium, I have drawn on opportunities to observe other institutions. Other examples were provided or validated by others who would rather remain unnamed and their institutions unidentified.¹² To respect these wishes, I will simply describe some of the value-laden, hidden, negative-professionalism education students might¹³ receive at *X* law school.

The negative professional values students gather in the hidden curriculum from faculty members can be delivered in a variety of contexts, but for the limited purposes of this short essay, I will divide them into two: inside the classroom and outside of the classroom.

III. THE NEGATIVE HIDDEN CURRICULUM IN THE CLASSROOM

Let's start in the classroom—what undermines the credibility of faculty members and models unprofessional values and behavior? These examples of behaviors are not in order of egregiousness, but some do occur frequently.

1. Faculty members who are late for class or hold class over. There are faculty members who do this as standard operating procedure.

Message: Your time (students) is not as important as my time (faculty member); schedules are simply suggested parameters—if there are things I need to do before class, they take priority over your endeavor to be in class; if I hold class over, it is because what I have to teach is more important than any commitment you may have, including the next class; and displacing the class after mine—both students and faculty—is not my problem. Control and power exempt my behavior.

2. Faculty members who are unorganized, disorganized, or apparently (sometimes truly, though I believe rarely) unprepared.

Message: Full engagement in my commitment as a faculty member to your education is not a significant priority for me; sloppy and incomplete preparation is not a disqualification for the profession.

3. Faculty members who teach from the same notes in the same way every year. Your boilerplate scripts are out there.

message did I send him and his hard-working staff by promising and not delivering in an appropriately timely fashion?

12. Thank you to my unnamed decanal and faculty colleagues who have contributed to the compendium of the hidden curriculum. I vouch for the existence of every behavior in the compendium; none of these are products of my imagination. I could not make them up.

13. I use the conditional tense. Some of the behaviors are common, some of them are rarer. None of them are unheard of because they are all true.

Message: Doing it the same way works...every time. I don't need to invest time rethinking.

4. Faculty members who play to factions of students in the classroom.

Message: Fair play does not matter, even as an aspiration.

5. Faculty members who physically present themselves in class inappropriately.

Message: Personal care and hygiene are optional.

6. Faculty members who make personal remarks in class about particular class members, other faculty members, or staff members. Faculty members who make jokes, remarks, or posit stereotypes that demean or marginalize other human beings.

Message: Power and control allows disregard of the basic tenets of respect for others, or exempts hurtful and callous behavior.

7. Faculty members who treat students of color, students with disabilities, or women differently than majority students in class—failing to call on them in class, deciding not to pursue their responses as the answers of majority students.

Message: Such students are not capable of being held to the same standard of intellectual academic rigor as majority students.

8. Faculty members who pander to the class to be “popular” or to achieve “high numbers” on student evaluations.

Message: It is more important to be liked than to be rigorous.

9. Faculty members who are not publicly accountable for their errors in class or fake knowledge.

Message: Honesty does not matter when you can get away with avoiding it.

IV. THE NEGATIVE HIDDEN CURRICULUM OUTSIDE OF THE CLASSROOM

1. Faculty members who frequent bar nights, get drunk with students, use drugs with students, or attend strip clubs with them.¹⁴

14. This is such a fraught area with drug and alcohol abuse a subject of significant concern in the profession; the “collegial” faculty indulgence with students crosses many lines. In addition, students themselves are sometimes left wondering why faculty members feel the need to participate with students.

Message: Boundaries do not exist; laws are not applicable.

2. Faculty members who become intimately involved or entangled with students.¹⁵

Message: Enmeshing from the power-up position is fine. Boundaries are made to cross.

3. Faculty members who gossip with students about other students, faculty members, or staff members, making students confidants in questions or conversation about the student, student's family or partner, or faculty member's personal life.¹⁶

Message: People with power can say or do what they want with the reputations and feelings of others—and have no responsibility to keep their own counsel.

4. Faculty members who use their positions to manipulate students to further an agenda, pulling students into disputes with administrators or other faculty members.¹⁷

Message: The ends justify the means.

