

PREFACE

TEACHING VOLUNTARY CODES AND STANDARDS TO LAW STUDENTS

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Lawyers work with law. That simple truism explains why law professors assign their law students thousands of pages of court decisions and statutory and regulatory materials each semester. By studying the legal doctrines and principles found in the authoritative materials produced by government institutions, law students come to understand the legal system and its rules and methods. They analyze legal materials to prepare for careers in which they will need to understand and translate law for their clients and help those clients navigate institutional processes that are governed by legal norms.

All that is as it should be. But the reality today is that many clients' transactions and disputes are affected by more than just the rules established by courts, legislatures, and administrative agencies. Today, many businesses and individuals are also significantly affected by codes and standards issued by a variety of nongovernmental institutions. These nongovernmental organizations, sometimes called standards-developing organizations, operate at the national, regional, and global levels to affect every sector of the economy. A major standards-developing organization can easily produce as many "rules" in any given year as does a typical legislature or regulatory agency.

Some people may have heard of at least one or two of these private standards organizations. Underwriter's Laboratories, for example, authorizes the placement of a familiar "UL" label on many consumer products that meet private safety standards. The "LEED" energy-efficient building standards, established by the U.S. Green Building Council, might be known to those who work in an office building that was constructed to meet those standards. Yet well-known standards organizations are vastly outnumbered by less recognizable organizations that nevertheless play a significant role in shaping business practices and product designs, including the American Petroleum Institute, the Institute of Electrical and Electronics Engineers, the International Code Council, the International Organization for Standardization,

the National Fire Protection Association, and ASTM International, among many others.

The codes and standards developed by these nongovernmental organizations are often considered to be “voluntary” because they are not directly backed up by the threat of civil or criminal penalties. Nevertheless, in practice, these voluntary codes and standards can shape behavior perhaps as much as any government law can. Customers—usually larger businesses purchasing from suppliers—often demand conformity with private codes and standards. The economic implications can be significant enough that businesses pay close attention to the nongovernmental codes and standards that apply within their industrial sector or area of service.

Many aspects of day-to-day life would simply not be the same without codes and standards adopted by nongovernmental entities. For example, most consumer products—literally from appliances to zipcars—would probably not work as well or as safely as they do were it not for voluntary codes and standards. Around the world, businesses are taking steps to reduce or manage their pollution in accordance with voluntary standards for environmental management. Different brands of mobile phones communicate with each other only because they are built in conformance with private interoperability standards. The physical spaces in which nearly everyone in the United States lives and works offer lifesaving protection from fires and earthquakes because they have been built to meet standards that originate in nongovernmental building codes. And the virtual spaces of the Internet in which so many reside, although initially created by government, exist today because a nongovernmental standards system establishes protocols that enable computers to interact with each other.

And yet, despite the significance of private codes and standards, most law students learn virtually nothing about them in law school. Many students likely have never even heard that such codes and standards exist at all. It is not their fault. Few if any law courses cover private codes and standards or convey anything about the role they play alongside of, and often in close interaction with, government-created law. With important exceptions, legal scholars have tended to neglect codes and standards in their research too.

The lack of attention to private codes and standards is all the more surprising because, in nearly every area of practice, legal practitioners or their clients must grapple with private codes and standards. These codes and standards find their way into the provisions of business contracts that practicing lawyers negotiate on behalf of their clients. Questions about conformity to the standards in these provisions then become fodder for contractual disputes. In tort law, the underlying duty of care is today often established by prevailing codes and standards rather than by imagining what the proverbial “reasonable” person would do. In criminal law, professional societies

have established standards for the handling and analysis of critical evidence that can have important implications for the work of prosecutors and defense attorneys.

In the field of intellectual property, private standards have led to “standard essential patents,” which arise when the only way to comply with an industry-wide private standard depends on the use of one firm’s patented technology. Contractual schemes have developed to compel the holders of standard essential patents to grant licenses to their competitors under fair, reasonable, and non-discriminatory terms. And of course, what constitutes “fair, reasonable, and non-discriminatory” can—and, on occasion, does—become the subject of litigation.

