
**ILTAM: DRAFTING EVIDENCE-BASED LEGISLATION FOR
DEMOCRATIC SOCIAL CHANGE**

ANN SEIDMAN* AND ROBERT B. SEIDMAN**

INTRODUCTION	437
I. WE HAVE GOOD LAWS BUT POOR IMPLEMENTATION: THE LOSS OF THE “FATAL RACE”	438
A. <i>Why Populist Governments Lost the Fatal Race</i>	439
B. <i>Translating Policy into Law: The Role of the Legislative Drafter in the Law-Making Process</i>	443
1. The Lack of Discussion of the Drafter’s Design Role in the Existing Scholarship	443
2. The Bill’s Design Is of Significant Importance in the Legislative Process	444
3. The Drafter’s Critical Role as a Bill-Designer	445
4. Why Legislative Drafters Fail to Draft Effective Transformative Laws	448
II. ILTAM AS A GUIDE FOR DESIGNING AN EFFECTIVELY IMPLEMENTED BILL	451
A. <i>Step 1: Describe (a) the Social Problem the Bill Targets, and (b) Whose and What Behaviors Comprise It</i>	452
B. <i>Step 2: Explain the Behaviors that Comprise the Targeted Social Problem</i>	453
C. <i>Step 3: Create a Legislative Solution</i>	455
D. <i>Step 4: Monitor and Evaluate</i>	455
III. ILTAM’S SCHOLARLY ROOTS	456
A. <i>ILTAM’s Four Underlying Assumptions and Their Roots in Scholarly Debate</i>	457
1. Denying the Fact/Value Dichotomy, One Can Warrant a Normative Hypothesis Concerning at Least Its Suitability by Propositions About Matters of Fact	457
a. <i>Professional Obligations</i>	457

* Adjunct Professor, Boston University School of Law. Many thanks to LaKeisha Applegate for her extraordinarily competent and diligent research assistance, to Sue Morrison for her many services above and beyond the call of duty, and to colleagues in the International Consortium for Law and Development (“ICLAD”) the world around for many ideas that find themselves in this Article. For more information about ICLAD, please visit <http://www.iclad-law.org>.

** Professor Emeritus, Boston University School of Law.

b. <i>Contestation Persists over the Fact/Value Dichotomy</i>	458
2. Law Addresses a Social Problem by Changing the Problem's Constituent Problematic Behaviors.....	461
3. Government Can Use Law to Change Society	462
4. A Pervasive Difference Systematically Exists Between a Law's Prescriptions and That Law's Addressees' Behaviors.....	466
B. <i>Scholarship and ILTAM's Four Steps</i>	468
1. ILTAM's Pragmatic Problem-Solving Methodology.....	469
2. ILTAM's Criteria of Relevance for Evidence Required to Predict a Bill's Likely Behavioral Consequences	471
3. Issues Concerning ILTAM's Methodology for Designing a Legislative Solution.....	477
a. <i>Considering a Menu of Alternatives</i>	477
b. <i>How the New Law Addresses the Behaviors' Causes</i>	477
c. <i>Why the Requirement of a Cost-Benefit Analysis?</i>	478
4. Monitoring and Evaluation.....	478
C. <i>The Research Report as a Quality Control for the Bill</i>	479
1. The Research Report as Quality Control over the Suitability of Legislation	479
2. In the Legislative Process, Power and Wealth Do Not Inevitably Prevail	480
3. The Research Report as Quality Control over the Worth of the Legislation	481
a. <i>Communicative Discourse</i>	482
b. <i>Pragmatic Philosophy</i>	483
CONCLUSION.....	484

[W]hat is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.¹

¹ 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 683 (London, John Murray 4th ed. 1873) (1832). A theorist inevitably cultivates the shoots of a new theory that springs from roots planted long ago by others laboring in the same vineyard. Almost a decade ago we, with a Sri Lankan colleague, Nalin Abeysekere, proposed an institutional legislative theory and methodology ("ILTAM"). We did so, not in the usual academic form of a scholarly journal article, but in a practical manual entitled *Legislative Drafting for Democratic Social Change: A Manual for Drafters* ("Manual") now translated into approximately ten languages. ANN SEIDMAN, ROBERT B. SEIDMAN & NALIN ABEYSEKERE, LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE (2001) [hereinafter SEIDMAN ET AL., LEGISLATIVE DRAFTING]. ILTAM aims to guide legislative drafters who are laboring in law-making's muddy trenches. Back then, we intentionally omitted the usual footnotes and

INTRODUCTION

In contemplating the failed legislative projects that litter development's convoluted path, people the world around shake their heads, sigh, and complain: "We have good laws, but they remain badly implemented." Why? This question constitutes a central problem confronting new lawmakers seeking to use the law as an instrument for social change.

Many implementation failures lie at the door of those who design the bills that comprise the essence of legislation.² Most frequently officials, conventionally called legislative drafters, do the grunt work of two conceptually distinct but intertwined roles. First, these legislative drafters design the detailed provisions of the bill,³ and second, they chain together the bill's words.⁴ In most countries, ministry civil servants formulate the policy that underpins a bill's general thrust. The drafters put those policies into the proper form. In practice, more often than not, the drafters also design the bill's detailed substantive provisions.⁵ In reality, "whoever writes out a law's detailed provisions inevitably serves not merely as communicator, but as a participant in the process of determining the policy's operative content."⁶ Those drafted provisions determine who does what to implement the new law.⁷

Whether in legal academe or elsewhere, scholars tend to ignore the drafter's crucial role in the process.⁸ Jurisprudence, usually focused on courts and

other scholarly apparatus, and we made no effort to explain that the *Manual's* theoretical contributions grew on the roots planted by earlier scholars. None of those earlier writers addressed problems similar to the problem that concerned us, namely how to draft laws likely to help overcome the obstacles that too often blocked efforts to build democratic governments and people-oriented development. Every theory grows out of roots planted by earlier theorists. For *ILTAM*, this Article aims to describe those roots.

² By "design" of a bill we mean developing the detailed substantive commands, permissions, and prohibitions that constitute a bill. *See infra* Part I.B (describing the legislative drafter's role in the law-making process and the importance of a law's design).

³ We characterize this as the designer role. As designers, the legislative drafters formulate the substantive content of the bill. SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 23-26 (explaining that drafters receive very general terms for proposed bills and must supply the details for these bills).

⁴ We characterize this as the scrivener role. As scriveners, the legislative drafters "strive[] to express the legislation's operative details in increasingly clear and precise words and sentences." *Id.* at 26.

⁵ *Id.* at 25 (describing the widely-used British drafting tradition that makes the assumption that ministry officials provide policy while central office drafters provide form).

⁶ *Id.* at 26.

⁷ This Article subsumes under "drafter" all those who contribute to the detailed design of a bill. These may include experts from the relevant ministry and research institutions as well as legally trained drafters who chain together the final bill's words. *See id.* at 25.

⁸ *Id.* at 21 (suggesting that other drafting texts downplay the drafter's influence throughout the drafting process because they insist that drafters "assume no responsibility for their bills' substance").

judges, hardly gives the drafting process a nod. If they study legislation at all, legal academics typically focus on examining how courts interpret legislation. Studying the uses of power, political scientists center attention on the processes by which legislators, before enacting it, bargain over a proposed law's detailed provisions. Almost no academics study the drafters' role in the designing and drafting of the bill. In practice, however, the bill-designing and drafting process inevitably provides a bill's detailed content. Those details constitute a critical input to the legislative process. If after its enactment a law proves ineffectively implemented, the drafter, who designed its detailed provisions, bears a significant share of responsibility.

Too often, traditional drafting methodologies produce laws that do not *work*.⁹ In 2001 we published *Legislative Drafting for Democratic Social Change: A Manual for Drafters* ("Manual").¹⁰ That *Manual* proposes an institutionalist legislative theory and methodology ("ILTAM") to guide drafters seeking to draft legislation that *works*.¹¹ Part I of this Article describes the underlying problem that ILTAM seeks to help resolve, namely, the too frequent failure of newly installed lawmakers, and especially legislative drafters, to design and enact laws that *work*, resulting in the state losing the "fatal race."¹² Part II briefly summarizes the four steps of ILTAM's problem-solving methodology. Finally, Part III locates ILTAM within the relevant scholarly discourses.

I. WE HAVE GOOD LAWS BUT POOR IMPLEMENTATION: THE LOSS OF THE "FATAL RACE"

Section A of Part I briefly underscores the failure of many populist lawmakers – however they won state power¹³ – to enact the kinds of laws necessary to transform their countries' inherited institutions. Those institutions perpetuate the poverty that still condemns four-fifths of the world's peoples to

⁹ For the purposes of this Article, a law does not "*work*" if it either does not induce its prescribed behaviors, or if those behaviors, although induced, do not help to resolve the targeted social problem.

¹⁰ SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1.

¹¹ *Id.* at 5 ("[T]his Manual incorporates a legislative theory and methodology for translating policies into laws likely to facilitate substantive change.").

¹² *See infra* notes 27-29 and accompanying text (describing the fatal race as one between new populist leaders and existing institutions. Would the populist leaders transform the inherited, colonialist institutions? Or would those institutions continue to impose poverty and powerlessness on the majority of the population?).

¹³ After World War II, in Africa and elsewhere, many populist lawmakers won office through prolonged liberation struggles (e.g., Mozambique, Zimbabwe). Elsewhere, some took power through other means including military coups (e.g., Peru, Liberia), and in the 1980s, some led transitional governments (e.g., Kazakhstan, Kyrgyzstan).

struggle for survival on one-fifth of global output.¹⁴ Too often the populists lost the fatal race. Section B describes the legislative drafter's significant but problematic role in the much-neglected bill-designing process. Finally, Section C discusses the drafters' reliance on "fall-back" methodologies that so often produce laws that promise change but do not *work*.

A. *Why Populist Governments Lost the Fatal Race*

Throughout the post-colonial world, development has become a moonscape of legislative wrecks and of programs with lofty aims that did not *work*. The list of those failed projects seems endless. For example, the Guyanese¹⁵ and Bhutan governments¹⁶ copied laws from other countries to improve public welfare; however, decades later nothing had changed. Indonesia,¹⁷ Soviet Central Asia,¹⁸ and southern Africa¹⁹ demonstrate other significant examples

¹⁴ UNITED NATIONS DEV. PROGRAMME, CAPACITY DEVELOPMENT: EMPOWERING PEOPLE AND INSTITUTIONS ANNUAL REPORT 2008, at 13 (2008), *available at* http://www.undp.org/publications/annualreport2008/pdf/IAR2008_ENG_low.pdf (stating that approximately "1.2 billion people in the world live on less than one dollar a day and almost 850 million people go hungry every night").

¹⁵ In 1999 we led a workshop in Guyana to draft a new Forestry Commission Act. During this workshop we discussed the establishment of a Forestry Commission in 1957 by the populist political leadership. The legislation establishing the Commission copied British public corporation legislation and sought to exploit Guyana's remarkable natural forestry riches, presumably in the public interest. Some thirty years later – having run up a \$300,000,000 debt – the Commissioners had returned nothing, either to the Guyanese government or its people.

¹⁶ Seeking to improve its "investment climate" to attract foreign investment, Bhutan copied the American Uniform Commercial Code, including sections governing transactions by the "carload lot," defined as a *railroad* carload. Mountainous Bhutan never had – and still does not have – a railroad. We learned of this anomaly while serving as consultants to a conference on Bhutan's legal system in 1997.

¹⁷ Following dictator Suharto's fall, Indonesia enacted a wide-swinging law to make corruption a major criminal offense. Its drafters specified severe punishment to control corruption. Global experience demonstrates that, although punishment may reduce parking offenses, it rarely deters an official confident that a particular form of corruption defies discovery. Not surprisingly, by all accounts Indonesia's new statute proved ineffective in reducing officials' corrupt behaviors.

¹⁸ Soviet Central Asia of the 1920s illustrated the dangers of the gap between visionary policy-making and poorly conceptualized legislation: Soviet leaders, identifying women as an oppressed minority, characterized them as a surrogate revolutionary proletariat. They appointed women as judges and other high officials. To celebrate women's liberation, officials conducted mass unveilings in local town squares. As a result, believing these women had proven immoral and had dishonored their families, traditional husbands and fathers cast them out of their family homes. Without other income sources, many became prostitutes. GREGORY J. MASSELL, *THE SURROGATE PROLETARIAT: MOSLEM WOMEN AND REVOLUTIONARY STRATEGIES IN SOVIET CENTRAL ASIA, 1919-1929*, at 346-59 (1974).

of a disconnect between legislation's policy goals and their implementation. To understand why these repeated, sometimes catastrophic failures to draft effective law occurred, we begin with an examination of a country's institutional context.

To describe a country, one should describe its institutions – its industries, banks, schools, hospitals, farms, factories, families, and a myriad more. To explain poverty, vulnerability, and the quality of governance, one should again look to a country's institutions.²⁰ A country's inherited institutions define the relative poverty or wealth of different segments of its population.²¹ Essentially, institutions consist of repetitive patterns of social behaviors.²² Therefore, in order to change an institution one must change the social behaviors that comprise it.

The institutions that structured the labor force in colonial countries illustrate the pattern between institutions and relative wealth. During the colonial era, for the workforce in the metropolitan countries to reproduce itself, a male head of a household earned enough to feed and house some four or five family members – himself, his wife and children, and occasionally an elderly parent. In contrast, in the colonial countries taxes compelled husbands and young men to migrate to work on colonial mines or settler-owned plantations, or as sharecroppers.²³ There they barely earned a sufficient wage to feed and clothe themselves, making roughly less than a quarter of the wages paid to workers

¹⁹ In Anglophonic southern Africa, “[p]overty and inequality continued because of the failure to use the legal order – that is, the laws and regulations and the behavior of the relevant implementing and law-making institutions – to transform economic and social relationships.” Neva Makgetla & Robert B. Seidman, *Legal Drafting and the Defeat of Development Policy: The Experience of Anglophonic Southern Africa*, 5 J.L. & RELIGION 421, 421 (1987). Despite South Africa's attempt to implement laws to better the economy and allow the majority of its population to benefit from the country's rich resources, in practice, “little changed in the pattern of investment or the structure of the economy” and its resources continued to only “benefit small, local, elite and foreign investors.” *Id.* at 445, 471.

²⁰ Ann Seidman & Robert B. Seidman, *The Fatal Race: Law-Making and the Implementation of Development Goals*, THIRD WORLD LEGAL STUD. 79, 81 (1992) [hereinafter Seidman & Seidman, *The Fatal Race*] (“Like all social problems, poverty and powerlessness result from patterns of behavior, that is, *institutions*.”).

²¹ *Id.*

²² An institution is defined as “a significant practice . . . in a society or culture.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 606 (10th ed. 1999); *see also* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 988 (2d ed. 1983) (“[A] well-established and structured pattern of behavior or of relationships that is accepted as a fundamental part of culture, as marriage: the institution of the family.”).

²³ IMMANUEL WALLERSTEIN, *Peripheralization of Southern Africa*, in AFRICA AND THE MODERN WORLD 139, 143-49 (1986).

doing similar jobs in the imperial metropolitan countries.²⁴ Migrant workers' meager remittances forced wives and mothers who remained in remote rural hinterlands to struggle to support themselves and their children by subsistence farming.²⁵

While institutions inevitably change over time, for the most part they change haphazardly. This Article, however, focuses on how governments might deliberately change the problematic behavioral patterns – the dysfunctional institutions – that perpetuate external dependence, poverty, vulnerability and poor governance. To accomplish such deliberate social change, lawmakers must use state power. While non-governmental advocacy groups and private-sector educational programs may press for reforms, in most cases only governments can exercise state power to mobilize society's resources to facilitate essential institutional transformations.