5. Faculty members who undermine staff, sometimes on the impulse to “solve” problems for students rather than demonstrating the appropriate steps available for students to follow, sometimes belittling the abilities of staff to deal with those matters under their orbit of appropriate responsibility.

Message: When I have power, I know best.

6. Faculty members who treat staff, including secretaries, disrespectfully—screaming, berating, belittling, or intimidating them.¹⁸

15. I speak more generally than a “sex-for-grade” exchange, and I do not limit my view to involvement with students in a faculty member's class or for whom the faculty member has some oversight responsibility. I am speaking of intimate relationships with any student.

16. I completely disagree with the AALS Statement of Good Practices that adopts faculty member as “friend” to student. The enmeshing or sharing of “too much information” can occur in the classroom, as when faculty members use their personal problems in class as an excuse or as fodder for class discussion. AALS Statement of Good Practices, *supra* note 5, at 91.

17. For example, faculty members have sneered at the courses taught by other faculty members in areas of the curriculum they do not hold in high regard, or have cited the existence of college policies and made clear they do not support them in (sometimes successful) attempts to enlist their students in a political battle of the faculty member's cause. A faculty member shows contempt for colleagues by screaming at them, making fun of them, or otherwise belittling them with student audiences (including e-mail, committee meetings, and faculty meetings where students are present). Some of this behavior occurs in class, but it is not confined to class.

18. Door slamming, phone slamming, and demeaning or menacing posture are other examples.

Message: Some people are exempt from civil behavior—and those are the people in charge. When I am upset, those with less “status” are appropriate targets for venting.

7. Faculty members who fail to get their final exams written with enough time for careful proofreading, reproduction, and delivery (or uploading) for administration; faculty members who simply use someone else’s exam wholesale; faculty members who fail to take note of the free availability of the exams they are reusing and “answers” in the student population.

Message: When there are no “sanctions,” I can run things so they are most convenient for me. Care for the effects on others is a side issue. Other people exist to adapt to me. Sloppy work does not matter.

8. Faculty members who are unavailable to deal with problems of administration of their exams.

Message: My priorities prevail over your needs.

9. Faculty members who use the names of faculty or students as characters in their exams.

Message: Amusing myself at your expense can be done subtly but effectively.

10. Faculty members who fail to grade their exams in a timely manner. The cost to students and the institution is huge when you procrastinate.¹⁹ A subset of this behavior occurs when faculty members give midterm examinations and do not get them back to the students until after the student evaluations are completed.

Message: Deadlines do not matter. What matters is my convenience, not the consequences to others.

11. Faculty members who promise to provide letters of recommendation to students and fail to do so.

Message: Non-enforceable commitments are not necessarily worth living up to, even when they are critical to someone else.

19. I fear that this is an intractable problem. At the June 2008 AALS New Law Teacher’s Workshop, at least two members of a panel gave a sense of leisurely pacing of reading exams, a pace that in a class of seventy students with three bluebooks per student could result in weeks of reading. The problem of late grades is enormous for students, including students who are not in the affected class. Even more stunning is the number of faculty who give purely multiple-choice exams, another problem in itself, and yet still fail to hand in grades in a timely fashion.

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12. Faculty members who purposefully demean the institution to the students who are in attendance.

Message: When you are privileged to have a seat at the table, you can denigrate the meal. Trashing your professional home is appropriate.

13. Faculty members who refuse outright to take on independent studies, externship supervisions, or other “extra” academic supervision, or who create so many barriers for students that students give up.

Message: Professional “responsibility” is what you can get away with; if you do not agree with the rule, find a way around it. It is someone else’s problem.

14. Faculty members who allow students’ shoddy work to pass through in written projects.

Message: It is “okay” to lower your standard when it saves you work.

15. Faculty members who exploit research assistants either by using their work without any recognition or by employing them to do tasks that are purely personal in nature.

Message: Power permits exploitation and misuse of resources.

The negative hidden curriculum instruction delivered by faculty members through behavior raises another major concern. How can faculty members be relied on to accurately assess the students on their “professional behavior” in a credible way if many of faculty members routinely engage in some of the behavior described above?

For many faculty members, the pressure to be someone other than “who I am” is low. For others, it is just not possible to conform behavior to a narrower spectrum. All of us are experts at avoiding the cognitive dissonance that would result if we actually thought our negative messages through this hidden curriculum were harmful to values and professional development—at least I would like to think so.

