INSTRUMENTALISM 2.0: LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE

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Abstract

This article addresses developing and transitional countries' frequent failures to use legislation as government's primary tool to induce desired social change. It refutes the extensive scholarly literature that claims efforts to use legislation instrumentally prove impossible or undesirable. Using Institutional Legislative Theory and Methodology (ILTAM) as a guide, the article first identifies the social problem at issue: the common behaviours of drafters who design a bill either by copying similar legislation from elsewhere; by drafting a compromise reached by competing interest groups; by indiscriminately criminalizing unwanted behaviour; or by drafting in vague generalities. None of these methods requires the drafter to study the specific circumstances in which the targeted social problem arises. ILTAM's Step 2 directs the drafter to identify the causes of the problematic behaviours – here, principally the drafters' belief that they ought to direct their concerns not to a bill's substance, but only to its form, and their usual lack of an adequate methodology. Step 2 thus lays the essential evidential base for Step 3, the design of a solution that addresses the specified social problem. To ensure that drafters produce bills that will likely induce their prescribed behaviours, and that those behaviours will ameliorate the identified social problem, the article urges that drafters follow ILTAM as a guide for designing 'evidence-based' legislation. That theory and methodology teaches that law always addresses two actors (the role occupant and the implementing agency), and that individuals and collectives behave in the face of a new rule of law by making choices within the range of constraints and resources of their situation. ILTAM's Step 4 requires the drafter to ensure that a bill includes provisions for the appropriate monitoring and evaluation of the new law's implementation. Properly designed, instrumental legislation can 'work'. Democratic self-government demands no less.

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Keywords

Instrumentalism, legislative drafting, legislation, social change, ILTAM, institution, social problem

"Although [the several definitions of the word 'instrumentalism'] may sound very neutral, just the mere referring to the word instrumentalism causes blood pressure to rise amongst many socio-legal scholars. (...) The multifaceted critique of instrumentalism has gradually taken over most of the socio-legal thinking about law. It became almost 'academically incorrect' not to discredit instrumentalism." ~ Koen van Aeken[1]

"All legislative powers herein granted shall be vested in a Congress of the United States ..." ~ United States Constitution, Article 1(1)

A. INTRODUCTION

In the first article of the Constitution, the Founding Fathers endowed the Congress with "the legislative power". Slightly less than two centuries later, President Kwame Nkrumah, Ghana's 'founding father', won independence from the colonial power on the slogan "seek ye first the political power, and all else will follow". The power to legislate lies at the heart of self-government. Today's societies define themselves through legislation, no place more than in the developing world. Development means deliberate institutional transformation. To accomplish development that serves popular needs, the exercise of democratic state power through legislation constitutes an essential tool.[2]

Some anti-instrumentalists flat-out deny that legislation can change social behaviours to ameliorate social problems (section C.1.a). Some argue that the social problem of well-financed, pervasive lobbyist influence inevitably negates the use of legislation for the public good.[3] Others assert that legislation ought not to lead social change.

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[1] K. van Aeken, 'Legal Instrumentalism Reassessed' in L. Wintgens (ed.), *The Theory and Practice of Legislation* (Ashgate Publishing, Aldershot 2005) 67-68 and 73.

[2] J. Waldron, 'Legislation and the Rule of Law' (2009) 1 *Legisprudence* 91, 98: "[The denigration of legislation, implicit in the view that legislation runs counter to the Rule of Law], particularly social and economic legislation, is associated with a sense of its being undesirable for the people of a country to act collectively even through the medium of (what we would ordinarily call) law to pursue social justice, heal social antagonisms, diminish inequality, or take control of the conditions of their social and economic life. That... is not a healthy proposition to associate with the rule of law."

[3] A. Vermeule, 'Book Review: Instrumentalisms: *Law as a Means to an End: Threat to the Rule of Law*' (2007) 120 *Harvard Law Review* 2113: "Law as a Means to an End: Threat to the Rule of

All three versions seemingly abandon the process of deliberate democratic social change. Instead, their authors seem willing to substitute unplanned, fortuitous transformations, too often shaped by endless interest-group conflicts.[4] Anti-instrumentalist denials undermine and trivialize the democratic law-making enterprise, surrendering 'development' to the institutions that perpetuate today's global inequality.

One statistic summarizes the tragic social impact: four-fifths of the world's population, receiving only a fifth of the global income, struggle to subsist at or below poverty levels.[5]

One article, of course, can address only a small segment of that overarching social problem. Three parameters define this article's focus: its concentration on legislation, its exclusion of symbolic legislation, and its limit to issues arising in the course of the development project.

1. This Article's Focus

(a) The Focus on Legislation

Of the several modalities available to effectuate desired social change, this article examines only legislation. In general, to help resolve social problems that perpetuate

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Law (...) announces that the American legal system is off course, heading 'toward turbulent waters with threatening shoals', and that '[w]e must pay heed to the signs now'. The danger is to the very rule of law, and the source of the danger is legal instrumentalism, the idea that 'law is a means to an end'. Instrumentalism is a cause, a by-product, and a diagnostic signal of increasing conflict in the legal system, a dim jungle in which interest groups battle endlessly (in mutual self-defense) by manipulating legislatures, agencies, and courts; in which judges have mostly become freewheeling policymakers; and in which law professors and law students have mostly become cynical consequentialists." Also see: R.T. Miller, 'Lawless Ends' in *First Things* (New York, January 2008) <http://www.firstthings.com/article/2007/12/003-lawless-ends-12> accessed 15 May 2011; B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006) 201-203: "[Although interested parties have always lobbied legislators,] not since the Gilded Age has the mix of money and politics been this pervasive or this blatant."

[4] E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of America* (Holt, Rinehart & Winston, Chicago 1960) 35, notes that too often the "pluralist chorus sings with an upper class accent".

[5] Even among the seemingly more fortunate one-fifth of the world's inhabitants, vast discrepancies persist. The U.S. Department of Agriculture (USDA) reported in 2008 that, of the 49.1 million people living in food-insecure households (up from 36.2 million in 2007), 32.4 million are adults (14.4 percent of all adults) and 16.7 million are children (22.5 percent of all children); 17.3 million people lived in households that were considered to have "very low food security", a USDA term (previously denominated "food insecure with hunger") that means one or more people in the household were hungry over the course of the year, because of the inability to afford enough food. For recent information, see: United States Department of Agriculture, 'Food Security in the United States: Key Statistics and Graphics' (*Economic Research Service*) <http://www.ers.usda.gov/Briefing/FoodSecurity/stats_graphs.htm> accessed 18 September 2010.

poverty and vulnerability of four-fifths of the world's population, communities everywhere have little option but to adopt one or a combination of three modalities: markets, civil society organizations, and government action through the law. In every modern nation, a relatively small group of people must use rules to order and coordinate the behaviours of relatively large numbers of government employees, and the even larger numbers of the citizenry at large. Whatever form of social system a nation adopts, its government must enact legislation (broadly defined to include regulations of every sort). Without laws that prescribe how each of these varied groups of people should behave, how might a government successfully coordinate their efforts?

In calling for a law's enactment, its supporters always have a purpose. As Jeremy Waldron observes, the legislative process involves a multi-layered journey: someone must initiate a bill, ensure its drafting, enter it into the legislative docket for committee consideration and plenary debate, and shepherd it through executive review and ultimately executive approval. Waldron suggests that this prolonged journey undergirds the 'dignity' of legislation.[6] Without any purpose, a bill's supporters would not likely undertake that journey.

To outlaw instrumentalism in the legislative process would outlaw the use of law as an instrument for accomplishing deliberate social change. Yet why struggle for self-government if the members of civil society cannot use legislation either to define their society's fundamental aims, or specify the detailed means of achieving them?

(b) Exclusion of 'Symbolic' Law

This article excludes from consideration what some denote as 'symbolic' laws – that is, laws proposed, not to change the institutions that comprise society, but simply to make a statement about an issue's importance.[7] This article focuses only on laws

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[6] J. Waldron, *The Dignity of Legislation: The 1996 Seeley Lectures* (Cambridge University Press, Cambridge 1999).

[7] Prohibition in the United States presents the iconic case, see: J.R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (University of Illinois Press, Champaign, Illinois 1965). There, in the years following World War I, the previously powerful and respected rural elites rapidly lost both power and respect. They wanted the State to demonstrate its respect. Largely 'hard-shell' Baptists, those elites strongly believed that drinking alcoholic beverages violated good morals. As demonstrated by the small sums allotted for implementation of the Prohibition Amendment after its enactment, its proponents did not really expect government seriously to enforce it. The Prohibition Amendment constituted symbolic law. Because a legislature enacts symbolic law without a purpose of changing behaviour, one can never say that symbolic law works or does not work. Some authors use 'symbolic law' in a different sense, see: W.J. Witteveen, 'Significant, Symbolic and Symphonic Laws: Communication through Legislation' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 27, writing that some laws demand new behaviours, and some codify popular norms – these latter are 'symbolic'.

enacted with the expectation that the law will 'work'. For purposes of this article, a law *works* if it induces the behaviours it prescribes, and if those behaviours help to ameliorate the targeted social problem.[8]

(c) Using Legislation to Facilitate Development

This article focuses on the instrumental uses of legislation to facilitate 'development'. That raises three issues: What does this article mean by the word 'development'? What does that imply as to the scope of change? Why the focus on legislation in the development project?

First, as to the meaning of 'development': most people characterize a country as 'underdeveloped' when its inhabitants confront massive social problems – in its economy, health care system, education, government, on and on and on; a long tortured landscape of dysfunctional institutions.

Here, 'development' means the process of transforming those institutions or inventing new ones to replace them. This article makes no effort to discuss the relative merits of alternative development strategies.[9] Whichever development strategy legislators adopt, they must exercise state power through law to reshape the country's institutions in ways likely to ensure that strategy's effective implementation. Because of underdeveloped countries' widespread poverty, most development strategies give priority to institutions that provide productive employment opportunities and access to 21st century social welfare and living conditions – advantages denied to the impoverished four-fifths of the world's inhabitants.[10]

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[8] J. Griffiths, 'Is Law Important?' (1979) 54 *New York University Law Review* 339.

[9] Does 'development' require merely increasing GDP per capita, relying on the old saw about rising tides lifting all boats? Does it include as well a measure of equity in the distribution of that national product? Should it focus on exports as the leading force for increased income? Or should it focus on an import-substitution strategy? Should it attend not only to 'economic' institutions, but also on seemingly 'political' ones, usually captured by the concept of 'good governance'? With A. Sen, *Development as Freedom* (Oxford University Press, New York 1999) 14-15, should it focus on the "perspective of substantial [positive] freedom" which is concerned with "enhancing the lives we lead and the freedoms we enjoy", thus "expanding the freedoms we have reason to value", so that our lives will be "richer and more unfettered" and we will be able to become "fuller social persons, exercising our own volitions [capacities for deliberate choice] and interacting with –and influencing– the world in which we live"? Or should it follow Bhutan's reach for "gross national happiness" rather than gross national product? See: The Centre for Bhutan Studies (*Gross National Happiness*) <http://www.grossnationalhappiness.com> accessed 15 May 2011.

[10] Eighty percent of the world's population lives on less than $1.00 per day. See more information at the *Global Issues* website: <http://www.globalissues.org> accessed 15 May 2011. The majority of that 80% lives in the formerly colonized and transitional countries. For those countries, the development project proves especially relevant. As illustrated by the current effort to transform the United States' health care delivery system, however, it also reaches into the heart of the industrialized world, see: P. McMichael, *Development and Social Change: A Global Perspective* (Sage Publications, Los Angeles 2008) ch. 2.

Second, the degree of social change involved in development involves massive institutional transformations. Every country, developed or underdeveloped, has its share of social problems. In a developed country, most of these tend to be incremental and small-scale. Not so in the less-developed world: there, massively dysfunctional institutions demand immediate transformation.[11] This article focuses on the instrumental uses of law with respect to legislation, but excluding issues relating to symbolic law, in the course of Project Development.

2. This Article's Underlying Logic

The authors agree with the anti-instrumentalists that, too often, explicitly instrumentalist laws fail to resolve the laws' targeted social problems. Rejecting the anti-instrumentalists' arguments, however, this article defends the use of legislation as an essential means for transforming the dysfunctional institutions that perpetuate the poor governance, poverty, and vulnerability experienced by the majority of the world's inhabitants.

This article follows the methodology proposed by Institutionalist Legislative Theory and Methodology (ILTAM).[12] Its four-step, problem-solving methodology aims to guide a drafter in designing legislation aimed at ameliorating perceived social problems. ILTAM teaches that the law addresses social change by changing the problematic behaviours of critical actors – here, the legislative drafters. Its methodology begins by identifying those actors and providing evidence as to their behaviours.

Tracking that methodology's Step 1.a, this article's section B describes the superficial appearance of the social problem of concern to both the anti-instrumentalists and ourselves: law's frequent failure to achieve its declared instrumental ends. As required by legislative theory's Step 1.b, section B.2 of this article then describes whose and what behaviours constitute that social problem. Those include not only the behaviours of the law's primary addressee, but also the

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[11] How to achieve wide-scale social transformations by individual laws, many focusing on relatively small changes, demands attention that lies beyond the scope of this article, see: E. Klein, 'Getting Real about Bill Length' in *The Washington Post* (Washington D.C., 10 February 2010) <http://voices.washingtonpost.com/ezra-klein/2010/02/getting_real_about_bill_length.html> accessed 27 November 2010. Two strategies suggest themselves: (i) the adoption of a legislative program, listing the related, narrowly focused bills that the program's proponents will introduce into the legislature, and (ii) the use of an intransitive law, pursuant to which an agency drafts either regulations for promulgation by the agency, or bills for legislative enactment. Some authors propose a third alternative: drafting and enacting a 'framework' law, and later enactment of narrow bills to fill in the hiatuses of the 'framework'. The literature, however, offers no clear definition of 'framework law'.

[12] A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001), which is now translated into more than ten languages.

behaviours of the relevant implementing agencies. (The anti-instrumentalists typically omit this essential sub-step.) In particular, section B.2 identifies the legislative drafter as a primary actor or 'role occupant' whose behaviours lie at the root of the problem.[13]

ILTAM's Step 2 requires that a person designing a proposed bill state the explanations or 'causes' of the problematic behaviours specified in Step 1. This article's section C therefore first summarizes and refutes the anti-instrumentalists' explanations for the widespread failure of laws to 'work' – an explanation that nowhere mentions the responsibility of the legislative drafter for drafting failed legislation. Second, it offers an explanation, justified by evidence, as to why the drafters so frequently draft instrumental laws that fail to 'work'.