Kwame Nkrumah, the first President of Ghana (the first sub-Saharan country to win independence), campaigned under a slogan that speaks for populists everywhere: "Seek ye first the political kingdom, and all else shall follow."²⁶ Tragically, even after the liberation movements conquered the political kingdom, all else did *not* follow. After World War II, when imperial flags came fluttering down in most former colonies, new anti-colonial populists took over the colonial seats of political power.²⁷ This takeover marked the beginning of what we denote the "fatal race": would the new lawmakers change the inherited institutions or would the inherited institutions oust or co-opt the new lawmakers?²⁸

At the outset, the new lawmakers inevitably had to rule through the tired, often racist, undemocratic, exploitative institutions inherited from their countries' past. Many of those populist leaders had earned their credentials through long years of struggle. Had they learned how to use state power to accomplish deliberate social change? To change institutions, new political lawmakers have only one instrument: the law, broadly conceived as a set of norms made, promulgated, and potentially enforced by the state.²⁹ Even to

²⁴ See, e.g., ANN SEIDMAN & NEVA SEIDMAN, *SOUTH AFRICA AND U.S. MULTINATIONAL CORPORATIONS* 21 (Lawrence Hill & Co. 1978) (1977) (explaining that migrant workers in the mines of South Africa earn significantly lower wages because their short term contracts make it difficult for them to organize to demand better wages and working conditions).

²⁵ WALLERSTEIN, *supra* note 23, at 143-49.

²⁶ Papa Yalae, *Africa Must Unite!*, GHANA HOMEPAGE, Mar. 6, 2006, <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=100492>.

²⁷ Seidman & Seidman, *The Fatal Race*, *supra* note 20, at 79 ("In these nations, a political leadership, which had acquired power with a populist, frequently socialist rhetoric, controlled a country whose laws and economic institutions had emerged out of colonial capitalism.").

²⁸ *Id.* at 79-80.

²⁹ In this Article, the word "law" includes all normative state instruments, including constitutional provisions, laws enacted by elected legislatures, regulations implemented by

bring about change to something as fundamental as an educational program, lawmakers must enact an appropriate law to make that program a reality.³⁰ Therefore, to overcome existing institutions lawmakers must design, enact, and effectively implement laws that result in meaningful change.

In countries throughout the world, generations of new lawmakers enacted laws that did not *work*.³¹ Over time, social, political, and economic institutions did change, but rarely in ways intended by the populist leaders; and almost everywhere, the populist lawmakers lost the fatal race to the existing institutions. But why? Populist leaders gained their positions for many reasons: leadership in the struggle, intelligence, charisma, frequent bravery in street fighting, or steadfastness in prison or under torture. Few, if any, had acquired the skills required to design laws likely to help transform problematic institutions.³² Discouraged by the failure of their attempts at social change through law, rather than transforming the inherited institutions that impoverished the majority of their countries' inhabitants, the new lawmakers too often turned their attention to feathering their own nests. Too often, coups ousted those who persevered in their efforts to restructure those institutions. Too often, the people lost the fatal race.

A popular interpretation of that history assumes the struggle always focused on who would reap the perks of high political office. That view assumes populist leaders always cynically sought to manipulate the liberation struggles to serve their personal, materialist ends, and acted as the economist's ideal-type of rational actors by always seeking to maximize their gains and minimize their costs. If the populists did adopt those cynical views during the liberation struggles, however, they did not act "rationally." Fighting for twenty years in the jungle, or enduring years of imprisonment in colonial jails, seem like less than rational career choices.

After winning their places in halls of power, why did so many populists seemingly abandon populism? This question has contemporary significance because in some countries, such as South Africa, the development project continues. Moreover, the fatal race occurs not only in conditions of development but also whenever a populist party takes power and promises

designated administrative agencies, and municipal ordinances. When ILTAM proposes that a drafter accompany a non-trivial proposed "law" by a research report, that requirement applies not only to proposed legislation, but also to all other proposed non-trivial prescriptions promulgated by the state.

³⁰ Cf. SHARYN L. ROACH ANLEU, *LAW AND SOCIAL CHANGE* 138-39 (2000) (discussing the criminal justice system as an example of using laws to promote social conformity and compliance with norms).

³¹ See *supra* notes 15-19 and accompanying text (demonstrating examples of failed legislation).

³² See Paul Collier, *Laws and Codes for the Resource Curse*, 11 *YALE HUM. RTS. & DEV. L.J.* 9, 19 (2008) (suggesting that populist candidates advocate "strategies that are superficially appealing but too simplistic to be viable").

radical social reform. In a country's history, from time to time, the elite that control the levers of political power have interests and programs that differ from those of the elite that control the levers of economic power. If the political leadership genuinely intends to advance the interests of the poor majority, that sets the stage for yet another fatal race.

In our *Manual*, we tried to discover an answer to the social problem of how to equip populist leaders with a theory and methodology to guide them in exercising state power through law to benefit their peoples.³³ Only that kind of guide will likely enable populist lawmakers confidently to employ law as an instrument to achieve deliberate, people-oriented social change. Only that kind of guide holds out the hope that populist lawmakers can use state power to transform a country's institutions and thus to transform society. In an attempt to provide such a guide, we worked with colleagues throughout the developing world to formulate ILTAM.

B. *Translating Policy into Law: The Role of the Legislative Drafter in the Law-Making Process*

ILTAM targets a social problem that has contributed to the loss of the fatal race, namely, the failure of legislative drafters to draft transformative laws that *work*. To win the fatal race, populist leaders must master the task of producing laws likely to help resolve social problems. In the past, populist lawmakers failed, not for want of good intentions, but because they had no theory or methodology to guide them in drafting laws likely to *work*. This Section discusses the following: (1) the existing scholarship about the drafter's role; (2) the importance of the bill's design; (3) the critical importance of the drafter's role in designing the detailed substantive content of a bill's commands, prohibitions, and permissions; and (4) the fall-back methodologies used by most drafters in designing those substantive details and the reasons why most drafters adopt such problematic bill-designing behaviors.

1. *The Lack of Discussion of the Drafter's Design Role in the Existing Scholarship*

As previously discussed, a legislative drafter plays the dual role of scrivener and designer in the bill-drafting process. Social science has barely discussed either of these roles. Political scientists tend to perceive the law-making process as a process dominated by power.³⁴ In that view, a bill's details and the processes of formulating them have scant significance. Even within the limited discussion on these roles, the discussion remains incomplete. The relevant literature tends to neglect the designer role. Until the very recent rise of legisprudence, the legal academy perceived drafters as mere scriveners.

³³ SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 7-15.

³⁴ See *infra* text accompanying note 61 (explaining that a bill's provisions are likely to reflect the demands of those with bargaining power).

Existing texts on legislative drafting focus on the scrivener role and particularly on the techniques for chaining words together to achieve clarity and precision. Yet they contain very little about the designer role.³⁵

2. The Bill's Design Is of Significant Importance in the Legislative Process

Legisprudence has begun to recognize the central importance of the designer's role.³⁶ In the long route from policy to law, the bill-designing process has a critical but under-valued function. Consider the steps in a bill's journey from bright idea to enacted law:³⁷ a drafter translates a policy into a bill in the bill-designing process, the bill goes through the many steps of the law-enacting process,³⁸ and then ultimately through an executive-approval process.³⁹ These steps constitute a many-layered deliberative process, a complex structure to which Jeremy Waldron attributes the "dignity" of legislation.⁴⁰

At each of these legislative steps someone makes decisions as to the bill's substantive content. Occasionally a legislator will introduce an amendment to a bill under consideration; very rarely, however, does a legislator actually draft

³⁵ See REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 1-7 (1954) (introducing legal drafting and specifically focusing on wording and achieving substantive clarity as means to improving legal instruments, including legislation and constitutions); TOBIAS A. DORSEY, *LEGISLATIVE DRAFTER'S DESKBOOK* 169-240 (2006) (describing the importance of writing effectively in legislative drafting and emphasizing that "the essence of effective drafting is clear writing"); G.C. THORNTON, *LEGISLATIVE DRAFTING* 1-17 (2d ed. 1987) (discussing written communication as the foundation for legislation). This Article does not further discuss the bill-scrivener role, but for more information on improving the techniques of legislative drafting, see SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, chs. 8-13.

³⁶ See, e.g., Cyral Wojciech, *How Rational Is Rational Lawmaking?*, in *THE THEORY AND PRACTICE OF LEGISLATION* 93, 98-100 (Luc J. Wintgens ed., 2005) (describing evaluations of the rationality of laws by distinguishing between the conceptualization and the communication of legislative thinking).

³⁷ The process here described models most presidential governance systems. In general, with relatively insignificant changes, that system also mirrors law-making procedures in common-law jurisdictions.

³⁸ The law-enacting process includes: committee hearings; debates in both chambers (if a bicameral legislature); bargaining in legislative hallways; late night, back-room negotiations; votes in both houses; and conference committees to reconcile differences.

³⁹ In some cases judicial review constitutes a fourth step in the legislative process.

⁴⁰ Waldron sees the legislation process as dignified when "representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them." JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 2 (1999).

a bill. In practice, a legislator mainly assesses bills drafted by others.⁴¹ In a decision-making process, outputs reflect inputs. In the process of turning policy into law, the bill itself constitutes a principal input. In the several steps of the law-enacting and executive-approval processes, the draft bill's design sets the agenda for legislative consideration. As a result, as the one who constructs the details of a bill, the drafter plays a central role in creating that design.

3. The Drafter's Critical Role as a Bill-Designer

Populist lawmakers repeatedly lost the fatal race in part because they introduced bills in the legislature that when enacted did not *work*. These lawmakers usually relied on legislative drafters and sometimes non-legally-trained civil servants who claimed some expertise in the substantive matters of concern. Those drafters, and often only those drafters, participated in designing the detailed substantive content of the laws, and, in effect, the drafters actually participated in the policy-making process.⁴² For two reasons, the legislative drafter easily slides into the designer role. First, in finalizing the bill's detailed wording, aimed at translating the policy into the bill's detailed commands, permissions and prohibitions, the drafter inevitably has the final cut. While the bill's words determine its form, those words also define its substance. The drafter chooses the words of the bill's provisions that, to implement the policy, specify who will do what. Second, the legislative drafter becomes the designer because usually nobody else plays a role that close to the bill's content. The policy-makers, usually high-level political leaders, prioritize social problems for government action by declaring the proposed law's overall objective: "Law should ensure that every child receives an adequate primary school education"; or "The law must provide every

⁴¹ Ann Seidman, Robert B. Seidman & Nalin Abeysekere, *Assessing Legislation: A Manual for Legislators* 17, 22 (Feb. 2003) (unpublished manuscript, available at <http://www.iclad-law.org/Downloads/index.html>) [hereinafter Seidman et al., *Assessing Legislation*] (describing a legislator's role as formulating policies, enacting effective legislation, "overseeing its implementation, and communicating with constituents" by using their "capacity to assess a bill in the public interest").

⁴² POVERTY REDUCTION AND ECON. MGMT. UNIT, WORLD BANK, *ADMINISTRATIVE CAPACITY IN THE EU 8: SLOVAKIA COUNTRY REPORT, BACKGROUND PAPER 2-3* (2006) ("[T]he fact that many of the basic choices end up in the hands of the drafters alone means that the drafting can develop in a political vacuum."); Richard C. Nzerem, *The Role of the Legislative Drafter in Promoting Social Transformation*, in *DRAFTING LEGISLATION* 131-32 (Constantin Stefanou & Helen Xanthaki eds., 2008) (explaining that a drafter is inevitably involved in policy considerations because he or she must be aware of the reasons for legislation and think about society's past, present, and future when "laying down rules of conduct for the guidance of society").

household with clean, ample potable water.”⁴³ Once the policy-maker declares the objective, the drafters translate those policies into bills by choosing the words to use and how to effectively communicate that objective to enable its enforcement.⁴⁴ Despite the drafter’s substantial role in developing a bill’s content, academics focus their study on the policy-maker role. They recognize the role of the scrivener merely as a mechanical task, not recognizing, much less studying, the drafter’s designer role.⁴⁵

To understand the relationship between policy-maker and drafter, consider a relationship between a client and an architect. The client says: “My policy is to build a house.” If asked to define what she means by house, the client responds, “You know, a place to live.” The client then consults an architect and they discuss the budget, the rooms, the architectural style, and a host of other details. Next, the architect produces the plans and specifications which contain the detailed instructions to the builder who actually constructs the house. Now, when asked to define house, the client points to the plans and specifications. Who made the policy: client or architect? Truly, the devil *is* in the details.⁴⁶

In the same way, the drafter’s designer role bridges the gap between the policy declared by the relevant government official or policy-maker and the behaviors of those responsible for actually implementing the bill, a task performed after the bill’s promulgation. When drafting the bill and thus communicating how to put the bill into effect, the drafter must prescribe *who* will do *what*, including both governmental and private actors, to implement the

⁴³ John Dewey referred to the propositions of such overall objectives as statements of generalized ends. John Dewey, *Theory of Valuation*, in 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE NO. 4, at 44 (1939) [hereinafter Dewey, *Theory of Valuation*] (discussing generalized ideas of ends as “tools that direct and facilitate examination of things in the concrete while they are also developed and tested by the results of their application in these cases”). In Dewey’s view “ends” and “means” interpenetrate each other. *Id.* at 40-50. An end is simultaneously a means to the state of affairs that follows the *soi disant* end. *Id.* at 43. Dewey explains that “the distinction between ends and means is temporal and relational” because ends and means are part of an ongoing stream of events. *Id.* That chain of successive states of affairs will end, if ever, in the far future. For example, the generalized end, such as needing a law to ensure clean, ample, potable water in every household, merely calls attention to the social problem occasioned by the fact that at present, the generalized end stated in the quoted sentence remains unfulfilled. Detailed plans and specifications, likely to reach the next state of affairs, Dewey called an end-in-view. *Id.* at 41.

⁴⁴ See SEIDMAN ET AL., LEGISLATIVE DRAFTING, *supra* note 1, at 26.

⁴⁵ *Id.*

⁴⁶ Nzerem, *supra* note 42, at 132 (“In practice, . . . a drafter often participates in defining the meaning of policy and translating the broad terms of policy in to the law’s details.”); Constantin Stefanou, *Drafters, Drafting and the Policy Process*, in DRAFTING LEGISLATION, *supra* note 42, at 321.

bill's provisions.⁴⁷ In the United States, for example, a law that a drafter designed provides detailed instructions to members of the Coast Guard who keep in place the buoys and lighthouses that safeguard ships at sea. Other drafter-designed laws instruct privately-owned food distribution companies' employees as to what they must do to ensure food safety. Still other laws define what other government agencies – like the courts, the police, or administrative agencies – must do to ensure that relevant social actors conform to the law.

Again, the drafters design the detailed rules that fill the gap between generalized policy ends and the people who actually carry out that policy. As drafters take the stated policies and compose them into bills, they are in effect substantially contributing to the bills' substantive content. Elmer Driedger distinguishes policy from the legislative plan, describing the former as “the objective to be achieved” and the latter as “an outline of the method by which it is to be achieved.”⁴⁸ The clarity and detail of a bill's design largely define the likelihood that the relevant social actors will or will not obey its prescriptions. Nevertheless, academics traditionally pay little or no attention to the drafter's critical role in designing a bill.⁴⁹ Professor Rubin explains modern legal scholarship's usual neglect of the crucial role of drafters as bill-designers as stemming from the idea that legislation is “too political for methodologies.”⁵⁰

John Dewey makes the same point, albeit on a larger scale. He argues that in what he characterizes as a practical judgment – that is, a judgment about what is a good or appropriate thing to do – means and ends have a reciprocal character.⁵¹ He asserts: “If this be admitted it is also admitted that only by a

⁴⁷ SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 29.

