

# Drafting for the Rule of Law: Maintaining Legality in Developing Countries

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## Introduction

Recently some U.S. scholars claim to have discovered the dark side of the force: bureaucracy.<sup>1</sup> They tell us that “[b]ureaucracy is the primary form of organized power in America today, and . . . is therefore a primary target of those who seek liberation from modern forms of human domination.”<sup>2</sup> Bureaucracy oppresses its clients simultaneously by discretion misused and by precise rules overused. As an alternative, some critics of bureaucracy put forward roseate visions of participatory democracy, sometimes reduced to concrete proposals,<sup>3</sup> and sometimes as a code-word for “the ideal under which the possibilities of joint transformation of social life are collected.”<sup>4</sup> Whatever the future of participatory democracy in the United States, in today’s Africa to abandon bureaucracy in pursuit of the chimera of participatory democracy will only ensure the perpetuation of poverty and vulnerability rooted in the economic, political, and social institutions inherited from colonialism. Unchanged despite independence, these institutions continue to grind out wealth and power for a tiny minority (mostly non-African and living overseas), and poverty and vulnerability for most Africans.

To address the problems of poverty and vulnerability requires new institutions that will bring about higher productivity, create ample employ-

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1. At least among lawyers, “bureaucracy” seems to have no agreed-upon definition. Compare Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1278 n.2 (1984) (bureaucracy includes both public and private—especially corporate—hierarchies) with Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U.L. REV. 900, 904 (1985) (because most of us work in bureaucratically-organized institutions, “we are all bureaucrats most, if not all, of the time”). In this article, I consider “bureaucracy” only with respect to public hierarchies, and speak mainly to the problems of controlling the behavior of their higher-level members.

2. Frug, *supra* note 1, at 1295.

3. See, e.g., J. COHEN & J. ROGERS, ON DEMOCRACY 146-83 (1983); cf. Macneil, *supra* note 1, at 939-43 (“community” as an “alternate vision” to participatory democracy).

4. Frug, *supra* note 1, at 1296.

ment opportunities, distribute income more equitably, and limit or eliminate the export of economic surplus and instead channel it into investment at home in ways likely to create an economy with a high degree of specialization and exchange. These changes can only occur if political institutions change as well, to represent the interests not of the old political and economic ruling classes, but of the mass of the population. Development necessitates *institutional* transformation. Institutions appropriate for a colonial, capitalist mode of production must be drastically changed to permit development even in a capitalist mode. For development in a socialist mode, they must be completely redesigned and rebuilt.

However, the transformation of African political and economic institutions appears unlikely without the use of state power. State power in turn functions through rules of law that are implemented by bureaucrats.<sup>5</sup> Maybe someone, somewhere, will devise a way, without delegating authority to a bureaucrat, to permit participatory democracy to decide where to locate a country's only steel mill, how to organize a central bank and enforce its control over monetary policy and the banking system, or how to determine which passenger aircraft are safe or which drugs will not kill too many of their users. To date, no one has come close. To make these decisions, the only form of organized power that exists, or even hovers on the horizon, is bureaucracy.<sup>6</sup> In Africa, "those who seek liberation from modern forms of human domination" must employ law and state power—and bureaucracy—to induce those economic, political, and social institutional changes that constitute the development process.<sup>7</sup> This requires not the abandonment of bureaucracy, but its taming.

To tame bureaucracy, a legislative drafter must write laws that will, so far as possible, induce officials to conform not only to the letter of the law, but to its spirit—that is, she must write laws instrumentally.<sup>8</sup> A

5. The use of law and state power to facilitate development constitutes only a special case of the general problem of the use of these tools to bring about social, political, and economic change. See generally Auerbach, *The Relation of Legal Systems to Social Change*, 1980 Wis. L. REV. 1227 (discussing the role of legal systems in maintaining social stability or bringing about social change).

6. Cf. Macneil, *supra* note 1, at 923 (management of a large-scale capital base requires bureaucratic control).

7. Montgomery, *A Royal Invitation: Variations on Three Classic Themes*, in APPROACHES TO DEVELOPMENT: POLITICS, ADMINISTRATION AND CHANGE 257 (J. Montgomery & W. Siffin eds. 1966); see also *id.* at 261-62 ("[A]lmost nobody loves a bureaucracy, although no one conceives of development without it.").

8. This article promotes an unabashedly instrumental perspective on law. *But cf.* Frug, *supra* note 1, at 1292 (law not a set of rules prescribing behavior, but primarily a legitimating ideology, "a structure that lawyers can use to formulate arguments for and against the activity

Third World drafter cannot avoid the obligation to draft to enhance the rule of law.<sup>9</sup>

Traditionally, the rule of law called for narrow grants of discretion. In conditions of development, however, where uncertainty and turbulence reign, legislatures can do little more than identify difficulties, allocate resources, and give officials power to experiment with solutions—that is, they must give officials wide discretion. Under these circumstances, how can a drafter encourage legal behavior?

This article addresses the issue of bureaucracy from the perspective of a drafter concerned with development in the Third World. It asks how, using the tools available to a drafter, she can induce officials to conform to the rules prescribed for their behavior, and how, when (as is usual) nobody can devise a bright-line rule to prescribe specific behavior, she can induce these officials to accomplish the law's objectives.<sup>10</sup> To answer these questions, we first inquire why officials misbehave.

under review"). Viewing law primarily as a legitimating ideology resonates comfortably with writers who decry the instrumental uses of law. See, e.g., Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339 (1979) (law has no causal relationship to behavior); Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (documents a growing conviction among scholars in developing countries that law may have little effect on society); cf. Buchanan, *Politics, Property and the Law: An Alternative Interpretation of Miller v. Shoene*, 15 J. LAW & ECON. 439 (1972) (generally undesirable to use law to change institutional and property relationships because of the possibility of interfering with market forces that promote efficient solutions to disputes).

In this article, by the "legal order" I mean the formal and conventional rules that the state enforces to prescribe behavior, and the tribe of people—judges, lawyers, civil servants, police, jailers, and so forth—who create and implement those prescriptions. See *infra* text accompanying notes 85-98. This definition assumes the law's instrumental use.