ILTAM's Step 3 calls for a legislative solution – a proposed bill that addresses the causes identified in Step 2 for the behaviours described in Step 1.b. Here, section D.1 first demonstrates the insufficiency of the anti-instrumentalists' proposed solutions to the problem of failed instrumentalist legislation – essentially, that at best the law can play 'catch-up with an ever-changing society. As a more effective solution, section D.2 then proposes to equip drafters with ILTAM as a guide in preparing a bill's detailed provisions that, when enacted, will induce new behaviours likely to work.

Finally, Step 4 requires monitoring the implementation of the new law, evaluating it and providing information as to its implementation and social impact. That demands that in a draft bill a drafter incorporate provisions for that step (see section D.2.c).

As a key element in that proposed legislative solution, ILTAM requires an important bill be accompanied by a research report.[14] At each step of problem-solving's four-step methodology, that report must provide sufficient available evidence to convince a rational sceptic that the proposed legislative solution will likely work in the public interest.

3. This Article's Definitional Framework

Preliminarily, the next section specifies four definitions that further frame this article's argument: 'institution', 'social problem', 'social change', and 'instrumentalism'.

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[13] A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) 17 and 28-9.

[14] The word 'bill' as used here refers not only to a draft law prepared for enactment by a legislature. It also includes a draft regulation (or 'subsidiary legislation') which, assuming it meets the criteria and procedures specified in the relevant enabling act, a government implementing agency may promulgate.

(a) Institution

A basic sociological description pictures society as comprised of sets of people acting in repetitive patterns of behaviours. This article defines 'institution' as a repetitive pattern of social behaviours.[15] Adequately to describe a society requires specifying the repetitive patterns of behaviours that comprise the society, that is, its institutions: its schools, banks, government, families, factories, a myriad of them.[16] To develop a society requires changing its problematic institutions.

(b) Social Problem

No agreed definition of 'social problem' exists. Because law can only address behaviours, this article defines 'social problem' in terms of the behaviours that constitute it. By 'social problem', therefore, this article means one or more repetitive patterns of problematic social behaviours (that is, one or more dysfunctional institutions).

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[15] G.C. Homans, *The Nature of Social Science* (Harcourt, Brace & World, New York 1967) 50-51; N. Uphoff, *Local Institutional Development: An Analytical Sourcebook, with Cases* (Kumarian Press West, Hartford 1986) 9. Many alternative definitions of 'institution' exist. All definitions include repetitive patterns of behaviour as a necessary characteristic of an institution, see: *Merriam-Webster's Collegiate Dictionary* (10th edn., 1999) 606: "[A] significant practice, relationship, or organization in a society or culture"; *The Random House Dictionary of the English Language* (2d edn., 1983) 988: "[A] well-established and structured pattern of behaviour or of relationships that is accepted as a fundamental part of culture, as marriage: the institution of the family".

[16] S.E. Sjostrand, 'On Institutional Thought in the Social and Economic Sciences' in S.E. Sjostrand (ed.), *Institutional Change* (M.E. Sharper, West Armonk 1993) 9-12, calls 'institution' "a human mental construct for a coherent system of shared (enforced) norms that regulate individual interactions in recurrent situations" and 'institutionalization' "the process by which individuals subjectively approve, internalize and externalize such a mental construct". D.C. North, 'Institutional Change: A Framework for Analysis' in S.E. Sjostrand (ed.), *Institutional Change* (M.E. Sharper, West Armonk 1993) 36. The law can address issues of institutional change only by seeking to change the institution's constituent behaviours. That utilitarian consideration suggests two reasons for the definition of 'institution' used here: (i) because solutions build on causes (or explanations), to build into the definition of 'institution' only one possible explanation for repetitive patterns of behaviour (for example, Sjostrand's definition tends to limit the investigation of explanations for those repetitive patterns, and thus contracts the range of possible legislative initiatives to change them, and (ii) to confine the definition of 'institution' to the rules that prescribe the behaviour (as does North) can lead to focusing on the rules as distinguished from the behaviour they will likely induce in the given circumstances; that is, it neglects the American Legal Realists' observation that the law-in-action systematically differs from the law-in-the-books. Also see: R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12; K. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222. Confining the meaning of 'institution' to a set of rules ignores the potential use of law to change institutions and thus to foster development. North himself may avoid this trap by subsuming under the word 'organization' what we subsume under 'institution'.

(c) Social Change

A society comprises the sum of its constituent institutions. Changing an institution, to some extent, inevitably changes a society. To ameliorate a social problem requires transforming the relevant repetitive patterns of problematic behaviours (the institutions) that comprise that social problem. This article's definition of 'social change' therefore follows from its definition of 'social problem' and 'institution': in this article, 'social change' means institutional change

(d) Instrumentalism

As applied to legislation, no agreement exists about the meaning of 'instrumentalism'. Some authors adopt a narrow meaning of 'instrumentalist law'. These authors envision the legislature as the captain, seeking to steer the Ship of State. The captain issues commands that travel unaltered to the addressees who, unhesitatingly, obey the captain's orders. That Sender-Message-Receiver model (SMR) patently incorporates a host of unrealistic assumptions. The instrumentalists and many anti-instrumentalists – rightly – object to smuggling these into the concept of 'instrumentalism'.[17]

Some authors define instrumentalism to include all non-symbolic legislation. Long ago, Hart and Sacks held that "[Law is] a purposive activity, a continuous striving to solve the basic problems of social living".[18] In that view, save perhaps for symbolic law, all legislation has an instrumental purpose. In that view, 'instrumental legislation' expresses a tautology.

Following Van Aeken, in this article 'law' consists of "the intervention from a government body in society through the promulgation of rules with the intention to steer the conduct of the relevant constituting parts".[19] He amplifies: "[Instrumentalism] considers a legislated rule as a tool in the hands of a policy-maker who is bent on realizing some sort of social change. More generally, instrumentalism assumes that law is created with a particular result in mind (...) a goal that lies outside the realm of law."[20]

In terms of this article, to induce social change, a society may use legislation to change the behaviours that constitute a perceived social problem – in other words,

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[17] K. van Aeken, 'Legal Instrumentalism Reassessed' in L. Wintgens (ed.), *The Theory and Practice of Legislation* (Ashgate Publishing, Aldershot 2005) 71 ff.

[18] Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law,* William N. Eskridge and Phillip P. Frickey, *eds.* (Foundation Press, Minneapolis 1994) 148.

[19] K. van Aeken, 'Legal Instrumentalism Reassessed' in L. Wintgens (ed.), *The Theory and Practice of Legislation* (Ashgate Publishing, Aldershot 2005) 67.

[20] Ibid. 2. Note that this definition excludes 'symbolic law' from Witteveen's definition of law in W.J. Witteveen, 'Significant, Symbolic and Symphonic Laws: Communication through Legislation' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 27.

that constitute a problematic institution. Like Van Aeken, this article excludes from the scope of 'instrumental legislation' laws introduced because society has changed, leaving the law behind – that is, legislation that aims to play 'catch-up' with a changing society. He and this article focus, instead, on law designed to play a leading role in the development process.[21]

This 'preliminary' section of the introduction explicates seven parameters of this article's investigation: the definitions of key terms (institution, social problem, social change, and instrumentalism) and limitations imposed by focusing on legislation, excluding symbolic law and the imperative that government use legislation to advance development.

To use law successfully to foster people-oriented development proves no easy task. Everywhere, many instrumental laws fail to induce the laws' prescribed behaviours. Even when a law does induce its prescribed behaviours, those new behaviours may not ameliorate the targeted social problem. (That is to say, not all legislation works, see section A.1.b.)

Why instrumental legislation's frequent failure? ILTAM's problem-solving methodology purports to answer that question. It begins with Step 1: a description of the social problem and whose and what behaviours comprise it.

B. THE SOCIAL PROBLEM ADDRESSED: MANY LAWS LOOKING TO SOCIAL CHANGE DO NOT WORK

ILTAM's Step 1.a calls for a description of the superficial appearance of the targeted social problem. Law, however, cannot command resources to change their allocation, nor institutions to transform themselves. Law can only command, prohibit, or permit specified behaviours.[22] To determine what prescriptions a law would require generally to improve instrumental legislation, one must first specify whose and what behaviours so often produce laws that do not work. Step 1.b therefore calls for a specification of whose and what behaviours constitute that social problem.

Here, Section B.1 reviews examples that seem to justify the anti-instrumentalists' claim that instrumentalist legislation often fails to work. As a primary actor in the

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[21] R.S. Summers, *Instrumentalism and American Legal Theory* (Cornell University Press, Ithaca 1982) 20: "[A] theory of this type is instrumentalist in its view that legal rules and other forms of law are most essentially tools devised to serve practical ends, rather than the general norms laid down by officials in power, secular embodiments of natural law, or social phenomena with a distinctive kind of past."

[22] J. Stark, *The Art of the Statute* (Fred B. Rothman, Littleton 1996); A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) 232 *ff.*; R.J. Martineau and M.B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* (West Publishing, St. Paul, Minnesota 2005).

law-making process, much neglected by legal scholarship, Section B.2 identifies the legislative drafter. Too often, drafters design instrumental legislation that does not work.[23]

1. The Surface Appearance of the Problem: The Frequent Failure of Instrumental Legislation

The anti-institutionalists justifiably claim that the instrumental use of legislation frequently fails to produce laws that work. That dismal scenario has played and replayed nowhere more frequently than where governments invoke the law to overcome institutional obstacles to people-oriented development.[24] Box 1 describes a handful of failed instrumental laws.[25]

Box 1: Examples of The Social Impact of Laws Which, over the Last Century, Have Not Worked

■ *To protect its highways from loads so heavy that they tend to break up the pavement, Belize adopted a Highways Act, largely copied from an analogous U.K. statute, prohibiting lorries of more than a stated weight from travelling on its highways. Belize has no weigh-station to determine a lorry's weight.*[26]

■ *In 1957, Guyana enacted a Forestry Commission Law. That law established the Commission as an independent corporation with a single mission: To realize income for Government out of Guyana's largest unexploited resource, its lush and rich*

[23] Obviously, in the law-making process, other actors play significant roles, particularly the legislators themselves. This article focuses on a set of central players that the literature too often ignores: acting within the drafting institutions, the legislative drafters, broadly defined. See section B.1.b.

[24] Law does not invariably work in the developed nations. In the summer of 1947, Max Radin told his Columbia Law School class (of which one of us was a member) a story about a law in a Western, sheep-rearing state, which suffered from a plague of lamb-eating coyotes. The state sought to reduce the coyote population by enacting a law that offered a bounty for each pair of coyote's ears brought to the county agent. Farmers then began breeding coyotes for the bounty. The new law increased the coyote population.

[25] R.B. Seidman and N. Makgetla, 'Legal Drafting and the Defeat of Development Policy: The Experience of Anglophonic Southern Africa' (1987) 5 *Journal of Law and Society* 421; A. Seidman and R.B. Seidman, 'ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change' (2009) 89(2) *Boston University Law Review* 435.

[26] Some years ago, while on a consultancy in Belize, we were so informed. We understand that Lesotho has a similar law – and also lacked a weigh-station.

tropical hardwood forest. By 2003 the Commission had not paid any money into the Guyanese treasury, and had accumulated some $300,000,000 in debt.[27]

■ *In an effort to transform its poverty-stricken rural areas, South Africa's post-apartheid government sought to implement land reform by resettling a number of rural families on small plots of land. The new land reforms largely failed significantly to improve small farmers' quality of life. A widely-held view explained that failure in part on South Africa's historical development. Unlike most rural people elsewhere in the world, its supporters said, because under apartheid white landlords long dominated production and marketing in the agricultural sector, black rural families had little opportunity to develop the skills or resources required for successful commercial farming.*[28]

■ *Perhaps the iconic case of an instrumental law's failure occurred in the Central Asian lands of the Soviet Union in the early 1920s:*[29]

In the period shortly after the 1918 Soviet revolution, the new Soviet governors confronted the problem of facilitating the development of Soviet Central Asia. Marxism held that the industrial proletariat would lead the socialist revolution. In Central Asia no substantial industry – and therefore no industrial proletariat – existed.

Soviet theorists cast about for a 'surrogate proletariat.' In Central Asia, as the largest depressed and exploited group, their choice fell on Muslim women. They

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[27] We so learned in Guyana in 2001 in the course of a consultancy that in part concerned amendments of the Forestry Commission Law.

[28] S. Neuwied, 'Western Cape Farmers Expect the Unexpected' in *Interpress News Service* (Rome, 21 July 2008) <http://ipsnews.net/africa/nota.asp?idnews=43255> accessed 15 May 2011: "[T]he land restitution programme has often failed because the beneficiaries often do not have the skills to farm successfully."; C. Morris, 'Assessment of Agricultural Information Needs In African, Caribbean & Pacific (ACP) States: Country Study: South Africa' (Wageningen, 21 September 2007) <http://www.fara-africa.org/media/uploads/ library/docs/Final_South_Africa-report_10_12_07_.pdf> accessed 15 May 2011): "Recent prominent failures of group farming enterprises on redistributed land have highlighted the crucial need for skills training and knowledge transfer (e.g. through on-farm and FET training and mentoring) and the provision of good information support to resettled communities and emerging farmers and agribusiness entrepreneurs."; A. Bradstock, *Key Experiences Of Land Reform In Northern Cape Province of South Africa* (Policy and Research Series, FARM-Africa, London 2005) <http://www.slideshare.net/FARMAfrica/key-experiences-of-land-reform-in-northern-cape-south-africa> accessed 15 May 2011: "Following the historic election of 1994, the South African government embarked on an ambitious land reform programme to redistribute and return land to previously disenfranchised and displaced communities. However, many black people lack the knowledge skills and experience needed to manage their land."

[29] G. Massell, 'Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia' (1968) 2(2) *Law and Society Review* 179.