⁴⁸ Elmer A. Driedger, *The Preparation of Legislation*, 31 *CAN. B. REV.* 33, 39 (1953) (describing how the draftsman must consider the targeted audience and resources available for implementing a policy). Note that Driedger uses the word “plan” to mean what we express by the word “design.” Professor Rubin makes a similar point suggesting that legislatures must consider the following questions prior to drafting legislative products to implement its policies: “Which requirements will best achieve the basic goal? How specifically should these requirements be framed? Who should be responsible for implementing the legislation? What sort of enforcement strategy should be employed?” Edward Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 *GEO. L.J.* 233, 240 (1991).

⁴⁹ The current interest in “legisprudence” reflects a growing awareness of that role's importance. For example, a new academic journal focuses entirely on “contributing to the improvement of legislation by studying the processes of legislation from the perspective of legal theory.” *Legisprudence*, <http://www.hartjournals.co.uk/legisprudence/> (last visited Feb. 20, 2009); see *Editors' Note on “Legisprudence,”* 89 *B.U. L. REV.* 423 (2009).

⁵⁰ Rubin, *supra* note 48, at 240-41.

⁵¹ Dewey, *Theory of Valuation*, *supra* note 43, at 45 (discussing the continuum of means and ends and describing valuation as involving a “*means-end relation* and not . . . an end per se”).

judgment of means – things having value in the carrying of an indeterminate situation to a completion – is the end determinately made out in judgment.”⁵² Following the analogy of the client and architect, both these scholars emphasize that, until the drafter specifies a bill’s details, the bill’s policy remains vague and indeterminate.⁵³ Just as by designing a house’s details the architect participates in defining what the client means by the word “house,” so by designing the bill’s details does the drafter participate in defining what the policy-maker means by the stated policy.

4. Why Legislative Drafters Fail to Draft Effective Transformative Laws

To use law effectively as an instrument of social change, a drafter must predict the behaviors that a proposed new law will likely induce, and their probable impact on the targeted problem addressed – that is, that it will *work*. We cannot act purposively unless we can predict the outcome of our actions. For example, one can predict that a seed will grow into a plant; it follows that to grow a tree one plants not a stone but a seed. Analogously, having no way of accurately predicting the behaviors a new law will induce, too often drafters fail to design laws that *work*. The reason drafters experience difficulty in predicting behaviors in the face of a newly-designed rule lies embedded in the four fall-back methodologies that, the world around, drafters commonly adopt.

First, lawmakers, including drafters, too often believe that they need only to specify their vision of a new law’s goal and then miraculously society will conform. As illustrated in the Guyanese and Central Soviet Asian cases mentioned above, they assume that, by prescribing a social actor’s behavior, a law will successfully induce that behavior.⁵⁴ Behavioral change, however, requires more than mere prescription. Second, as in Bhutan, a drafter frequently copies laws from another jurisdiction while ignoring significant differences between the realities of the drafter’s own country and those of the country whose laws they copied.⁵⁵ These drafters apparently believe the law embodies justice, which in turn embodies a set of easily transferable values. In that view, law constitutes a set of value propositions. What constitutes justice in one jurisdiction arguably constitutes justice in another. Accepting that facts and values inhabit different universes, these drafters believe it unnecessary to study the facts of another country’s circumstances before copying its law.⁵⁶ For them, law finds its grounding not in propositions about matters of fact, but in propositions about matters of values. As a result, these drafters blindly adopt laws that do not *work*.

⁵² JOHN DEWEY, DEWEY AND HIS CRITICS 759-80 (Sidney Morgenbesser ed., 1977).

⁵³ See Driedger, *supra* note 48, at 268-69; Rubin, *supra* note 48, at 37-40.

⁵⁴ See *supra* notes 15, 18 and accompanying text.

⁵⁵ See *supra* note 16 and accompanying text.

⁵⁶ See *infra* Part III.A.1 (discussing the alleged dichotomy between facts and values and then denying its existence).

Third, some drafters simply criminalize every problematic behavior in sight – and never mind the widespread experience that criminal law, as a general deterrent, with distressing frequency does not work.⁵⁷ Lastly, in designing bills many legislative drafters employ a methodology that political scientists dub “pluralism.”⁵⁸ A law, they claim, embodies normative prescriptions. By implying the superiority of *this* rather than *that* behavior, these normative propositions imbricate values. They therefore constitute value propositions. As we discuss below, positivist philosophy asserts a dichotomy between facts and values.⁵⁹ The dichotomy of facts and values implies the incommensurability of propositions about facts and values – that is, one cannot employ propositions about matters of fact to falsify propositions about matters of values. Value propositions, the positivists assert, come from the gut, from matters learned in a process of socialization, that in the course of growing up we learn through our shoulder blades.⁶⁰ Faced by the claims of competing interest groups, a drafter cannot resolve them by facts and logic. She can only design a compromise between their claims.

In a bureaucratic or hierarchically-organized society, policy-makers at the top of the pyramid, for example, the director, the CEO, or the minister, rely on their values to determine a law’s end, or policy. Following the fact-value dichotomy, they cannot justify those values by propositions about matters of fact. To realize the promises of the populist faith, the best the policy-maker can do is to “level the playing field,” thus to enable as many stakeholders as possible to participate in bargaining over both the bill’s policy ends and its detailed design. E.E. Schattschneider famously remarked that the pluralist chorus “sings in an upperclass accent.”⁶¹ Since bargaining power tends to reflect power and wealth, the bill’s detailed provisions, too, will likely conform to the demands of those with power and wealth.

⁵⁷ See *supra* note 17 and accompanying text (describing Indonesia’s failed attempt at reducing corruption by simply enacting a criminal law against corruption).

⁵⁸ See generally E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* (1960) (discussing the need for new public policy by analyzing what makes things happen in American politics).

⁵⁹ See *infra* Part III.A.1.b.

⁶⁰ See *infra* notes 140-141 and accompanying text (discussing the view that people base their conduct on embedded customary norms that may cause them to act irrationally or disobey a law).

⁶¹ SCHATTSCHNEIDER, *supra* note 58, at 35 (suggesting that this is the “flaw in the pluralism heaven” because “[t]he system is skewed, loaded and unbalanced in favor of a fraction of a minority”). Further, Hannah Pitkin holds that a representative convinced that she should support a position on a bill that most of her constituents oppose, must vote her conscience, but justify her vote to her constituents in terms likely to win their acceptance. HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 222-23 (1967). The question is, in terms of ends-means and the consequent fact-value dichotomy, does that seem possible? See *infra* Part III.C.3.a and accompanying text (arguing for evidence-based drafting as a better and more realistic alternative than succumbing to wealth and power).

The four alternatives just described can be called fall-back methodologies. A drafter uses one or another of these fall-back methodologies when the drafter must design a bill for which she has no legislative theory to guide her in the process. These four common fall-back methodologies – drafting a law that merely prescribes in vague terms a generalized end, copying law from some other jurisdiction, criminalizing unwanted behavior indiscriminately, and compromising between competing interest groups – mightily contributed to the loss of the fatal race, and with it, to the destruction of the hopes and dreams of generations inhabiting the world's poorest countries.

None of these fall-back methodologies enables a drafter to predict a bill's behavioral outcomes. None offers a guide to a drafter on how to identify relevant evidence of the nature and causes of the problematic behaviors that comprise the dysfunctional institutions. None offers a guide to a drafter in designing evidence-based legislation.

Three hypotheses may explain why, without regard to their frequent failure to produce laws that *work*, drafters repeatedly used these fall-back methodologies. First, at least British drafting tradition taught that drafters *ought not* concern themselves with policy. Before 1869, each ministry drafted and sent its bills directly to Cabinet, and thence to Parliament. After Sir Henry Thring's appointment as Britain's first Chief Parliamentary Draftsman, he required the ministries to send their drafts first to his office.⁶² After they objected that this threatened to diminish their powers, Thring asserted that his office would deal, not with policy, but only the bills' form.⁶³ In reality, of course, both a bill's substance and its form express itself in that bill's words. To change a word to improve a bill's form inevitably affects its substance.

Second, a whole host of academics and others insist that law cannot change society. Although we demonstrate below that these arguments err, they nevertheless tend to deter drafters from even attempting to use law as a tool for social change.⁶⁴ Finally, drafters fall back on problematic drafting methodologies because they do not have a better methodology. Believing that a drafter either ought not or cannot use the law to bring about social change, and absent a legislative theory that empowers a drafter to predict behaviors in the face of a law, drafters have no choice but to employ fall-back methodologies even though none reliably produces laws that *work*.

Over the last half century, populist leaders promised to use state power to transform the inherited institutions that condemned their peoples to the evils of underdevelopment. In the fatal race between the new leaders and the institutions, however, with few exceptions the populist lawmakers lost. As a result, more than a few populists turned to the business of using government to

⁶² See Stefanou, *supra* note 46, at 321.

⁶³ See *id.*

⁶⁴ See *infra* Part III.A.3 (summarizing different scholarly views that deny government's ability to use law to facilitate social change and then ultimately rejecting those views in promotion of the view that government can and should use the law to change society).

maximize their personal power and wealth.⁶⁵ Without an appropriate methodology for designing change-oriented legislation that *works*, new generations of populists likely will continue to lose the fatal race. Seeking a solution to the problem that drafters have in constructing laws that *work*, our *Manual* proposes ILTAM to guide drafters in designing and drafting effectively implemented transformative law.⁶⁶ Next we outline the steps of ILTAM as a guide to drafting a bill that *works*.

II. ILTAM AS A GUIDE FOR DESIGNING AN EFFECTIVELY IMPLEMENTED BILL

Part I described the problem that populist lawmakers in general, and drafters in particular, confront in their efforts to use law to transform poor countries' institutions. Without an adequate theory and methodology as a guide, drafters too often employ fall-back methodologies that produce inadequately designed legislation. Instead of enacting transformative laws in the public interest, many new lawmakers end up adapting to the status quo. As a result the people lose the fatal race.

Here we describe ILTAM as a guide to drafters seeking to design transformative evidence-based legislation likely to *work*. To that end, ILTAM prescribes a research report as an essential quality control for legislation. A well-constructed research report fulfills several functions.⁶⁷ It provides the evidence a drafter needs to conceptualize, draft and justify a bill's detailed provisions. Publication of the research report should give legislators and stakeholders the evidence they require to assess whether that bill will likely *work*.⁶⁸

ILTAM's problem-solving methodology comprises four decision-making steps a drafter needs to conceptualize and develop a bill. With one important difference concerning Step 4, the same outline structures the research report's

⁶⁵ In the late 1960s, for example, when we taught in the University of Dar es Salaam, in Tanzania, local critics complained that government officials did not merely drive to work, but rather, government-employees chauffeured them in Mercedes-Benzes. Some called those officials, "Wabenzies" – the "people of the Mercedes Benz automobiles."

⁶⁶ See SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 5. In the new millennium we have worked with colleagues from almost forty countries to build the International Consortium for Law and Development. ICLAD aims to institutionalize an ongoing learning process for interested country nationals' drafters to learn-by-doing – that is, to design legislation likely to be effectively implemented and to help resolve the social problems that still block efforts to attain people-oriented development and good governance. ICLAD, <http://www.iclad-law.org/about.html> (last visited Mar. 3, 2008).

⁶⁷ A research report that tracks ILTAM's problem-solving methodology serves to justify a bill. SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 85 ("[A] drafter should write [the research report] to demonstrate that a proposed bill's measures seem likely to resolve the social problem it addresses. That is to say, it aims to equip a drafter to practice a legislative theory and methodology likely to facilitate good governance and development.").

⁶⁸ See *infra* Part III.C.

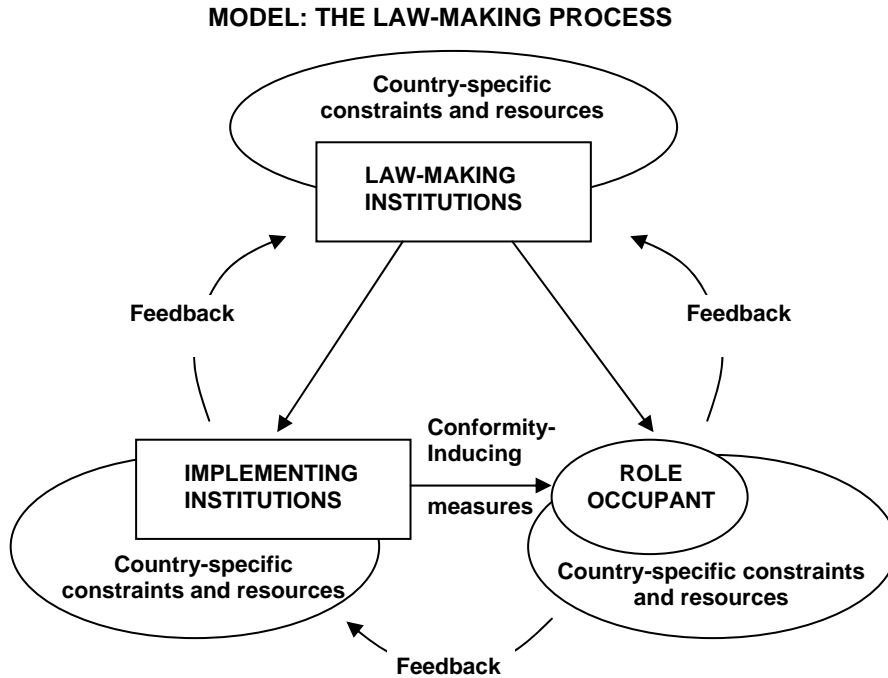
justification for the bill. This Part discusses those steps, essential for both designing the bill and outlining the research report.

A. *Step 1: Describe (a) the Social Problem the Bill Targets, and (b) Whose and What Behaviors Comprise It*

In Step 1, ILTAM's methodology requires that the drafter provide evidence to describe the targeted social problem's surface appearance and whose and what behaviors constitute that problem. Frequently, the social problem appears on its surface as a pattern of inequitably distributed resources. A law cannot usefully command those resources to reallocate themselves. For that reason, the drafter must also describe whose and what behaviors constitute the social problem. In particular, to understand the problem fully the drafter must provide detailed evidence about those problematic behaviors, the relationships between them, and how each contributes to the targeted social problem.

As indicated in the model of behavior in the face of the law, Figure 1 below, a law must take into account the problematic behaviors of two sets of social actors: (1) role occupants and (2) the implementing agencies. Role occupants consist of the actors whose behaviors the bill aims to change. The implementing agency has the task of taking steps to increase the probability that the primary role occupants conform their behaviors to the prescriptions addressed to them. The outcome of the fatal race, described in Part I, shouts that the drafter must design appropriate provisions to change the relevant problematic behaviors, not only of the primary role occupant, but also of the implementing agency, including its personnel. To evaluate the proposed bill effectively, the research report must provide the evidence necessary to describe the problematic behaviors of both the role occupant and the relevant implementing agency. Those behaviors constitute the social problem addressed.

Figure 1: The Law-Making Process⁶⁹



B. Step 2: Explain the Behaviors that Comprise the Targeted Social Problem

To change the problematic behaviors described in Step 1, the drafter must design a bill’s detailed commands, prescriptions, and prohibitions so that they likely will induce both the role occupant and the implementing agency to behave as the bill prescribes. For the bill to *work*, its prescriptions must alter or eliminate the causes of the problematic behaviors. Therefore, Step 2 calls for explanations of each set of problematic behaviors described in Step 1. Step 2 requires the drafter to formulate explanatory hypotheses for the role occupants’ problematic behaviors and provide evidence to warrant those explanations.

