Rhetoric and Reality in the ABA Standards

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Language creates the reality it describes.[1]

—Desmond Tutu, *Excerpt from Bill Moyers' Conversation with Archbishop Tutu*, Apr. 27, 1999, PBS (Dec. 28, 2007)

The language of the American Bar Association (ABA) Standards governing the approval of law schools reflects and creates "how things are" in legal education. Looking at the language of the ABA Standards on faculty and curricula, it's clear that the Standards reflect and create hierarchy. Nothing demonstrates this as well as the former Interpretation 402-1, which declared that only a tenure-track faculty member would count as "one" full faculty member while "additional teaching resources" would be counted as "less than one."[2]

What set of beliefs and values could justify explicit subordination of some categories of law school professors based on the subject matter of their courses or the method of their teaching? For that matter, what beliefs and values could justify the implicit devaluation found elsewhere in the Standards of clinical and legal writing courses? Nowhere in the Standards or their legislative history are these beliefs and values set forth. They appear to go without saying, rationales unstated, assumptions unexplained.

Equally clear from rhetorical analysis of the language of the Standards is that they reflect and reinforce a set of ideological commitments. As an example, let's focus on the Standards' confluence with neoliberal philosophy.

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1. Desmond Tutu, *Excerpt from Bill Moyers' Conversation with Archbishop Tutu*, Apr. 27, 1999, PBS (Dec. 28, 2007), http://www.pbs.org/moyers/journal/12282007/transcript2.html [https://perma.cc/BV79-CQEE].

2. Some legal writing and clinical professors benefited from the interpretation because it encouraged law schools to put these professors on the tenure track so they could be counted as "one." The provision was removed in 2014. *See* Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar, *Explanation of Changes from 2014 Comprehensive Review of the Standards*, Am. B. Ass'n, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201408_explanation_changes.pdf [https://perma.cc/SJL6-NE57].

In the neoliberal view, the meritorious rise to the top. Those at the top are by definition deserving, and no further explanation or justification need be offered. If, on the other hand, individuals or groups occupy a lower rung, or could be considered outsiders or outliers, even well-documented arguments may be insufficient to justify their worth.[3]

If we confronted similar circumstances outside the law school setting, we would critique the resulting regulatory system. Based on largely hidden and therefore unexamined assumptions, it makes subordination natural and inevitable. Faced with similar conclusions elsewhere, we would demand full protections and equal rights for those in the resulting marginalized categories.

As law professors committed to equal justice and full citizenship throughout society, we have an obligation to do no less at home. Timely amendment of the ABA Standards appears unlikely. As a result, the policy statement published in this issue of the *Journal of Legal Education* and setting forth "best practices" for protecting the rights of those with Standard 405(c) status[4] provides one of our most powerful options, serving as an essential bridge for individual law faculties and law schools motivated to equalize protections and rights themselves.

This brief rhetorical analysis grows out of the work of Sonja Foss and other contemporary rhetoricians who sought to uncover ideological commitments through analysis of rhetorical structures, strategies, and language uses. As Foss notes, to remain dominant, governing ideological commitments "must be constructed, renewed, reinforced, and defended continually through the use of rhetorical strategies and practices."[5] When the project is successful, the "dominant ideology controls what participants see as natural or obvious by establishing the norm. . . . [and] provides a sense that things are the way they have to be as it asserts that its meanings are the real, natural ones."[6]

How do the ABA Standards accomplish this? The Standards combine the rhetorical structure of hierarchical categories (dividing law faculty and curricula along subject matter lines, which results in analogous divisions along the lines of teaching methods) with the rhetorical strategy of assuming the conclusion (supporting the privileges accorded to *what everyone already knows*, no explanation needed) and supporting language choices (establishing traditional prototypes of *faculty* and "*substantive" law* and labeling everybody and

3. *See, e.g.*, Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, Law & Contemp. Probs., no. 4, 2014, at 71 (2015) (Neoliberalism "*redefines* equality as equal choice (or equal amounts of entrepreneurial liberty) and places any failures in that arena firmly with the individual. One's choices are restricted by one's own merit and by one's prior choices, not by systemic or structural inequalities."). *Id*. at 93.

4. *See* Melissa Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. Legal Educ. 538 (2017); Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017, at 29 (2016) [hereinafter 2016–17 ABA Standards].

5. Sonja K. Foss, Rhetorical Criticism: Exploration & Practice 210 (4th ed. 2009).

6. *Id*.

everything else as *others*). Together, these structures, strategies, and language choices ensure that no one will mistake the faculty and courses that constitute the "norm" of legal education, further propping up their legitimacy.

To begin with Chapter 4, Standard 401 establishes a minimum standard for faculty qualifications: "A law school shall have a faculty whose qualifications and experience enable the law school to operate in compliance with the Standards and carry out its program of legal education."[7] In order to meet that standard, "[t]he faculty shall possess a *high degree of competence*, as demonstrated by *academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship*."[8] Consistent with the rhetorical strategy of assuming the conclusion, nothing more than this is necessary because ABA site team inspectors are the kind of experts—primarily other law school faculty members—who already know what *everybody knows* about what constitutes a competent faculty.[9]

When it comes to protecting job security and academic freedom, Standard 405(a) requires law schools to "establish and maintain conditions adequate to attract and retain a competent faculty."[10] Standard 405(b) specifies that a law school must "have an established and announced policy with respect to academic freedom and tenure."[11] Read together, these Standards might be construed to mandate a uniform policy of academic freedom and tenure for all of a law school's faculty members.