V. STAFF MEMBERS: OTHER DELIVERS OF THE NEGATIVE HIDDEN CURRICULUM

Staff members in all areas and at all levels also deliver parts of the negative hidden curriculum in law schools. While they do not stand behind the podium, they have significant and regular interactions with the students and with faculty members within the view and earshot of students. Just as faculty members can deliver the negative hidden curriculum through their interactions with students, staff members do so in their behavior, speech, and presentation.

Here are some examples: staff members who denigrate the faculty in general or specific faculty members to students, staff members who are rude to students,

staff members who fail to provide information students need in a timely manner, staff members who shuttle students from one office to the other, staff members who refuse to take an extra step to assist a student, and staff members who permit students to speak to them disrespectfully or contemptuously.

The negative hidden curriculum is also evident in the behavior of staff members who manifest their disinterest in or hostility to the welfare of the students and the institution through their interactions with students, faculty members, or other staff members. Additional examples of negative hidden curriculum include staff members who flirt with students or offer “inside” information to certain favorites, staff members who indulge in rumor mongering among themselves or with students or faculty, and staff members who withhold information when it is their responsibility to disclose or distribute it in a timely fashion.

VI. DEANS AND THE NEGATIVE HIDDEN CURRICULUM: IT IS ALL *U.S. NEWS* ALL DAY LONG

In talking about delivering the negative hidden curriculum, deans do not get a pass. Ego trips, hypocrisies, and various other decanal behaviors also add to law students’ education. This article will give some negative decanal examples.²⁰ In addition to the direct message of bankrupt professional values through the behavior many deans have either willingly demonstrated or have been “forced” to personify, we also lose credibility to check the negative modeling among faculty members and staff members.²¹

A. *Achieving a Skinny Waist with a Fat Belly: The Transfer Strategy*

Some law deans have crafted, perfected, and perpetuated a strategy of luring students to apply to their law schools to inflate the number of applicants. This strategy allows for a higher selectivity rate for *U.S. News & World Report* law school rankings, as the law school may then reject many of those it lured into applying.²²

20. I am not going to enumerate any decanal activities that fall into the “everyone knows” category but for which there is no actual evidence other than rumors. One example is deans who sanction or encourage false reporting of admission numbers on the American Bar Association questionnaire, and, therefore, on the *U.S. News and World Report* data sheet. Also, I will not address the same with respect to employment of graduates’ numbers (I recall a conversation with a respected staff member at another law school, in which the staff member expressed disbelief at the 100% employment at graduation data supplied for some schools at which this staff member knew, as a matter of fact, many students took jobs as local prosecutors and would not be employed until after passing the bar). In this essay I will only catalogue a few of the behaviors that make deans suspect as leaders of the values or professionalism brigade.

21. This is a strong statement, and I believe that most of us who behave in this way really do not think we are behaving the way we are. Deans are subject to enormous pressures regarding school status. I think we have gone to greater and more public depths in recent years while denying we have done so.

22. Even more shocking, at least one law school purposefully rejected applicants whom it would deeply appreciate to matriculate because they were not likely to accept an offer. By

It is no surprise that deans are driven to enhance the academic credentials of their students, that is, to seek to enroll students with ever-higher Law School Admission Test (“LSAT”) scores and undergraduate grade point averages (“UGPA”).²³ Some institutions have adopted, and some have truly mastered, a strategy of turning down applicants strategically to create a false picture of the institution for *U.S. News* purposes.²⁴ These institutions inflate their academic requirements by rejecting applicants for admission to the first-year class and then later recruiting those same rejected applicants as transfer students.²⁵

U.S. News reports only the LSAT scores and UGPAs of full-time, first-year matriculants at any law school on a set date in the fall semester.²⁶ By shoving students out of the first-year class and luring them back in the second year, some law schools have managed to present themselves as more “elite” than they can actually afford. Dependent on tuition for financial security, like most law schools, these particular law schools “slim down to beef up.” They need, or wish, to maintain an overall enrollment that creates significantly more tuition revenue, but they do so by purposefully inflating upper-division enrollment. Some of these institutions are notorious and engage in the activity shamelessly, appealing to vulnerable students who feel certain they should be at better schools than those they were “forced” to attend because these (hologramatically) elite schools had just “too many qualified” applicants to accept them, but might make

rejecting these “over credentialed” candidates, the law school appeared selective. It was. It purposefully rejected applicants with high academic credentials—for those with weaker credentials.

23. Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Law School Rankings*, 83 IND. L.J. 791, 802 (2008).

24. Jeffrey Evans Stake, *Ranking Methodologies: The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 238 (2006); *Northwestern U. Law School’s Transfer Policy Draws Criticism*, CHRON. HIGHER EDUC., Dec. 31, 2008 <http://chronicle.com/news/article/5727/northwestern-u-law-schools-ransfer-policy-draws-criticisim> (citing American Bar Association Journal). For a recent essay by a practitioner decrying the effect of *U.S. News* rankings on behavior, see Peter Kalis, Opinion, ‘*U.S. News’ List: A Curse*, NAT’L L.J., Dec. 21, 2008, at 19.

A recent report in the *New York Law Journal* cited the dropping enrollment of minority law students and described the view of law school deans that efforts to scramble up the *U.S. News* list are partly to blame. With law schools focusing on quantifiable items as the best way to climb the charts, minority and other deserving candidates with less stellar scores may be left by the wayside.

Id.

25. *See id.* You can envision this as a slice of pie. The law school needs the entire area of the pie slice to be financially secure. It makes the decision to take a narrower area at the center of the pie (a falsely “elite” first-year class) and bulge outward after that to capture the students and tuition. I should also add that these students do not just provide tuition money, but they also can be claimed as faithful and financially supportive graduates—these schools recognized how good they were and leveraged them up to a better school!

26. *See Law Methodology*, U.S. NEWS & WORLD REP., Mar. 26, 2008, <http://www.usnews.com/articles/education/best-graduate-schools/2008/03/26/law-methodology.html>. More on the “full-time first-year” shell game later in this essay.

room for them somehow in the second-year class.²⁷ As a result, these law schools strengthen their financials, their alums have an exaggerated picture of the overall “academic strength” of their alma mater, and the public does not know any better, so who is the wiser? In fact, such schools continually build an essentially deceptive reputation for their selectivity and strength of students.²⁸

While this was a hidden strategy for years, visible only to some, and fiercely denied as a strategy for *U.S. News* rankings by the deans of those law schools employing it, it has now been openly touted at the American Bar Association’s conference for new deans as if it was part of the “Official Dean’s Playbook.” It certainly cannot be denied as a strategic approach, one that has been successful for the first schools to employ it.²⁹ Other deans who could have employed this approach rejected it as wrong. That will show them!

B. We Love Our Part-Time Students and Our Part-Time Program Is an Opportunity for so Many (but if You Count Their Credentials for U.S. News and World Report We Will Be Forced to Kill the Program)

Law schools come in many varieties. Some law schools started as “night schools” that provided access to legal education for people who worked all day but still wanted to get a legal education. Some law schools had or added “night divisions” to their regular programs for similar reasons. It is also true that some state law schools in major metropolitan areas have experienced pressure to open night schools to address the political discontent regarding access to a relatively scarce “resource” for people who hold jobs during the day.

27. One of my most vivid memories as a dean is being confronted by a few 1Ls in the hallway in March or April. They let me know that they were among “fifteen students” that *X* Law School (a notorious performer in this particular reject-but-come-see-us-as-a-2L opera) was taking as transfer students, and by the way, they planned on dropping the required Legal Research and Writing course, because they “wouldn’t get credit for it at *X* Law School.” Therefore, they had no use for it, and oh yes, the fact that *X* Law School didn’t care about it was evidence of the useless nature of this endeavor. I wished them well, in a manner of speaking, but wasn’t able to help them out of their writing courses. I wanted to express two thoughts: first, “the only group of fifteen?” Perhaps the only group of fifteen who had letters addressed to them that day from *X* Law School. Second, I thought with those attitudes, this law school is better off without them.