The model of the law-making process shown in Figure 1 rests on the theoretical proposition that, in the face of a new law, an actor behaves by *choosing* within the constraints and resources of that actor’s surround. To help the drafter formulate hypotheses as to the probable causes of behaviors in the face of a rule of law, the model guides the drafter in examining three broad categories of possible causes of each set of role occupants’ problematic

⁶⁹ SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 17.

behaviors: (1) the actor's understanding of the relevant rule; (2) the actor's anticipation of the implementing agency's behavior; and (3) the non-legal constraints and resources of the actor's own environment.⁷⁰

ILTAM further unpacks these three categories of possible explanations into seven sub-categories: (1) the **R**ule, that is, the precise wording of the relevant existing cage of laws within which each actor behaves; (2) the actor's **O**pportunity to obey the law including factors in the actor's environment that facilitate the actor's obedience or disobedience of the Rule; (3) the actor's **C**apacity to obey the rule, that is, the actor's skills and resources that foster obedience or disobedience; (4) **C**ommunication of the law to the actor and the extent to which the actor learns about and understands the existing laws' prescriptions; (5) the actor's **I**ncentive to obey or disobey the rule, in other words, the actor's interest in obeying or disobeying the existing law; (6) the **P**rocess by which the actor decides whether and how to obey the rule, and the input, feedback, and decision-making systems by which the actor chooses how to behave in the face of the rule; and (7) the actor's **I**deology or his, her, or its values and attitudes as tradition and experience have shaped them.⁷¹

One way to characterize the above-described categories is in terms of subjectivity and objectivity. Two of the named causal factors, Incentives and Ideology, remain subjective because the actor's own perceptions influence them,⁷² while the relevant actor's objective circumstances define the other five factors.⁷³ Broadly interpreted, these categories guide the drafter in formulating explanatory hypotheses, or educated guesses, as to all the possible causes of a set of actors' problematic behaviors.⁷⁴ In turn, these explanatory hypotheses direct the drafter in capturing the evidence required to test their validity.⁷⁵ By defining causal factors for the drafter to examine, ILTAM offer the drafter a guide for capturing the relevant evidence needed.

⁷⁰ *Id.* at 93.

⁷¹ The first letters of these categories make the mnemonic "ROCCIPI." *Id.* at 95 n.14 (noting that the order of ROCCIPI has no significance and serves only its mnemonic purpose). "The ROCCIPI categories aim to help drafters identify the detailed probable, interrelated causes of problematic behaviors." *Id.*

⁷² *Id.* at 95.

⁷³ *Id.* at 96 ("ROCCIPI[s] objective categories . . . center attention on the institutional causes of the behaviors that block good governance and development.").

⁷⁴ In a particular case, the drafter may not discover a relevant hypothesis related to one or another of the ROCCIPI categories – except the Rule. Every new law constitutes a change in the existing laws. Problem solving teaches that a solution aims at the cause of the social problem at issue. If the new law ordains changes in the existing law (and all new law does that), then the causes of the social problem must include the existing law.

⁷⁵ Evidence is necessary when hypothesizing about the causes of social problems to offer support for explaining why the drafter's bill will or will not *work*. SEIDMAN ET AL., LEGISLATIVE DRAFTING, *supra* note 1, at 99.

C. *Step 3: Create a Legislative Solution*

To translate a proposed policy into effectively implemented law, Step 3 requires the drafter to design the bill's detailed commands, permissions, and prohibitions. The drafter must design the bill's provisions to meet two overriding criteria. First, the commands, permissions, and prohibitions of the bill must logically prove likely to alter or eliminate the causes of the problematic behaviors described in Step 1 and explained in Step 2; otherwise, the bill will likely only poultice symptoms. Second, the solution adopted must prove more cost-effective than any logically-possible alternative.

For Step 3, the drafter should list in the research report a menu of logically-possible alternative solutions, ensuring that each solution listed addresses one or more of the several causes of the problematic behaviors that were identified in Steps 1 and 2. In addition, the drafter should describe in detail the preferred solution embodied in the draft bill to demonstrate that it adequately addresses the social problem's causes. Third, and crucially, the research report should provide evidence to compare the social and the monetary costs and benefits of (a) the preferred solution, (b) the status quo, and (c) the nearest potential competitor solution. That analysis should demonstrate that the proposed bill's social and economic benefits outweigh its probable social and economic costs, including the government's prospective 'out-of-pocket' expenses. Furthermore, as part of the costs and benefits analysis, the research report should incorporate a social impact statement that describes the proposed legislation's likely consequences for those who usually have no seats in the halls of power, namely, the poor, disadvantaged minorities, women, and children.

D. *Step 4: Monitor and Evaluate*

Thus far, the three steps described guide the drafter in both designing a bill and in structuring the accompanying research report. Here, we describe ILTAM's fourth and final step, which serves a rather different function. ILTAM emphasizes that decision-making about a bill does not conclude with its drafting or even its promulgation. In Step 4, ILTAM calls for monitoring and evaluating the implementation and social impact of every new law *ex post* to assess whether and how it *works*. Since the law-in-the-books and the law-in-action systematically differ, one would expect the evaluation to reveal that, in one or another particular way, the law did not *work* entirely as predicted. This result might reflect the drafter's failure to adequately ground the bill's detailed provisions on the relevant evidence or the reality that the prevailing circumstances – the world out there – have changed. If the resulting new problem proves sufficiently serious, given the resources and the political will to remedy it, the evaluation may lead to a new round of law-making. The reality just described underscores that law-making in today's rapidly changing world may require an ongoing process of drafting, implementing, monitoring, and redrafting.

With respect to designing the bill, Step 4 requires the drafter to ensure that, in the bill itself or elsewhere, the law provides for an adequate monitoring and evaluation mechanism. Further, this mechanism should specify criteria for gathering the evidence necessary to assess whether, after the bill has been in force a reasonable time, its provisions have effectively induced the implementing agency and the primary role occupant to behave as prescribed and whether those behaviors tend to ameliorate the targeted social problem. The monitoring and evaluating procedures must prove transparent and accountable. They must ensure that those affected, especially the poor and vulnerable, have opportunity to provide input and feedback of relevant evidence as to the law's impact on their lives. In short, this monitoring and evaluating process answers the question of whether the new law *works* as the research report predicted.⁷⁶ Only after the drafter analyzes the law-in-action can improvements be made to ensure the law *works*.

ILTAM underscores the advantages of requiring that drafters accompany important bills, including draft administrative regulations, with a research report. ILTAM's four-step problem-solving model provides drafters a guide for gathering and logically structuring the relevant evidence required to demonstrate – that is, predict – that the proposed bill will likely *work*. At the same time, the research report provides the facts that legislators, their constituents, and the general public need to assess the bill's detailed provisions' probable social impact. Effectively, in justifying the bill, a well-structured research report serves as a quality control for a new law. The research report not only aids drafters in the bill's design stage but also facilitates the participation of those most affected by the bill in its assessment stage and, if necessary, in improving the bill. Support for this model in the academic legal community has grown. The idea that a legislative theory can provide a guide for designing both an *evidence-based* bill and an *evidence-based* quality control for a law likely to foster democratic social change, however, still confronts significant skepticism.

III. ILTAM'S SCHOLARLY ROOTS

ILTAM did not arise fully armed and ready for the wars as, legend improbably asserts, Athena sprang from the brain of Zeus. Rather, ILTAM grew from intellectual and theoretical roots planted long ago by earlier writers on law, jurisprudence, and sociology. Contrarian cross-currents still deny the possibility of using law to facilitate transformation of the dysfunctional institutions that constitute social problems. Although they arose in a variety of different disciplines, and although none of them directly addressed issues of

⁷⁶ That evaluation may also indicate unexpected new problems requiring new legislative action for at least two reasons: (1) the drafter may not have gathered sufficient evidence as to the nature and causes of the behaviors that comprised the social problem under the pre-existing rule; and (2) new circumstances may arise, sometimes, in part, as a result of the new law's impact, that create a new problem.

legislation, much less legislative drafting, four strands of deeply-rooted jurisprudential, philosophical, and social science scholarship vigorously contest the contrarians' arguments. These roots not only sprouted into a call for jurisprudence and evidence-based legislation in general, but contributed specifically to the formulation of ILTAM. First, Section A reviews the scholarly roots of ILTAM's four underlying assumptions as to the nature of the legislative enterprise. Next, Section B locates the four steps of ILTAM's problem-solving methodology within the relevant scholarly discourse. Lastly, Section C discusses ILTAM's claim that a properly constructed research report can serve as a quality control for effective legislation.

A. *ILTAM's Four Underlying Assumptions and Their Roots in Scholarly Debate*

Early scholarly roots nourished ILTAM's four fundamental assumptions that: (1) denying the positivists' fact/value dichotomy, one *can* warrant a normative hypothesis by propositions about matters of fact; (2) the law can only effectively help resolve a social problem by changing the problematic behaviors that constitute it; (3) the government can use law to change society; and (4) the law-in-the-books systematically differs from the law-in-action.

1. Denying the Fact/Value Dichotomy, One Can Warrant a Normative Hypothesis Concerning at Least Its Suitability by Propositions About Matters of Fact

ILTAM underscores that to produce a law that *works* a drafter should design evidence-based legislation. This Subsection discusses first, the drafter's professional obligation to draft a bill warranted by sufficient suitable evidence to persuade a rational skeptic that the new law will likely *work*; and second, the growing scholarly opposition to the alleged fact/value dichotomy that positivists claim negates the possibility of successfully grounding legislation on evidence.

a. *Professional Obligations*

Drafters have a professional obligation to predict the behaviors a bill will induce after its enactment. A client relies on the drafter's professional and ethical duty of competence. Seeking to use law instrumentally to transform a problematic institution, a policy-maker rarely gives the drafter detailed instructions about the proposed bill's specific commands, permissions, and prohibitions. Instead, the client relies on the drafter's professional and ethical duty of competence to draft effective bills.⁷⁷ Therefore, in the capacity of bill-

⁷⁷ "Of all the ethical commands to a professional, competence constitutes the most important. An incompetent professional fails the client at the very point where that client most needs the professional's help." SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 45; *see also* Nzerem, *supra* note 42, at 135 (stating that competence is the most important

designer, a drafter undertakes a professional obligation to accurately predict the resulting behaviors of a new law.

If policy consists only of the identification and prioritization of social problems for legislative action, that professional ethic gives some small support for Sir Henry Thring's injunction that drafters ought never to impose their will on the client's decisions about a bill's policy.⁷⁸ Whether in the former British colonies or elsewhere, the relationship of trust and confidence between the client and the drafter demands that a drafter refrain from imposing on a client the drafter's preferences as to the priority of legislative projects. Conventional drafting texts, at least those written in English, go even further. These texts construe Thring's prescription as prohibiting the designer/drafter from making any decisions about a bill's substance.⁷⁹ Because form and substance comprise two sides of the same coin, as this Article has already argued, one cannot so limit a drafter's intervention. Professional obligations require a drafter to predict accurately a new law's behavioral consequences. Legislation's frequent failure to *work* testifies to the drafters' failure to live up to that professional obligation.

b. *Contestation Persists over the Fact/Value Dichotomy*

Scholars divide on how a drafter may best make predictions about the behaviors a bill will induce. The positivists' assertion of a fact/value dichotomy "denies the possibility of logically deriving what *ought* to be from what *is*."⁸⁰ One meta-theory, emotivism (also known as the "hurrah-boo" theory), suggests that ethical statements induce behaviors by expressing emotions and feelings about certain objects and conditions.⁸¹ Ernest R. House wrote:

ethical duty, which suggests that drafters must be competent enough to draft effective laws). For example, the New York Rules of Professional Conduct state: "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." N.Y. RULES OF PROF'L CONDUCT R. 1.1(a) (2007).

⁷⁸ See *supra* note 62-63 and accompanying text (discussing Sir Henry Thring's assertion that drafters only deal with the bill's form and not the bill's policy).

⁷⁹ See Stefanou, *supra* note 46, at 321.

⁸⁰ Howard H. Kendler, *Psychology and Ethics: Interactions and Conflicts*, 15 PHIL. PSYCHOL. 489, 490 (2002).

⁸¹ See ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 105, 108 (2d ed. 1948) ("[I]n every case in which one would commonly be said to be making an ethical judgment, the function of the relevant ethical word is purely 'emotive' [However,] ethical terms do not serve only to express feeling [but t]hey are calculated also to arouse feeling, and so to stimulate action."); Charles Leslie Stevenson, *The Emotive Meaning of Ethical Terms*, 46 MIND 14, 18, 31 (1937) ("[The major use of ethical statements] is not to indicate facts, but to create an influence Ethical statements are social instruments. They are used in a cooperative enterprise in which we are mutually adjusting ourselves to the interests of others.").

The logical positivists thought that facts could be ascertained and that only facts were the fit subject of science, along with analytic statements like “1 plus 1 equals 2” that were true by definition. Facts were empirical and could be based on pristine observations, a position called foundationalism.

On the other hand, values were something else. Values might be feelings, emotions, or useless metaphysical entities. Whatever they were, they were not subject to scientific analysis. People simply held certain values or believed in certain values or did not. Values were chosen. Rational discussion had little to do with them.⁸²

In that logical positivist view, propositions about matters of fact, what we call evidence, can have no bearing on a law’s appropriateness. For logical positivists the concept of “evidence-based legislation” at best constitutes a theoretical delusion.

Despite these views, however, ILTAM’s problem-solving methodology does enable a drafter to achieve exactly what believers in the fact/value dichotomy declare impossible. From a detailed description of the facts as to the present problematic situation and its constituent behaviors,⁸³ and detailed explanations of those behaviors, supported by evidence,⁸⁴ a drafter may gather and use facts to justify a bill’s normative prescriptions as logically likely to prove cost-effectively implemented.⁸⁵ Each step of ILTAM finds a basis ultimately in propositions about matters of fact. If ILTAM’s claim holds then a bill’s design developed pursuant to ILTAM’s methodology will likely *work*. Absent better facts or better logic, a justification set forth in a research report that tracks that methodology must persuade a rational skeptic that the proposed bill will *work*.⁸⁶

Furthermore, ILTAM scholarship denies the fact/value dichotomy on the grounds put forward by philosophical pragmatism.⁸⁷ Eugene Meehan asserts: “Value judgments are absolutely contingent upon descriptions and

⁸² Ernest R. House, *Unfinished Business: Causes and Values*, 22 AM. J. EVALUATION 309, 313 (2001); accord HILARY PUTNAM, REASON, TRUTH AND HISTORY 127 (1981).

⁸³ ILTAM’s problem-solving model Step 1. See *supra* Part II.A.

⁸⁴ ILTAM’s problem-solving model Step 2. See *supra* Part II.B.

⁸⁵ ILTAM’s problem-solving model Step 3. See *supra* Part II.C.

⁸⁶ Richard F. Elmore, *Backward Mapping: Implementation Research and Policy Decisions*, 94 POL. SCI. Q. 601, 602 (1979-80) (“[A rational decision-rule consists of a] logically-ordered sequence of questions that policy-makers can ask, prior to making a policy decision, that will provide prescriptions for act[ing].” (emphasis omitted)). Such a decision rule as described by Elmore also structures a persuasive justification.

⁸⁷ See HILARY PUTNAM, *Rationality and Value*, in THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 128 (2002) (arguing that the distinction between fact and value is “at the very least hopelessly fuzzy because factual statements themselves . . . presuppose values”).

explanations.”⁸⁸ If value-propositions merely express a sentiment, then choice becomes irrelevant. Meehan continues:

Until a situation has been described accurately, and the consequences of the choices open to an actor in that situation have been projected on the future by an accurate explanation, no choice can be made. Every choice implies a description and an explanation of the empirical world. . . . Without adequate descriptions and explanations, the actor in the situation is forced to choose among unknown [alternatives] – a contradiction in terms. When alternatives are not known, man acts at random, and self-delusion with respect to alternatives . . . merely obscures the randomness.⁸⁹

Today, the proponent of a proposed public policy must justify it in the public square.⁹⁰ Substantiating Meehan’s strictures, hard-won human experience proves that – better than divining the entrails of a chicken, consulting the oracle at Delphi, or blindly following the decision of a self-proclaimed “decider,” better than intuition, guesswork, common sense, or any of the other arguments often urged in support of judgments of “practical reason”⁹¹ – relevant and logically-organized facts constitute a sound foundation for designing legislation.⁹²

⁸⁸ EUGENE J. MEEHAN, VALUE JUDGMENT AND SOCIAL SCIENCE 54 (1969).

