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Recommended Citation

Berger, Linda L., "When Less is More: An Ideological Rhetorical Analysis of Selected ABA Standards on Curricula and Faculty" (2017). *Scholarly Works*. 1065.

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When Less is More: An Ideological Rhetorical Analysis of Selected ABA Standards on Curricula and Faculty

Linda L. Berger*

Chapter 9 [excerpts only]

Rhetoric's Critique

THE DOCTRINE/SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND

(Linda H. Edwards ed., Carolina Academic Press 2017)

<http://www.cap-press.com/books/isbn/9781611636130/The-Doctrine-Skills-Divide>

Editors' Note:

This section of the book examines some of the negative entailments of our choice to segregate doctrine and skills teaching. Chapter 9 provides a rhetorical critique of the doctrine/skills divide and the ironic consequences of our response.

Sometimes a single phrase conveys the essence of a complex question. When it adopted Interpretation 402-1—written to help evaluators determine whether law schools were complying with its Standards on faculty-student ratio—the American Bar Association (ABA) decided that only tenure-track faculty members should count as “one” full faculty member while “additional teaching resources” would be counted as “less than one.” More specifically, the ABA authors wrote, “clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load” would be counted as seven-tenths of one full faculty member.¹

The tone deafness of this proposition (reminiscent of the Constitution's equation for counting slaves as three-fifths of one free citizen) was matched by its irony. Because they would be counted as “one” if they were converted to tenure-track positions, the Interpretation was helpful to clinicians and legal writing professors. Despite the harmful impression left by the offensive measure, the ironic reality was that the seven-tenths ratio encouraged law schools to add more clinicians and legal writing professors to the tenure track.

This example sets the stage for this chapter's ideological rhetorical analysis of the ABA standards on faculty and curricula. As the following analysis will demonstrate,

* Thank you to Linda Edwards, Melissa Weresh, and Richard Neumann for discussing the concepts in this chapter with me; the mistakes that remain are mine. Thank you to Andrea Orwoll for research assistance.

¹ American Bar Association, Section of Legal Education and Admissions to the Bar, Standards for Approval of Law Schools (as of July 2014). After years of study, a number of revisions, many of them technical, were approved in August 2014. See ABA, REVISED AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS, August 2014 (*available at* http://www.americanbar.org/groups/legal_education/resources/standards.html).

when we examine an historical text for its ideological implications, it is often difficult to distinguish between situations in which the text reflected implicit ideological commitments and those where the text explicitly created and perpetuated them. In most cases, rhetorical critics conclude, the historical text has contributed in all three ways to the further entrenchment of a dominant ideology. For the purposes of this analysis, what's most important about the seven-tenths standard is that it appeared to embody an underlying set of beliefs and values that rationalized the subordination of some classes of law school professors based on the subject matter of their courses or the method of their teaching. For ABA reporting purposes, these professors actually were counted as seven-tenths rather than as "one" full professor. More powerful than that concrete result was the lasting image: professors who specialized in clinical or legal writing teaching were not *fully* citizens of the legal academy. In the language of the ABA Standards, torts professors were recognized as "faculty members" (a group of people), while clinical and legal writing professors were considered "teaching resources" along with computers and books in the library.

There was no claim that these professors were not carrying a full teaching load, or that they were not carrying their fair share of working with and counseling students, or that they were not performing sufficient community or public service. So the lack of full citizenship apparently was based on the lack of some other mark or merit among these professors. Although no clear legislative history exists, many observers believed the interpretation was the result of the largely implicit assumption that clinical and legal writing professors would not be engaged in scholarship (in part because their teaching loads were heavier than those of tenure-track professors) and so they should not count the same as "one" full faculty member. This assumption was supported by pervasive and powerful ideological commitments, including a commitment to the value of theoretical legal scholarship as by far the most important part of the professor's contributions to legal education.