28. See Stake, *supra* note 24, at 245 (discussing the ability for law schools to improve on criteria used in the ranking while not improving the law program as a whole).

29. See *id.* at 238 (noting there is little benefit to the school other than increasing their ranking). While you used to have to access the confidential ABA data from the annual questionnaires in order to see the transfer information, it is now generally available. See Official Guide to ABA-Approved Law Schools, <http://officialguide.lsac.org/SearchResults/ShowAllSchools.aspx> (last visited Nov. 2, 2008) (follow the link for selected particular law school, then follow the “ABA Law School Data” link). In the past, when asked about the approach, deans of such schools usually did not talk about the strategy to purposefully exclude in the first year and tantalize with a second-year spot, but highlighted the fact that they wanted to make “opportunities” available to such students who could “benefit” from it in their institutions. And lest there be any thought that only the high academic performers are accepted, there is strong empirical evidence that is not necessary at all. This takes us back to the false impression the strategy successfully sells to the public.

There are also law schools that opened “part-time” programs. Some law schools have part-time divisions in which first-year part-time students dwell apart from full-time division students. This is the old model with night programs.³⁰ First-year courses for part-time students were taught separately, and so were many upper-division courses, though in the upper division there might be some mingling of night-division and day-division students in night classes. Law schools can and do open such programs for many reasons, and part-time programs can take many shapes, including part-time programs that essentially take students at, perhaps, one course less than a full-time student.

In the continuing drive to hone the credentials measured by *U.S. News*, some interesting things have happened. Schools that did not have part-time programs created them, and the lines between being a part-time student and a full-time student started to differ from the old days of night school.³¹ Without working through all the permutations, a pattern of sorts began to appear.³²

Law schools place students with “weaker” *U.S. News* credentials in the part-time programs.³³ That is not to say every part-time student has weaker credentials than every full-time student, but it happens, and it happens frequently. There was a trend to “blend” these students with full-time students in courses.³⁴ In some schools it might be difficult to differentiate the full-time from the part-time students, and in some law schools, part-time students “caught up” with the full-time students.³⁵

In the *U.S. News* rankings, 1L full-time matriculants’ LSAT scores and cumulative UGPAs are very significant factors.³⁶ The part-time 1Ls’ credentials do not count at all.³⁷ If a law school has part-time matriculants in the 1L class, they get a “*U.S. News* hall pass” from counting the credentials of those students.³⁸ Further, the school gets to define part-time.³⁹

The reason the change in part-time programs is part of the unprofessional hidden curriculum is because it is a highly visible “ploy” to retain tuition revenue while improving *U.S. News*-worthy credentials by admitting students who have

30. See Morse Code, <http://www.usnews.com/blogs/college-rankings-blog/2008/6/26/changing-the-law-school-ranking-formula.html> (June 26, 2008, 16:46 EST) (discussing that part-time programs were viewed as “truly separate” programs and noting “[t]hat no longer appears to be the case at many law schools”) (last visited Nov. 2, 2008).

31. See Posting of William Henderson to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2008/07/effect-of-of-th.html (July 14, 2008, 12:06 EST).

32. Amir Efrati, *Law School Rankings Reviewed to Deter ‘Gaming’*, WALL ST. J., Aug. 26, 2008, at A1.

33. *Id.* at A1.

34. See Western New England College School of Law, Academics, Programs, <http://www1.law.wnec.edu/prospective/index.cfm?selection=doc.324> (last visited Nov. 2, 2008).

35. Efrati, *supra* note 32, at A1.

36. See *Law Methodology*, *supra* note 26.

37. Efrati, *supra* note 32, at A1.

38. *Id.*

39. After learning about the ways in which deans were taking this approach, I suggested that the best way to do this was to get one full-time student with a 4.0 gpa and an over-the-top LSAT, and admit everyone else as “part-time.”

less-stellar academic credentials that do not count into a law school under a part-time label that disappears.⁴⁰

If you do not agree that such a manipulation is a part of the unprofessional hidden curriculum created and fostered by deans and an indication of why we deans should mistrust ourselves as the source of professionalism or value curricular reform, perhaps the reaction of deans to the possibility that *U.S. News* might change its calculations and INCLUDE part-time students in computing the 1L entering credentials will provide some additional perspective. When *U.S. News* suggested it was considering making this “adjustment,” the ABA Deans’ listserv was alive with commentary.⁴¹ Law school deans expressed a variety of views, and those views were not confined to the Deans’ listserv. They appeared in newspaper articles as well.⁴²