> *undertook a heroic campaign instantly to 'free' Muslim women. They appointed women judges and women officials on all levels of the bureaucracy. They instituted schools for women. They enacted laws to guarantee female equality.*
>
> *To celebrate and symbolize women's new freedom, they held mass meetings in town squares, in which hundreds and even thousands of women simultaneously cast off the traditional veil. As a result, following traditional notions of morality, many husbands, fathers and brothers of these newly-unveiled women regarded them as immoral, and cast them out of the family home. With no other means to support themselves, a number of the newly unveiled women became prostitutes.*[30]

To claim that a law fails to work says that the law fails to produce its anticipated outcomes. John Griffiths draws a useful distinction between a law's 'direct' and 'indirect' effects.[31] A law forbids driving while intoxicated, with the aim of reducing automobile accidents. Whether drivers obey the law and do not drive while drunk concerns the law's direct effects. The law's consequences in terms of reducing the incidence of automobile accidents concern its indirect effects. When an author asserts that an instrumental law failed, all but invariably the author refers to a failure to achieve the law's indirect effects.

A law's sponsors only rarely propose legislation because they want to prevent the primary behaviour involved.[32] They usually sponsor a law because of its anticipated secondary effects. Most of these the law cannot directly address. The law cannot usefully command that automobile accidents reduce their frequency. It could not usefully require that the Guyanese forests produce more income for government, or that South African farmers instantly acquire the skills required to process and package farm produce for supermarket sale, or negotiate with banks for the credit commercial farming requires. Laws can usually only require behaviours, frequently innocuous in themselves, that likely will have desirable indirect effects.

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[30] After about two and a half years, the Soviets gave up on the notion that they could in one stroke achieve feminine liberation. In its place they settled on a program of incremental reforms. In about a decade, women in Central Asia had reached many of the goals that had been earlier set and abandoned, see: G. Saidazimova, 'Women & Power In Central Asia (Part 1): The Struggle For Equal Rights' in *Radio Free Europe Radio Liberty* (Prague, 29 December 2005) <http://www.rferl.org/content/article/1064211.html> accessed 15 May 2011.

[31] J. Griffiths, 'Is Law Important?' (1979) 54 *New York University Law Review* 339.

[32] Only in a relatively rare case does a law decree its primary effects without having a secondary effect as its larger aim. Criminal law constitutes the largest class of those exceptions to the general rule. For example, a law forbidding rape anticipates a primary effect of reducing the number of rapes. That may have secondary consequences in terms of women's sense of autonomy, freedom from fear, and the like, but the social good of reducing the number of rapes seems obviously adequate to justify its criminalization.

In sum: a law works when it achieves both its anticipated direct and indirect effects.[33] This article centres attention on laws whose direct or, much more frequently, whose indirect effects aim at resolving the plethora of social problems that together spell 'underdevelopment' (see section A.1.c). Too often, around the world, these laws fail to work. To that extent, the law's failures diminish both the development project and the democratic ideal of effective self-governance.

Law, however, has a limited reach. Tracking Step 1.b, the following section discusses how a drafter can translate a description of a social problem's superficial manifestation into a narrative susceptible of change through the law.

2. Whose and What Behaviours Produce Failed Instrumental Legislation?

Step 1 begins with a description of the surface appearance of the social problem addressed – here, the manifest frequent failure of instrumental laws to work. Law, however, can only resolve a social problem by prescribing how the relevant social actors should behave in ways likely to achieve the desired social impact. Before one can usefully propose a law to change problematic behaviours, one must specify whose and what behaviours the law must change.

(a) Whose Behaviours?

Whose behaviours constitute the social problem here addressed? Many actors suggest themselves. Here we discuss, first, whether the critical actors responsible for producing failed instrumental laws comprise the implementing agency that fails adequately to implement the new law – or the responsible actors in the legislative institutions, who design, draft and enact laws that do not work; and, second, who among those legislative actors seems critical to the development of legislation that fails to work.

(i) Implementers or law-makers? Many authors tend to blame the responsible agencies for their failure to adequately implement laws once enacted. Per contra, this article focuses on behaviours central to law-making process.

The world around one hears a familiar complaint: "We have good legislation but it remains badly implemented." That complaint raises two issues. First, as between the law-makers and the implementers, who here constitute the actors of concern?

Hans Kelsen taught that a norm deserves the title of 'law' only if it has not one but two addressees. In addition to the norm addressed to the primary addressee, either in the same or another norm, the law must also assign an agency to ensure the implementation of the primary law's detailed prescriptions. Moreover, the law must

[33] As noted in section A.1, this article, dealing with the problem of failed legislation looking to development, excludes symbolic laws.

specify the steps that that agency should take to ensure that the primary norm's addressee conforms his or her behaviour to that primary norm (see Figure 1).[34]

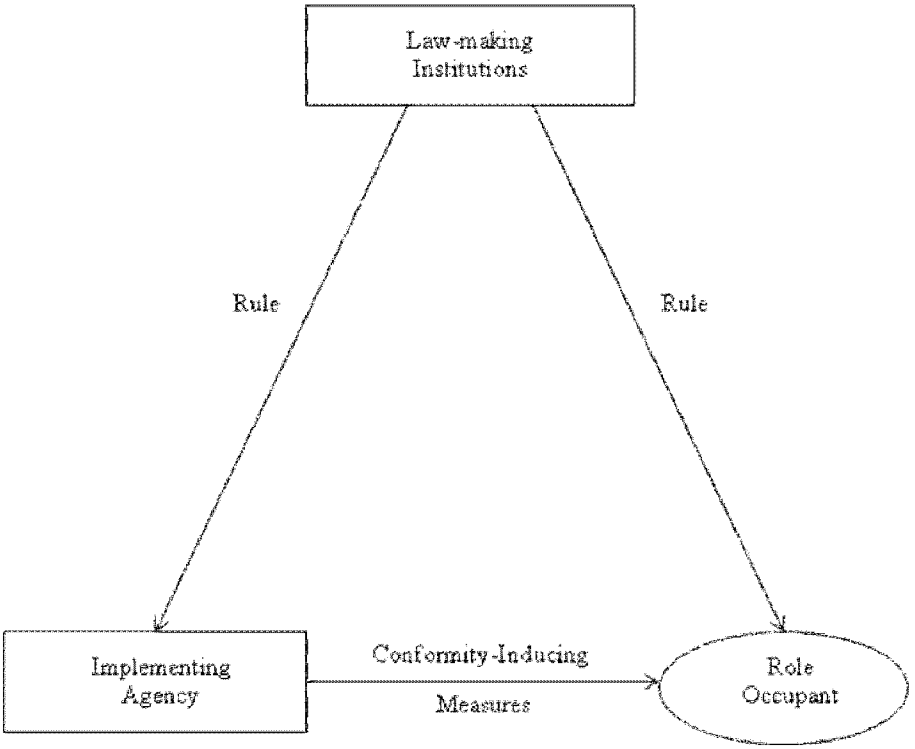

Figure 1

As we have seen, many authors of instrumental laws seem to assume that a law passes unchanged from legislature through society's communication channels to the law's addressee and that, if the implementing agency attends to its duty, the addressee will unerringly obey the law's prescriptions. That assumption leaves no room for error in the law-making system. The error must lie in the only behaviour that remains subject to doubt: the performance of the implementing agency. If, in choosing between error in the law-making system and error by the implementing agency, one assumes away the possibility of law-making error, it becomes an easy call to assign the error to the performance of the implementing agency.

[34] Note that, following Kelsen, Figure 1 diagrams only the normative structure of a law. It does not speak to behaviour.

That call errs. As Kelsen's model of the law's normative system suggests, the law-makers must prescribe the behaviours of the implementing agency. If the implementing agency follows those prescriptions precisely as received, but nevertheless fails properly to implement the bill, the fault manifestly lies not with the implementers, but with the law-makers. Apparently, the law-makers did not sufficiently understand the conditions on the proverbial 'shop floor' likely to influence the relevant implementing agency personnel's response to the new laws' commands, prohibitions and permissions.[35] (ii) Which law-maker? That the law-makers, not the implementers, constitute the actors of interest here solves only the first part of the conundrum. 'Law-makers' comprise a gaggle of actors: instructing officials, drafters, civil servants in the Cabinet office, Cabinet itself, legislative committees, legislative staff, legislators sitting in plenary session, civil servants in the President's office, the President herself – one way or another, all participate in the law-making process. Among these several subsets of actors within the complex, many-layered institutions that collectively constitute the law-making process, who does what that results in so many laws that do not work?

In the popular view, the legislator holds pride of place. The constitution endows a legislator with the 'legislative power' – that is, to serve as pilot of the Ship of State. Academia has largely adopted the popular view, focusing attention on the legislator's role in the exercise of the 'legislative power'.[36]

For three related reasons, although largely unremarked and unstudied in the legal academy, in the law-making process the drafter also plays a central role, perhaps the central role. Note that here the singular term 'the drafter' refers to the drafting roles that comprise a major component of drafting institutions. Those institutions may include not only drafters properly so-called, but also other actors. These may, for example, conduct research, and help design a bill's detailed provisions (see section A.3.a).

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[35] On society's 'shop floor's many frequently teach their members norms that contradict the rules promulgated by the legislature 'semi-autonomous social fields' [social organizations such as the family, professional associations], see: S.F. Moore (ed.), *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul, London 1978) 55 ff. By the 'shop floor' Griffiths means the total "social context within any rule must work" that "emphasizes the normatively pluralistic character of that context, and indicates in rough terms which aspects of that context are important for the social working of law and why they are important", see: J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 92.

[36] J. Dolan and M. Ezra, *CQ's Legislative Simulation: Government In Action* (Sage Publications, Thousand Oaks, California 2001); T.Kousser, *Term Limits and the Dismantling of State Legislative Professionalism* (Cambridge University Press, Cambridge 2004); J.M. Carey, *Legislative Voting and Accountability* (Cambridge University Press, Cambridge 2008); G.P. Gershman, *The Legislative Branch of Federal Government: People, Process, and Politics* (ABC-CLIO, Santa Barbara, California 2008).

First, the drafter has a relatively unnoticed duty to fill in the crucial substantive details that determine whether instrumental legislation works. Second, in main part because of the structure of the electoral system, the legislators do not originate those details. In the legislatures of which the authors have knowledge, legislators very rarely conduct the research or draft the legislation to which they put their names. Legislators usually do assess a bill's details as proposed by its drafters. Legislators almost never draft those details. Third, legislative institutions structure legislative debates so that a bill's draft all but invariably sets the agenda for discussion. By structuring the choices before the legislature, the drafter necessarily has enormous power. A major share of the onus for frequent failures effectively to implement legislation must therefore rest on the drafter's shoulders, and on the legislative institutions that leave mainly to the drafter's discretion decisions about whether and what research to conduct, what substantive details to include, and what words to use to describe those details.

In developing the bill as first presented to the legislature, the drafter defines its substantive details. Those details determine whether the bill works. Driedger writes:

> Legislative policy is not the same thing as the legislative plan; the former is the objective to be achieved, and the latter an outline of the method by which it is to be achieved. For example, it may be laid down as a policy that certain grants are to be paid to a class of persons under specified conditions. In order to give effect to such a policy the draftsman needs to know that his statute must, among other things, prescribe the persons who are to benefit, specify the amount of the grant and the condition under which it may be paid, and provide authority for payment out of the Consolidated Revenue Fund, for suspension for breach of conditions and for recovery of unauthorized payments, for applications, decisions and awards, for penalties for misrepresentation or other wrongful conduct. In the case of an amending statute the draftsman must decide what statutes are to be amended, what sections, and in what manner.[37]

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[37] E.A. Driedger, 'The Preparation of Legislation' (1953) 31 *Canadian Bar Review* 33, 39. Also see: P. Delnoy, 'The role of legislative drafters in determining the content of norms' (*Department of Justice*, 31 July 2009) <http://www.justice.gc.ca/eng/pi/icg-gci/norm/ index.html> accessed 15 May 2011: "But to my mind, drafters should also attend to the content of the rule. By 'content of the rule,' I mean the components of what is commonly referred to as "the legislative intent" – the conduct permitted, imposed or prohibited by the rule; the institution created by the statute; the contract organised by the norm; the procedure put in place for the holding of a proceeding; and so on, together with, of course, the sanction prescribed for a breach of the rule. In other words, the legislative drafter should be responsible for not only the norm's form but also its substance." In this article, we use the word 'design' as equivalent to Driedger's use of the word 'plan'.

As a useful analogy,[38] consider an architect's relationship to the client: a family decides on a 'policy' to build a new house. At that point, to describe the family policy, the family says that by 'house' they mean, "Well, you know, a place in which to live." The family then consults an architect. The family and architect discuss budget, number of rooms, style of architecture, a host of details. The architect produces plans and specifications – that is, detailed instructions to the builder about how to build the house. Now, asked about the 'policy', the family points to the plans and specifications. Who designed that 'policy'? The family? The architect? Both together?

With respect to a bill, the drafter fills a role analogous to that of the architect. In principle, the policy-maker – usually, the relevant Minister and staff – should develop the bill's substantive details. In practice, however, the drafter works under the policy maker's more or less vague and ambiguous instructions – usually, little more than generalized ends.[39] Those instruct the drafter to produce a bill to resolve the targeted social problem. Civil servants in the commissioning Ministry may engage in a bill's detailed design. Typically the Minister directly instructs the drafter to complete the desired bill (usually accompanied by a peremptory demand to 'have the bill on my desk by Monday').[40] The drafter's role in the bill-making process inevitably requires drafting a bill's detailed wording. That wording embodies the bill's substance. The drafter has small choice but to have the final cut on the bill's design – including the details that define the bill's 'policy'. The devil indeed lies in those details.

Ministers and civil servants can, and sometimes do, ask for detailed changes. Under the pressure chamber of the legislative session, more often than not, they propose relatively few changes in a bill's text. Instead, it typically goes to the legislature with most substantive details as formulated by its drafters.

Second, legislators assess bills designed and drafted by others. In polities following the British parliamentary system, the majority party elects the members of the Cabinet – the movers and shakers in the political system. Where the election follows the 'list' system, a legislator's chance of serving in the next legislature depends upon where on the list the ruling party places that legislator's name: the lower on the list, the less chance for remaining in office. Only a bold legislator votes against a bill proposed by the Party chiefs; from Parliament, what the Cabinet wants,

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[38] A. Seidman and R.B. Seidman, 'ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change' (2009) 89(2) *Boston University Law Review* 117 ff.

[39] J. Dewey, 'Theory of Valuation' (1939) 2(4) *International Encyclopedia of Unified Science* 44, writes that "generalized ends" functioned as an expression of dissatisfaction with the present state of affairs.