9. Drafters' manuals do not ordinarily address the issue of inducing official conformity to the law. Reflecting the nineteenth-century British origins of legislative drafting, most manuals describe drafters as concerned with the form, not the policy, of legislation. With respect to form, they instruct drafters mainly how to draw precise lines between mine and thine, between licit and illicit. See, e.g., E. DRIEDGER, *THE COMPOSITION OF LEGISLATION: LEGISLATIVE FORMS & PRECEDENTS* 1-128 (1976) (Canada); G. THORNTON, *LEGISLATIVE DRAFTING* 102-70 (2d ed. 1979) (United Kingdom); Special Project, *Legislative Drafting in Federal Agencies*, 21 CATH. U.L. REV. 707, 707-23 (1972) (United States). In practice, of course, drafters always deal with policy. Cf. H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *MATERIALS ON LEGISLATION* 234 (4th ed. 1982) (supplies a checklist concerning the substance of legislation; last item on the list states: "In the light of careful appraisal of your answers to the foregoing questions, do you recommend the enactment of a new law? If so, draft the necessary bill.>"). Almost alone among those involved in the long, frequently tedious process of bill creation, drafters concern themselves with the details of legislation. Most politicians believe they fulfill their policy functions by identifying a social problem and deciding to devote some resources to its solution. Sometimes with guidance and assistance from the officials involved, sometimes without, the drafter fills in the blanks. As much as the underlying policy, these details define the bill's thrust and determine whether the law's lay and official addressees will obey it.

10. The difficulty of drafting a law in a developing country is well illustrated in the following example, which I witnessed personally. In Zambia, the government wanted to induce the formation of agricultural producer cooperatives. It passed a law providing that peasants who cleared the bush would receive a set payment per acre, obviously to encourage peasants to

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### I. Why Our Deviant Bureaucrats?

During the feudal and mercantilist eras, dominated by the aristocratic conception of government, the power to govern coincided with property ownership.<sup>11</sup> In these aristocratic periods, self-interested, parochial rule violated no premise of the dominant conception of government. During the bourgeois democratic era, by contrast, the prevailing theory held as a central proposition that no bureaucrat had a property interest in her job.<sup>12</sup> Governors supposedly ruled in the interests of the governed. Periodic elections were instituted to ensure that the elected government represented the interests of the majority of the people. The rule of law was meant to ensure that the bureaucracy obeyed the laws embodying the directives of the people's representatives.

When governmental and bureaucratic decision-making failed to live up to these expectations, a variety of theories arose to explain the failure of the state to represent the mass of the population. Every contemporary theory of the state seeks to explain the abuse of official power—in sociological terms, goal-substitution.

#### A. *Goal-Substitution, the Deadlock of Development Administration, and the Drafting Problem*

##### 1. Goal-Substitution

In the developed and developing worlds alike, goal-substitution infects bureaucracy at every level. "Goal-substitution" refers to the process by which an official substitutes some other goal for that established for her position by higher authority.<sup>13</sup> For example, a hospital has the overall mission of preserving life and health. As part of that overall task, an admissions nurse in the emergency ward must record a new patient's name, address, next of kin, and hospitalization insurance data. To get that information the nurse questions an accident victim, meanwhile let-

bring more acreage into agricultural production. The rule worked to a degree: whole cooperatives earned their livings by clearing plots of land and then going on to clear more plots. However, nobody planted the cleared land. By contrast, elsewhere in Africa schemes for peasant agriculture have sometimes succeeded in producing more crops and improving peasant incomes, sometimes quite spectacularly—with maize in Zimbabwe, rice in western Tanzania, coffee in Kenya. How could Zambia's drafters have written rules so as to achieve a higher degree of productivity in Zambian cooperatives? With respect to official behavior, the same drafting problem emerges: how to draft rules making likely a high degree of conformity.

11. POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 10-15 (A. Heidenheimer ed. 1970).

12. *Id.*; cf. M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 344 (A. Henderson & T. Parsons trans., T. Parsons ed. 1957) (ideal-type of bureaucracy requires "a complete absence of appropriation of his official position by the incumbent").

13. See Selznick, *An Approach to a Theory of Bureaucracy*, 8 AM. SOC. REV. 49 (1943) (defining goal-substitution).

ting him bleed to death. The nurse in this case has rearranged official priorities. For the overall goal of the hospital—saving lives—she has substituted the goal set for her position. When a politician takes a bribe to make a discretionary decision favoring a particular businessman, goal-substitution again occurs. The politician substitutes her personal goal of self-aggrandizement for the broader goals of the state.

Goal-substitution lies at the heart of arbitrary government and encompasses the core of complaints that scholars raise against a bureaucracy:

[It results in] resistance to change, rigid adherence to rules, reluctance to delegate authority, sycophancy toward superiors, "target" mentality, indifference to the standards of efficiency, ignorance of the purposes behind regulations, generalist-elitist orientation combined with hostility toward technology (especially in the despised field of agriculture), insistence on status and prestige symbols, "formalism" or adherence to traditional relationships while desiring to appear modern; and, not to put too fine a point on it, job-stocking and over-staffing, corruption, xenophobia, and nepotism.<sup>14</sup>

The rule of law and socialist legality alike have as their principal thrust the avoidance of goal-substitution by government officials.<sup>15</sup> Both

14. Montgomery, *supra* note 7, at 262.

15. Those two analogous legal ideologies arose under very different circumstances. The nineteenth-century entrepreneurial class required of the law above all else predictability, without which their investments stood at risk. *See, e.g.,* Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 270; A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 778 (Modern Library ed. 1937) ("[A] very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty."). A rogue bureaucrat who substituted her goals for those of the statute made government decisions unpredictable. The ideology of the rule of law reflected entrepreneurial desires for predictability. *See* Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270, 1275 (1983); W. CHAMBLISS & R. SEIDMAN, LAW, ORDER AND POWER 59-60 (2d ed. 1982). To achieve predictability, the rule of law required officials to obey the law. It justified that principle in the name of individual rights.

Socialist legality reached an analogous conclusion, but for different reasons. Faced with the necessity of keeping a complex, highly bureaucratized, centrally-planned economy and society functioning, socialist states had to ensure that bureaucratic behavior followed the rules, or else planning came to naught. Socialist jurisprudence encapsulated the principle of strict observance of law in the concept of socialist legality. *See, e.g.,* HUNG. CONST. art. 77, para. 3 ("It is the duty of every organ of the State . . . to observe the Constitution and constitutional rules of law. . . ."), *quoted in* Markovits, *Law or Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 516 (1982). By "legality," modern socialist constitutions mean "obedience and loyalty towards the socialist state and its commands . . . [.] identification with a collective goal and continuous vigilance against those who might endanger its realization." *Id.* at 518. Although socialist legality justified its claims with reference to the necessity of operating a planned economy, it reached the same doctrinal conclusion about legality as did the rule of law: officials must obey the law. To the extent that the law prescribed non-arbitrary behavior, socialist legality served to protect individuals against arbitrary state action; indeed, its modern renaissance arose in response to the Stalinist outrages. *But see id.* at 522 ("Despite their insistence on law and legality, modern East European constitutions are not expressing bourgeois . . . Rule of Law . . . notions; they only reflect the conviction of socialist governments that discipline, regularity, and order will further their administrations' goals.").

suggest a necessary characteristic of responsible government: officials must obey the law. To achieve that objective we must first identify the problems raised by goal-substitution.