⁸⁹ *Id.* at 54-55; see also PUTNAM, *supra* note 87, at 128.

⁹⁰ See GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS 19 (1989); ALEXANDER SESONSKE, VALUE AND OBLIGATION: THE FOUNDATIONS OF AN EMPIRICIST ETHICAL THEORY 13 (Oxford Univ. Press 1964) (1957) (“We expect . . . all factual statements[] to be *grounded* and when someone . . . fails to provide a ground, we cease to give the utterance serious consideration.”).

⁹¹ “Practical reason” has as many definitions as it has proponents. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 71-72 (1990) [hereinafter POSNER, PROBLEMS] (defining “practical reason” as “the methods by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation”); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 747 (1989) (introducing “practical reason” as “the capacity . . . to act intentionally in various circumstances on reasons for action, notably norms”); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 536 (1992) (discussing a foundational concept of “practical reason” as “the ability to take a complex set of facts, identify the key relevant attributes, and understand their societal significance” (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 39-41, 62-72 (1996) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION])); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 837 (1988) (recognizing a lack of standardized meaning for “practical reason” and here describing it as “the methods . . . that people use to make a practical or ethical choice”); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 46 (1985) (describing “practical reasoning” as “the reasoning of ends to means” and the most appropriate theory of judicial justification). *But see* Robert Audi, *A Theory of Practical Reasoning*, 19 AM. PHIL. Q. 25, 25 (1982) (“[P]ractical reasoning’ is a term of art

By requiring a systematic description and explanation of the empirical world *ILTAM* guides a drafter in discovering the relevant evidence required accurately to predict the behavior that a law will induce, and thus to justify it – that is, to persuade a rational skeptic that the law will likely *work*.⁹³

Evidence-based drafting does not state an impossible dream. An evidence-based law will more likely induce its addressees to behave as prescribed and the resulting behaviors will more likely help to resolve the targeted social problem. By using existing facts to analyze the root causes of social problems when drafting bills, evidence-based legislation proves more likely to *work*. Committed to drafting evidence-based legislation, a drafter confronts vast fields of potentially relevant evidence. To winnow out the relevant from the irrelevant, *ILTAM* offers criteria of relevance that a drafter may use to determine which of the vast meadows of potential evidence will likely prove useful and which will not. These criteria rest, in the first place, on a recognition that a social problem consists of behaviors that together constitute a problematic institution.

2. Law Addresses a Social Problem by Changing the Problem's Constituent Problematic Behaviors

Historically, analytical positivism has long argued against the possibility that a law can help to resolve a social problem by inducing change in the problematic behavior patterns that comprise it.⁹⁴ Rather, analytical positivism focuses attention on the law's dispute settlement function. Law, John Austin said, constitutes a command of the sovereign.⁹⁵ Deeply immersed in a culture that elevated courts to what Dworkin dubbed "the capitol of law's empire,"

with little life in ordinary parlance and a multiple personality in philosophical literature.”). Judge Posner summed up the matter by saying that practical reason is the modality by which practical men reach practical conclusions, for example, by using “anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction.” POSNER, *PROBLEMS*, *supra*, at 73.

⁹² A decision must appear rational – that is, “[one that] can be explained and defended by arguments acceptable to a reasonable audience.” MAJONE, *supra* note 90, at 34; *see also* LOUISE G. WHITE, *IMPLEMENTING POLICY REFORMS IN LDCs* 50 (1990) (“People are intentional and responsive to ideas and willing to listen to reasons that people give for different policies. . . . They respond to cues from their situation about what is appropriate, and they are willing to accept reasonable and satisfactory solutions and decisions.”); *cf.* Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1036 (1989) (“[To act rationally is to act] with full awareness of the costs and benefits of our actions.”).

⁹³ Seidman et al., *Assessing Legislation*, *supra* note 41, at 127-38.

⁹⁴ Analytical positivism has been long associated with the name of John Austin, and is probably still the most significant school of British jurisprudence.

⁹⁵ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 118 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (describing sovereign bodies as one type of author that establishes positive laws).

positivist lawyers interpreted a rule of law as a precept instructing judges on how to resolve disputes.⁹⁶

Implicit in this proposition lies the assumption that the law's function in society does not include facilitating social change, but remains limited to settling disputes. By its commands to the judges, a law prescribes the sovereign's will in settling a dispute of the order subsumed by the law. For specific disputes of various sorts, such as crime, contracts, real property, and other titles remarkably similar to a conventional law school's course offerings, law should guide judges in making decisions as the sovereign may command. In contrast, elementary sociology provides a broad base for ILTAM's foundational proposition that law *can* change a society. ILTAM emphasizes that society consists of sets of institutions,⁹⁷ each of which consists of its members' repetitive patterns of behavior.⁹⁸ By changing those behaviors one can change the institution. To the extent law changes an institution it changes society. Nevertheless, whether law *can* change society constitutes a much-contested position.

3. Government Can Use Law to Change Society

As its basic thrust, ILTAM aims to guide drafters in designing laws as government's primary tool for facilitating social change.⁹⁹ Yet, on grounds other than those already mentioned, many scholars deny that government either *can* or *should* use law for that purpose. Some scholars flatly deny that government has the capacity to use law instrumentally: "[S]tateways cannot change folkways."¹⁰⁰ Further, some naysayers insist the market makes superior decisions. Following Coase,¹⁰¹ they place their reliance on an ideal

⁹⁶ RONALD DWORKIN, *LAW'S EMPIRE* 33-44 (1986) (discussing and defending the legal positivist view).

⁹⁷ See *supra* note 22 (offering multiple definitions of institutions).

⁹⁸ Thus sociology's proposition that the simplest model of society is that of people behaving in repetitive patterns (i.e., in institutions). See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 22, at 1115 ("[Society is] a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests."); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 22, at 1811 ("[Society is] the body of human beings generally, associated or viewed as members of a community.").

⁹⁹ Much of what follows in this Subsection draws heavily, without further attribution, from Ann Seidman & Robert B. Seidman, *Between Policy and Implementation: Legislative Drafting for Development*, in *DRAFTING LEGISLATION*, *supra* note 42, at 287, 287 (discussing three themes of the drafter's role).

¹⁰⁰ ROBERT L. KIDDER, *CONNECTING LAW AND SOCIETY: INTRODUCTION TO RESEARCH AND THEORY* 38 (1983) (quoting William Graham Sumner's popular observation on the matter).

¹⁰¹ Coase's famous thesis held that, given sufficient stability in the law, in a perfectly competitive market, the parties will bargain their way to market equilibrium – by definition,

free market economy.¹⁰² Some sociologists, though using an alternate route, reach the same conclusion, believing that, at least with respect to the law, one cannot in any sense warrant a law by fact propositions. Professor Kidder spoke for many when he wrote that human behavior proves so complex that no one can explain behavior in terms of a law's influence.¹⁰³ These scholars express the view that, because one cannot explain a law's influence on behaviors, one cannot predict how a new law will change those behaviors.

Alternatively, others argue that static inevitably infects the communication channel between the legislature that enacts a law and that law's addressees.¹⁰⁴ How a law's addressee receives its prescriptions almost inevitably differs from what the law's author intended. Some *soi disant* "Marxists" maintain that the base – the system of production of goods and services – remains immune from efforts to change it by using the superstructure which, in this view, includes the law and law-making institutions as a tool for resistance.¹⁰⁵ Still others follow the deconstructionist literary theory which suggests that a reader brings to a text the reader's own subjective views of the world and language. Therefore, since the law constitutes a text, a single determinate meaning eludes it. Instead, the law likely has a different meaning for each reader, and given differing subjective understandings of the law's text each reader will likely

a state in which supply and demand balance each other perfectly. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5 (1960).

¹⁰² By "free market" economy, we mean a market free of transaction costs. See James M. Buchanan, *Politics, Property and the Law: An Alternative Interpretation* of Miller et al. v. Schoene, 15 J.L. & ECON. 439, 441-42 (1972). *Contra* JOACHIM AHRENS, GOVERNANCE AND ECONOMIC DEVELOPMENT 28-29 (2002) ("Today, even the World Bank . . . concedes 'that development requires an effective state, one that plays a catalytic, facilitating role, encouraging and complementing the activities of private businesses and individuals.'" (quoting WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD, at iii (1997))).

¹⁰³ For example, consider the situation where an automobile drives down a side street that crosses a very busy highway on which heavy automobile traffic moves at very high rates of speed. A sign at the crossing instructs the motorist to stop. If the motorist stops before crossing, does the motorist do so because the law – that is, the 'Stop' sign – requires stopping? Or because the motorist knows that not to stop raises the probability of a serious accident? See KIDDER, *supra* note 100, at 118-22 (discussing whether people obey laws because of the law's impact or for reasons stemming from habit, fear, and routine).

¹⁰⁴ By "static" we mean that, in the process of communicating a law, inevitably the law passes through a variety of officials, each of whom puts her own gloss upon the text. The text as received by the addressee thus only accidentally resembles the law as originally promulgated. Koen Van Aeken, *Legal Instrumentalism Revisited*, in THE THEORY AND PRACTICE OF LEGISLATION, *supra* note 36, at 67, 71-76; cf. John Griffiths, *The Social Working of Legal Rules*, 48 J. LEGAL PLURALISM & UNOFFICIAL LAW 1, 17 (2003).

¹⁰⁵ See, e.g., David V. Williams, *The Authoritarianism of African Legal Orders: A Review and Critique of Robert B. Seidman's The State, Law and Development*, 5 CONTEMP. CRISES 247, 254-55 (1981) (stating Marx's view of economic determinism that state and law, as elements of a superstructure, are ultimately determined by the economy).

construe the law differently. As a result, it remains unlikely that the law will, in every case, induce the behaviors that its author intended.¹⁰⁶

Some, citing the Nazi or the Soviet experience, object that the use of law for purely instrumental reasons may foster emergence of an authoritarian state.¹⁰⁷ Yet, while one may use the law to carry out a new Holocaust, another may use the law for benign purposes, such as establishing a minimum wage or social security or protecting children against exploitation. As we have seen, Kidder denied instrumentalism in law on grounds of the complexity of human behavior.¹⁰⁸ Meanwhile, others maintain the law remains unimportant while the policy that underpins it remains critical.¹⁰⁹ Many writers view law as always playing catch-up with society, suggesting that society changes, and law changes to express its new social relationships.¹¹⁰

Finally, the mainly European autopoiesis school has adopted the most elaborate theoretical position against using law as an instrument to transform society. The autopoiesis school's adherents claim that society has become so complex that it consists of discrete, though distinct, systems operating within it.¹¹¹ Each of these operating systems has its own method of communication, for example, in economics it is efficiency and in science it is truth. Likewise, law's distinctive discourse provides its criteria for right and wrong, that is, for determining the legality or illegality of a specified action.¹¹² Therefore, law thus considered becomes a self-referential system,¹¹³ so that whether the law characterizes action *X* as legal or illegal depends entirely upon factors within the legal order itself.¹¹⁴ Autopoiesis theory makes irrelevant not only law's influence on society, but also instrumentalism, as defined in this Article.¹¹⁵

¹⁰⁶ See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-19 (1984) (arguing that because legal doctrine is indeterminate, meaning that doctrines give us choices and do not tell us exactly what to do, the "proper goal of legal theory" should not rely on "determinacy, objectivity, and neutrality").

¹⁰⁷ See Van Aeken, *supra* note 104, at 89 n.4.

¹⁰⁸ KIDDER, *supra* note 100, at 119-20.

¹⁰⁹ John Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339, 357 (1979) (arguing that "most of the effects which have been attributed to legal rules are more properly regarded as the effects of political decisions").

¹¹⁰ See JOHN PHILLIP REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* 3 (1970); GEOFFREY SAWER, *LAW IN SOCIETY* 147 (1965); cf. ELMER A. DRIEDGER, *CONSTRUCTION OF STATUTES* 150 (1983) (explaining that judges may consider the "fluctuating circumstances of society" when interpreting law). *But see* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 225-26 (1979) ("It is of the essence of law to guide behavior through rules and courts in charge of their application.").

¹¹¹ ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 44-49 (1992).

¹¹² *Id.* at 67.

¹¹³ *Id.* at 66.

¹¹⁴ *Id.* at 67.

¹¹⁵ See *supra* note 100 and accompanying text.

Professor Postema summarized the anti-instrumentalist autopoiesis position in what he called the “Autonomy Thesis”:

[L]egal reasoning is a viable and vital form of public practical reasoning that is able to serve the task assigned to it because of its autonomy from moral and political reasoning. This autonomy consists, roughly, in the fact that the existence, content, and practical force of the norms from which legal reasoning proceeds are determined by criteria that make no essential reference to considerations of political morality, and so legal reasoning can proceed entirely without engaging in arguments of political morality.¹¹⁶

Against the naysayers, a growing cluster of jurisprudential and sociological theorists have marshaled arguments to support law’s instrumental use. American legal realists firmly believe that legislation has its social consequences, as do many sociologists of law. One sociologist, Roger Cotterrell, sums up the case:

As long as law is seen as an aspect of society – a certain side of social life as a whole – there can be no possibility of it “standing apart” in some way and “acting upon” society.

But when law is seen as no more than an instrument of state power, as it has almost invariably been seen in contemporary Western societies, it is thought of as independent of other aspects of social regulation. It is no longer considered to derive its effectiveness from its congruence with popular mores but from the concentration of political power which the state represents. . . . To legislators and ordinary citizens alike law appears increasingly as a purely technical regulation, much of it lacking any clear moral element. . . .

As technical regulation, however, it appears to be available for *any* regulatory purpose. Its freeing from whatever community roots it may have possessed is paralleled by its liberation as a mechanism of purposeful government. Modern law is thus the instrument of the modern state.¹¹⁷

In so holding, the realists and sociologists aligned jurisprudential theory with the evidence, proving the naysayers wrong. In some cases, the law clearly does cause changed behaviors. For example, without law no one would pay taxes. An election becomes impossible. At least in these examples, law does induce conforming behaviors. As their primary task lawmakers must, in the circumstances within which a new law will function, discover what factors lead to a law that *works* and what factors make that outcome unlikely. To distinguish these factors, drafters must structure the relevant evidence into a

¹¹⁶ Gerald J. Postema, *Law’s Autonomy and Public Practical Reason*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 79, 80 (Robert P. George ed., 1996).

¹¹⁷ COTTERRELL, *supra* note 111, at 45-46.

persuasive justification for a bill's detailed provisions. To facilitate drafting bills that *work*, ILTAM provides drafters with a comprehensive guide to defining these factors.¹¹⁸

Anti-instrumentalism destroys the very *raison d'être* for legislation. The American legal realist school of jurisprudence taught unapologetically that society ought to use legislation to achieve appropriate social objectives, that is, instrumentally. As earlier adumbrated, the realist school taught that law prescribes behaviors.¹¹⁹ Why bother to write a law unless one does so to instate desired, new behaviors? Why instate new behaviors save for dissatisfaction with the existing ones? In the teaching of American legal realism, as in the sociology of law, ILTAM found strong support for its central thesis that legislation constitutes government's tool for inducing desired behaviors and that it not only can but *should* be used instrumentally to address identified social problems. Furthermore, implicit in the instrumentalist position lies the acceptance of a realist mantra that a pervasive difference exists between the law-in-the-books (what the law says on its face) and the law-in-action (the relevant actors' behaviors in the face of that law).