One contradiction caught my attention as relevant to the question of values and professional education:⁴³ while defending their part-time programs’ existence as, in some cases, important for immigrants, civil servants, people who need to work, mothers, and many other categories of people who might, I suppose, actually benefit from some, but certainly not all, of the part-time programs, the deans were not going to “save” those programs. It appeared they were going to “have” to discontinue the part-time programs because including the part-time students with the full-time students would have a depressing effect on their *U.S. News* rankings.⁴⁴ How credible are we as leaders of “professional values”

40. Professor William Henderson produced a presentation on this matter which he gave at the Southeastern Association of Law Schools (“SEALS”) Conference in July 2008. The presentation was entitled “The Part-time Loophole and Our Credibility as Lawyers and Educators.” In my view, the empirical data he presented firmly supports the facts in this text: law schools are using part-time programs to retain tuition revenue while inflating the credentials they report to *U.S. News*. I appreciate Professor Henderson for sharing the presentation with me and for conversation about the part-time program issue.

41. The ABA Deans Listserv is hosted by the American Bar Association and participation is limited to the Dean at each ABA-accredited law school. The kinds of communications posted by such deans may be the subject of another essay.

42. See, e.g., Efrati, *supra* note 32, at A1.

43. Or in Professor Henderson’s term, “credibility.”

44. The following e-mail, written by the dean of a law school to the ABA Deans listserv but never sent, provides a satiric but genuine reflection of the state of the matter of the “abuse” of part-time programs. The e-mail was composed after several days of hand wringing on the listserv about Robert Morse’s statement that *U.S. News* was considering combining the entering credentials for all first year students at each law school. I have the author’s permission to reproduce the e-mail, but for some reason, this dean would only permit this if the dean’s name and institution were deleted.

Dear all,

Thanks for the discussion the last couple of days.

I think I missed the early part of the discussion—I did not see the strong argument for excluding some first-year students because of the division to which they are initially admitted. I can understand an argument that part-time students should be blended with full-time students, or the argument that they should be calculated as a separate group, but the strong reason for excluding them altogether has not been too clear.

In any admissions season there are lots of folks admitted who schools would not like to report, or for whom there is some kind of claim or another for being special. But, the fact that someone is in a full-time or part-time program does not in and of itself stand as a reason to

curriculum when we engage in this kind of public charade?⁴⁵ Let's add to this the number of schools that for years signed on to a letter, sent to all law school applicants, which told them not to rely on *U.S. News* rankings while the same deans used those rankings, when they were beneficial to their institution, in the literature they sent to alums, students, applicants, and even their fellow deans.⁴⁶

Those who live by the rankings tend to also be rankled by them. In 2008, the e-mails that some law school deans sent to their students in response to a "fall" in their school's rankings became public when student recipients posted them on various law-related blogs.⁴⁷ It is not surprising that *U.S. News* rankings distract us, but should it be to the point where we have to explain to students what we are doing to fix the rankings in e-mails? Is that what it comes down to? And if it does, what does that say about our academic leadership if we are supposed to improve professional-values curriculum?

C. *A Recent Development—Special Programs*⁴⁸

Our decanal ingenuity knows no bounds. In late September 2008, the legal blog world came alive with the news that a major law school at a respected university had announced a new program for selected individuals for admission

count one and not count the other. If somebody wants to exclude older or diversity or any other group (not that it is a good idea), why not do it categorically rather than by division?

For that matter, why should they be excluded only by schools with part-time programs? Should they, but only they, not have to count non-traditional students (or others with low scores the school does not want to count as "real" students)? Perhaps those schools without actual part-time divisions should be permitted to have "constructive" part-time programs so that they can admit these students.

The fact, of course, that US News counts a student is hardly a reason to admit or not admit the student. The strong statements of commitment to part-time legal education (a view I share) are touching. They ring a little hollow, however, when coupled with the suggestion that the schools who value these part-time students so much might have to quit admitting some of them if they had to count them for US News. Has it really fallen to this?