The first problem involving goal-substitution concerns the structure of bureaucracy itself. The colonial administration perceived itself as concerned mainly with law, order, and tax-collection.<sup>16</sup> The ideal type of a law-and-order and tax-collecting administration prescribes a hierarchical, bureaucratic structure applying bright-line rules that precisely define decision and require relatively little exercise of official discretion.<sup>17</sup> Bright-line rules generally allow less room for goal-substitution than vague ones.

In development situations, however, turbulence prevails. No legislature knows all the answers, and bright-line rules can exist only if someone in a position of responsibility and power does know the answers. Discretion permits officials to experiment, to learn from experience how to solve the complexities of development. Development therefore requires the radical transformation of a rule-oriented, tax-collecting, law-and-order bureaucracy into a problem-solving development administration, a transformation from a regime of bright-line rules to a regime of broad grants of discretion. Discretion unguarded, however, can become a fertile seed-bed for goal-substitution.

The second problem is that officials' goal-substitutions tend systematically to favor the rich and powerful and to disadvantage the poor and powerless.<sup>18</sup> This happens for two reasons. By definition, elite members

16. See A. ADU, *THE CIVIL SERVICE IN THE NEW AFRICAN STATES* 14-23 (1965); Schaffer, *The Deadlock in Development Administration*, in *POLITICS AND CHANGE IN DEVELOPING COUNTRIES: STUDIES IN THE THEORY AND PRACTICE OF DEVELOPMENT* 177, 179 (C. Leys ed. 1969); E. NWOSU, *THE POLITICS OF DEVELOPMENT ADMINISTRATION: A VIEWPOINT* 7 (1974).

17. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 55-57 (1969). In practice, colonial officials had virtually unbridled discretion when dealing with Africans. In Southern Rhodesia, for example, it was criminal for Africans to disobey an *unlawful* but "reasonable" order of a District Officer. Proclamation No. 55 of 1910, at 14, cited in Seidman, *The Individual in African Law: Zimbabwe's New Primary Courts*, in *THE INDIVIDUAL UNDER AFRICAN LAW: PROCEEDINGS OF THE FIRST ALL-AFRICA LAW CONFERENCE* 95-99 (P. Takirambudde ed. 1982). See also *The King v. The Earl of Crewe (ex parte Sekgome)*, [1910] 2 K.B. 576 (High Commissioner detained without trial a candidate for chieftainship. While it might seem incongruous that the British administration retained power to detain without trial when Bechuanaland had its own complete criminal code, the Court stated that the matter became easier to understand when one remembered that in Bechuanaland a "few . . . civilized men have to control a great multitude of the semi-barbarous." *Id.* at 610.).

18. See Marx & Engels, *The Communist Manifesto*, reprinted in *THE MARX-ENGELS READER* 475 (R. Tucker ed. 1978) (bourgeois state an executive committee for the capitalist class). This idea resonates easily with another central Marxist proposition, that the law constitutes a mere epiphenomenon of the mode of production, a superstructure erected upon a material base. Marx, *The German Ideology*, reprinted in *id.* at 3, 4. These explanations spawned a range of Marxist theories of the state. See, e.g., R. MILIBAND, *THE STATE IN CAPITALIST*

of society have preferred access to decision-making<sup>19</sup>—and bureaucrats favor those with such access. Moreover, their own self-interest leads bureaucrats to exercise their power and discretion to maximize rewards and minimize strains for themselves and their organizations. Those with power and privilege—principally the members of the ruling economic class—usually have the greatest opportunity to create strains and allocate rewards. Therefore, bureaucrats will exercise discretion in ways contrary to the purposes of the empowering law—that is, they will substitute personal for organizational goals—most frequently to favor the rich and powerful.<sup>20</sup> Thus, in Africa as elsewhere, private goal-substitutions by individual bureaucrats have tended to become goal-substitutions in favor of the ruling economic class.<sup>21</sup>

Most African governments have articulated a rhetoric of socialism. For them, the tendency of goal-substitution to favor the rich and powerful poses a special hurdle. Socialism does not come into existence with a pen-stroke. African countries that seriously espouse a socialist solution to poverty and vulnerability face at best a long, storm-plagued passage from the existing institutional arrangements to ones appropriate for a socialist organization of society. That transition requires that economic and political power shift from those presently at the top of the heap to the mass of the population. Goal-substitutions that favor the rich and powerful therefore frustrate a government's populist and socialist objectives, constituting not merely one of development's many seemingly insoluble problems, but its core difficulty.

SOCIETY (1969) (state an instrument of capitalist class); N. POULANTZAS, *CLASSES IN CONTEMPORARY CAPITALISM* (1975) (capitalist class influences state by way of state structure; state has "relative autonomy," but capitalist class will ineluctably control it "in the final instance"). Because the principal goal of these theories was to explain the state in modern, post-industrial, capitalist polities, they did not directly address the problem of the uses of state power to bring about radical social transformation. If the base determines the superstructure—if, in Africa, the "colonial capitalist mode of production" determines the state—then an African government could not hope to change the state structure before changing the mode of production. Yet, if one cannot use the existing state structure, and hence state power, to change the mode of production, nothing remains except to join Professor Frug and the exponents of "deadlock" in deploring the sad inevitability of it all. See, e.g., Williams, *The Authoritarianism of African Legal Orders: A Review and Critique of Robert B. Seidman's The State, Law and Development*, 5 *CONTEMP. CRISES* 255 (1980) (after independence, African leaders had no choice save to make their economies appendages to world capitalist system). Instead of taking as a given the control of the state by the economic ruling class, a theory for changing Third World institutional structures must take that control as a contingent possibility.

19. See generally G. PARRY, *POLITICAL ELITES* (1970); T. BOTTOMORE, *ELITES AND SOCIETY* (1964) (discussing elites' role in governing and the tension between reality of elites and the ideal of equality).

20. W. CHAMBLISS & R. SEIDMAN, *supra* note 15, at 285-300.

21. See generally A. SEIDMAN & N. SEIDMAN, *SOUTH AFRICA AND U.S. MULTINATIONAL CORPORATIONS* (1977).

For this difficulty, the rule of law and socialist legality suggest a possible solution. The traditions encapsulated in the rule of law teach that bright-line rules can tame goal-substitution. Yet development requires discretion. Thus emerges the specter of the deadlock of development administration.

### 2. The Deadlock of Development Administration

The contradiction between development's demands for discretion and the classical bright-line formulation of the rule of law produces another of development's endless vicious spirals. Development means change. Change requires a government to solve novel problems: "[H]ierarchy and routinization are appropriate institutional characteristics of the classic governmental tasks of maintaining order, collecting taxes and providing services," but "flexibility and innovation are the traits a bureaucracy needs in development."<sup>22</sup> Flexibility and innovation call for broad official discretion.