This chapter will undertake an ideological rhetorical analysis of several key provisions of Chapters 3 and 4 of the ABA Standards, specifically, the interrelated provisions that regulate the curriculum and specify the required conditions of employment for the faculty of a law school. Many amendments have been made to those chapters over the years, and in order to work with a non-moving target, this analysis will focus on the version that was current as of July 2014, several years into the recognition that the legal profession was changing and that legal education needed to reflect some of those changes.

I. The process of ideological rhetorical analysis

Ideologies are patterns or systems of beliefs, concepts, attitudes, values, and assumptions. Members of a group use these patterns and systems to understand the world

around them. When we buy into the resulting blueprints and networks, our commitments to them serve three major purposes.²

First, ideological commitments serve an “integrating” function. The influential symbols and images we create and maintain help us to forge individual and group identities and to integrate or constitute our understanding of the world consistent with those identities. Second, by filling in gaps in our reasoning with the glue provided by shared networks, ideological commitments “legitimate” existing authority and make the current state of things seem natural and inevitable. Third, as a result of the integrating and legitimating functions, our commitments to particular ideological systems “distort” reality because they suppress the complexity of real-world situations. Through the process of creating individual and group identities and legitimizing our resulting perceptions of how things work, we view problems and challenges through a filter. As these problems and challenges lose complexity and dimension, they become easier to understand and to resolve.³

An ideological rhetorical analysis allows the critic to examine the underlying systems of beliefs and values that have influenced the creation, interpretation, and revision of a rhetorical artifact or document: in this case, selected provisions of the ABA Standards. More specifically, the ideologically-based rhetorical analysis is aimed at discerning what beliefs and values were viewed as most important (or most privileged) by the authors of the document being studied.⁴ This is important because the privileged ideology gains the “symbolic power to map or classify the world for others.” Used as a filter or a frame, the “dominant ideology controls what participants see as natural or obvious by establishing the norm. . . . A [governing] ideology provides a sense that things are the way they have to be as it asserts that its meanings are the real, natural ones.”⁵

To maintain its position, that is, to remain dominant, Sonja Foss writes that “a [governing] ideology must be constructed, renewed, reinforced, and defended continually through the use of rhetorical strategies and practices.” In addition to uncovering the ideologies that dominate, the analysis can bring to the surface some of the rhetorical techniques through which “resistance” to the dominant ideology is “muted.” For example, questions about why certain classes of people are not paid equally with other classes of people can be muted or suppressed by depicting those classes as lacking in the qualifications relevant to the established norm.

² Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 142-45 (2001) (relying on PAUL RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA (1986)).

³ As applied to the law school setting, Philip Kissam wrote that “[i]deology is most important when it serves existing authority, law school faculties for example, by constructing identities that resonate with this authority, by helping to legitimate the authority, and by disguising or distorting aspects of reality that might be used to criticize existing authority.” *Id.* at 145.

⁴ When it comes to a rhetorical artifact such as the ABA Standards, there is obviously no single author. My use of the term *author* is intended to refer to the authorship of the Standards by various actors over time.

⁵ SONJA K. FOSS, RHETORICAL CRITICISM: EXPLANATION AND PRACTICE 295 (Waveland Press 3d ed. 2004).

What follows in this chapter is a very abbreviated application of Sonja Foss's classic approach to ideological criticism combined with some aspects of Stuart Hall's theory of ideology.⁶ It is designed to offer the beginnings of an "analysis that goes beyond appearances and examines the underlying constraints and determinants of the discourse."⁷ The chapter will follow the Foss approach, using these steps: first, identifying the presented elements of the artifact (topics regulated by the Standards); next, identifying the suggested elements (references, themes, allusions, and allied concepts suggested by or linked with the presented elements); third, formulating the underlying ideology (grouping suggested elements into categories and frameworks); and finally, identifying the functions served by the ideology.

Under Foss's approach, "[t]he primary components of an ideology are evaluative beliefs—beliefs about which there are possible alternative judgments."⁸ Working in tandem, Hall's approach is aimed at revealing the existence of alternatives by bringing attention to assumed connections and disturbing them.