4. A Pervasive Difference Systematically Exists Between Law's Prescriptions and That Law's Addressees' Behaviors

A theory to guide legislative drafters and other bill-designers must, at least implicitly, recognize that a law's addressees do not automatically behave in conformity with the law's prescriptions. ILTAM holds that the drafter should design a law to minimize the dissonance between the law-in-the-books and the law-in-action, and it aims to guide the drafter in designing a law that will make conformity with the law more likely.

Some writers seem to infer that the word "instrumentalism" implies that a law needs only to prescribe the opposite of the behavior that comprises the

¹¹⁸ As applied to the actions of a judge or a member of the executive branch in a "clear case," the anti-instrumentalists and legal positivists make a strong argument. In such a case the facts fall unambiguously within the "core meaning" of relevant common law precedents or legislation. H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961) (suggesting that law's open texture leaves room for courts to develop it in light of the circumstances). Where they do not unambiguously fall within or without that core meaning, the judge has no option but to determine which side of the line a particular case falls. As precedent, that decision becomes a more or less authoritative decision as to the statute's meaning; the judge, in a very limited sense, makes law. Call that a "trouble case." Cf. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 91, at 491 (illustrating by example a case of first impression which once decided, becomes precedent to be followed). In such a case, the realists argue, of course, a judge ought to decide by considering which of the possible alternative interpretations of the governing norm best advantages the public interest. Holmes wrote: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

¹¹⁹ See *supra* note 117 and accompanying text.

targeted social problem.¹²⁰ After the drafters prescribe that generalized end, these writers imply, the people implementing the bill will automatically take over. Drawn from American legal realism,¹²¹ the concepts of the law-in-the-books and the law-in-action make clear the error of assuming that a drafter, by drafting a generalized end can, as if by magic, induce the desired conforming behavior. Some sociologists use the term “fallacy of normative determinism” to describe the error of assuming that a norm that prescribes behavior also describes behaviors that will automatically take place in the face of the rule.¹²² With respect to law, identification of that fallacy calls attention to the American legal realists’ distinction between the law-in-the-books and the law-in-action. The American legal realists taught that to understand how law *works*, one ought not to assume that behaviors conform to the law. On the contrary, one must expect systematic differences between a law and resulting behaviors.

Consider the repeated failures of new lawmakers’ laws looking to institutional transformation. Too often, the laws prescribed one set of behaviors, but the law’s addressees behaved in other ways. The realists taught that this divergence between the law-in-the-books and the law-in-action did not occur accidentally. They demonstrated that it occurred to some degree with respect to every law.¹²³ Recognizing that reality, *ILTAM* guides drafters to look for and understand the causes of those divergences, and to learn from that study how better to design the law-in-the-books to induce the desired changes.

A drafter ought not to expect complete compliance. Instead, expecting possible divergences between the law’s wording and actual behaviors, the drafter should search for places where divergence seems likely, and redesign the bill to reduce that probability. In other words, recognition of probable systematic differences between the law-in-the-books and the law-in-action reinforces a drafter’s primary duty: to induce the new behaviors required to

¹²⁰ Cf. W.A. BOGART, *CONSEQUENCES: THE IMPACT OF LAW AND ITS COMPLEXITY* 119 (2002) (“Instrumentalist claims concerning cause and effect regarding deterrence, compensation, and so forth may be realized in particular circumstances. Yet the extent of the achievement of such goals is by no means certain, even as other effects may be produced by the law in question.”).

¹²¹ K.N. LLEWELLYN, *THE BRAMBLE BUSH* 12 (5th ed. 1975) (capturing the concept of American legal realism by remarking that “the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*”).

¹²² Judith Blake & Kingsley Davis, *Norms, Values, and Sanctions*, in *HANDBOOK OF MODERN SOCIOLOGY* 456, 461 (Robert E.L. Faris ed., 1964) (“At its most naive level, normative determinism takes the fact that norms *are meant* to control behavior as the basis for assuming that they *do* control it.”).

¹²³ Cf. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 91, at 508-12.

resolve the targeted problem, the drafter must design and draft a law in a way likely to ensure its effective implementation.¹²⁴

In summary, ILTAM builds on four basic assumptions. First, one can, in a sense, warrant a proposed normative instrument by grounding it on evidence (i.e., “evidence-based legislation”). Second, the law addresses a social problem by addressing the problem’s constituent problematic behaviors. Third, government can use legislation instrumentally to change society. Finally, the pervasive difference between the law as prescribed in authoritative texts and the behaviors of the law’s addressees underscores the importance of drafting to ensure implementation of effective conformity-inducing measures. Despite vigorous contestation, all four assumptions prove rooted in respected and persuasive scholarly traditions.

B. *Scholarship and ILTAM’s Four Steps*

As described in Part II above, ILTAM requires that the drafter consider (and the research report provide) a detailed description of the problematic behaviors which the proposed bill aims to change, a detailed explanation of those behaviors, and a detailed menu of the possible alternative legislative solutions among which the drafter may chose in drafting the bill. Whether in the bill or elsewhere, the drafter also must ensure adequate monitoring and evaluation of the new law’s implementation and social impact. In short, ILTAM requires evidence-based legislation.

Just as academics criticize the four assumptions that underpin ILTAM, they likewise contest several specific features of ILTAM: (1) its problem-solving methodology; (2) its criteria for relevance of evidence concerning a bill’s likely behavioral consequences; (3) three issues relating to its methodology for devising a legislative solution for the identified social problem; and (4) its reliance on factual evidence of how well the new law *works* to support or discredit the law. Like the four assumptions underlying ILTAM, these four specific features also grow out of powerful scholarly traditions.

¹²⁴ Mostly by the law-in-action the realists meant what judges *do*. The realists did not usually consider the implications of their mantra for the bill-creating process. Oliver Wendell Holmes suggested:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

HOLMES, *supra* note 118, at 5. An early precursor of the realists did perceive the law as prescribing behaviors, as early as 1917. ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 7-13 (2d ed. 1965) (suggesting that modern social legislation was intended to establish the free status of persons, protect freedom of thought, curb immoral activities, and protect public health and safety).

1. ILTAM's Pragmatic Problem-Solving Methodology

ILTAM's methodology begins the drafting process not with a statement of a vision or the bill's objectives, but with a description of the targeted social problem and the nature and causes of the behaviors that comprise it.¹²⁵ This approach differs from that usually adopted by academics in business and administration circles. Nevertheless, ILTAM's problem-solving methodology rests on solid scholarship.

In the relevant literature, two major methodologies seem to incorporate the critics' view. One, which we denote as "ends-means," teaches that policy-makers identify the "ends" or "objectives" of proposed legislation.¹²⁶ Drafters then design the means of accomplishing those ends. That formulation implicitly assumes the fact-value dichotomy. The "ends" embody a value-judgment.¹²⁷ The "means" imbricate a series of factual propositions concerning the fitness of means to ends.¹²⁸

Within the limitations of the ends-means paradigm, some sophisticated ends-means theorists sail a course that closely parallels that of the problem-solving methodology. Before designing a bill's detailed provisions, these scholars emphasize the drafter must analyze the existing situation.¹²⁹ Most other ends-means theorists, however, tend to jump immediately from the statement of the ends to a consideration of alternatives. They choose between those alternatives by an often less-than-sophisticated cost/benefit analysis. Frequently they insist on quantifying the ends in numerical terms, on the ground that, without a clearly defined end, a policy-maker can never learn whether the means functioned satisfactorily. The ends specified, however, imbricate values and hence can never claim factual warrant. At the end of the day ends-means methodology rests on the policy-maker's values – immune from evidential challenge and incapable of persuading a legislator or a stakeholder who holds different values.

Accepting that ends-means methodology makes evidence-based legislation impossible, incrementalism holds that a drafter can, at best, only "muddle through."¹³⁰ For drafting, therefore, incrementalism suggests development of a

¹²⁵ Behind that issue lies a deeper, more general, and also highly contested proposition, later adumbrated: that one can justify a proposed bill (a collection of normative propositions) by propositions about matters of fact. *See infra* Part III.C.

¹²⁶ SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 89.

¹²⁷ Rubin, *supra* note 48, at 285 ("[T]he legislature needs to define its true goals – the political purposes it wants to achieve . . .").

¹²⁸ *Id.* at 299-300 (suggesting that legislatures assess policy options by "collecting data to determine the effects of those options").

¹²⁹ *See, e.g., id.* at 286 ("The proper starting point for the design of effective legislation is an issue, not a bill.").

¹³⁰ Charles E. Lindblom, *The Science of "Muddling Through,"* 19 *PUB. ADMIN. REV.* 79, 81 (1959) (describing a method of policy formulation "starting from fundamentals anew

set of rules of prudence. It argues that if something goes wrong, social engineering of whatever sort inevitably involves huge risks¹³¹ – and the more far-reaching the social change a law seeks to engender, the greater the social risk. Hence the principal mantra of the incrementalist school: smaller is better. Draft for the smallest change that still ameliorates, however slightly, the social problem addressed. Incrementalism leaves largely unaddressed the pervasive, overwhelming problems of underdevelopment and the colonial legacy. To address a social problem by “muddling through,” without a detailed analysis of the problematic situation at hand, too easily leaves affairs in an even greater muddle.

Confronting these kinds of criticisms, ILTAM finds sustenance in John Dewey and the American pragmatic school’s problem-solving methodology, adapted to the problems the drafter faces.¹³² Dewey’s great project (and that of the American pragmatists more generally) concerned importing into social and political life the rational control over outcomes made possible by scientific practice. He had a special concern with “judgments of practice,” meaning those propositions “relating to *agenda* – to things to do or be done, judgments of a situation demanding action.”¹³³ Clearly a bill requires a judgment of practice. What methodology might one employ to arrive at a normative proposition of the sort that constitutes a bill?

Following Dewey, Step 1 of the process as proposed by ILTAM begins with a careful description, not of visions or ends, but of what is the case, that is, the problematic situation that calls for enquiry. As described by Joseph Ratner, the editor of a compendium of Dewey’s writing:

[U]nless we believe in miracles (in which case we need believe in nothing else and have no *reason* for any inquiry into anything), the knowledge of the specifications desirable and the knowledge *how* to change things so they will fulfill the specifications are both consequences of learning first of all *how things are*.¹³⁴

Here the special requirements of designing a bill impose their own stamp on the methodology. Many, probably most, social problems that gain legislative attention appear at first glance as misallocations of resources. Consider the problem of water pollution. Toxic industrial waste from a neighboring manufacturing plant pollutes Healthytown’s water supply. For an academic article or for a policy paper urging a policy-maker to do something to clean up

each time, building on the past only as experience is embodied in a theory, and always prepared to start completely from the ground up”).

¹³¹ See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 156-60 (5th ed. 1971).

¹³² See generally JOHN DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* 1-7 (Dover Publ’ns, Inc. 1954) (1916) [hereinafter DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*] (presenting a discussion on logical thinking with emphasis on the incorporation of experience).

¹³³ *Id.* at 335.

¹³⁴ Joseph Ratner, *Introduction* to JOHN DEWEY, *INTELLIGENCE IN THE MODERN WORLD* 3, 131 (Joseph Ratner ed., 1939).

Healthytown's water supply, a detailed description of how that toxic waste works its way into Healthytown's water supply system sufficiently describes the social problem at issue.

For the purposes of the bill drafter, however, such a description does not suffice. As earlier argued, law cannot directly change resource allocations.¹³⁵ It cannot command the water supply of Healthytown to cleanse itself of the toxic pollutant. It can prescribe new behaviors to the critical actors. For that purpose, in the second part of Step 1 the drafter must unpack the perceived social problem by specifying in as much detail as possible the problematic behaviors that introduce the waste into Healthytown's water supply, and that the proposed law must change.

Properly designed within the limits of law, a new law can prove effective in changing the relevant problematic behaviors. That requires the drafter, having described the nature and scope of the pollution problem in the first part of Step 1, to identify – perhaps with the help of knowledgeable experts – who does what in disposing of the waste. Those actors include not only the people who dispose of waste in ways that pollute the community's water supply, but also any implementing agency officials responsible, under existing law, for protecting the water supply from pollutants.

In the critical Step 2, the drafter must provide the relevant evidence to specify the causes of each set of actors' problematic behaviors. That lays the essential basis in facts for Step 3, the design of detailed legislative provisions logically likely to alter or eliminate the causes of those problematic behaviors and to induce those actors to behave in ways likely to prevent continued water pollution.

2. *ILTAM's Criteria of Relevance for Evidence Required to Predict a Bill's Likely Behavioral Consequences*

What evidence in *ILTAM's* Step 2 does a drafter need to warrant explanations as to the actors' problematic behaviors described in Step 1? Step 2 rests on four propositions. First, implicitly, it asserts that, to prescribe what ought to be the case, one should analyze the causes (or "explanations") of the existing problematic behaviors. Second, equally implicitly, it asserts that human behavior usually has, not a mono-causal explanation, but many possible causes. Third, it assumes that every law has not one but two addressees: a primary role occupant and an implementing agency. Fourth, perhaps most importantly, it holds that one can explain behavior by examining the environment in which the actor responds to a law. We discuss these *seriatim*.

(1) *Why require explanations?* Various authors reject the necessity of *ILTAM's* second, explanatory step. From a statement of ends, ends-means proponents usually immediately formulate a menu of possible means and use a cost-benefit analysis to choose from among them the preferred means. Dewey and others contested that process. Dewey held that a decision maker – here,

¹³⁵ See *supra* Part II.A.

the drafter – should first discover the causes of the targeted problem, and then design a solution logically likely to alter or eliminate those causes.¹³⁶ Finding the causes (or explanations) of the problematic behaviors described in Step 2 lays a basis for designing a bill’s detailed contents. Having identified the causes of the relevant problematic behaviors, a drafter logically can design the bill’s commands, permissions, and prohibitions to “regulate[] the occurrence of the consequent,” that is, to induce the desired changed behaviors.¹³⁷

(2) *Mono- or multi-causal explanations?* Those who understand that law has societal and behavioral consequences follow one of two very general methodologies to answer the underlying question of why people behave as they do in the face of a rule of the law. The majority see the purpose of the enquiry as similar to that of the mainstream academic seeking understanding of a social phenomenon. From that view one explains a phenomenon by an argument syllogistic in form. One articulates a general rule, and shows that the rule subsumes the case in hand. The search for a powerful theory consists of the search for a covering principle, that is, a theory that subsumes the greatest amount of data. Many assert that, in the social sciences, this nomothetic approach to research has become the most influential methodology of explanation.¹³⁸ Frequently, a covering principle does lead to a general understanding of social phenomenon. After reading an article espousing such a nomothetic explanation, one may rightly nod one’s head and say, “Aha! Now I understand!”

The search for a covering principle, however, usually generates a mono-causal explanation. Law and economics scholars hold that incentives best explain all behaviors, including behaviors in the face of a law.¹³⁹ Sally Falk Moore argues that “semi-autonomous social fields” (for example, a family, university, or legislature and staff) inculcate in their members customary norms of conduct that, consciously or unconsciously, the addressees of a law take into account in deciding to obey a law.¹⁴⁰ Many sociologists attribute to embedded norms otherwise seemingly inexplicable and “irrational” behaviors

¹³⁶ JOHN DEWEY, *EXPERIENCE AND NATURE* 109 (Dover Publ’ns Inc. 1958) (1929) [hereinafter DEWEY, *EXPERIENCE AND NATURE*] (“A ‘cause’ is not merely an antecedent; it is that antecedent which if manipulated regulates the occurrence of the consequence.”).

¹³⁷ *Id.*

¹³⁸ *Cf.* THOMAS A. SCHWANDT, *THE SAGE DICTIONARY OF QUALITATIVE INQUIRY* 292 (3d ed. 2007) (“A formal understanding common in the natural and social sciences is that theory is a unified, systematic causal *explanation* of a diverse range of social phenomena . . .”).