That proposition flies in the face of the dogmas that equate the rule of law with bright-line rules and limited discretion.<sup>23</sup> "A country might enjoy instrumentality, predictability and equality before the law, but must therefore suffer authority, narrow discretion and compartmentalized, hierarchical decisionmaking. It might enjoy change, creativity and flexibility, and discretion and goal-substitution. One cannot have both [the advantages of discretion and bright-line rules] simultaneously. That becomes the 'deadlock' of development administrations."<sup>24</sup>

22. D. DRESANG, *THE ZAMBIA CIVIL SERVICE: A STUDY IN DEVELOPMENT ADMINISTRATION* (1975), quoted in R. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 226 (1978).

23. Max Weber, who invented bureaucracy's ideal-type, insisted that "'equality before the law' and the demand for legal guarantees against arbitrariness demand a formal and rational 'objectivity' of administration as opposed to the personally free discretion flowing from the 'grace' of the old patrimonial domination." FROM MAX WEBER, *ESSAYS IN SOCIOLOGY* 220 (H. Gerth & C. Wright Mills eds. & trans. 1958). The pursuit of this goal required bright-line rules.

Dicey, who in modern times reinvented the concept of the rule of law, earlier said much the same thing. The rule of law meant:

[T]hat no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 188 (10th ed. 1959). In Weber's formulation, bright-line rules gained "legal-rational" or "bureaucratic" legitimacy; in Dicey's, they became the badge of the rule of law.

24. R. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 227 (1978); see also Schaffer, *The Deadlock in Development Administration*, in *POLITICS AND CHANGE IN DEVELOPING COUNTRIES: STUDIES IN THE THEORY AND PRACTICE OF DEVELOPMENT* 177 (C. Leys ed. 1969). The same "deadlock" affects the legal orders of the developed countries. See Frug, *supra* note 1, at 1288-89 (rules and discretion constitute a "dangerous supplement" to each other); Simon, *Legality, Bureaucracy & Class in the Welfare System*, 92 *YALE L.J.* 1198, 1223

If this deadlock holds, it puts an end to hopes for development in favor of the masses. The deadlock has its roots in goal-substitution. It seems insoluble, however, only because the formulation assumes that officials always exercise discretion improperly and thus erode legality. A strong probability of goal-substitution of course exists, but that probability constitutes the problem that must be explained and solved. In solving that problem, drafters play a special role.

### 3. The Drafting Problem

Like other lawyers, drafters have a responsibility to assure their clients that their legal product will function as promised. Whatever illusions existed in an earlier, perhaps more naive era, today we know that politicians introduce some laws not for instrumental but for symbolic purposes.<sup>25</sup> Drafters sometimes cynically go along with their clients. Usually, however, the drafter fashions the law as though it had a clear instrumental purpose. No drafting text teaches drafters to write symbolic law. Those texts deal (albeit narrowly) with law's instrumental functions.<sup>26</sup> So, inevitably, do drafters.

Law must induce the behavior it prescribes as an instrument for social change, or a statute will not accomplish its purpose.<sup>27</sup> Officials must obey the law.<sup>28</sup> Drafters must write laws that simultaneously grant discretionary power to the appropriate officials and induce them to use that power for the common weal as defined by the statutory language.<sup>29</sup>

At the heart of legislative drafting lie the dilemmas of allocating and controlling discretion.<sup>30</sup> Ministers and civil servants usually deny that

(1983) (dominant legal ideology "contrasts legality with discretion and prescribes the elimination or minimization of discretion").

25. See, e.g., J. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1966); M. EDLEMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

26. See, e.g., H. THRING, *PRACTICAL LEGISLATION: THE COMPOSITION AND LANGUAGE OF ACTS OF PARLIAMENT AND BUSINESS DOCUMENTS* (2d ed. 1902); C. ILBERT, *LEGISLATIVE METHODS AND FORMS* (1901); R. DICKERSON, *LEGISLATIVE DRAFTING* 3-16 (1954); S. NAMASIVAYAM, *THE DRAFTING OF LEGISLATION* (1967); G. THORNTON, *LEGISLATIVE DRAFTING* 102-26 (2d ed. 1979); Kennedy, *Legislative Bill Drafting*, 31 MINN. L. REV. 103 (1946).

27. See Blankenburg, *The Waning of Legality*, 1985 LAW & POL'Y 481, 482 ("Legislators do consider factors which influence the likelihood of compliance with their decisions . . .").

28. *Entick v. Carrington*, 95 Eng. Rep. 807 (1765) (sometimes described as the foundation of the British Constitution).

29. The same task increasingly confronts U.S. law. See, e.g., Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174, 1188 (1983) ("[P]aradigm Public Interest cases, dealing with pollution, ecological, health and safety rules, raise concerns about bureaucratic rationality rather than about particularized rights. As a result, the concept of right has become . . . almost lost in a rising concern about a wide variety of techniques for controlling discretion in programs affecting broad-based societal interests.").

30. The development demands of discretionary power in officials arise from the demands of social justice. Western scholars have more frequently addressed the demands of individual

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legislated discretion poses a problem. Government must get on with its job. To do so, its officials need power and therefore discretion. Every law they propose, they expect to administer. They assert that they are upright and competent, and oppose every fetter on their exercise of discretion.

Laws, however, outlast particular officials. The next official may be neither competent nor upright, nor will he necessarily have the same perspective as the current minister. Drafters draft for future governments as well as sitting ones. Alone in the law-making process, their role requires them to protect the rule of law. A legislative drafter cannot avoid the responsibility thrust upon her post. A Third World drafter cannot surrender to the deadlock of development administration and the acquiescent philosophy that it implies. How can the drafter escape the deadlock?

### B. *Reasons for Goal-Substitution*

Our examination of goal-substitution has identified a key dilemma of development. Solutions to a problem must explain its causes in order to address them. This section, therefore, will attempt to explain bureaucratic goal-substitution.

A drafter deals with the law. In an examination of a particular pattern of goal-substitution, she must devise an explanation that reveals how the legal order “causes” the behavior in question. Only in this way can she devise a legislative solution. An explanation must constitute a “theory of the middle range”<sup>31</sup>—i.e., a proposition, general in form, of which the behavior at issue constitutes a particular example. To devise a middle-range theory requires a set of concepts likely to focus the drafter’s thinking and research on relevant theories and data—that is, it demands a vocabulary of law and behavior.

The search for that vocabulary constitutes the burden of this section. This section first offers a general paradigm of behavior and law; second, it lists a set of variables to explain why people obey a rule of law prescribing behavior; and third, it addresses more extensively the structure of decision-making institutions as it affects official opportunity and capacity to obey the law.

justice. See, e.g., K. DAVIS, *supra* note 17, at 5-6 (concerned only “with that part of discretionary power which pertains to justice, and with that portion of justice which pertains to individual parties”); Frug, *supra* note 1 (suggests four “models” for legitimizing bureaucracy teased out of U.S. judicial opinions; all four address issues of justice *within* existing institutions).