For anyone interested in administrative and regulatory law, the private world of codes and standards offers still further implications and plenty of fascination. Just as federal agencies must follow the provisions in the Administrative Procedure Act when they make new regulations, standards-developing organizations have established comparable procedures for developing voluntary codes and standards. Admittedly, there are differences between these private organizations’ procedures and public administrative procedures. The federal courts, for example, do not enforce the procedures of standards-developing organizations. But many of these organizations do submit to accreditation oversight by the American National Standards Institute (ANSI). Itself a nongovernmental organization, ANSI has established a set of essential procedural requirements that bear remarkable resemblance to the administrative procedures that government agencies must follow.

In the governmental context, the conventional wisdom holds that administrative procedures help protect against regulatory capture—a predicament that arises when businesses effectively take over governmental regulatory power and wield it to their own advantage and to the disadvantage of the public interest. Interestingly, in the context of voluntary codes and standards, businesses have literally created and effectively control the decisions of standards-developing organizations. These organizations typically operate through committees comprising engineers and other representatives of businesses within an industry. Given that voluntary codes and standards, just like government regulations, can create both winners and losers, the fact that businesses themselves participate in the process of crafting and approving voluntary codes standards raises important policy questions for society—not to mention some inherent risks to businesses under antitrust law.

At a substantive level, private codes and standards can and do bear a strong resemblance to government regulations. In fact, government regulators not infrequently conclude that private standards will work sufficiently well in addressing problems that new regulations are not needed. With the National Technology Transfer and Advancement Act of 1995, Congress has

encouraged agencies, whenever permissible and practical, to rely on voluntary codes and standards to achieve their regulatory objectives. Regulators sometimes like private codes and standards so much that they decide to borrow them wholesale, adopting them as part of the law. The process by which government agencies adopt private codes and standards as binding law—referred to as “incorporation by reference”—not only raises questions about potential undue business influence but also about governmental transparency. Transparency becomes an issue because many private codes and standards are protected under copyright law, which precludes government agencies from reprinting the text of the private code or standard in the public law books. Instead, agencies incorporate *by reference*—literally just by referring to the private code or standard by its name or designated number. Any interested business or member of the public must often then pay a fee—and, not infrequently, a substantial one—to the private standards organization for the chance to read the text of what has become, through incorporation, the law of the land.

Private codes and standards thus raise important theoretical and practical questions. As a result, just as no law student today should go through law school without gaining at least some passing familiarity with private mediation and arbitration—that is, the world of alternative dispute resolution—no legal education should be considered complete without some exposure to private standard setting. It is for this reason that we are pleased that this issue of the *Administrative Law Review* can feature two distinctive works of legal scholarship on private standards in the pages that follow: (1) Emily S. Bremer, *When Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, and (2) Cary Coglianese and Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*.

As indicated by the subtitles of each work, both are Teaching Guides that seek to help law faculty who wish to devote some time to private codes and standards in their existing courses. These guides can, of course, be read fruitfully on their own by any law student, law professor, or practicing lawyer who seeks to learn more about private codes and standards. But the *Administrative Law Review* also hopes that these Teaching Guides will inspire law professors to find ways to incorporate discussion of private standards into their standard courses on administrative law, regulation, or legislation. The guides should make it easy to accomplish this goal, as they provide the resources needed to build into existing courses lessons that span from brief ten-minute excursions to full class sessions.

Coglianese and Scheffler’s Teaching Guide probes a previously hidden facet of a widely excerpted Supreme Court case, *Industrial Union Department, AFL-CIO v. American Petroleum Institute*—commonly known as the Benzene Case. Many leading textbooks in administrative law, environmental law, and

statutory interpretation excerpt the Court's opinion in this canonical case. Interestingly, that opinion mentions an early private standard that was eventually incorporated by reference into the Occupational Safety and Health Administration's (OSHA's) limit on workplace exposure to benzene. Yet the casebooks never explain the Court's reference—nor use it as a springboard for any consideration of private standards.

The traditional rationale for studying the Benzene Case has been to learn about the nondelegation doctrine, statutory interpretation, and risk regulation. Coglianese and Scheffler's Teaching Guide will help law teachers expand their treatment of the Benzene Case by using it also as a teachable moment about private standards. Along the way, Coglianese and Scheffler tell the intriguing, yet previously untold, story of how OSHA transformed a private standard into public law while bypassing the usual rulemaking procedures that ordinarily apply to federal agencies. Their Teaching Guide shows how the Benzene Case can be used not merely for a window into traditional issues surrounding the delegation of authority to administrative agencies, but also for the consideration of important questions about the role of—and limits on—private actors' involvement in creating law.