¹³⁹ *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (2007) (“The concept of man as a rational maximizer implies that people respond to incentives – that if a person’s surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so.”).

¹⁴⁰ Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC’Y REV.* 719, 722 (1973).

that seem to defy what an economically rational person should do.¹⁴¹ Others hold that people obey the law *if*, but only *if*, they view the law as legitimate; that is, they not only understand that the law requires specific behaviors, but they also believe that they ought to conform to its precepts.¹⁴² Some scholars assert that:

Like surfers, legislators and corporate officials who wish to change everyday social norms must wait for signs of a rising wave of cultural support, catching it at just the right time. Legislate too soon and they will be swamped by the swells of popular resistance. Legislate too late and they will be irrelevant. Legislate at the right moment and an emerging cultural norm, still tentatively struggling for authority . . . acquires much greater moral force.¹⁴³

Identifying “law” with “punishment,” not a few legal scholars still maintain that deterrence constitutes the chief factor in inducing compliance.¹⁴⁴

For purposes of designing laws likely to prove effectively implemented, the long list of suggested mono-causal explanations for obedience to law all exhibit a common failing. They imply that behaviors in the face of the law can be explained by a single, common causal factor: incentives, embedded norms, legitimacy, deterrence, culture, etc. Experience, however, underscores the reality: to design legislation likely to *work*, identification of a single causal factor almost always proves insufficient. To explain current behaviors and predict future behaviors in the face of a rule of law, a drafter must consider a range of interrelated causes.

Take for example some government officials’ corrupt behaviors. They may act corruptly in part because of personal greed, but also because they have internalized the precepts of a general culture of corruption; the institutions within which they work may have inadequate systems of financial accounting

¹⁴¹ See, e.g., JUDITH GOLDSTEIN & ROBERT O. KEOHANE, *IDEAS AND FOREIGN POLICY* 20-24 (1993).

¹⁴² See, e.g., COTTERRELL, *supra* note 111, at 141-42 (describing the ultimate state of moral development as “obeying only when law reflects proper ethics”); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 24 (2006) (“[L]eaders can gain voluntary compliance with their actions if the actions are consistent with people’s views about right and wrong, even if not personally beneficial.”); Thomas Hilbink, *The Power of Legitimacy in Obedience to the Law* 1 (Mar. 6, 2007) (unpublished manuscript, available at <http://www.umass.edu/legal/Hilbink/250/S07%20model2.pdf>) (“[T]he power to compel obedience to the law is derived from the power to sway public opinion to the belief that the law and its agents are legitimate and deserving of this obedience.”).

¹⁴³ Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 69, 85 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

¹⁴⁴ See BOGART, *supra* note 120, at 58 (stating laws imposing sanctions for noncompliance do have a recognized deterrent effect while also acknowledging that “the effectiveness of deterrence in problem areas . . . is much more questionable”).

that enable them to avoid accountability for their corrupt behaviors, or the law may give them discretion to decide how to distribute public goods through a process clothed in secrecy.

To focus attention on any one of these general causes may provide some insight into corruption as a general phenomenon. It would do little to alter or eliminate the particular causes of officials' corrupt behaviors in a particular country's unique circumstances. For example, if education successfully transformed a general culture of corruption into one emphasizing transparency and accountability, a grossly underpaid public official might nonetheless seize an opportunity to behave corruptly for personal reasons. To make corrupt behaviors more difficult, a drafter must design specific provisions in every new law to block all of the possible interacting causes likely to exist in the particular country-specific circumstances. In short, drafters require a multi-causal model of problematic behaviors likely to take place in the face of a rule of the law. ILTAM offers that kind of model.¹⁴⁵

(3) *Why two addressees of a law?* ILTAM's model of the legal order posits that a law necessarily has not one, but two sets of addressees: the primary role occupant, and an implementing agency. Unfortunately, in existing drafting practice, drafters often prescribe only the primary role occupant's behaviors. Too often, they neglect the implementing agency, that is, the agency responsible for designing and implementing measures likely to ensure that the primary role occupant actually conforms with the behaviors the bill prescribes. When the bill, once enacted, does not *work*, people then complain, "we have good laws, but they are poorly implemented."

ILTAM's model of how a law induces behavior rests on Hans Kelsen's *Pure Theory of Law*.¹⁴⁶ As a positivist, Kelsen focused not on social actors or their behaviors, but on the relationship between the sets of norms that constitute a legal system. He emphasized that a law must have not one, but two sets of addressees: the primary addressees and an implementing agency.¹⁴⁷ Cultivating that root, ILTAM holds that, unless a law prescribes *who* will do *what* to ensure its effective implementation, it will likely prove – like those that contributed to repeated losses of the fatal race – just another example of a good law poorly implemented.

(4) *Why the importance of evidence of the unique, non-legal circumstances of each set of the law's addressees?* Recognizing that many interrelated causes influence each set of a law's addressees, ILTAM holds that a drafter must gather the relevant evidence as to *all the possible causes* of their problematic behaviors. In the research report, the drafter must describe those causes in sufficient detail to serve as a basis for logically designing the bill's prescriptions for new behaviors required to alter or eliminate them all. Only

¹⁴⁵ See *supra* p. 453 fig.1.

¹⁴⁶ HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1934).

¹⁴⁷ *Id.* at 4-10.

then will the bill's prescriptions (especially those relating to the implementing officials) likely induce the new behaviors necessary to facilitate the role occupants' efforts to resolve the targeted social problem. Only that kind of detailed evidence will likely persuade a hypothetical rational skeptic that the bill proves grounded on logically-organized facts.

To guide the drafter in designing a bill likely to *work*, *ILTAM* does not offer a covering principle as to the causes of existing problematic behaviors, but an agenda of categories of all the possible causes of behavior, including the wording of the law.¹⁴⁸ In searching for potentially useful explanatory hypotheses, the drafter should consider each of these categories. Those hypotheses, in turn, should guide the search for the evidence logically necessary as a basis for formulating the bill's detailed provisions.

In assembling *ROCCIPI* as a heuristic,¹⁴⁹ *ILTAM* finds inspiration in the work of a Norwegian anthropologist, Fredrik Barth, who proposed a very general model of the causes of behavior: people behave by choosing among the constraints and resources of their own location-specific realities.¹⁵⁰ To explain how a role occupant behaves in the face of a rule of law, consider the constraints and resources of that actor's circumstances. Likewise, to explain how an implementing agency behaves, consider the constraints and resources of the agency's circumstances.¹⁵¹ As an organization, an agency does nothing except make decisions; in reality, the agency's officials make decisions through a complex process usually involving several actors. Presumably, those officials act on behalf of the agency in implementing those decisions.¹⁵²

To phrase the question as it appears to the drafter who must predict behavior under a proposed new law: Given the proposed bill's prescriptions, how will each of the two sets of addressees likely choose to behave in the context of the constraints and resources in their particular circumstances?¹⁵³ Following

¹⁴⁸ That is to say, *ILTAM* offers the drafter an idiographic rather than a nomothetic set of explanations, remembered by the mnemonic, *ROCCIPI*. See *supra* note 71 and accompanying text.

¹⁴⁹ See *supra* note 71 and accompanying text.

¹⁵⁰ Fredrik Barth, *Processes of Integration in Culture*, in *MODELS OF SOCIAL ORGANIZATION* 12-13 (photo. reprint 1971) (1966).

¹⁵¹ A complex organization does not constitute a single rational actor. Cf. GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 32 (1971) ("The nation or government, conceived as a rational, unitary decisionmaker, is the agent. This actor has *one* set of specified goals . . . , *one* set of perceived options, and a *single* estimate of the consequences that follow from each alternative."). Note that almost every implementing agency constitutes a complex organization.

¹⁵² See SEIDMAN ET AL., *LEGISLATIVE DRAFTING*, *supra* note 1, at 131 (suggesting that institutional processes consist of "the repetitive behavior patterns of designated officials acting in the face of laws or regulations that purport to prescribe those behaviors").

¹⁵³ See *supra* note 54 and accompanying text (suggesting that laws do not *work* when drafters merely specify their vision, rather than predict the behaviors that the law will induce).

Kelsen, the constraints and resources of each set of primary role occupants should include the impact of the relevant implementing agency's expected new behaviors designed to induce those role occupants' conformity to the new law's prescriptions addressed to them.¹⁵⁴ In the same way, to predict the behavior of the implementing agency, the drafter must understand the constraints and resources of the implementing agency's circumstances.¹⁵⁵

In general, Barth's model of behavior looks not for a single causal factor governed by a general principle, but for the multiple constraints and resources likely, in a country's specific circumstances, to influence behaviors in the face of a law. Again consider Figure 1. Role occupants likely take into account (1) the meaning of the law's wording as they understand it; (2) their expectations of the implementing agency's behaviors; and (3) the other non-legal constraints and resources in their particular circumstances. ILTAM further unpacks these three categories into the seven categories of possible causes, identified by the ROCCIPI heuristic.¹⁵⁶ These serve to guide the drafter in gathering and organizing evidence as a basis for designing the bill's details.

Some object to this methodology. People, they say, do not continually consciously make choices as to whether or not to obey a rule of law. That assertion, of course, reflects reality. Like Sally Falk Moore, Ehrlich went further to hold that in social life, the law's threat has little force compared to the effect of the living law, the customary rules which, whether or not they accord with positive law, govern most people's interactions with their fellows.¹⁵⁷ For example, while driving in the United States, I automatically drive on the right side of the road because I have so driven these past seventy-odd years. When I go to South Africa, however, where people drive on the left, as I drive I must continuously remind myself of the law and continuously, as a driver, *choose* on which side of the road to drive. After a law has remained in force for a time conforming behaviors become routine. In contrast, every time a new law comes into force, the role occupants must consider how to behave in the face of the new rule; they must make a conscious *choice*.

In conditions of development, the issue always arises: how to behave in the period immediately following introduction of a new, behavior-changing law? In those conditions, it seems hard to believe that an actor who knows about a

¹⁵⁴ See Kelsen, *supra* note 146, at 33.

¹⁵⁵ See *supra* p. 453 fig.1. Note that in a case in which the role occupant of interest serves as an official in a government agency conventionally denoted as an "implementing agency," a superior official in that agency frequently acts as the implementing agency for that role occupant.

¹⁵⁶ See *supra* note 71 and accompanying text.

¹⁵⁷ EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 493 (Walter L. Moll trans., Russell & Russell Inc. 1962) (1936); see also Moore, *supra* note 140, at 722 (suggesting that the semi-autonomous social field "can generate rules and coerce or induce compliance to them").

new law does not consciously *choose* whether and how to conform to its prescriptions. ILTAM's model of why people behave as they do in the face of a rule of law, however, does not require a conscious *choice*. Instead, it holds that in the face of the law, the actor responds not only to the terms of the law, but also to a number of non-legal constraints and resources inherent in the relevant circumstances – including what goes on in that actor's head. In terms of the ROCCIPI categories, these considerations fall under Ideology and Interest. Whether the actor conforms her behavior to the new law or to an embedded norm may in large part depend upon how recently the law was promulgated.

3. Issues Concerning ILTAM's Methodology for Designing a Legislative Solution

Step 3 raises three potentially contested issues. First, why the requirement of considering alternative possible solutions? Second, why the insistence that the solution (the detailed commands, permissions, and prohibitions of the proposed bill) address the causes of the problematic behaviors? Third, why the reliance on cost-benefit analysis?

a. *Considering a Menu of Alternatives*

Both to guide the drafter to the best solution and to persuade a rational skeptic of the proposed law, the research report must describe the alternatives from which the drafter may choose. Step 3 crucially requires the drafter to describe the alternatives considered, and to justify the drafter's choice among them: "A value judgment requires a reasoned choice from among the alternative sets of outcomes that can be achieved by an identifiable actor in a specified empirical situation."¹⁵⁸ Unless the drafter considers possible alternatives, he or she will not know the bill embodies the best available choice. Unless the research reports the range of alternatives considered, the reader cannot determine whether it justifies the bill.

b. *How the New Law Addresses the Behaviors' Causes*

Why the requirement that the drafter demonstrate the new law addresses the causes of the problematic behaviors of concern? As already mentioned, ILTAM builds on Dewey's emphasis on the meaning of the word cause: "that antecedent which if manipulated regulates the occurrence of the consequent."¹⁵⁹ If the "consequent" of interest to a drafter consists of changing the bill's targeted problematic behaviors, then, in order to regulate "the occurrence of the consequent," the solution must help to alter or eliminate the causes of those behaviors. In Step 2, ILTAM identifies and provides evidence as to the *causes* of each set of problematic behaviors. In Step 3, the drafter

¹⁵⁸ MEEHAN, *supra* note 88, at 53.

¹⁵⁹ DEWEY, *EXPERIENCE AND NATURE*, *supra* note 136, at 109.

must demonstrate that the bill's detailed prescriptions logically seem likely to alter or eliminate those causes, and to induce the relevant social actors to behave in ways necessary to transform the dysfunctional institutions that constitute the targeted social problem.

c. *Why the Requirement of a Cost-Benefit Analysis?*

Emotivists reject the possibility of using evidence as the basis for value choice.¹⁶⁰ In so doing, they deny the utility of cost-benefit analysis. Meehan, in contrast, points out that “[r]easoned choice, considered as a process, is a kind of cost-benefit analysis, though the meaning of cost and benefit need not be stated in terms of dollars and cents.”¹⁶¹ Designing an adequate cost-benefit analysis requires estimating the qualitative, as well as the quantitative social and economics costs and benefits – an area that requires further research. Nevertheless, lawmakers must use whatever evidence they can find to assess whether the benefits of implementing the law, including its probable social impact, outweigh the social and economic costs.

4. Monitoring and Evaluation

With respect to a law, what function does ILTAM's fourth step of monitoring and evaluation serve? A law, as a statement of a government rule, at least implicitly commands that its addressees should follow its prescriptions. For a true believer in the fact/value dichotomy, that command classifies a law as a value statement, immune from factual warrant. Alexander Sesonske argues otherwise. He draws a distinction between two meanings of the proposition, “X is a good thing to do.” He emphasizes that “statements containing either ‘right,’ ‘good,’ or ‘ought,’ whether ethical or nonethical, serve one or both of two functions. They express judgments of worth or judgments about the existence or satisfaction of requirements.”¹⁶² Evaluation of a law after its implementation provides information from which responsible authorities and the public generally can learn whether the law achieves its instrumental purpose. An adequate evaluation process provides criteria and procedures for judging a law's suitability for achieving its designed requirements. In that sense, Step 4 follows logically from ILTAM's insistence that a polity not only can, but should use legislation instrumentally in the public interest.

¹⁶⁰ See *supra* note 81 and accompanying text.

¹⁶¹ MEEHAN, *supra* note 88, at 110 (emphasis added). Note that ILTAM emphasizes both the economic and social aspects of a cost-benefit analysis.

¹⁶² ALEXANDER SESONSKE, VALUE AND OBLIGATION: THE FOUNDATIONS OF AN EMPIRICIST ETHICAL THEORY 11 (Oxford Univ. Press 1964) (1957); cf. Dewey, *Theory of Valuation*, *supra* note 43, at 5 (suggesting that “the words ‘valuing’ and ‘valuation’ are verbally employed to designate both *prizing*, in the sense of holding precious, dear . . . , and *appraising* in the sense of *putting* a value upon, *assigning* value to”).

C. *The Research Report as a Quality Control for the Bill*

A research report describes and assesses the new law *ex ante*, that is, before its implementation. A research report that tracks ILTAM can serve as a quality control over the bill that the research report discusses. After the law's promulgation and implementation, Step 4 of ILTAM's problem-solving methodology calls for *ex post* examination and evaluation of the new law to provide an evidentiary basis for determining whether the new law *works*. Assuming adequate circulation of the results, that evaluation affords opportunity for officials, legislators, and stakeholders to review their expectations of the program and to continue, change, or abolish it.