31. See A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* (1970).

## 1. A General Paradigm of Behavior and Law

Notwithstanding some drafters' notions of their own importance and power, a drafter cannot play God. She has only a limited, rather blunt tool at her command. A drafter can only write rules that prescribe repetitive patterns of behavior. By definition, a repetitive pattern of behavior constitutes an *institution*. A drafter's sole tool to correct a social evil is the prescription of an institution.

Any theory seeking to explain the use of such a tool must explain not why a law's addressees fail to obey it,<sup>32</sup> but why they conform to it at all.<sup>33</sup> A law addressed to persons who fill roles in implementing organizations—administrators, police, judges, secretaries, government ministers, directors of public corporations, and others—frequently requires its addressees to behave in ways at odds with their own interests and beliefs. Less obviously, it requires the addressees to act in ways that the existing institutional surroundings make difficult or impossible.<sup>34</sup> Not deviance, but conformity, often constitutes the surprising type of behavior. Unless a drafter has a theory explaining why law-implementors occasionally *obey* the law, she cannot draft law with much chance of inducing conformity.

Drafters seek to solve problems caused by particular patterns of behavior by writing rules that prescribe behavior. Institutions consist of actual behavior. Unless a systematic relationship exists between prescriptions and actual behavior, no drafter can hope, save by serendipity, to draft a rule of law that will change behavior. For example, unless a policeman knows of a rule of law, he cannot knowingly conform to it. Therefore, a policeman who does not know of a law will more likely violate it than one who does. A possible hypothesis would explain police conformity to law in part by the policeman's knowledge of the law—i.e., by the communication of the rule.

Explanations of why a law-implementor conforms to the law prescribing her behavior must therefore rest on a theory of the systematic relationship between the legal order and behavior. Among the factors contributing to a particular behavior (that is, one of its "causes") is its

32. H. JOHNSON, *SOCIOLOGY: A SYSTEMATIC INTRODUCTION* 552 (1960) (Deviant behavior is not merely behavior that violates a norm, but behavior that violates a norm "to which the actor is oriented at the time; it is motivated violation."). To use deviance as the central concept with which to examine why people obey or disobey a law assumes that actors are oriented to the law that they violate. In many cases, that kind of analysis misses the point.

33. R. SEIDMAN, *supra* note 24, at 101.

34. See Kuper, *The Influence of Council Structure on Decision-Making*, in *COUNCILS IN ACTION* 28 (A. Richards & A. Kuper eds. 1971) ("a greater respect for institutional constraints" should be brought into the current interest in decision-making); J. FARMER, *TRIBUNALS AND GOVERNMENT* 167 (1974) ("Lawyers have not studied . . . the effects which institutional and procedural matters have on the decision-making process.").

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social (that is, “institutional”) milieu. To the extent one can give a systematic account of how the institutions that comprise the social surroundings affect individual behavior in the face of a rule of law, one teaches a drafter how to draft rules more likely to induce the desired behavior.

To take another example, suppose that research discovered that a set of officials made decisions that violated the constitutional requirements of non-discrimination—that is, they substituted their personal, racist goals for those defined by the constitution. A psychologist may “explain” that behavior by the officials’ subjective racist biases. That alone, however, does not help a drafter whose immediate concern is not with eliminating sources of bias but with ensuring color-blind official decision-making. An explanation adequate for the drafter’s purposes must explain those discriminatory decisions in terms of the laws affecting the officials. The drafter must examine the institutions that shaped those officials’ psychologies and ideologies, selected them for their positions, kept them in place, and permitted them to substitute their private goals for the public ones they should have been pursuing. The drafter must then examine the laws that define and structure those institutions. Only in this way can she begin to draft rules to remedy the situation, for a law forbidding people to hold racist ideas will hardly succeed of itself in changing their ideologies. Thus a drafter must “explain” behavior in terms of the legal and institutional order.

The question then becomes, how do individuals act in the face of a rule of law? Action implies choice. The simplest model of society consists of people and collectivities acting—that is, choosing—within a world they did not choose. The constraints and resources of their arena of choice channel their action. It is as though the actor were walking through a forest filled with trees, rocks, swamps, ponds, and rivers. He must choose his path within the constraints and resources found in the forest. Without divine intervention, he cannot pass through a rock wall or walk on water. By describing the traveller’s world—the external forest and his subjective appreciation of it—we can explain his actions and the causes of his behavior. Based on that explanation we can propose ways to rearrange his milieu—by driving a tunnel through the rock wall, perhaps, or by bridging the river—and thus restructure his arena of choice. We explain behavior by describing choice.

In a politically-organized society, every person’s arena of choice includes the bonds and prods and opportunities of the legal order. Frequently, of course, these seem mere pinpricks compared with the other institutional, physical, and psychological constraints that populate that arena. For the drafter, however, they become the particular “cause” upon which she must focus.

By the legal order I mean more than the black letter text—statutes, ordinances, subsidiary legislation, regulations of all sorts. I include also the institutions which create laws and which administer, implement, and adjudicate them. When an individual acts within his milieu, he must take this entire amalgam of individuals and institutions into account. Faced with a rule, and with the possibility that implementing agencies will engage in a variety of different behaviors (themselves operating in the face of a rule within *their* arenas of choice), the addressee acts by *choosing*. So too do bureaucrats when faced with a rule of law prescribing their behavior.<sup>35</sup>

A law addressed to a primary addressee (the “role occupant”) also addresses an implementing agency, directing it to implement the law by applying a conformity-inducing measure.<sup>36</sup> If we place an official in the position of role occupant, it becomes apparent that institutions erected to implement the laws directed at the official frequently seem diffuse and relatively ineffective. Affected individuals can of course bring an action to set aside an improper administrative decision—usually a costly and lethargic procedure. In England, the government minister, and in much of English-speaking Africa,<sup>37</sup> only an independent civil service commission, can discipline a senior civil servant. (In practice, short of a rape in a Bond Street shop window, disciplinary action is rarely taken.)

Implicitly recognizing the weaknesses of the implementing agencies directed at officials, H.L.A. Hart argued that it becomes “crucial” that officials share a common acceptance of “the rule of recognition containing the system’s criteria of validity”—that is, that they conform to those highest-order rules without external compulsion. Absent that voluntary continuity, a legal order cannot exist.<sup>38</sup> Widespread goal-substitution in most governments suggests that official consensus on applicable rules and a sense of official obligation to obey them has, to a degree, dissipated. To induce compliance with the law in most developed and developing countries a drafter can no longer rely upon shared ideologies, domain assumptions, and values among the ruling elite—witness the recently-disclosed doings of the Reagan Administration in the Iran-Contra scandal. (Upon what other factors a drafter might rely, of course, constitutes the burden of this essay.)