[40] The relevant Minister of an African country which had just emerged from a long civil war, mainly incited by the inequities of the colonial-decreed land tenures, asked one of us to prepare land reform legislation. Asked for further instructions concerning the details of the proposed bill, the Minister answered, "You're the expert. You tell us!"

the Cabinet gets. In a system in which Government initiates and therefore drafts almost every bill, what emerges from the Cabinet largely reflects the drafter's power to determine the details of the law that finally emerges from the law-making process.[41]

Third, the drafter, of course, has nothing to do with placing a bill on the agenda for legislative action. That power falls to the political leadership. For those, who in the course of the legislative process come to consider the bill, from the instructing official and the relevant Minister to the President whose signature completes that process, however, the details of the bill under consideration set the agenda for the discussion.

How could it be otherwise? A bill falls for discussion, for example, before a legislative committee. A member wants to introduce an amendment. That amendment must specify the language that requires change in the bill – almost invariably, language written by a drafter. Inevitably, the specific provisions of the bill determine most of the agenda for discussion.

One can hardly overestimate the power latent in agenda-setting: "Agendas foreshadow outcomes: the shape of an agenda influences the choices made from it... In the twentieth century, as governments have grown in size and complexity, the agenda function has become wholly apparent, so much so that making agendas seems just about as significant as actually passing legislation."[42]

In short, the drafter has great power over the content of the bill presented to and enacted by the law-makers. As an architect largely determines the details of a family's house, so a drafter has power to decide a bill's detailed substantive as well as its formal content. In no country of which we know do legislators more than very rarely originate a bill's language. They assess bills presented to them by Government. A majority legislator concerned with re-nomination typically does not vote against a government bill. In reality, in a parliamentary system the draft bill sets most of the agenda for legislative decision-makers. In setting that agenda, a drafter acquires major power to shape an enacted law's substantive details – including those likely to determine whether it proves effectively implemented.

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[41] In some jurisdictions, the ruling Party caucus offers an opportunity for MPs to raise objections to specific provisions of a draft bill. Because Party caucuses typically take place behind a veil of secrecy, the literature on the extent of discussion on the details of bills in the caucus is singularly barren.

[42] W. Riker, cited in L. Epstein and J.A. Segal, *Supreme Court Agenda Setting: Assessing Cross-Institutional Constraints* (Annual meeting of the Midwest Political Science Association, Chicago, 1997) <http://epstein.law.northwestern.edu/research/conferencepapers.1997_MPSA.pdf> accessed 15 May 2011. The Political Science Glossary defines 'agenda setting' as "[d]etermining which [public-policy] questions will be debated or considered", and 'agenda setting effect' as "[l]imitations of focus caused by agenda setting", see: <http://www2.cruzio.com/~zdino/psychology/political.science.glossary.htm> accessed 15 May 2011.

Anti-instrumentalists all but unanimously ignore the central role of drafters and drafting institutions in determining the substantive content of legislation. Bernard Jackson, for example, describes the drafter's role as follows:

> Since the purpose of the legislative draftsman is to communicate to those who will handle the details of the legislation itself, by recourse to its *ipsissima verba*, their pragmatic function is technical: to satisfy as completely as possible the prevailing norms of what constitutes good legislative language... which may generally be described in terms of accuracy and completeness.[43]

Focusing centrally on drafting techniques, Jackson simply ignores the drafter's responsibility for designing the bill's substantive details – and conducting the detailed research about the 'shop floor' within which the new law will function.

More than other actors in the legislative process, that the drafter writes out the detailed wording of instrumental laws ineluctably empowers the drafter to make detailed decisions about the bill's substance. The drafting institutions and the behaviour of the drafters too often produce laws that do not work.

(b) What Drafting Behaviours Result in Instrumental Laws that do not Work?

To solve or at least ameliorate the social problem of drafters who design and draft instrumental legislation that does not work, Step 1 requires a detailed description of the drafter's problematic behaviours. Step 2 teaches that the drafter should formulate explanatory hypotheses for those behaviours, and demonstrate that those explanations prove consistent with the available evidence. (Given that foundational

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[43] B.S. Jackson, 'Legislation in the Semiotics of Law' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 5 and 13; J. Bell, 'Statutes, Text and Operative Enactments' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 73: "For the draftsman, structure, grammar and elegance of expression are key criteria for the quality of the product. (...) It is in judging the quality of the work of the draftsman that one might limit oneself to examining the text."; G.C. Thornton, *Legislative Drafting* (2nd edn., Butterworths, London 1973) 1: "The regulation and control of society is the field in which the legislative draftsman toils; his task is to frame the communication of policy decisions having legal consequences to members of society. It is true that he has a small though responsible part to play in the earlier stages before policies are finally determined and ready to be expressed...but his major task is in the field of communication."; R.J. Martineau and M.B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* (West Publishing, St. Paul, Minnesota 2005) 8: "The role of the drafter of legislation is very similar to that of the appellate advocate. (...) The [appellate advocate's] whole purpose is to take what appears long and complicated and reduce it to what is concise and clear. (...) The same principle applies to legislation or a rule."; R. Dickerson, *The Fundamentals of Legal Drafting* (2nd edn., Little Brown, Boston 1986) 9: "Briefly, the draftsman's job is to help his client put in legal form what the client wants in substance and to help him accomplish it as smoothly and effectively as possible."

evidence, in Step 3 the drafter can design detailed prescriptions logically likely to alter or eliminate the causes of the problematic behaviours, and induce new ones likely to resolve the targeted problem.)

Instead, however, the world around, most drafters tend to adopt one of four methodologies for designing new legislation: (i) they copy a law from elsewhere, usually without either analyzing the specific social circumstances that enabled the law to work in its original environment, or comparing those circumstances to the realities that prevail in their proposed new law's environment;[44] (ii) they draft a law as a compromise between competing interest groups – and never mind whether the proposed law's detailed provisions will work; (iii) they criminalize every behaviour in sight; or (iv) they draft in broad, general terms that leave to the responsible agency's discretion whether and how to implement the new law's detailed provisions.[45]

None of these four 'fall-back' or 'entropic'[46] methodologies seem likely to produce transformational instrumental legislation that works. None offers a theory to guide a drafter in capturing evidence concerning the influence of competing norms on 'the shop floor', or whether and how the new law's addressees will likely read and understand it – far less alter their existing problematic behaviours to behave as its details prescribe.

In contrast, ILTAM's Step 2 requires the drafter to provide evidence to identify the causes (or 'explanations') of the relevant social actors' problematic behaviours as described in Step 1. Therefore, this article's section C looks for the causes of the failure of legislative drafters consistently to ground substantive details of a bill on evidence in a way likely to ensure the new law will work.

C. WHY DO DRAFTERS SO OFTEN PRODUCE INSTRUMENTAL LAWS THAT DO NOT WORK?

Rather than attack the symptoms of a social problem, an adequate solution must address its causes or 'explanations'. Why do so many instrumentalist laws,

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[44] J. Davies, *Legislative Law and Process* (2d edn., West Publishing, St. Paul: Minnesota 1986) 159: "The drafting process moves fastest when the copying machine is used to borrow the first draft. In complicated bills the drafter can borrow many sections from parallel legislation."

[45] We rest these hypotheses in main part on our experience presenting in workshops in more than twenty countries, ranging from Afghanistan to Zimbabwe, see: A. Seidman, R. B. Seidman and T. Waelde (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (Kluwer Law International, London 1999), essays by experienced international consultants discussing the legislative theories they follow in drafting.

[46] In the absence of new energy inputs, the Second Law of Thermodynamics teaches that a dynamic system becomes more and more disorganized. So, without inputs suggested by new theory, does legislative drafting.

frequently designed and implemented with the best of intentions, fail to work? The anti-instrumentalists offer generalized explanations for that failure. They do not, however, specify the relevant problematic behaviours, far less attempt to explain them in all their complexities. Section C.1 first reviews and then demonstrates the weaknesses of the anti-instrumentalist's answers to these questions. Section C.2, in contrast, examines five explanations for drafters' continued use of 'entropic' drafting methodologies.

1. Anti-Instrumentalist Explanations Considered

Many anti-instrumentalists insist that instrumentalism cannot work. Much of their opposition, however, rests on mistaken or monocausal explanations for the failure of efforts to use law as a means to an end. Others, for reasons examined below, claim that a polity ought not even to try to use the law instrumentally.

Both sets of anti-instrumentalist claims effectively deny the possibility of meaningfully using law to facilitate democratic social change. This section first demonstrates that extensive available evidence disproves the claims that government cannot successfully use law instrumentally. It then refutes the claim that government ought not to use the law instrumentally.

(a) The Naysayers' Explanations for the Frequent Failure of Change-Oriented Legislation to Work[47]

On varying grounds, some anti-instrumentalists assert that the innate nature of human society and law makes impossible the successful instrumental use of law. Human beings, these authors argue, develop law in the course of social living. They acquire deeply inbred patterns of behaviour that, merely by writing new laws, they cannot deliberately change.[48]

Adopting what one might characterize as a crude Marxist orientation, other anti-instrumentalists assert that the 'base' (the economic relations of production) controls the 'superstructure' (including the law). That view rejects the possibility of using

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[47] This section amplifies A. Seidman and R.B. Seidman, 'Between Policy and Implementation: Legislative Drafting for Development' in C. Stefanou and H. Xanthak (eds.), *Drafting Legislation: A Modern Approach* (Ashgate Publishing, Aldershot 2008) 287, 291 ff.

[48] J.P. Reid, *A Law of Blood: The Primitive Law of the Cherokee People* (New York University Press, New York 1970) 3: "Law is a signet of a people and a people are the product of the land. The primitive law of the eighteenth century Cherokee nation reflect the mores, the integrity and the rapport of the Cherokee people just as the characteristic traits of Cherokees themselves reflect the physical environment of their existence: the mountains upon which they lived, the harvest reaped from forest, field and stream, and the enemies – both in nature and mankind – that their geographical position required them to fight." Also see: W.G. Sumner, *A Study of the Sociological Importance of Usages, Manners, Customs and Morals* (Ginn & Company, Boston 1906).

law instrumentally to change the underlying class structures that mould the law itself.[49]

Following the teachings of post-modern literary criticism, Joseph Singer argues that people read a text in light of their own predilections.[50] If Singer's claims hold, given human beings' marvellous variety, no two readers of the law will likely understand it in precisely the same way. How then can a would-be instrumentalist use law successfully to achieve the law's prescribed behavioural patterns?

Arguing that, in manifold ways, society structures both institutions and the law, others reach the same anti-instrumentalist position. Koen van Aeken usefully collects these arguments in an analysis of the Sender-Message-Receiver (SMR) model of communication theory mentioned above.[51] Naive instrumentalism, Van Aeken argues, makes the unrealistic assumptions embodied in the SMR model.[52] The legislators do hear their constituents' claims.[53] A law does not pass unchanged from sender to receiver; society itself creates 'static' that clogs the channels through which the legislative message travels.[54] The law's addressees do not invariably exactly obey the law's prescriptions.

A variety of anti-instrumentalists advance differing reasons for the static that obscures a legislative 'message.'[55] Kidder points to the inherent complexity of

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[49] D.V. Williams, 'The Authoritarianism of African Legal Orders: A Review and Critique of Robert B. Seidman's *The State, Law and Development*' (1980) 5 *Contemporary Crises* 255.

[50] J. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1; J. Bell, 'Statutes, Text and Operative Enactments' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 71: "In Bernard Jackson's work we are presented with the view that the construction of the statutory message is the activity of the audience and that different audiences may have different perceptions and preoccupations."

[51] K. van Aeken, 'Legal Instrumentalism Reassessed' in L. Wintgens (ed.), *The Theory and Practice of Legislation* (Ashgate Publishing, Aldershot 2005) 71, citing J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 81 and 94-95.

[52] W.J. Witteveen, 'Significant, Symbolic and Symphonic Laws: Communication through Legislation' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 27.

[53] Think of the influence in the U.S. Congress of lobbyists for various interest groups, see: B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006).

[54] K. van Aeken, 'Legal Instrumentalism Reassessed' in L. Wintgens (ed.), *The Theory and Practice of Legislation* (Ashgate Publishing, Aldershot 2005) 72

[55] A. Allott, *The Limits of Law* (London, Butterworths 1980) 121: "To the norm-setter or law-giver the legal message is his message, which must get through to its intended recipient and influence his behaviour. The communications medium is saturated with other messages, some of which are or purport to be normative. (...) The recipient is receiving messages from a variety of sources telling him what he 'ought' to do: messages from his religion, ethical messages; messages from those he regards as authoritative in matters of conduct, such as leader writers in newsarticles, and television

human behaviour.[56] Does the automobile driver, who drives on the right side of the road, do so in obedience to the law, or to avoid a serious accident?

Explanations ground predictions. To grow a tree, do not plant a stone; plant a seed. That proposition rests on an explanation of why trees grow where they do: trees grow from seeds. Unless one can explain how the law channels behaviours, how can one predict behaviour in the face of a new rule of the law? Absent ability accurately to predict behaviour in the face of a law, the instrumental use of the law becomes an impossible dream. By denying that mere humans can explain human behaviour, Kidder denies the possibility of using law instrumentally.

By different routes, other authors reach similar anti-instrumentalist conclusions. Adherents of autopoiesis assert that some disciplines remain, as it were, self-contained. They claim to resolve issues of validity in terms of a discipline's own, internally consistent linguistic rules. Gerald 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.[57]

Hanneke van Schooten summed up much of anti-instrumentalist scholarship when she declared: "Government 'steering' as a metaphor is suggestive of a simple picture in which the commander orders to shift the helm with the consequences that the ship will change course as ordered. Today's complex society defies that metaphor: the ship has its own momentum. The results of steering manoeuvres become

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or radio commentators; messages from his work-mates, his neighbors, his family, his friends; messages from the past. Can this legal message override all these competing messages?"); J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 81; J. Griffiths, 'The Social Working of Legal Rules' (2004) 48 *Journal of Legal Pluralism* 1.

[56] R.L. Kidder, *Connecting Law and Society: An Introduction to Research and Theory* (Prentice-Hall Publishing, Englewoood Cliffs 1983).

[57] G.J. Postema, 'Law's Autonomy and Public Practical Reason' in R.P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, Oxford 1996); G. Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenberg' (1984) 18 *Law and Society Review* 291, 294.

unpredictable."[58] Absent predictability, anti-instrumentalists justifiably view the instrumental use of the law as a pipedream.

(b) Refuting the Anti-Instrumentalists' Claims

This section briefly reviews the fallacies in the anti-instrumentalists' arguments.