From Hall's perspective, the ideological moment occurs when *everybody knows* what something is without needing any further explanation. Our acceptance of such underlying concepts and relationships is usually unconscious, but that lack of conscious acceptance only reinforces the illusion that what we know is natural and inevitable. According to Hall, ideology pervades our mental frameworks through the concept of "articulation," the system of connections that makes it appear that two different elements are unified. By conjuring up one association over another, a collection of coordinated meanings can be invoked, overwhelming alternative conceptions and reinforcing the meanings attributed by the associations.

Conclusion

This analysis of selected ABA Standards regulating curricula and faculty supports Sonja Foss's conclusion that 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."⁹ Like feminist and other critical theories, ideological rhetorical criticism aims to uncouple connections and uncover embedded structures of authority. This is accomplished by examining what we assume to be or implicitly accept as necessary connections between and among the rhetorical elements and various systems and networks of beliefs. Equally important, by illustrating how ideological commitments shape our ability to listen to and

⁶ Anne Makus, *Stuart Hall's Theory of Ideology: A Frame for Rhetorical Criticism*, 54 WESTERN J. OF SPEECH COMM. 495, 495-507 (1990).

⁷ *Id.*

⁸ FOSS, *supra* note 5, at 239.

⁹ Foss, *supra* note 5, at 242.

respond to others, the rhetorical critic hopes to foster more productive conversations about the future.

In other words, because the primary goal of rhetorical criticism is to unveil the dominant ideologies and describe the functions they serve, the act of disarming the connections is the desired result. When implicit and unnecessary connections are severed, alternatives become more possible and more open for discussion, even if achieving them is not easily accomplished. For example, one promising alternative to the current ABA Standards—“drafted along functional lines based on the policies to be fostered rather than by establishing categories of faculty and setting out precise rules related to those categories”—was described, but not recommended, in a report issued in 2008 by the Special Committee on Security of Position appointed by the Section Chair.¹⁰ The authors recognized that an alternative might avoid “the current appearance of inequity” as the “present rules accord different treatment to different faculty positions without any clearly stated reasons for the distinctions.” Yet the report emphasized that it was only because distinctive rules had been established for faculty outside the traditional tenure track that it had become “possible to force some schools to move forward in their skills programs.”

Some progress has been made to better integrate expectations and requirements and to provide reduced support for hierarchical frameworks. In August 2014, the ABA House approved major revisions in the Standards, concluding a lengthy process undertaken as the number of law applicants dropped and critiques of legal education increased. Among those revisions was the elimination of the seventh-tenths ratio.

In addition, the amendments imposed a new graduation requirement of six credits of coursework that is “primarily experiential in nature.” Under the new standard, the experiential coursework must integrate doctrine, skills, and ethics; engage students in performance of professional skills; develop the concepts underlying the professional skills being taught; provide multiple opportunities for performance; and provide opportunities for self-evaluation.

Few legal educators would argue with that utopian description. However, while “substantive” courses (again using the category established by the ABA Standards) may include experiential learning elements, the new experiential requirement explicitly states that simulation, law clinic, and field placement courses are the only ones that will *count*.

Is this success or failure? If you approach the new requirement with the same ironic sensibility we used to argue that the seven-tenths standard was good for clinical and legal writing professors, the new requirement looks like success: more students will have more opportunities for experiential learning; more clinical and legal writing professors might be hired to teach those courses; and a few more might even be

¹⁰ See Report of the Special Committee on Security of Position, May 5, 2008 (available at http://www.americanbar.org/groups/legal_education/committees/standards_review/comp_rev_ew_archive/special_committee_reports.html).

converted to tenure-track positions because of the higher value now being placed on experiential coursework.

But for those who are wary of unanticipated consequences—for those who worry about creating, reflecting, and maintaining hierarchy—and for those who are inclined to work to dismantle insupportable dichotomies in legal education today—the perspective is different. For them, even if the new requirement looks like success, it is a success that should be open to questioning.