35. R. SEIDMAN, *supra* note 24, at 74-75.

36. *Id.* Unless an implementing agency exists, a system of law-like norms may command allegiance and induce conforming behavior; according to my definition, however, these norms do not constitute “law.” Cf. H. HART, *THE CONCEPT OF LAW* ch. VI (1961) (without secondary rules addressed to officials, a legal system does not exist).

37. See, e.g., ZIMB. CONST. § 75(1)(d).

38. H. HART, *supra* note 36, at 111.

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Thus, like other role occupants, officials act by choosing within the range of constraints and resources of their milieu. Within this milieu, the threats and promises of the formal legal order constitute only one element—more frequently than not a rather weak and insignificant element—affecting choice. We turn next to an examination of the relevant categories of constraints and resources.

### 2. Behavior in the Face of a Rule of Law<sup>39</sup>

Accepting that role occupants act by choosing within the constraints and resources of their physical, social, and subjective environments, the following proposition sets a research agenda to map those environments.

A person will likely obey a law if:

- a) a *rule* prescribes her behavior;
- b) she has the *opportunity* to obey the law;
- c) she has the *capacity* to obey it;
- d) the law is *communicated* to her;
- e) her *interests* (including threat of sanction) encourage obedience;
- f) she decides in a public, participatory *process* whether or not she will obey; and
- g) her *ideology* (beliefs, values, tastes) is compatible with the desired behavior.

For these, “ROCCIPI” makes a convenient acronym.

These seven categories serve to trigger hypotheses to explain specific instances of official behavior. A role occupant will likely follow the prescriptions of law if, but only if, the sum of these factors induces obedience. For example, when an official decides in favor of a party who has bribed her, she responds to her *interests*. A bureaucrat who does not understand the purposes of the law (i.e., where a failure of *communication* exists) will implement it at best woodenly. In Zimbabwe, for example, older officials socialized under the old (Rhodesian) regime repeatedly misinterpreted the new socialist government’s directives, despite the fact that at least some of these officials had internalized the civil service ethic of conscientiously serving the government of the day. They failed to implement government policy not out of recalcitrance, but out of ignorance. Similarly, by expressing itself ambiguously,<sup>40</sup> or by explicitly granting

39. See generally H. JONES, *THE EFFICACY OF LAW* (1969); Seidman, *Why Do People Obey the Law? The Case of Corruption in the Developing Countries*, 5 *BRIT. J. L. & SOC’Y* 45 (1978); Evan, *Law as an Instrument of Social Change*, in *APPLIED SOCIOLOGY: OPPORTUNITIES AND PROBLEMS* 285 (A. Gouldner & S. Miller eds. 1965).

40. Some contemporary writers argue that law is always indeterminate. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984); H. VAN GUNSTEREN, *THE QUEST FOR CONTROL* 86-87 (1976). If that view corresponds with reality, the project of using law to change behavior—whether in a developed or a developing country—

broad, unstructured discretion, a *rule* may itself make goal-substitution more likely.

As another example, the Prisons Act of Ghana requires that wardens keep the prisoners separate from one another.<sup>41</sup> Every warden in the hundred-year history of Ghana's prisons has violated that law daily, for never has Ghana had fewer than twice as many prisoners as prison cells.<sup>42</sup> The wardens lack the *capacity* to obey.

A drafter may also ask whether a particular set of goal-substitutions results from the official's lack of qualifications. An official appointed as a Roads Commissioner on a patronage basis will less likely succeed in meeting the goal set for the position than will a graduate civil engineer with five years practical experience in road-building. He too lacks *capacity*.

These factors (ROCCIPI) thus help to generate explanations for the variety of behaviors that emerge in the face of a law. With respect to officials, the structure and processes of decision-making institutions largely define the decision-makers' *opportunities* and *capacities* to conform to the law. I turn now to a model of decision-making institutions.

### 3. The Structure of Decision-Making Institutions<sup>43</sup>

A decision-making institution consists of the repetitive behavioral patterns of its members. We must study both the repetitive behavior itself—the working rules, or the law-in-action—and the behavior that the rules prescribe—the law-in-the-books. Preventing goal-substitution requires that the law-in-the-books prescribing decision-making consists of norms that (1) if followed, are likely to result in official behavior apt to achieve the law-maker's objectives, and (2) will have a substantial probability of inducing officials to conform to the rule. A rule that requires judges to give female academics a remedy for discriminatory university employment decisions probably meets the first of these requirements. The fact that so many women claim discrimination on the part of university tenuring officials argues that such a rule does not meet the second requirement.<sup>44</sup> To help analyze official opportunity and capacity to make the decisions which the law requires, this section proposes a simple sys-

becomes impossible. That project depends upon an ability to communicate desired behavior to its addressees; if law wallows in ambiguity, the requisite communication cannot occur.

41. Prisons Ordinance, 1876 (Gold Coast) Reg. 14.

42. Seidman, *The Ghanaian Penal System: An Historical Perspective*, U. GHANA L.J. 89, 95, 100 (1966), reprinted in A. MILNER, *AFRICAN PENAL SYSTEMS* 429, 437, 442 (1969).

43. See generally R. SEIDMAN, *supra* note 24, at ch. 11 (1978); Seidman, *How a Bill Became a Law in Zimbabwe: On the Problem of Transforming the Colonial State*, 52 *AFRICA* No. 3, at 56 (1982).

44. See W. CHAMBLISS & R. SEIDMAN, *supra* note 15, at 292-300.

terms model to explain decisions in terms of the repetitive patterns of behavior that define decision-making institutions.

The outputs of a decision-making institution consist of the decisions it produces. A particular decision ("output") results from the issues, facts, and theories that the institution throws up to the decision-makers for their consideration ("inputs"). A decision results also from the information received by the decision-makers about the results of their own earlier decisions ("feedbacks").<sup>45</sup> Finally, it results from the way the institution combines the various inputs and feedbacks to arrive at a decision ("conversion processes").<sup>46</sup>

What inputs and feedbacks a decision-maker receives, and the conversion processes she uses, depend upon the behavior of the people involved in the decision-making system. If a decision-maker consults only those with wealth and influence, she is likely to face different issues, and act on different facts and theories, than if she holds a public hearing at which people with different interests bring forward alternative issues, facts, and theories. Whom a decision-maker consults results from the working rules of the decision-making institution.<sup>47</sup> By carefully designing the law-in-the-books governing decision-making institutions, the law-maker will more likely induce behavior that will generate a range of inputs, feedbacks, and conversion processes appropriate for decisions that conform to the institution's prescribed goals. As every common law lawyer quickly learns, procedure bears a systematic relationship to substance.