(i) Can instrumental law ever work? At the end of the day, the anti-instrumentalists cannot demonstrate their central claim: that instrumental law inherently cannot work. That assertion rests on reasons grounded both on evidence and in methodology.

Karl Popper demonstrated that one does not warrant a proposition by confirmatory evidence.[59] One warrants a hypothesis only by showing its consistency with available evidence. A single proposition comprised of falsifying evidence calls into question that hypothesis' validity.[60]

(ii) Extensive evidence negates the anti-instrumentalist claims. Many pieces of evidence demonstrate the falsifiability of the proposition that instrumental law never works. But for tax law, nobody would pay tax. But for election law, nobody could vote. Many other instrumental laws work reasonably well.[61] As their primary research task, law-makers must, so far as possible, identify the evidence likely to ensure that, after enactment and promulgation, a bill's detailed provisions will work.

Two examples illustrate that the anti-instrumentalists' arguments lack supporting evidence. A reference to the Nazi's use of law does not prove that, carefully designed, law cannot serve to advance the public interest. As Singer observes, a person may interpret a law's text idiosyncratically – but we can still communicate with each other.[62] Not all words have idiosyncratic meanings. (To every English speaker, 'elephant' means the same big gray animal with floppy ears and a trunk.)

(iii) Faulty methodology. The anti-instrumentalists' claims as to the causes of laws' apparent ineffectiveness also suffers from methodological problems. Many adopt a 'nomothetic' research design: assuming that the more data a theory orders,

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[58] H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 185-186.

[59] K. Popper, *Objective Knowledge: An Evolutionary Approach* (Oxford University Press, Oxford 1972).

[60] For example, to test the proposition that 'water always boils at 100° Centigrade', one can boil water thousand times in an open pot at sea level. Every time, it boils at 100° C. That, some might say, warrants the hypothesis. Boil water once at five thousand feet altitude or in a closed pot at sea level; it boils at a different temperature than 100° C. That necessarily falsifies the original proposition: Water does not always boil at 100° C. (That does not, however, necessarily warrant the contrary hypothesis.)

[61] Whatever the laws' imperfections, almost nobody wants to live in a world without food and drug laws, traffic laws, industrial safety laws, most environmental laws, and most people want to live under many of the laws of the welfare state: anti-discrimination laws, minimum wage laws, workmen's compensation laws and many others).

[62] J. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1.

the more 'powerful' the theory, they focus on formulating a single 'covering law'.[63] John Griffiths, for example, explains instrumental law's failures by invoking Sally Falk Moore's insight: on the 'shop floor' of actual social experience, a maze of 'semi-autonomous social fields' (SASFs)[64] have deeply-entrenched norms that in many cases contradict and therefore inevitably undermine legislation's intended social impact.[65]

Many, probably most, anti-instrumentalists, however, overstate their cases. Human behaviour usually responds not to a single, but to multiple causes.[66] A drafter may unknowingly design a bill to change one problematic behaviour while ignoring – perhaps without considering – other relevant constraints and resources that, on the

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[63] A well-defined social studies tradition influences most anti-instrumentalists to adopt a nomothetic, rather than an ideographic methodology; the former seeks to find a 'covering law' that draws on many instances of similar behaviour to find at least one common cause for the several instances, whereas the latter examines a specific set of behaviours to detail its (usually) several causes. The former has enormous power in developing understandings of complex social phenomena. Who today, seeking to understand a complex social situation, does not, explicitly or (probably more often) quite unselfconsciously, consider Marx's famous phrase, that "all history is the history of class struggle"? Or an equally famous proposition from neo-liberal economics, that "incentives explain all human behaviour"? Neither of these propositions, however, holds without substantial qualifications. Covering laws almost invariably depend upon various explicit or – more often, implicit – forms of correlation analysis – with all their familiar dangers. Nevertheless, these and other nomothetic explanations do contribute mightily to understanding the social world – the 'shop floor'– on which social actors decide how to behave.

[64] Moore (and Griffiths) define SASF as 'semi-autonomous social field', see: S.F. Moore (ed.), *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul, London 1978) 55-8.

[65] J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999), offers a significant insight in his conclusion. It warns a drafter to ask whether, in the "semi-autonomous social field" in which a proposed law will function, cross-cutting norms exist that may warp or even nullify the new law's prescriptions. A drafter who identifies a cross-cutting norm must include provisions in the proposed new law likely to thwart that norm's potential to block its successful implementation. For example, suppose a proposed law requires a medical professional, knowing that a form of medical misbehaviour by a colleague will likely shorten patient life, to notify the appropriate authorities. The custom of the medical profession (a SASF), however, prohibits a doctor from informing on a colleague's medical misbehaviour, see: J. Griffiths, 'The Social Working of Legal Rules' (2004) 48 *Journal of Legal Pluralism* 1. In such a case, the drafter might include in the bill a provision ensuring confidentiality for a medically-trained person who informs a relevant medical authority about a colleague's possible medical misbehaviour, and provide for a 'hot line' and perhaps reward to the informant who reports quickly and confidentially, see: J. Griffiths, H. Weyers and A. Blood, *Euthanasia and Law in the Netherlands* (Amsterdam University Press, Amsterdam 1998).

[66] Several factors may cause a doctor to behave contrary to a new law's prescriptions: a doctor may not report an instance of improper medical behaviour shortening life because the relevant medical personnel kept their behaviours secret from their colleagues. The responsible implementing agency officers may fail to inform medical personnel that the new law requires reporting on colleagues' misbehaviours to competent authority, or the law itself may fail to designate a specific official to whom the doctor must report.

shop floor where the new law will function, may affect the behaviours of a bill's addressees

To avoid that result, drafters must undertake, not the nomothetic search for a 'covering law', but an 'ideographic' research design to discover the multiple interacting 'causes' of specific human behaviour. Nomothetic explanations do little to help a drafter to design a law likely to prove effectively implemented.

As we discuss in section D.2.a, a drafter's professional responsibility includes an obligation accurately to predict (i) the behaviours that a bill will likely induce, and (ii) that, logically, those (new) behaviours will help to transform the targeted institution. In contrast, a nomothetic explanation for a social problem usually offers a monocausal explanation for the specified problem[67] Monocausal explanations for specific problematic behaviours, however, rarely prove sufficient.[68] Whatever the Bible's monocausal explanation for the Jews flight from Egypt (the will of God), a modern social scientist would look for a multi-causal explanation: bureaucracy, soil exhaustion, class conflict, the applicable law, overpopulation, perverse incentives, and many others.

A legislative drafter must design a bill that, when enacted, will, in the particular social circumstances, induce the desired changed behaviours. If a social problem has multiple explanations, a bill seeking to help resolve it must contain provisions logically likely to alter or eliminate all those causes.

For example, consider the pervasive problem of governmental corruption. A widely-accepted explanation for corrupt behaviour attributes it to a single cause, identified in a 'covering law': subjective factors – greed, or perhaps low civic morality – many hold, explain all corruption. Other 'objective' factors, however, often contribute to corruption's causes. Frequently, these depend on the circumstances within which a specific form of corruption takes place. Existing law may neglect the possibility of institutionalizing a article trail as to the reasons behind

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[67] For example, J. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1: '[T]he law constitutes a 'text', which different readers will likely construe differently."; J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 81: "[C]ross-cutting norms from existing SASFs frequently contradict the prescriptions of instrumental legislation."; W.G. Sumner, *A Study of the Sociological Importance of Usages, Manners, Customs and Morals* (Ginn & Company, Boston 1906): "[S]ocial mores defeat state-made law."

[68] R.E. Allinson, *Saving Human Lives: Lessons In Management Ethics* (Kluwer Academic Publishers, London 2005) 13: "The belief in monocausality may lead the unwary thinker in the direction of either finding particular scapegoats of which to affix blame or it may lead the unwary thinker in the direction of singling out technical factors on which to place blame. In order to better appreciate the causes of a disaster, it is best to steer clear of the belief in a single cause operating alone or in small clusters apart from some other background out of which they emerge. The reason why it is important to fully understand how disaster may be approached is to look for the systemic causality in addition to the particular causation of any particular element in that system." Covering laws almost invariably depend upon correlation analysis – with all its familiar dangers.

a governmental expenditure. Instead of requiring competitive bidding in a public forum, existing law may permit the negotiation of contracts behind closed doors. In short: corruption arises not only because of weak individuals, but also because of weak institutions. Monocausal explanations too easily persuade a drafter to ignore measures likely to increase the transparency, accountability and participation required to alter or eliminate corrupt behaviours.[69] Evidence underscores the reality: corruption has multiple causes – not only weak individuals, but also weak institutions.[70] Monocausality too easily misses a significant explanation – and then the anti-instrumentalists point a finger at that failure as proof positive that instrumental law cannot work.

Many anti-instrumentalists ignore the likelihood that drafters, too, often fail to search for facts likely to prove their hypotheses inconsistent with the available evidence. Faulty or incomplete analyses of the interrelated causes of targeted problematic behaviours, however, seldom lay a basis in facts for designing legislation likely to work. That a resulting law does not induce the prescribed behaviour testifies that the drafter has failed to meet a drafter's prime professional responsibility: a drafter can only reliably accurately predict the new behaviours her law will likely induce by examining, not a single factor suggested by a nomothetic theory, but the likely interrelated multiple causes of the problematic human behaviours in the face of the existing law.

To summarize the fallacies in the anti-instrumentalist arguments: the claim that the nature of law makes impossible the successful use of legislation as a means to an end fails, on both evidentiary and methodological grounds. First, the evidence that some instrumental law works calls into question the proposition that all instrumental law must inevitably fail. Second, many anti-instrumentalists employ a nomothetic methodology, which for some purposes may prove useful. A legislative drafter, however, must look for – and in a bill, address – all the interrelated causes for the behaviours that constitute the social problem at issue.

(c) Other Anti-Instrumentalists Claim That a Polity Ought Not to Enact Instrumental Laws

This section recapitulates and refutes some naysayers' philosophical and ethical arguments against any use of instrumental law. First, citing Nazi and Soviet

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[69] A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) ch. 14.

[70] The World Bank, *Module IV: Causes of Corruption* (Youth for Good Governance: Distance Learning Program) <http://info.worldbank.org/etools/docs/library/35971/mod04.pdf> last accessed 15 May 2011: "We have just considered what causes individuals to pay or take bribes. Some of these answers reflect morality, about good and bad people. But more often, the underlying reason that people get involved in corruption is that *systems don't work well* and create bad incentives."; U. Myint, 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 32; R. Klitgaard, *Controlling Corruption* (University of California Press, Berkeley 1988).

experience, some anti-instrumentalists assert that instrumentalist legislation too easily serves perverse objectives. Second, they argue that instrumentalism in legislation may violate the dictates of the rule of law. Third, they claim that instrumentalist legislation as practiced fails to promote the common good.

(i) The argument from history. Some point to fascist and other authoritarian regimes of recent memory – citing the laws that facilitated the Holocaust[71] – as proof positive that instrumentalist law easily lends itself to anti-humanitarian purposes. Many countries, however, use laws instrumentally for the manifestly humanitarian purposes that in many countries undergird the welfare state: minimum wages; anti-racist, feminist, civil libertarian laws. Not the inherent nature of instrumental law, but the social and physical context within which a law operates shape that law's social impact.

(ii) Instrumentalist legislation and the rule of law. Some anti-instrumentalist authors complain that too often and too easily instrumental legislation violates the 'inner morality' of legislation as expressed by the tenets of the rule of law. Government therefore ought not to use legislation instrumentally.

That claim confronts two realities: First, except perhaps the rubrics that 'we have a government not of men but of the law', and that 'no person is above the law', no agreement exists concerning the detailed content of the rule of law.[72] Second, however hazy the ideology called 'the rule of law', a cluster of agreed-values seems to justify it. Some anti-instrumentalists nevertheless object that those values seem absent from much legislation – and therefore condemn all instrumental legislation.

Other anti-instrumentalist authors offer their own idiosyncratic definitions of the rule of law, most seemingly based on a version of natural law. [73] Gribnau sums up their position:

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[71] B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006).

[72] *G.* P. Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press, Oxford 1996) 11: "Of all the dreams that drive men into the streets, from Buenos Aires to Budapest, the 'Rule of Law' is the most puzzling. We have a pretty good idea what we mean by 'free markets' and 'democratic elections'. But legality and the 'rule of law' are ideals that present themselves as opaque even to legal philosophers."; J.N. Shklar, 'Political Theory and the Rule of Law' in J.N. Shklar and S. Hoffman (eds.), *Political Thought and Political Thinkers* (Chicago University Press, Chicago 1998) 21: "[The 'Rule of Law' constitutes] just another of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians. (...) No intellectual effort need therefore be wasted on this bit of ruling-class chatter."; A.W. Seidman and R.B. Seidman, 'Lawmaking, Development and the Rule of Law' in J. Arnscheidt, B. van Rooij and J.M. Otto (eds.), *Lawmaking for Development: Explorations into the theory and practice of international legislative projects* (Amsterdam University Press, Amsterdam 2008) 91.

[73] F. von Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago 1944); B.Z. Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) *St. John's Legal Studies Research Paper* 07/0065, 32 <http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=960280> accessed 15 May 2011.

> "[L]aw is more than just an instrument to achieve social and economic ends. The law itself aims to realize a value, i.e. justice. As such, it is also a system which embodies values that cannot be understood solely as a means to direct society. These values are essential determinants of the law's content. Some of these more specific legal values are legality, equality, predictability, transparency, (judicial) impartiality, a fair opportunity to be heard. It is by upholding these values that the law offers protection to the citizen against government."[74]

In Gribnau's view, "law contains a fundamental tension between the orientation to the ends which are external to the law on the one hand, and the orientation to internal legal values on the other."[75] 'General principles' allegedly connect law to the 'fundamental norms and values prevalent in a society of free and equal citizens.' Radbruch[76] suggests these "can be considered as expressions of legal values, and constitute the normative core of law in a modern democratic state." Gribnau emphasizes that:

> The development and actual meaning of legal principles is colored by extra-legal influences, like the prevailing norms of the society or the practice which the law aims to regulate. These internal standards are generated and developed by the legal system itself (although they are influenced by morality). These principles are not the product of the will of some lawmaking institution... [Their origin lies] in a sense of appropriateness developed in the profession and the public over time.[77]

In essence, these writers seem to maintain what au fond constitutes a natural law thesis: That law, properly so-called, contains its own, unique, inner morality.