45. These part-time students do get the same law degree as the full-time students. So the law schools are not ashamed to graduate them with their degree. Why should they kill their programs rather than "count" their credentials?

46. Brian Leiter's Law School Reports, <http://leiterlawschool.typepad.com/leiter/2008/03/hall-of-shame-s.html> (Mar. 31, 2008). One decanal colleague reads these and has a "wall of shame" for deans who signed on to the letter and then plastered whatever good *U.S. News* number they had all over the place. The letter is no longer sent or posted.

47. See, e.g., Letter from Dennis O. Lynch, Dean, Univ. of Miami Sch. of Law, to Students of the University of Miami School of Law (on file with The University of Toledo Law Review), available at http://www.discourse.net/archives/docs/Deans_Letter.pdf. This letter was posted at http://abovethelaw.com/2008/03/the_us_news_rankings_more_wail.php#more. My source for these e-mails was the Above the Law blog, <http://abovethelaw.com> (last visited Dec. 22, 2008), during the days following the release of the *U.S. News* Law School rankings in late March 2008.

48. Here is the only advantage of being late with this essay. It allowed me to be engaged in writing when the Wolverine Scholars Program hit the "press." Though I did not want to identify the university by name, the program's title and the many articles discussing the program made identification unavoidable. I see this program as the first step in the direction suggested by the author of the unsent e-mail reproduced in *supra* note 44. Instead of a "constructive" part-time program, we can create a "constructive" credentials program.

to their law school.⁴⁹ The law school limited the program to undergraduate students at the university. Those students applying through the program must have completed at least their junior year and have a specific grade point average—a grade point average that, if enough students were enrolled under this program, could give a positive bounce to *U.S. News* numbers for the school. There was one other condition: *no one would be considered for the program if they took the LSAT*. In other words, by not permitting applicants to have an LSAT score, the law school would not have to report it or figure it in the data used by *U.S. News*. Instead, it would have more people with a very high UGPA to include in that data. Students accepted under this program would be required to graduate with at least the high average they had when accepted as a prerequisite for admission.⁵⁰

Whatever the intent, some deans, legal academics, and commentators⁵¹ saw this as an attempt to manipulate the data by avoiding having data to report, particularly in light of the accreditation standards by which all law schools must live if they wish to retain accreditation by the ABA—and they all do. Those standards⁵² call for a valid and reliable admission test, though law schools may weigh the test results as is appropriate for their program.⁵³ For law schools, that test is presumptively the LSAT. Structuring a program on the condition that the test not be taken rather than giving it little weight, or allowing someone to take it for the sheer hell of it, raised eyebrows, particularly because some law schools had unsuccessfully requested ABA variances to not count LSATs for defined admission programs.⁵⁴

49. Wolverine Scholars Program, <http://www.law.umich.edu/prospectivestudents/admissions/applyingtomichigan/Pages/WolverineScholars.aspx>. See also Debra Cassens Weiss, *No LSAT Allowed in Michigan Law School's Special Admissions Program*, ABA J.L. NEWS NOW, Sept. 25, 2008, http://abajournal.com/weekly/no_lsats_allowed_in_michigan_law_schools_special_admissions_program.

50. Wolverine Scholars Program, *supra* note 48.

51. See Karen Sloan, *U. of Michigan Will Let Select Students Skip the LSAT*, LAW.COM, Sept. 26, 2008, <http://www.law.com/jsp/article.jsp?id=1202424823169>; Weiss, *supra* note 48.

52. While not requiring the LSAT, ABA standard 503 states:

A law school shall require each applicant for admission as a first year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's educational program. In making admissions decisions, a law school shall use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.

ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS stand. 503 (2008). Interpretation 503-1 states:

A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish that such other test is a valid and reliable test to assist the school in assessing an applicant's capability to satisfactorily complete the school's educational program.

Id. interpret. 503-1.

53. *Id.* interpret. 503-2.