Can the research report serve as a quality control for proposed legislation? In answering that question in the negative, naysayers offer two objections: first, whatever the claimed influence of facts and logic, wealth and power always have the final say; and second, in the course of designing a bill, the drafter makes a number of discretionary decisions which inevitably prove controlled by values.

1. The Research Report as Quality Control over the Suitability of Legislation

Can the research report serve as quality control over legislation? If *ex post* evaluation provides the basis for assessing whether a law *works*, then a sound, evidence-based prediction that the bill *will work* ought to serve as a surrogate. In view of the respective tasks of policy-maker and drafter, the bill's evaluation provisions must provide for testing whether the new law *works* – that is, whether the new law's provisions actually induce their prescribed behaviors, and whether those behaviors tend to ameliorate the social problem addressed. Circumstances confine the drafter's duty to designing a law (and hence an evaluation provision) to respond to the issue defined by the policy-maker, and not to the question of the worth (or desirability) of the new law.

In requesting the drafter to design a bill to help resolve a specified social problem, the client – the policy-maker – asserts that the bill is worth drafting, and that the drafter should prioritize it accordingly. Impliedly, the client asserts the *worth* of the bill. Both professional ethics and Thring's injunction require that the drafter take those valuations as given.¹⁶³ Of the two possible meanings of the phrase, "this is a good bill" (suitability and worth), the legislative drafter's brief charges the drafter with responsibility to ensure the bill's suitability, the likelihood that the new law will *work*.¹⁶⁴ Combining the fact/value dichotomy with the drafter's professional obligation, that brief argues that the drafter has no business permitting a personal valuation of a bill's desirability (or any particular aspects of it) to influence the bill's design. The drafter's concern properly focuses solely on suitability, and so should the

¹⁶³ See *supra* note 78-79 and accompanying text.

¹⁶⁴ See *supra* note 162 and accompanying text.

commands, permissions, and prohibitions concerning evaluation that the drafter includes in the bill. The ex post evaluation responds to at least that concern. If well done, it answers the question of the bill's suitability for accomplishing the client's policy.

ILTAM's Step 4, the monitoring and evaluation of the effectiveness of the new law's implementation and its social impact, offers an ex post opportunity to gather and assess information as to whether the new law actually *works* as predicted.¹⁶⁵ That process should provide further evidence as to the bill's suitability for accomplishing the client's policy. In John Dewey's words, "[t]he determination of end-means (constituting the terms and relations of the practical proposition) is hypothetical *until the course of action indicated has been tried. The event or issue of such action is the truth or falsity of the judgment.*"¹⁶⁶

By requiring effective monitoring and evaluation of the consequences of enacting and implementing a law, ILTAM's Step 4 provides what Dewey views as the final, essential test. To the extent the evidence demonstrates that the law *works*, it testifies to "the truth or falsity of the judgment" (i.e., of the commands, permissions, and prohibitions of the law).¹⁶⁷ After the ex post experience of the law's implementation, legislators, stakeholders, and members of the general public (through their representatives or in person) can assess whether results warranted the research report's ex ante prediction that the bill's provisions would prove suitable.

The research report's proposed solution implicitly embodies a prediction that the bill's prescriptions will *work*. That the bill *works* warrants, in the sense of suitability, a proposition affirming the bill's *worth*. Just as an ex post evaluation measures the actual relative effectiveness of the bill for achieving its aim of changing problematic behaviors, so does an ex ante prediction of behavior measure its probable relative effectiveness. (The probability that the drafter's prediction of consequent behavior will prove accurate defines the probability that the bill will in practice prove effective.) Thus does a research report that sets forth the relevant evidence and logic serve as quality control of the suitability of a bill: the more likely that the bill will *work*, the more likely it will prove suitable. Does it also serve as quality control concerning the worth (in the sense of desirability) of the proposed legislation?

2. In the Legislative Process, Power and Wealth Do Not Inevitably Prevail

Preliminarily we examine the claim that, at the end of the day, power and wealth, not facts and logic, determine what bills become law. To the question posed, a true fact/value dichotomy believer may retort: "Do you *really* argue

¹⁶⁵ See *supra* Part II.D.

¹⁶⁶ DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 132, at 346 (emphasis added); see also JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 156 (Beacon Press 1948) (1920).

¹⁶⁷ DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 132, at 346.

that power and wealth do not enter into the law-making process?” Of course, real-world power and wealth may warp the rationality of lawmaking. Not every stakeholder plays by the rules hypothesized for a rational skeptic. Nevertheless, in the public square, power and wealth do not always prevail. They prevail only when legislative decision-making hides behind a veil of secrecy. No matter that the senator nominally from Oil Country owes secret allegiance not to the Oil Country electorate but to Big Oil. Whatever the senator’s true allegiance, in the public square he always avows loyalty to Mr. T.C. Mits, “the celebrated man in the street.”¹⁶⁸

3. The Research Report as Quality Control over the *Worth* of the Legislation

As we have seen, the research report warrants a bill’s suitability.¹⁶⁹ Can it also warrant the bill’s worth? Before the new law’s implementation, ILTAM requires the drafter to write a research report that justifies the bill. Within the limits imposed by the drafter’s necessary acceptance of the client’s choice of the targeted social problem, the drafter typically must make ethical decisions about the bill’s substance. As we have argued,¹⁷⁰ in principle, the drafter should restrict those decisions to “judgments about the existence or satisfaction of requirements,” excluding from consideration “judgments of worth” (or desirability).¹⁷¹ A judgment of worth implies an evaluation of the particular legislative provisions’ inherent worth (or lack of worth). Excepting the drafter’s professional responsibility to call the client’s attention to a provision that seems to require reevaluation, an attempt to evaluate a bill’s provisions in terms of its worth or prizing remains outside of the drafter’s terms of reference.¹⁷² The client’s instructions therefore seemingly limit the drafter’s discretionary choices about a bill’s content to issues of suitability. That proposition raises contentious issues.

In designing a bill and a research report to justify it, a drafter cannot avoid making discretionary choices about the kinds of evidence required as to: (1) the nature and scope of the social problem, and whose and what behaviors constitute it; (2) which hypotheses as to the causes of those behaviors to put to empirical test; and (3) what alternative solutions to consider in the research

¹⁶⁸ See generally LILLIAN LIEBER, *THE EDUCATION OF T.C. MITS* (Paul Dry Books, Inc. 2007) (1944) (coining the term “the celebrated man in the street” to refer to the average person).

¹⁶⁹ See *supra* Part III.C.1.

¹⁷⁰ See *supra* Part III.C.1.

¹⁷¹ SESONSKE, *supra* note 162, at 11.

¹⁷² See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to *other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.*” (emphasis added)).

report, and how to estimate and weigh those alternatives' socio-economic costs and benefits. Even a conscientious drafter, attempting to confine her discretionary choices about a bill's content to issues of suitability, may unwittingly express subconscious, unarticulated preferences for *this* rather than *that* provision.

"Aha," says the fact/value dichotomy true believer, "here ILTAM's claims fall apart. At the end of the day, the bill reflects not merely judgments of suitability, but also judgments of worth. The facade of justifications in terms of facts and logic, of reason informed by experience, disappear. We are left only with the 'hurrah/boo' theory. So much for evidence-based drafting!"¹⁷³ On either of two grounds suggested by Jürgen Habermas and by John Dewey, however, the fact/value dichotomy argument fails.

a. *Communicative Discourse*

First, following Habermas, ILTAM's methodology, embodied in the research report, aims to justify the bill to a rational skeptic.¹⁷⁴ If a rational skeptic/reader disagrees with the justification given for the bill, then that reader can overcome the bill – but in principle only upon grounds that would win the support of an equally rational skeptic. That reader might supply better facts than those in the research report, whether they concern the description of the relevant behaviors, their explanations, the range of plausible solutions, or the relative costs and benefits of those solutions. The reader might furnish better logic, and can put forward a better alternative methodology. If the drafter has omitted relevant facts or arguments for whatever reason, then the processes of rational discourse hold the potential for disclosing those omissions. If not challenged by better facts or better logic, then the proposed law must come closer to embodying the public interest than any proposed rival. Evidence-based drafting remains not only a better, but also a realistic alternative to the exercise of wealth and power.¹⁷⁵

¹⁷³ See *supra* note 81 and accompanying text.

¹⁷⁴ See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 8-42 (Thomas McCarthy trans., Beacon Press 1984) (1981); cf. PITKIN, *supra* note 61, at 212 (suggesting that politics "is a field where rationality is no guarantee of agreement. Yet, at the same time, rational arguments are sometimes relevant, and agreement can sometimes be reached."); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 800 (1997) (suggesting that under the public reason model, "we think of persons as reasonable and rational, as free and equal citizens, with the two moral powers and having, at any given moment, a determinate conception of the good, which may change over time").

¹⁷⁵ Why use a hypothetical "rational skeptic" as the model auditor? Whether legislators – let alone Mr. Mits – are comparable to such an auditor remains a contested proposition. As earlier suggested, the answer lies in human experience, and in the demonstrated superiority of arguments that rest on reason informed by experience, that is, on facts and logic. See *supra* note 88 and accompanying text.

b. *Pragmatic Philosophy*

Second, pragmatic philosophy suggests that a properly drawn research report can warrant the prescriptions of a bill, albeit on somewhat different grounds than those advanced by communicative discourse. As its fourth step, *ILTAM* calls for an ex post evaluation of the new law's implementation. That evaluation serves several purposes; for example, it may reveal weaknesses in the law as enacted, or reveal that although the law was sufficient when enacted, the world has changed, and therefore so must the provisions of the law.

ILTAM – and almost every other school of thought – agrees with the proposition that society can and does use legislation instrumentally.¹⁷⁶ Those other schools must therefore agree that if evaluation demonstrates that the law *works*, then the provisions of the law prove themselves suitable for the purposes for which they were designed. To the extent the assertion, “the law as designed was good” means the law as designed proved that the law *works*, such an evaluation warrants the suitability of the law as designed.

Does the ex ante evaluation also, in a sense, warrant the probability that the law will prove good in the sense of worth? Again following Dewey, an ex ante evaluation can warrant not only the law's suitability, but also its worth – but only if that law has received adequate appraisal. Dewey remarks:

Are desires and interests (“likings,” . . .), which directly effect an institution of end-values, independent of the appraisal of things as means or are they intimately influenced by this appraisal? . . . For what is deliberation except weighing of various alternative desires (and hence end-values) in terms of the conditions that are the means of their execution, and which, as means, determine the consequences actually arrived at? . . . *The proposition in which any object adopted as an end-in-view is stutable (or explicitly stated) is warranted in just the degree to which existing conditions have been surveyed and appraised in their capacity as means. The sole alternative to this statement is that no deliberation whatsoever occurs, no ends-in-view are formed, but a person acts directly upon whatever impulse happens to present itself.*¹⁷⁷

A research report that follows *ILTAM*'s prescribed steps to justify a proposed bill's detailed substantive provisions meets the demands of both discursive rationality and pragmatic philosophy. Therein lies the research report's potential as a quality control over legislation. Those who adhere to the “hurrah-boo” theory assert the incommensurability of propositions about matters of fact and matters of valuation. According to this view, the closest approximation of a consensus bill becomes one that expresses the outcome of

¹⁷⁶ See *supra* note 92 and accompanying text.

¹⁷⁷ Dewey, *Theory of Valuation*, *supra* note 43, at 25 (emphasis added). Note that Dewey's exception for decisions made on impulse hardly applies to legislation whose claim to respect lies largely in the deliberate, complicated structure of legislative decision-making. See WALDRON, *supra* note 40, at 2.

bargaining between interest groups. If those negotiations proceed within the confines of a level playing field in which all the relevant interest groups participate on equitable terms, then the outcome embodies the public interest – or as close to it as one can fairly expect.¹⁷⁸ The quality of the bill finds a metric not in the bill itself, but in the equity of the bargaining process. Schattschneider famously observed: “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”¹⁷⁹

In contrast to pluralist wishful thinking, a research report holds the potential for assessing a bill’s *quality* when it follows ILTAM’s problem-solving methodology and evaluates a law based on an adequate appraisal rather than mere impulse. At its very heart, that report embodies predictions, demonstrably grounded on evidence, concerning the relevant actors’ probable future behaviors. The probability that those predications will prove accurate rests upon the sufficiency of the evidence and the reliability of the logic underpinning the predictions.¹⁸⁰ The better the evidence and the logic put forward in the research report – that is, the better it persuades the rational skeptic of its validity, and the more it demonstrates the deliberation that produced the bill – the better the bill’s quality. In that sense, the research report provides a quality control for the bill’s substance.

CONCLUSION

The fatal race, and the failure of drafters complicit in its too frequent loss by populists seeking to use state power and the law in the public interest, testify to the urgent need for a methodology likely to produce change-oriented legislation that achieves the desired social impact – in other words, that *works*. Human experience throughout the world, especially in developing countries, testifies to the criteria by which one should assess such a methodology: it must produce bills justified in terms of reason informed by experience, of facts and logic, that have by that justification demonstrably received careful appraisal.

¹⁷⁸ Cf. PETER H. SCHUCK, *Against (and for) Madison: An Essay in Praise of Factions*, in *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 204, 211 (2000) (stating that according to David Truman, Robert Dahl and others, “Politics is a complex process in which . . . [interest] groups bargain with one another, engaging in a combination of argument, resource exchange, threat, protest, and other forms of persuasion”).

¹⁷⁹ E. E. SCHATTSCHNEIDER, *supra* note 58, at 35. Many other authors agree with that assertion. See, e.g., Shauna L. Shames & Greg Weiner, *Raising Money, Raising Hackles: Analyzing Interest Group Response to Supreme Court Decisions Through Direct Mail Solicitations* 34 (unpublished manuscript, presented at Southern Political Science Association Meeting, Atlanta, Jan. 5-7, 2006, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/8/4/9/pages68494/p68494-1.php) (“The idea that controversial court decisions create a different opportunity structure is by no means a new idea . . .”).

¹⁸⁰ Cf. MEEHAN, *supra* note 88, at 53.

That calls for a legislative theory that guides a drafter towards drafting and justifying such a bill and its accompanying research report.

ILTAM embodies such a theory. Its roots lie deep in diverse fields of scholarship: jurisprudence, social science, and philosophy in general, particularly American legal realism, Hans Kelsen's pure theory of law, Fredrik Barth's sociology of law, and especially the work of Jürgen Habermas and John Dewey. ILTAM offers a guide to drafters who recognize the importance of accompanying a proposed bill with a research report that justifies a bill's detailed provisions by presenting relevant, logically-organized evidence. Pragmatic philosophy teaches that, *ex post*, one can test the validity of a bill by monitoring and evaluating its success: did the bill, once enacted, induce the behaviors it prescribes? Did those behaviors help to resolve the targeted social problem? *Ex ante*, by providing the relevant available evidence, a well-designed research report can facilitate forecasting the probable behaviors the bill will induce. Furthermore, discourse ethics argues that a research report that conforms to ILTAM's structures holds the potential for winning the approbation of a hypothetical rational skeptic. For both reasons, the research report serves as a quality control over proposed legislation. If nobody challenges the evidence or the logic that ground a bill, as stated in the research report, then, by the probability that the bill's predictions hold, the bill must serve the public interest.

Historically-shaped institutions define our world, where four-fifths of the world's population receives only one-fifth of the global income. Without transformation, those institutions will likely perpetuate the poverty, vulnerability, and poor governance suffered by one out of four of the world's inhabitants. Organized societies, rapidly forced by ongoing revolutionizing processes of technological change into shrinking global realities, have no better instrument than the law to facilitate essential social transformation. In the future, from time to time, populists will occupy the seats of power. Whether they win or continue to lose the fatal race depends to a surprising degree on their drafters' capacity to draft evidence-based bills likely to *work*.