We need not rehearse here the many objections to the natural law thesis. Law constitutes an artefact designed and made by man in the course of our social existence. Its contents being man-made, man can deliberately change it or add to its corpus. Legality, equality, predictability, transparency, (judicial) impartiality, a fair opportunity to be heard, indeed constitute laudable, indispensable goals. Below, this article considers how to ensure that instrumental law carries out these goals even as it achieves its 'indirect' or 'secondary' effects' (see section D.2.c).

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[74] H. Gribnau, 'Legal Principles and Legislative Instrumentalism' in *Pluralism and Law: Proceedings of the 20th World IVR Congress Amsterdam, 2001, Volume 2: State, Nation, Community, Civil Society* (Archiv fur Rechts- und Sozialphilosophie 2003) 33-34.

[75] Ibid. 34.

[76] G. Radbruch, *Rechtsphilosophie* (1932) 124, cited in B. van Niekirk, 'The Warning Voice from Heidelberg: The Life and Times of Gustav Radbruch' (1973) 90 *South African Law Journal* 234, 246.

[77] H. Gribnau, 'Legal Principles and Legislative Instrumentalism' in *Pluralism and Law: Proceedings of the 20th World IVR Congress Amsterdam, 2001, Volume 2: State, Nation, Community, Civil Society* (Archiv fur Rechts- und Sozialphilosophie 2003) 34.

(iii) Instrumentalism and Hobbes' war. Finally, Brian Tamanaha warns against yet a third threat posed by instrumentalism: "In situations of sharp disagreement over the social good, if law is perceived as an instrument, individuals and groups within society will endeavour to seize the law, and fill in, interpret, and apply the law to serve their own ends. What results is a contest over the law itself, a contest in which all sides seek to enlist the power of law on their behalf, spawning a Hobbesean conflict of all against all carried on within and through the legal order."[78]

Anti-instrumentalists justifiably object to blatant justifications of legislation in terms of its proponents' self-interest. As Habermas suggests however, the public policy chorus sings not in one voice, but at least two: One using the discourse of power, the other, of facts and logic. [79] In the public square, however, a proponent may never legitimately rest an argument merely on the claim of 'power.' The Senator nominally representing Texas may in fact represent Big Oil – but in public he will never so declare. No matter how blatant a proposed bill's warp in favour of Big Oil, the Senator will nevertheless seek to justify it in terms of the public interest.[80] In short, a bill's proponents frequently advocate it because it advances, not necessarily the public good, but their parochial interests. A significant feature of the discourse on legislation (frequently conducted in back rooms) consists of negotiations and compromises between competing interest groups.

That does not, however, tell the whole story. In public, at least, a bill's proponent must dress a proposal for legislation in the habiliments of the public good.[81] As a minimum, a bill's proponents must therefore offer justifications that appeal not only to the proponent's partisans, but also those in the opposition – 'across the aisle.' To

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[78] B.Z. Tamanaha, 'The Perils of Pervasive Legal Instrumentalism' (2005) *Legal Research Studies Paper Series* 05/011, 1-2 <http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=725582> accessed 15 May 2011. Elsewhere, Tamanaha devotes the best part of a chapter describing and denouncing the evils of lobbying in the U.S. Congress, see: B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006) 190 ff.

[79] J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, Boston 1985), denotes the former as "strategic" discourse, and the latter as "communicative" discourse. In strategic action the actor seeks to realize his or her parochial interests; in communicative action the actor looks to achieve consensus with the auditor.

[80] For example, the wealthy and their supporters never object to higher taxes on their income in terms of its impact on their wealth, but its potential reduction of their (proclaimed) 'trickle down' effect, see: S. Friedman, 'Deliberative Democracy: A Sympathetic View' (2000) 29 *Philosophy and Public Affairs* 371, 372: "It is a convention of democracy to appeal to the common good. Few persons or political parties would openly admit in legislative debate that they advocate legislation that benefits some groups at the expense of other legitimate groups."

[81] G. Majone, *Evidence, Argument And Persuasion In The Policy Process* (Yale University Press, New Haven 1989) 19; A. Sesonske, *Value and Obligation: The Foundations of an Empiricist Ethical Theory* 13 (University of California Press, Berkeley 1964): "We expect (...) all factual statements to be *grounded* and when someone (...) fails to provide a ground, we cease to give the utterance serious consideration."

extent that their arguments so persuade, they demonstrate that the bill serves, not merely private and parochial interests, but the public good.

To summarize: most legislation aims at instrumental objectives, and – as the anti-instrumentalists claim – many fail to change society in the ways they prescribe. The anti-instrumentalists, however, do not focus on the behaviours that produce failed legislation. In this respect, they fall into two schools. One holds that law inherently cannot change behaviours. They err; some instrumental laws do work. The other school argues that, for one of three reasons – an argument from history, the invocation of the rule of law, and the complaint that legislation invariably ends by advancing parochial, not the public interest – a polity ought not enact instrumental legislation.

The fundamental error in these three arguments lies in the absence of a theory to guide the drafter's investigation, and the resulting faulty analysis: They do not specify whose and what behaviour contributes to the failure of so much avowedly instrumentalist legislation to work, namely the drafters. Far less do they even attempt to explain the causes of the drafters' too-common failure. Section B demonstrates how ILTAM's Step 2 guides the drafter in identifying the multiple causes of the drafters' frequent failure to draft legislation that works.

2. Explanations for Drafter's Behaviours

Step 2 – a step that the anti-instrumentalists all but invariably skip – requires drafters to provide evidence as to the causes of the primary role occupants' problematic behaviours in drafting failed instrumental legislation. Five hypotheses explain those behaviours.

First, the culture of most drafting institutions holds that the drafter's role concerns a bill's form, not its substance. A snippet of British history suggests how the culture of many of today's drafting institutions emerged. In England prior to 1869, a ministry drafted its own bills and forwarded them to Cabinet, who then forwarded them to Parliament for enactment. Dismayed by the manifest inadequacies of that system (mainly revealed by inconsistent laws), Cabinet appointed a Chief Parliamentary Draftsman, Henry Thring (later Sir Henry). Now the originating ministry had to forward its bills to the Chief Parliamentary Counsel's chambers, whose staff revised the bills before sending them on to Cabinet. Some ministers objected, citing a diminution of their own power. Thring responded by asserting that his office did not deal with a bill's "policy", but only with questions relating the bill's "form".[82] That became the prevailing ideology within drafting institutions in the British tradition.

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[82] R.B. Seidman, 'Law, Development and Legislative Drafting in English-Speaking Independent Africa' (1981) 19 *Journal of Modern African Studies* 133.

As mentioned in section B.2.a, the notion that a drafter has nothing to do with 'policy' – the substance of a bill – wars with reality. Nevertheless, in the former British colonies, Thring's dictum became and remains the dominant understanding, not only of laymen and even lawyers, but of the principal actors within the drafting institutions – the drafters themselves.[83]

Second, most countries' drafting institutions allow the drafters all but unlimited discretion to adopt any legislative theory and methodology – or none at all. In practice, drafters largely follow one or another of the 'entropic' or 'fall-back' methodologies (see section B.2.b) describing the methods usually adopted).

Third, the failure to appreciate the drafter's role in the design of a bill marries easily with both prevailing academic opinion and the practicing lawyer's experience: Lawyers should and in practice do take the law as given, subject to the court's interpretation.

Fourth, every drafting office that we have visited labours under severe time constraints. Pushed by political realities, the Minister all but invariably wants the bill on his desk "by Monday". Under those pressures, the drafter has small choice but to skip the luxury of asking the instructing official for further detailed instructions, and decide matters of substance largely unaided.

Fifth, other than the four 'fall back' methodologies, drafters generally have little or no theory or methodology to guide them in drafting a bill's detailed provisions. As a result, most of today's drafters copy law from other jurisdictions, draft bills that memorialize the outcomes of interest-group bargaining, criminalize behaviour, and/or draft in vague generalities (see section B.2.b).[84]

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[83] An incident in Sri Lanka a decade ago suggests the depth of that ideology. We served as presenters to a workshop for drafters in the office of The Legal Draftsman (Sri Lanka's central drafting office). For more than a century, Sri Lanka, a former British colony, has had a drafting office in the British mode. At the workshop, in the course of discussion, a drafter of some twenty years experience told the following anecdote: The Minister of Transport instructed her to draft a law that would require a bus- or lorry-driver to be literate. "I wanted to ask the Minister whether he had considered that such a law would require the discharge of at least a third of Sri Lanka's bus- and lorry-drivers, but I considered that it was not my place to do so." Some authors do understand that, in such a case, a drafter owes a professional duty to a client to call attention to the problem raised, see: R. Dickerson, *The Fundamentals of Legal Drafting* (2nd edn., Boston: Little Brown 1986) 10. At least in the United States, a lawyer has a professional duty to call to the client's attention a matter, whether conventionally 'legal' or otherwise, germane to a decision relating to a matter about which the client consulted the lawyer, see: Rule 2.1 (Advisor) of the American Bar Association's Model Rules of Professional Conduct: "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."

[84] A. Seidman, R. B. Seidman and Thomas Waelde (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (Kluwer Law International, London 1999). In that volume a number of practicing consultants to developing countries almost all recommended copying law as the principal methodology for devising new law.

That legislative drafters had no theory as a guide seems to ignore the vigorous instrumentalist strain in American law and jurisprudence. Late in the nineteenth century, Justice Holmes famously trumpeted that "The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[85]

Early in the 20th century, the American Legal Realists called for social science research to improve legislation. Robert Summers wrote:

> "As part of their creed, [the early instrumentalists] believed that lawmakers must turn to social scientists or social science methods in order to ascertain the facts relevant to the creation and modification of law. (...) At the outset, facts would have to be found about the nature and extent of the problem confronting the law... [For example,] how many women employees are being forced to work beyond a forty-five hour week? (...) In all such inquiries, the lawmaker would also want to determine the social effects of these conditions. What, for example, were the effects of long hours on the health of women? On her family? (...) In addition, the instrumentalists assumed the lawmakers would need to know the causes of (...) excessive hours of labor. (...) Once legislator or court had made new law, the instrumentalists urged the continuous application of social science methods in order to determine whether this law was working out as envisioned. They reasoned that fact finding of this sort would prove useful in deciding whether to modify or perhaps even abandon the use of law at hand."[86]

Most of today's anti-instrumentalists seem unaware of the teachings of Karl Llewellyn, Roscoe Pound, Holmes, or the other leaders of the Realist school. Notwithstanding their daily experiences in practicing their craft, notwithstanding the teaching of scholars the best part of a century earlier, however, many drafters seem persuaded that their job requires only that they communicate a bill's content to its addressees. So believing, drafters continue to use the 'fall back' methodologies, producing too many failed 'instrumental' laws. A policy-maker who denies making policy only serendipitously produces sound policy. In legislation, that approach only serendipitously produces laws that work.

In terms of its likely contribution to equipping legislative drafters to draft more effectively implemented legislation, section D compares the anti-instrumentalists' proposed solution for the problem of instrumental legislation that does not work with that recommended by ILTAM.

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[85] O.W. Holmes, *The Common Law* (Beacon Press, Boston 1881) 2.

[86] R.S. Summers, *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press 1982) 87-88.

D. DESIGNING INSTRUMENTAL LAWS LIKELY TO WORK IN THE PUBLIC INTEREST

ILTAM's problem-solving methodology's Step 3 calls for an evidence-based legislative solution likely to alter or eliminate the causes of the drafters' behaviours described in Step 1.b, and explained in Step 2. Here, section A considers the anti-instrumentalists' proposed solutions for the social problem of failed instrumental laws. Section B then demonstrates that ILTAM's solution for the problem of ineffective instrumental legislation seems more likely to work.

1. Anti-Instrumentalist 'Solutions' for the Too-Frequent Failure of Instrumental Laws

Anti-instrumentalist authors offer five sets of possible solutions to the problem that persistently plagues the development project: instrumental laws' too-frequent failure to work. These solutions ignore the implicit question: Why go through the complex, arduous and expensive effort to draft legislation and shepherd it through the many-layered procedural maze of the legislative process unless one has in mind a purpose that the new law might accomplish? If not for instrumental reasons, why seek to enact legislation? This section describes these five anti-instrumentalists' solutions.

(a) No Prescriptive Advice

Those who flat-out deny that a legislature can deliberately use law instrumentally fall into two sub-groups. First, some who deny that instrumental legislation can work subsume under 'instrumentalist law' all uses of law to achieve an end. When William Graham Sumner proclaimed that "stateways cannot change folkways" he foreclosed the possibility that a clever drafter could evade that declared universal rule.[87] Conforming to his own advice, his solution to the 'problem' of instrumentalist legislation impliedly urged that states refrain from using law to direct change. (Presumably, Sumner approved of using law to conform the legal order to existing behaviours.) Following Coase,[88] Buchanan comes to much the same conclusion. He argues that the market will adjust to any existing legal configuration.[89] He urges government to rely on the market's self-correcting mechanisms.

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[87] W.G. Sumner, *A Study of the Sociological Importance of Usages, Manners, Customs and Morals* (Ginn & Company, Boston 1906).
[88] R. Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1.
[89] J.M. Buchanan, in 'Politics, Property and Law: An Alternative Interpretation of Miller v. Schoene' (1975) 15 *Journal of Law & Economics* 439.

(b) Conforming Law to Social Reality

Logically, the denial of the possibility of successful instrumental legislation seems to suggest abandoning attempts to use legislation instrumentally (see section C.1.a). To address what he sees as instrumentalism's threat to the rule of law, Tamanaha proposes two alternative strategies. Early in his book, he writes:
"Legislators with an instrumental view will promote whatever law will secure their re-election (personal end), or further their ideological position (political end), or advance the public good (social end); a legislator with a non-instrumental view, a view that had currency two centuries ago but has long been defunct, will seek to declare the immanent norms of the community or natural principles."[90]

That suggests that, in Tamanaha's (anti-instrumental) view, law ought not to lead social change. Inevitably, society changes. The behaviours that constitute its social institutions change. Existing law no longer prescribes the behaviours on the shop floor. A drafter should draft laws to prescribe the society's current behaviours. Thus, laws reflecting 'immanent' social norms can catch the occasional deviant from newly-institutionalized behaviours, and provide 'legal' solutions to reduce possible conflicts between the old laws and the new behaviours. That constitutes an important non-instrumental function for legislation.[91] Such legislation, however, does not command society to change.[92]

(c) Esoteric Legalism

Alternatively, Tamanaha proposes what Vermeule denotes as 'esoteric legalism.' Vermeule summarizes Tamanaha's unexpected proposal to remedy the evils of prevailing instrumentalism throughout the legal order (and not merely in legislation): "[L]egislators must be genuinely oriented toward enacting laws that are in the common good or public interest. (...) [G]overnment officials must see it as their solemn duty to abide by the law in good faith. (...) [J]udges, when rendering their decisions, must be committed to searching for the strongest, most correct legal answer. (...) These three points (...) are the minimal conditions necessary for a properly functioning instrumental system of law."[93]

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[90] B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006) 7 [emphasis supplied]; R.S. Summers, *Instrumentalism and American Legal Theory* (Cornell University Press, Ithaca 1982) 84.