But that is not the reading the Standards support. By establishing additional and lesser categories, the ABA lets us know that the requirement of an established and announced policy on academic freedom and tenure applies only to the category of faculty members whose membership need not be delineated because it is a category that *everybody already knows*—those who, by tradition, have been hired on the tenure track. By conveying the impression that this understanding is so widely shared that it need not be stated, the rhetorical choice reinforces the remarkable assumption that all other faculty members are so different that they require at least three additional categories.[12]

That the resulting categories reflect and create hierarchy is demonstrated first by the ABA's confidence that everyone will understand who is entitled to protection of their academic freedom through tenure. Moreover, not only

7. 2016–17 ABA Standards, *supra* note 4, at 27.

8. *Id.* When italics are used within quotations from the Standards, the emphasis has been added.

9. For confirmation that everybody knows the characteristics most in demand when hiring law school faculty members, *see, e.g.,* Fabio Arcila, Jr., *How to Become a Law School Professor,* SSRN (Dec. 13, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376549.

10. 2016–17 ABA Standards, *supra* note 4, at 29.

11. *Id.*

12. The categories include tenure-track faculty (405(b)); clinical faculty (405(c)); legal writing faculty (405(d)); and short-term clinical and legal writing faculty in some circumstances (405(c) & Interpretation 405–9). *Id.* at 29–30.

is it unnecessary to label or describe the category accorded such fundamental protection, it is unnecessary as well to define, describe, or detail what this essential policy must contain. The Standards say only that there must be a "policy with respect to academic freedom and tenure" and that it must be established and announced.

Through their language, the Standards reveal and enforce consensus: The protections and rights bestowed on those who fall within the top level of the hierarchy accrue so naturally that they need not be spelled out. As we descend in the hierarchy, more detailed descriptions will inevitably become necessary in order to assure less protection. For full-time clinical faculty members, it is sufficient for law schools to provide "reasonably similar" protections and rights.[13] For legal writing faculty, law schools need only offer the protections and rights that "may be necessary" to attract and retain a qualified faculty and "safeguard academic freedom."[14] In both instances, unlike the rights and protections that attach automatically and without question to the top tier, the ABA confirms the lesser status of the rights and protections afforded to the lesser categories by describing in some detail the least that law schools must do.[15]

Linking faculty status with the privileges accorded to the courses they teach, the ABA Standards maintain curricular hierarchies as well. In Chapter 3, curricular requirements are spelled out. Until the adoption of "learning outcomes" in 2014, the curricular requirements began with this one: "(a) A law school shall require that each student receive substantial instruction in: (1) the *substantive law generally regarded as necessary* to effective and responsible participation in the legal profession."[16] Mirroring the implicit message that norms need little explanation (and no regulation), the Standards ventured neither a definition of what constitutes "substantive" law nor a description of what courses are generally regarded as necessary.

Because they set the "standards for approval of law schools," we assume a connection between the Standards and the goal of assuring that law schools provide effective and appropriate legal education. Moreover, because the Standards establish norms, they suggest a real, natural, and obvious connection between merit and "normal" faculty and between quality and "normal" courses.

Beyond this network of implied associations, Chapter 4 explicitly names who's in and who's out. Faculty at the top are referred to simply as "faculty,"

13. *Id.* at 29 (Standard 405(c)).

14. *Id.* (Standard 405(d)).

15. *Id.* at 29-30 (Interpretations 405-3, 405-6, 405-7, 405-8).

16. Am. Bar Ass'n, Section of Legal Educ. and Admissions to the Bar, ABA Standards and Rules of Procedure for Approval of Law Schools 2013–2014, at 21 (2013). In place of the language cited in the text, the amended Standard 302 mandates that a law school establish learning outcomes that include competency in "[k]nowledge and understanding of substantive and procedural law." 2016–17 ABA Standards, *supra* note 4, at 15.

while those who fall into the lesser categories are known either as "clinical faculty members" or "legal writing teachers." (The ABA recently discarded even more explicitly hierarchical labels once attached to those who teach legal writing: "instructors" and "other teaching resources.") As always, language choices matter: Labels like these make the resulting categories appear to be "found, not made," preexisting and warranted, not created and perpetuated by the Standards themselves.

Throughout the legislative-regulatory process that shaped the ABA Standards governing law schools, the authors responded from time to time to arguments against hierarchies and to other dissenting voices. They recognized first clinical and then legal writing professors as deserving of protection for academic freedom and some form of job security. And although I have elsewhere concluded that the rhetorical effects of the detailed descriptions included in Standard 405(c) appear to reinforce the hierarchical nature of the created categories, I recognize that provisions spelling out what constitutes *reasonably similar* protections for clinical professors might in fact be used to assure the kind of "substantive equality" necessary to account for and protect genuine differences among different kinds of faculty.[17]

Still, the rhetoric of Chapters 3 and 4 of the ABA Standards creates, maintains, and perpetuates hierarchies. Those hierarchies subordinate some categories of faculty members and the courses they teach. Without change in the Standards or their implementation, these hierarchies will remain, and the values and norms of traditionally privileged faculty and subject matters will become even more firmly embedded as representing the best of the legal academy. By adopting the 405(c) "best practices" policy statement,[18] individual law schools and law faculties take upon themselves the power to demonstrate that the ABA Standards are the floor, not the ceiling, and that legal education's essential values and norms include robust protection of job security and academic freedom for all law professors.

17. Linda L. Berger, *When Less is More: An Ideological Rhetorical Analysis of Selected ABA Standards on Curricula and Faculty*, *in* The Doctrine/Skills Divide: Legal Education's Self-Inflicted Wound (Linda H. Edwards ed., forthcoming August 2017).

18. Weresh, *supra* note 4.