54. At least two law schools made such requests of the ABA and were denied a variance. The school that publicized the "new program" had not requested a variance. The information on the

VII. CONCLUSION

As deans, we live in an environment where professional leadership is difficult,⁵⁵ particularly if we are faced with behavior that cannot assist in building professional values with our students. But the depth of the problem goes far beyond the negative modeling some faculty and staff members demonstrate.

status of such a variance request was permitted by the dean of the law school with the special program to be released to deans of other schools who had seen the “press” on the program, read the details on the law school’s website, and then asked for an explanation from the ABA Consultant on Legal Education.

The following e-mail came to the Deans of American Bar Association Accredited Law Schools from one of my decanal colleagues. I have permission to use it. While the author allowed me to identify the school and to use the dean’s name, I have not. The e-mail rather directly asks this question: are the ABA standards what we are to follow, and if not, why do some of us feel constrained by them?

Dear All—Our ... Law School Foundation Board was here this weekend and its members were intrigued by the news of the no-LSAT ... program the University of Michigan Law School. I would like to know more myself. Accreditation Standard 503 states that “A law school shall require each applicant for admission as a first year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant’s capability of satisfactorily completing the school’s educational program.”

There is no specific mention of the LSAT in the standard and one of the interpretations says that a law school using something other than the LSAT “shall establish that such other test is a valid and reliable test to assist the school in assessing an applicant’s capability to satisfactorily complete the school’s educational program.”

This language suggests to me that there are other law schools using tests other than the LSAT. I am wondering if you would be willing to share what tests those are and how these tests work in predicting completion of law school. Are there significant costs in validating these other tests? There may be some interesting reasons for deviation from the LSAT and I am wondering what some of the reasons are and how the appropriate alternative test is chosen.

A curious colleague.

55. In the packet of materials sent to a variety of people, including deans of ABA-approved law schools, by the Consultant on Legal Education, Hulett H. Askew, on August 22, 2008, was a proposed deletion of Interpretations 402-1 and 402-2 of the *ABA Standards for the Approval of Law Schools*. Those interpretations were attempts to qualify how individuals “counted” for determining whether Standard 402 ‘Size of Full-Time Faculty’ was met. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 52, interprets. 402-1, 402-2. In providing the analysis and background that led to the proposal from the Standards Review Committee to the Council on Legal Education, the following text appears:

Why do these fairly subtle distinctions matter so much to schools? Often the impact on the student-faculty ratio of answering one of these questions one way instead of another seems relatively minor. But schools think it matters a great deal because the student-faculty ratio is one data point in the *U.S. News* rankings over which schools feel they can exercise some control. As a result, the Questionnaire Committee has spent huge amounts of time tweaking the questions that are used to collect data for the student-faculty ratio to try to insure that the data collected is comparable across schools. It continually finds new loopholes that some schools have chosen to exploit to try to improve their ratio, driven by the desire to improve their rankings.

Id.

In a time before I became a dean, I wrote an essay entitled *Enron, Arthur Anderson, U.S. News and Me*. It never saw the light of day, but in it I noted the ways in which the pressure for “short term” results can drive people who think of themselves as honest and ethical to behave in a manner that is neither and is corrosive of the values they are entrusted and relied on to uphold. I worried what it would do to me as I became a dean. That was over six years ago, and the current climate calling for greater leadership in curricular reform to ensure values infused with professionalism is problematic. The existing behaviors we see in ourselves and each other make it difficult to have confidence we could lead that reform, even if we truly believed in it.⁵⁶

56. These are just a few examples from decanal behaviors. An entire essay could be devoted to other examples. We also raise tuition while noting we care deeply about student-debt burdens and spending money on expensive mass mailings to thousands of people who will throw the glossy brochures directly in the trash. We can easily pass on the “dirty work” of the *U.S. News* hysteria to staff who feel obliged to make happen however they can the goals the dean sets forth. We can admit students who have little or no real opportunity to achieve success on a bar exam. It is a long list, and it is not a secret one to those in our institutions. These are just some of the problems some of us have. For a thoughtful, wider, and insightful examination of these issues and others, see generally Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67 (2008). Dean Matasar’s article provides a more rigorous philosophical context than I attempt and develops a thesis that moves the current legal academic institutional model, which begins with “Faculty-Centered Enterprise,” to a Trust Model with fiduciary responsibilities at the forefront.