[91] That 'catch-up' function for legislation constitutes the principal *raison d'etre* for the Law Reform Commissions that dot the common-law world. See: R. Pound, 'The Causes of the Popular Dissatisfaction with the Administration of Justice' (1906) 29 *American Bar Association Reports* 395; R. Pound, 'A Practical Program of Procedural Reform' (1910) 22 *The Green Bag* 438.

[92] Arguably, the phrase "the immanent norms of the community", at section D.1.b, might refer not only to norms prescribing behaviours that conform to existing societal norms, but also to norms of natural law

[93] B.Z. Tamanaha, cited in A. Vermeule, 'Book Review: Instrumentalisms: Law as a Means to an End: Threat to the Rule of Law' (2007) 120 *Harvard Law Review* 2113, 2127

Vermeule adds, however, that only if all the actors either genuinely adopt these conditions – or at least believe that most of their peers adopt them – can the system conform to the demands of the rule of law.[94]

Vermeule effectively demolishes Tamanaha's 'esoteric legalism' prescription: "One must give people reasons for adopting a particular theoretical stance," he observes, "and in an instrumentalist culture, the pressure to give instrumentalist reasons will be overwhelming, even if the result is that one's own theoretical stance becomes paradoxical."[95] Once the actors in the legislative process realize that esoteric legalism masks a hoax, what chance that they will abide by it?

(d) Solutions Urging Drafters, When Drafting Instrumental Law, to Avoid Specific Errors

Adopting a monocausal theory, as the cause of a specific instance of failed instrumental law, several authors identify the cause of a similar law's failure in other circumstances. One may fault these studies for assuming monocausality (see section C.2.b). Nevertheless, some do enrich our understanding of how specific defects affect the way law functions on the 'shop floor'.

Their solutions appear very limited. Professor Griffiths, for example, argues that the complexity of the 'shop floor' of social life, and specifically the inevitable existence of norms promulgated and enforced by 'SASFs' (Semi-Autonomous Social Fields), deny the assumption that a legislative message can travel unchanged from legislature to addressee.[96] He offers no strategy for using legislation to solve a social problem. He merely implies that to work, legislation must navigate the shop floor to avoid the many SASF impediments likely to block undistorted communication of the law to those affected. Other authors in this group urge the drafter to beware the particular monocausal defect that thwarted the achievement of the stated goal of instrumental law they examined; or they simply reiterate their mantra: Instrumental legislation never works.

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[94] B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York 2006) 250, holds that this form of 'esoteric legalism' does not constitute mere wishful thinking: "One of the themes of this study is that ideals have the potential to create a reality in their image only so long as they are believed in and acted pursuant to. This might sound fanciful, like suggesting that something can be conjured up by wishful thinking; or it might sound elitist, like the 'noble lie', the idea that it is sometimes better for the masses to believe in myths because the truth is too much to handle. But it is neither. It is a routine application of the proposition widely accepted among social theorists and social scientists that much of social reality is the construction of our ideas and beliefs."

[95] A. Vermeule, 'Book Review: Instrumentalisms: *Law as a Means to an End: Threat to the Rule of Law*' (2007) 120 *Harvard Law Review* 2113, 2130.

[96] J. Griffiths, 'Legal Knowledge and the Social Working of Law: The Case of Euthanasia' in H. van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999) 81; J. Griffiths, 'The Social Working of Legal Rules' (2004) 48 *Journal of Legal Pluralism* 1.

(e) The 'Soft Law' Solution

Many who declare that instrumental law cannot work define 'instrumental law' narrowly. Instead of meaning by 'instrumentalism' (in legislation) an attempt to use the law as a means to an end, they implicitly subsume under that term only legislation that assumes that the SMR model, earlier described, actually represents reality.[97]

Sociology of law's fundamental tenets deny that SMR assumption. On the 'shop floor' of real life only rarely do the peregrinations by which legislation travels from legislative enactment to the law's addressees match SMR's ideal-type model (see section A.3). 'Instrumentalism' in that sense plainly fails.

Some modern scholars view difficulties of communication – between different levels of hierarchical government, between citizens and government, the lack of popular knowledge of relevant law, and many other blockages – as the main causes of failed legislation.[98] Without adequate communication channels between citizen and government, and within government itself, the rule of law disintegrates.[99]

The anti-instrumentalists thus confront a paradox. They must improve the institutions for the communication of the law – but to do so, they may not use the law instrumentally to change the existing communications institutions. Some find the answer in 'soft' law,[100] or what some denote as 'communicative legislation.'[101] Van Gestel and Evers observe:

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[97] H. van Gunsteren, *The Quest for Control: A Critique of the Rational-Central-Rule Approach in Public Affairs* (John Wiley & Son, London 1976); R. van Gestel and G. Evers, 'Communicative Legislation: Can we trust certified management systems as tools for the interpretation and enforcement of environmental laws?' in N. Zeegers, W. Witteveen and B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press, Ceredigion 2005) 183-184: "[Some have described this as the "rational central rule approach']: Instrumental legislation presupposes a hierarchical relation and an almost perfect communication between the legislature and those who have to abide by the law. In this model, legislation holds commands, which simply have to be obeyed by civilians [citation omitted]. These legislative commands are assumed to be precise and, therefore, sufficiently clear for everybody who has to implement the rules. Government inspection agencies are entrusted with the enforcement of the law to ensure that, ultimately, persistent offenders change their behaviour and abide by the rules. (...)"

[98] W.J. Witteveen, 'Turing to Communication in the Study if Legislation' in N. Zeegers, W. Witteveen and B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press, Ceredigion 2005) 17 and 21-24.

[99] Ibid. 22-24.

[100] D.M. Trubek and L.G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 343.

[101] R. van Gestel and G. Evers, 'Communicative Legislation: Can we trust certified management systems as tools for the interpretation and enforcement of environmental laws?' in N. Zeegers, W. Witteveen and B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press, Ceredigion 2005) 183-184.

> "It is not easy to summarize the basics of what is the 'theory of communicative legislation'. (...) What is certain is that a communicative style of legislation relies on aspirative rules and principles rather than detailed (technical) standards, on persuasion rather than punishment or threats of punishment, on dialogue between state officials (judges, prosecutors and policymakers) and the public (citizens, interested organizations and companies) rather than legislative commands and on procedures for public participation in the processes of interpretation rather than governmental steering on output and results."[102]

Can 'soft law' solve the repeated difficulties encountered in drafting and implementing legislation designed, in the 'rational central rule' or 'hard law' style, as 'a means to an end'? In particular, recall that this article's concern focuses on transformational legislation, that is, legislation looking to institutional change in support of Development.

Cognitive dissonance teaches that, over time, the actors whose repetitive behaviours comprise an institution, especially a long-established one, develop myths, legends, ideologies and thought patterns to justify their roles.[103] Institutional elites, in particular, tend to believe that institutions as presently constituted prove appropriate and should remain unchanged. Moreover, even during a period of rapid change, institutional elites usually remain in place because the existing institutional structures offer incentives to retain them, unchanged.

Confronted by a 'soft' law directed at institutional transformation, the elites' beliefs and incentives persuade them, so far as possible, to exercise their discretion to vary their behaviours as little as possible from existing patterns. In principle, therefore, 'soft' law seems likely to undermine development's imperatives. Although soft law may help to make existing institutions perform more efficiently, it seems unlikely to transform them. Development, however, requires broad-scale institutional transformations. ILTAM proposes a better solution.

3. ILTAM's Solution: Evidence-Based Legislation

This section briefly outlines ILTAM's guide for designing evidence-based legislation that works. Preliminarily, subsection (a) proposes criteria required for such a solution. Subsection (b) demonstrates how a drafter, guided by ILTAM, can devise a bill grounded on available evidence, logically presented. Subsection (c) proposes detailed measures likely to ensure that the resulting draft law conforms to the rule of

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[102] R. van Gestel and G. Evers, 'Communicative Legislation: Can we trust certified management systems as tools for the interpretation and enforcement of environmental laws?' in N. Zeegers, W. Witteveen and B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press, Ceredigion 2005) 186, citing W. Witteveen and B. van Klink, 'Why is Soft Law Really Law: A Communicative Approach to Legislation' (1999) 14 *Regelmaat* 126-140.

[103] L. Festinger, *A Theory of Cognitive Dissonance* (Row & Peterson, Evanston 1957).

law. Subsection (d) emphasizes the requirement, specified by ILTAM's Step 4, that the bill's provisions create a transparent, accountable and participatory monitoring and evaluation mechanism. Finally, this section will underscore ILTAM's teaching that, as a quality control, the drafter accompany an important bill with a Research Report. Tracking problem-solving's four steps, and providing evidence at each step, that Report seeks to persuade the reader that the proposed bill will work.

(a) Criteria for an Adequate Legislative Theory and Methodology

Unlike the four 'fall-back' methods, one or the other of which most drafters adopt, ILTAM's problem-solving logic suggests criteria essential to ensure that a proposed bill will likely work. It offers a theory to guide a drafter in designing a bill that logically will likely alter or eliminate the causes of the problematic behaviours that comprise the targeted social problem. Legislation only works, however, if its addressees behave as the law prescribes (and not always then). That requires a drafter accurately to predict the behaviours the bill will likely induce. (Indeed, accurately predicting the behaviours a bill will induce constitutes a drafter's principal professional responsibility.)[104]

Long ago, Roscoe Pound suggested that the inherent nature of a society and its legal order imposed limits on the uses of law.[105] ILTAM offers a drafter a guide for gathering and logically organizing the evidence required accurately to predict the behaviours that, in the context of a country's unique circumstances – what John Griffiths calls the 'shop floor' – a proposed law will likely induce.[106] Many country-specific circumstances may hinder a law's addressees from obeying the law's prescriptions. Instrumental law can work – provided that the legislation takes those 'limits' into account.

ILTAM's legislative methodology follows a problem-solving model,[107] which incorporates a sociological model advanced by the Norwegian sociologist Karl

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[104] A client relies on the drafter's competence to draft a bill with a high probability that it will induce the behaviours it prescribes. As elsewhere in the law, where a client relies on a lawyer's competence, the lawyer comes under an ethical and professional duty to serve the client competently. See: Rule 1.1 (Competence) of the American Bar Association's Model Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[105] R. Pound, 'The Limits of Effective Legal Action' (1917) 27(2) *International Journal of Ethics* 150; R. Pound, *Jurisprudence* (West Publishing, St. Paul 1959) 353.

[106] Other writers use other metaphors to refer to the reality of the social situation within which a law functions: "The 'concrete situation,' the 'coal face,' the 'front line,' 'where the rubber hits the road.'" M. Galanter, 'Preface: The Perplexities of Legal Effectiveness' in N. Zeegers, W. Witteveen and B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press, Ceredigion 2005).

[107] A. Seidman and R.B. Seidman, 'ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change' (2009) 89(2) *Boston University Law Review* 469.

Barth.[108] Barth maintained that the simplest model of society consists of individuals and collectivities choosing within the constraints and resources of their circumstances.[109] Reworked to model the problem of how the law's addressees behave in the face of a new law, Barth's proposition implies that people behave in the face of a new rule of law by choosing within the constraints and resources of their immediate environment – including the constraints and resources imposed by the new law.

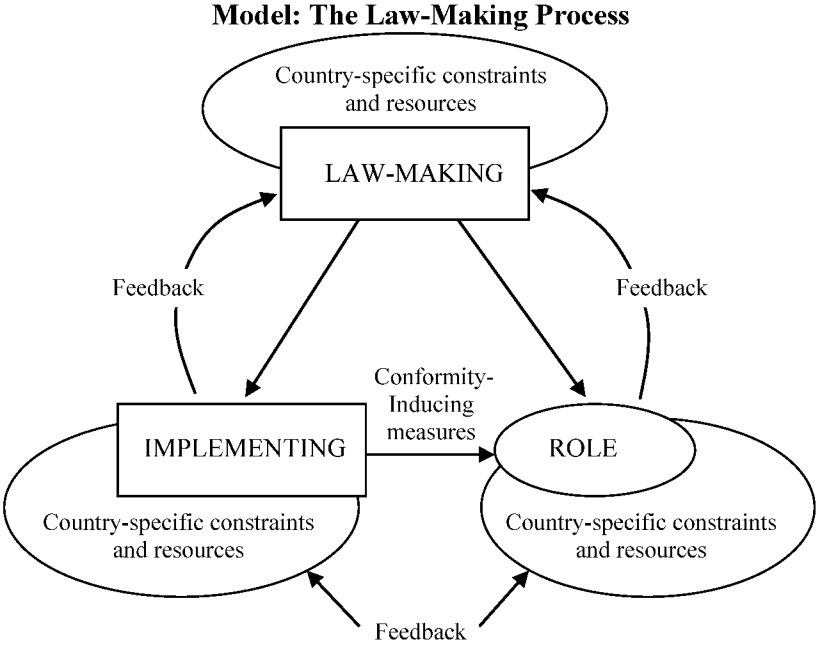

Figure 2

Drawing on Kelsen's map of a law's normative structure (see section B.2.a, including Figure 1), and conforming to Barth's insights, Figure 2 models Pound's

[108] F. Barth, 'Processes of Integration in Culture' in F. Barth, *Models of Social Organization* (photo reprint 1971, Royal Anthropological Institute: London 1966) 12-13.

[109] A. Seidman and R.B. Seidman, 'ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change' (2009) 89(2) *Boston University Law Review* 475 ff. After law has functioned for a time, people get accustomed to it. They rarely make new choices about how to behave in the law's face. But when the law has only recently been promulgated, surely actors do choose whether and how to obey the new prescription.

limits on law,[110] primarily the constraints and resources that, on a role occupant's 'shop floor,' will likely affect that role occupant's behaviours.