Bremer's Teaching Guide takes a still deeper dive into agencies' practice of incorporation by reference. Transparency is the animating question running throughout her comprehensive guide. She asks at the outset how agencies can lawfully get away with creating law by mere reference to outside texts created by private, interested actors. It turns out that the answer can be found in a single sentence in (perhaps ironically) the Freedom of Information Act which deems an agency rule to have been published in the *Federal Register* as long as it is "reasonably available" to those affected by it. But that answer only raises other questions, such as: Is a rule "reasonably available" if its actual text is protected by a copyright held by a private standards-developing organization?

Bremer explains how incorporation by reference raises questions of administrative law, statutory interpretation, and the law of intellectual property. She encourages faculty to invite their students to consider whether copyright law should prevail over the public's right to free access to the law. But then she also encourages faculty to invite their students to consider what might result if the government failed to respect intellectual property in this context—especially if standards-developing organizations rely on copyright fees as a major source of their funding. Bremer's Teaching Guide provides the foundation for instructors to lead lively classroom debates over tradeoffs between governmental transparency and intellectual property, and between private standardization and public access to law.

Both Teaching Guides—by Bremer, and by Coglianese and Scheffler—are highly flexible. They can be used in a variety of law school courses, and

they each give instructors multiple options for organizing and presenting material. Each are replete with discussion questions and lesson plans. In addition, a companion website—*www.codes-and-standards.org*—contains freely downloadable videos, PowerPoint slides, and other resources that accompany each Teaching Guide and can be used or adapted by faculty as needed to suit their own teaching objectives and methods.

The two Teaching Guides published here are actually part of a larger collection of curricular materials produced by the Penn Program on Regulation (PPR) at the University of Pennsylvania Law School. In addition to a compendium of other readings and background information on voluntary codes and standards, PPR's website also includes teaching materials on standard essential patents—including an original case study on litigation between Microsoft and Motorola—and materials on federal preemption issues raised by private energy efficiency standards incorporated into state and local building codes.

PPR's overall project was supported by the National Institute of Standards and Technology (NIST) within the U.S. Department of Commerce. NIST has for years supported the development of curricular material on codes and standards within engineering schools. PPR's project was the first one in which NIST supported the development of curricular materials specifically geared toward law students. (NIST's support, of course, is subject to its standard disclaimer that it does not necessarily endorse these or any materials prepared by outside researchers.)

In publishing Teaching Guides on both the Benzene Case and incorporation by reference, the *Administrative Law Review* seeks to foster greater awareness of the important world of private standards. The journal's editors believe that, in creating their respective Teaching Guides, Professors Bremer, Coglianese, and Scheffler address a major gap in the average law student's legal education, especially in administrative law. Most administrative law courses broach themes of government transparency, the public's ability to influence and access the law, and the dangers of regulatory capture. The incorporation by reference of private standards directly implicates these three themes, and yet the typical administrative law course does nothing to explore private standards or how they affect the law. These issues deserve greater attention in both legal scholarship and legal education.

The Teaching Guides published in this issue of the *Administrative Law Review* set out not only to educate our readers but also to create a way to institutionalize attention to private standards for future law school courses in administrative law. This level of sustainability is something that the typical law review article probably cannot realistically aspire to achieve. But with the *Administrative Law Review*'s wide readership, its editors saw great value in di

versifying what it publishes to include Teaching Guides like those featured in this issue.

Traditional law review articles, notes, and comments are, of course, important outputs of academic scholarship, but a distinctive advantage of Teaching Guides is that they explicitly and self-consciously seek to prompt an ongoing discussion that *includes students*. Many ambitious law students will make an effort to read some law review articles in their spare time, but typically students lack enough time to master all the topics covered in the legal literature, especially at the early stages of their legal education. We hope that these Teaching Guides will provide a vehicle for law professors to ensure that their talented but busy law students can obtain a foundational education on the pivotal issues raised by voluntary codes and standards and their incorporation into regulatory law.