45. See Baldwin & Hawkins, *Discretionary Justice: Davis Reconsidered*, 5 PUB. L. 570, 581 (1984) (the facts of the case are "the products of the complex legal and organizational processes in which reality is socially constructed and reconstructed").

To the extent that the feedback loop flourishes, decision-making becomes a learning experience for decision-makers. As they learn, they devise more particularized rules to deal with repetitive fact patterns. This constitutes the principal function of a feedback loop. *But cf.* Gifford, *Discretionary Decision-Making in the Regulatory Agencies: A Conceptual Framework*, 57 S. CAL. L. REV. 101, 104 (1983) (describing agency work as resolving cases in which factual components rarely repeat themselves). See also Deutsch, *Social Mobilization and Political Development*, 55 AM. POL. SCI. REV. 493 (1961); W. BUCKLEY, *SOCIOLOGY AND MODERN SYSTEMS THEORY* 55-56 (1967).

46. The model derives from one proposed by Robert Dahl. R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961). In its usual form, the model aims to explain particular decisions, taking as a given the patterned behavior of the several roles that comprise the system. So stated, the model directs attention only to issues that actually come to decision and to the available range of choice. It does not analyze "nondecision." *Cf.* P. BACHRACH & M. BARATZ, *POWER AND POVERTY: THEORY AND PRACTICE* (1970).

47. Theorists have sometimes drawn a distinction between personified and aggregationist views of complex organizations. See, e.g., M. DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR A DEMOCRATIC SOCIETY* (1986). This article adopts an uncompromising aggregationist perspective; it perceives organizations as the sum of the repetitive patterns of behavior of the individuals who fill the various organizational roles. The subject matter requires that perspective, for this article seeks to explain individual or organizational goal-substitution in terms of the rules that help shape those repetitive patterns of behavior.

The general model of behavior and law, the heuristics for which ROC-CIPI represents an acronym, and the decision-making model add up to a very general explanation for why people act in conformity with a rule prescribing their behavior. This explanation provides a vocabulary with which to discuss official goal-substitution and suggests a wide range of areas that a drafter must consider if she is to resolve the dilemmas of development and legality.

## II. Issues in Drafting for the Rule of Law

Law must empower officials to make decisions, while simultaneously channeling that power towards the public objectives for which the government enacts the legislation, and preventing its misuse through goal-substitution. To achieve these ends, the explanations for goal-substitution put forward earlier suggest issues that a drafter ought to address.<sup>48</sup> We discuss in order: (1) drafting issues that arise from the explanations for behavior offered above; (2) solutions addressed to the causes of goal-substitution lodged in the structure of decision-making institutions; and (3) institutions to implement rules that prescribe official conduct.

### A. *Drafting Issues Raised by the Factors Affecting Behavior*

#### 1. Rule

For a drafter, the form of a particular rule raises two principal issues: the scope of substantive discretion granted and the vocabulary employed in the drafting. With respect to the former, a drafter can write a rule that locates the official's discretion anywhere along a continuum from a bright-line rule ("pilots must retire at age 60") to a vague generality ("pi-

48. Scholars have proposed various alternative catalogues of devices to control administrative officials. In Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1500 n.63 (1963), Professor Martin Shapiro lists a "rather standard repertoire of possible constraints on administrative discretion . . . (1) creating substantive standards, rules and statements that constrain the range of lawful agency choice; (2) creating procedural rules for constraining the process by which the agency makes choices; (3) requiring the agency to create its own substantive rules; (4) requiring the agency to create its own procedural rules; (5) requiring the agency to establish and follow precedents; (6) requiring the agency to give reasons." Elliot, *The Disintegration of Administrative Law: A Comment on Shapiro*, 92 YALE L.J. 1523, 1534-35 (1983) adds five more recent techniques: actions for damages and injunctive relief, the Freedom of Information Act, advisory committees, legislative oversight, and cost-benefit analyses by the Office of Management and Budget. See also K. DAVIS, *supra* note 17, at 55-57 (discussing administrative rule-making to limit discretion).

The implementation literature addresses an analogous problem. E. BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES LAW* 66-95 (1977) lists a sophisticated agenda for writing an "implementation scenario"—an analysis of the possible sources of goal-substitution resulting from a proposed draft. Bardach's book contains useful insights, based, however, not on a general theory of goal-substitution, but rather on shrewd generalizations from particular instances of goal-substituting behavior. Unlike most authors in the field, Bardach does discuss explanations before solutions.

lots must retire when the Aeronautics Board deems it desirable that they do so").<sup>49</sup>

In general, the broader the discretion, the greater the opportunity for goal-substitution. The drafter must therefore define official discretion as narrowly as the situation will allow.

A drafter has a quiverful of techniques available to set discretion at the desired level. The easiest case arises when the drafter knows precisely what criteria ought to trigger official decision. ("Douglas fir beams on 4' centers spanning more than twelve feet and less than fourteen feet in a flat roof shall be not less than 3' 5/8" x 7' 5/8" in size.") Even though a bright-line rule may arbitrarily include or exclude cases that it probably ought not, ease of administration may nonetheless persuade a drafter to use a bright-line rule. (The rule, "a person who on a public highway drives at a speed in excess of 55 miles per hour commits the offense of speeding," directs a police officer not to arrest a person driving at 55 miles per hour on icy roads or in traffic conditions where that speed may make driving hazardous, but to arrest a person driving at 60 miles per hour in clear weather on a vacant highway with a straight, wide, and smooth roadbed.) Efficiency may also require bright-line rules where decision-makers must make many decisions involving similar fact patterns, for example, with respect to veterans' pensions.<sup>50</sup>

On the other hand, vagueness can also be desirable at times: first, where only a vague law can muster the support required for passage of the law (in effect delegating to implementing agencies the task of giving the vague standards precise content);<sup>51</sup> second, where the agency must have some room to experiment; or third, where the bright-line rule becomes so detailed and complex that its very precision makes it too dense for citizens or officials to deal with effectively.<sup>52</sup>

The more bright-line the rule, the less responsive it becomes to individual nuance.<sup>53</sup> Bureaucracy tends to transform the individual into a

49. See generally Gifford, *supra* note 45 (identifying discretionary decisions which can be constrained); Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (attempting to develop a standard for applying vague rules); Capowski, *The Appropriateness and Design of Categorical Decision-Making Systems*, 48 ALB. L. REV. 951 (1984) (comparing clinical and categorical decision-making).

50. See Gifford, *supra* note 45, at 103-06.

51. See R. DICKERSON, LEGISLATIVE DRAFTING 15 (1954).

52. See Simon, *supra* note 24, at 1226-27 (If all rules are bright-line, too many exist, leading to imprecision, overload, and indeterminacy for officials and confusion and consequent inability to deal with the system for citizens.); Diver, *supra* note 49, at 73; Baldwin & Hawkins, *supra* note 45, at 576-78. That very denseness gives officials opportunities to exercise *de facto* discretion. If rules become so complex that nobody understands them well enough to use them to assert rights, an official can use the rules selectively, or even invent rules to justify the position she wishes to take. Shapiro, *supra* note 48, at 1505-07.