That a role occupant fails to respond to a law's commands, prohibitions or permissions, signifies more than that the actor behaves problematically. It indicates that, in drafting the bill's detailed prescriptions, the drafter failed adequately to take into account the relevant constraints and resources in the role occupant's environment: the country-specific circumstances – that inevitably influence that social actor's behaviours.

That proposition implies that a drafter can design an effective new law only by grounding it on adequate detailed research concerning the conditions prevailing on each relevant set of role occupants' 'shop floor.' That requires two moves. First, the drafter must describe in detail the problematic behaviours at issue. Second, lest the bill not treat causes, but merely poultice symptoms, the drafter must explain those problematic behaviours.

ILTAM guides the drafter in systematically searching for hypotheses ('educated guesses') to explain the problematic behaviours the proposed new law aims to change. To discover all the possible causes likely to exist on a role occupant's 'shop floor,' ILTAM teaches the drafter to turn attention to each of seven categories: The wording of whatever Rule exists: the addressee's Opportunity and Capacity for behaving as the law prescribes; whether the law has been accurately Communicated to the addressee; whether the addressee has Incentives for conforming to the law; the Process by which the addressee reaches a decision about how to behave in the face of the rule, and actor's Ideology (i.e., what goes on the actor's head when determining how to respond to a rule of the law.)[111] A drafter should consider what, if any, explanatory hypotheses the category and the available evidence about the specified problematic behaviour suggest.

An instrumental law likely achieves its objectives – that is, it will work – only if, in designing it, the drafter respects the 'limits of law.'[112] The actual state of affairs on the shop floor of real life dictates those limits. For a drafter to produce bills that, once enacted, actually work, requires the drafter to capture evidence that explains the real-life behaviours that constitute the social problem addressed. The ROCCIPI categories offer a guide to discovering that evidence. Only by examining the evidence concerning the details of the relevant circumstances prevailing on a

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[110] R. Pound, 'The Limits of Effective Legal Action' (1917) 27(2) *International Journal of Ethics* 150.

[111] The first letters of these categories comprise the mnemonic 'ROCCIPI'. Broadly construed, these categories purport to encompass all the possible factors in a social actor's circumstances likely to influence that actor's problematic behaviour, see: A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) ch. 4.

[112] R. Pound, 'The Limits of Effective Legal Action' (1917) 27(2) *International Journal of Ethics* 150.

particular 'shop floor' can a drafter, within the limits of law, formulate legislation to prescribe the desired social change, and reliably predict the likelihood that the law will work.

(b) Drafting for the Rule of Law

Some naysayers argue that that the Nazi use of law proves that one ought never to try to use law instrumentally (see section C.1.b). In contrast, ILTAM requires a drafter, grounding a proposed law on facts and logic, always to draft in ways that protect rule of law values: basically, the values that cluster around 'justice' and 'good governance'.

Realization of these values requires transparency, accountability, and stakeholder participation in government decision-making under rules[113] that confine discretion as narrowly as the nature of the situation permits.[114] A bill contains prescriptions that, assuming the relevant actors behave as prescribed, aim to produce a newly-designed institution (a set of repetitive behaviour patterns). ILTAM cautions a law-maker (including drafters) to draft and enact legislation likely to ensure that its prescribed new institution will achieve its non-legal instrumental objective in a manner consistent with the basic premises of the rule of law (in whatever version the legislator chooses).[115]

(c) Step 4: Incorporating a Monitoring and Evaluation Mechanism

ILTAM's problem-solving Step 4 calls for incorporating in the bill a provision creating a transparent, accountable and participatory monitoring and evaluation mechanism. That provision should help to ensure that, after the law's enactment, those affected – especially the poor and vulnerable – may provide evidence as to its implementation and social impact.

For at least two reasons, a law may not work as predicted. First, the drafter may have failed to identify the factors that caused problematic behaviours in the face of the pre-existing law. Second, the bill's detailed provisions may not prescribe new behaviours likely to alter or eliminate those causes. Furthermore, the world 'out there' ever changes. Change inevitably introduces new, unanticipated problems. The detailed provisions for an adequate monitoring mechanism should engage stakeholders in identifying and suggesting timely revisions in the law to address those new problems.

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[113] The World Bank, 'Governance and Anti-Corruption' (*The World Bank*) <http://www.worldbank.org/wbi/governance> accessed 15 May 2011; The World Bank, 'The Worldwide Governance Indicators (WGI) project' (*The World Bank*) <http://info.worldbank.org/governance/wgi/index.asp> accessed 15 May 2011.

[114] A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) ch. 14.

[115] Ibid.; A. Sen, *Development as Freedom* (Oxford University Press, New York 1999).

(d) Drafting in the Public Interest: The Research Report as a 'Quality Control'

Finally, institutionalist legislative theory strongly recommends that a drafter accompany a significant bill or administrative regulation by a Research Report that demonstrates that the proposed bill rests on evidence, logically organized. By justifying a proposed bill in terms of 'reason informed by experience' or 'facts and logic', an adequate Research Report serves as an essential 'quality control'.

Jerry Mashaw suggests that, in respect of legislation, modern societies seem to have abandoned rational justification:

> We have in crucial ways given up on the project of rationality as applied to legislative action. As a constitutional matter we do not require that the legislature have a 'rational basis' for its actions, only that we could imagine one. (...) Save in special constitutional contexts where fundamental human interests can only be overridden by pressing state needs, the legislature need not have investigated the facts of the matter, analyzed them cogently, or been motivated by whatever reason can be constructed as a justification for its action.[116]

ILTAM seeks to resurrect that 'project of rationality'. To do so, it recommends that a drafter accompany a significant bill (including a significant administrative regulation) with a Research Report.

An adequate Research Report facilitates drafters' efforts to attain three objectives. First, it demonstrates that a bill's detailed prescriptions prove grounded on the available evidence. Second, it predicts the behaviours that those prescriptions, once enacted into law, will likely induce, and that those behaviours will effectively address the causes of the problematic behaviours (the institutions) of concern. Finally, it demonstrates that the preferred solution comes at less cost and provides more social benefits than any alternative solution. (Note that all three elements require evidential support.) In short, a Research Report, structured by ILTAM's problem-solving methodology, provides the facts and logic necessary to justify a proposed bill.

A Research Report that tracks ILTAM justifies an 'evidence-based' bill according to either of three routes suggested by leading philosophers. Habermas argues that one who seeks to justify a proposed prescription for public adoption (whether in law

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[116] J. Mashaw, 'Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 *Fordham Law Review* 17, 19; 'Introduction' in J. Bohman and W. Rehg (eds,) *Deliberative Democracy: Essays on Reason and Politics* (The MIT Press, Cambridge, Massachusetts 1997) x: "[A] democracy based on public deliberation presupposes that citizens or their representatives can take counsel together about what laws and policies they ought to pursue as a commonwealth. And this in turn means that the plurality of competing interests is not the last word, or sole perspective, in deciding matters of public importance. The problem, to use Kant's terms, is to bring about 'the public use of reason."

or by more general policy) must persuade a hypothetical rational sceptic reader[117] that the proposal, when promulgated, will likely work.[118] Unless that sceptic, or someone else, advances a proposal, grounded on better, more logically-organized facts, law-makers on both sides of the political aisle must agree that the proposed bill will likely ameliorate the targeted social problem. Where both sides of the political arena agree on a proposal, likely that proposal advances the public interest.

John Dewey's and others' pragmatic philosophy reaches a more or less similar conclusion. That philosophy holds that the metric of a measure's desirability lies in its results.[119] In the case of a draft law, after its enactment and implementation, does it work? Prior to its implementation, one can only estimate the probability of the proposed legislation working. That probability depends upon the accuracy of the Research Report's prediction of post-enactment behaviour. That, in turn, relies crucially on evidence relating to the 'shop floor's' constraints and resources within which the relevant social actors must choose how to 'behave'.

Finally, Jerry Mashaw exemplifies a school that maintains that, for a law to command obedience, its addressees must agree that its detailed prescriptions appear necessary and reasonable:

> We can understand ourselves only to the extent that we can give ourselves reasons for actions that correspond to a life plan that we recognize as our own.

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[117] Why use a hypothetical 'rational sceptic' as the model auditor? Whether the term, 'rational skeptic', fairly models legislators or citizens at large remains a contested proposition. Dewey and the pragmatists argued that the answer as to whether a law will work lies in human experience. They hold that experience demonstrates that propositions of practical reason (and therefore of the law), grounded on reason informed by experience (facts and logic) prove likely to produce superior results. H. Pitkin, *The Concept of Representation* (University of California Press, Berkeley 1967) 212, writes 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". See generally: J. Habermas and W. Rehg (tr.), *Between Facts and Norms; Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, Cambridge, Massachusetts 1996); J. Rawls, 'The Idea of Public Reason Reassessed' (1997) 64 *Chicago Law Review* 765, 800; J. Mashaw, 'Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 *Fordham Law Review* 17.

[118] J. Habermas and W. Rehg (tr.), *Between Facts and Norms; Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, Cambridge, Massachusetts 1996) 107: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."; J. Habermas and B. Fultner (tr.) On the Pragmatics of Communication (The MIT Press, Cambridge, Massachusetts 1998) 232: "We understand a speech act when we know the kinds of reasons that a speaker could provide in order to convince a hearer that he is entitled in the given circumstances to claim validity for his utterance—in short, when we know what makes it acceptable."

[119] J. Dewey, *Essays in Experimental Logic* (University of Chicago Press, Chicago 1916) 1-7. To the extent the evidence demonstrates that a practical judgment works, it testifies to "the truth or falsity of the judgment" –here, of the predictability of a law's commands, permissions, and prohibitions.

> And we can understand ourselves as members of an acceptable system for collective governance, bound together by authoritative rules and principles, only to the extent that we can explain why those rules and principles ought to be viewed as binding. The authority of all law relies on a set of complex reasons for believing that it should be authoritative. Unjustifiable law demands reform, unjustifiable legal systems demand revolution.[120]

In short, by whichever route, the research report constitutes a 'quality control'. At each of ILTAM problem-solving's steps, it provides the evidence necessary to demonstrate the likelihood that predicted behaviours facilitated by the bill's detailed provisions will likely serve the public's – not private – interests. ILTAM's proposal that a drafter should accompany a bill by a well-constructed Research Report makes less likely the 'Hobbesian war of all against all' that Tamanaha predicts legislative instrumentalism will likely produce. By supplying evidence essential for justifying a proposed bill by a process of public reasoning,[121] that Research Report buttresses both justice (and thus the rule of law) and democracy.

E. CONCLUSION

This article focuses on the use of legislation to achieve social – that is, institutional – change to facilitate a people-oriented development process. Section B describes the social problem of concern: in too many poor countries, change-oriented laws either fail to induce their prescribed behaviours, or, if induced, those behaviours do not effectively help resolve the social problems targeted. In brief, too many instrumentalist laws fail to work. With that proposition anti-instrumentalists and their opposites agree. On the explanations and possible solutions for that problem, however, we strongly disagree.

Following ILTAM problem-solving's agenda, section B.2 identifies as the actors of concern not the implementing agencies, not the legislators, but the drafting institutions and specifically the legislative drafters. By drafting the detailed provisions of a bill, the drafter inevitably plays a critical role in designing its substantive content. Following any of four 'fall-back' or 'entropic' methods, legislative drafters too often draft instrumental laws that do not work.

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[120] J. Mashaw, 'Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 *Fordham Law Review* 17, 19.

[121] J. Rawls, 'The Idea of Public Reason Reassessed' (1997) 64 *Chicago Law Review* 765, 796 suggests 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".

As required by Step 2, this article's section C first examines and largely rejects the anti-instrumentalists' explanations for so many law's failures to work. Instead, borrowing from sociology of law, ILTAM holds that people behave in the face of a new law by choosing among the constraints and resources of their own 'shop floor'. ILTAM suggests seven explanatory categories which, broadly construed, help to identify hypotheses explaining the problematic behaviours under examination. Here, that explanation focuses on the drafters' wide use of the 'fall-back' (or 'entropic') methodologies. Five propositions explain those behaviours: (i) the long-held belief that a drafter has no responsibility for a bill's substance, but only its form; (ii) the scope of discretion that drafting institution allow a drafter in the choice of a drafting methodology; (iii) the practice of most lawyers of taking the existing law as given;[122] (iv) the ever-present pressure of time constraints; and (v) the drafters' lack of an alternative theory to guide the design of instrumental laws.

Following Step 3, this section D then addresses the solution for the social problem of the frequent failure of instrumental laws. Section D.1 examines and rejects as insufficient the anti-instrumentalist 'solutions' for the problem. Instead, section D.2 demonstrates that ILTAM's theory and methodology logically guide the drafter in altering or eliminating the causes of the existing problematic behaviours analyzed in section C. The drafter does so by designing new provisions logically likely, after enactment, to induce new behaviours, thus to ameliorate or resolve the social problem identified in section B.

Organized in a Research Report whose structure follows ILTAM's methodology, the evidence discovered in Steps 1 and 2, and in the cost/benefit analysis of Step 3, justify the bill. That Report comprises the bill's 'quality control.' It warrants the claim that the proposed bill meets the criteria of 'evidence-based' legislation.

The anti-instrumentalists limit legislative changes to amendments necessary to conform existing law to ever-changing societal behaviour patterns, thus excluding the use of legislation to lead social change. Their approach deprives society of its most powerful weapon for achieving deliberate social change. The very possibility of using law to strengthen democracy – that is, to create a people's self-government – presupposes that that the people's elected representatives will vote to empower the government to draft and implement laws to fulfil the majority's demands for specific social change.

Whatever government's power, social change inevitably occurs – continuously. By asserting government's powerlessness to use the only instrument at its disposal to achieve deliberate social change – legislation, broadly construed – anti-instrumentalists inevitably leave human society at the mercy of custom and tradition,

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[122] Most law schools mainly focus not on teaching future lawyers how to draft legislation to help resolve existing social problems, but on how to take their clients by the hand through the forest of existing laws, as the judges interpret them, to bring them out (hopefully profitably) on the other side.

mindless, unplanned, unforeseen social change, the untrammelled dictates of 'the market' – and those who profit from those dictates.

ILTAM offers drafters a guide for designing instrumental laws, grounded on public reasoning and evidence, likely to prove effectively implemented – and likely to *work*. A research report that follows ILTAM's theory and methodology provides a guide that looks to restoring the project of justifying legislation in terms of facts and logic.

Evidence-based, instrumental legislation that effectively changes problematic behaviours, and thus induces desired social change: democratic self-government demands no less.