53. See Diver, *supra* note 49, at 72-73.

"case," ignoring factors which the applicable rule does not identify as relevant. In the turbulent conditions of development, however, law-makers often simply identify a problem, determine what resources to devote to its solution, and assign to the bureaucracy the task of finding a solution. Binding officials responsible for instituting social change with bright-line rules ensures that they will solve the problems they address only by chance.

In conditions of development, a drafter has three ways of identifying relevant criteria for administrative decision. First, the drafter can provide a list of factors to which the official must "have regard." Because such a list rarely includes a weighting provision, it hardly constrains an administrator bent on substituting illegitimate for public goals. She can readily find a hook on which to hang her decision.<sup>54</sup> More usefully, the drafter can leave the administrator space in which to experiment, while at the same time providing for relatively bright-line rules; she can do this by setting out bright-line rules and then giving the administrator power to amend them as experience teaches. Finally, the drafter can require that the administrator give reasons in writing for specific decisions and adhere to precedent in the same creative way as do common law judges.<sup>55</sup>

In addition to the question of the scope of discretion, the form of a rule raises the issue of appropriate vocabulary. A drafter of course ought to use the vocabulary and style best adapted to communicate to the law's addressees (in our case, the officials who must administer the law). Despite two centuries of parliamentary and academic fulminations against it, countries whose drafters follow the British tradition continue to use an archaic and convoluted style ("legalese"), so studded with "hereinbefores" and "hereinafters" and "*mutatis mutandis*" and incorporations by reference and deeming provisions that not only laypersons, but also judges and lawyers and bureaucrats, argue over meaning.<sup>56</sup> Few who have studied it defend that style.<sup>57</sup> It continues, however, to pervade legal drafting for all sorts of reasons unrelated to the law's instrumental functions.<sup>58</sup>

54. See, e.g., Penrose, *Some Problems of Policy in the Management of the Parastatal Sector in Tanzania: A Comment*, 1 AFR. REV. 48, 50 (1972) (referring to a "shopping list" of criteria for National Development Corporation investment: "[I]n weighing these criteria in any given case, the difficulty of course lies in the nature of the 'trade-off': how much to sacrifice employment to improve industrial linkages, or location to increase investible surplus, etc. . . ."); Loxley & Saul, *The Political Economy of the Parastatals*, 5 E. AFR. L. REV. 9, 15-22 (1972).

55. See K. DAVIS, *supra* note 17, at 106-11; GHANA CONST. art. 84(2)(a) (1969).

56. See W. CHAMBLISS & R. SEIDMAN, *supra* note 15, at 119.

57. See, e.g., Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978); R. DALE, *LEGISLATIVE DRAFTING: A NEW APPROACH* (1977).

58. See W. CHAMBLISS & R. SEIDMAN, *supra* note 15, at 130-35 (legalese continues to be used because it enhances the power and prestige of lawyers and other interest groups); Friedman, *Law and its Language*, 33 GEO. WASH. L. REV. 563, 566-72 (1964) (legal jargon is used,

### 2. Opportunity and Capacity

Obedience requires that an official have the opportunity and capacity to obey. Conversely, goal-substitution may occur because she has the opportunity and capacity to disobey. Opportunities for an official to disobey generally arise because of the peculiar configurations of the bureaucracy itself. Opportunity and capacity for official misbehavior, however, may arise for other reasons. Official corruption, for example, thrives on poor accounting methods and sloppy paperwork. As procedures for dealing with money become tighter, corruption becomes more difficult. If officials cheat on negotiated bids, moving to open public bidding may help by enlisting other bidders into the control mechanism.<sup>59</sup> (This solution commended itself to many American lawmakers in response to the graft disclosed by turn-of-the-century muckrakers.) If the mayoral form of government tends to produce municipal leaders who lack expertise in dealing with technical problems of city government, requiring an appointed, professionally-qualified city manager may seem an appropriate solution.

Drafters must also consider formal qualifications for officials. The broader the discretion granted, the more expertise the official requires.<sup>60</sup> A building code addressed to a building inspector with only a high school education, for example, may require more precise specifications than one addressed to an inspector with a master's degree in civil engineering.

Specifying the qualifications of the appointed official limits the discretion of the appointing agency. Otherwise, the appointing official may consult too easily her own interests and biases, a sure way to encourage patronage. For example, in specifying the qualifications of directors of public corporations, the British tradition followed by many drafters in English-speaking Africa requires only that they have suffered neither a conviction for a crime with a sentence of more than six months imprisonment nor a declaration of bankruptcy without discharge.<sup>61</sup> That tradition serves well enough in private corporations, where shareholders elect the directors. In public corporations, however, it creates the likelihood that political acceptability and personal influence, not competence, will determine appointment.<sup>62</sup> A drafter ought to determine the desired qual-

among other reasons, to enhance group cohesiveness and prestige and to command respect for ritual phrases).

59. See R. SEIDMAN, *supra* note 24, at 132-44.

60. See, e.g., Etzioni, *Organizational Control Structure*, in HANDBOOK OF ORGANIZATIONS 650, 655-58 (J. March ed. 1965) (the greater an organization's selectivity in choosing participants, the less the need for a control structure).

61. See, e.g., Zimbabwe Development Bank Act, No. 7, § 4(5) (1983).

62. See generally Pozen, *Public Corporations in Ghana: A Case Study in Legal Importation*, 1972 WIS. L. REV. 802.

ifications for appointment and the means of ascertaining whether a candidate has them, and then require them for appointment.

### 3. Communication<sup>63</sup>

Unless an official knows about a rule, she will not wittingly obey it. If she does not understand the overall governmental policy behind the rule, frequently she will accord the rule only wooden compliance. This poses two problems for drafters. First, a government must communicate its policies to its officials—both senior level personnel and those charged with carrying out the legislation on the local level. It is more difficult for a government to reach low-level personnel than senior civil servants. A secretary of agriculture can easily communicate a new rule to his deputy secretary two doors down the office corridor. He will have more difficulty communicating the rule to a lowly agricultural assistant or cooperative officer five hundred miles away in the hinterland. In most developing countries, no institutions exist upon which a drafter can rely to bridge this gap. The drafter must therefore devise a way to do so.

Second, if a government expects both senior and local officials to embrace the new rules in day-to-day decision-making, it must explain to them the rationale and purpose behind the new legislation. That task becomes especially important when (as occurred in Zimbabwe in 1980) a “revolutionary” government takes office and finds itself with many bureaucratic holdovers from an earlier regime. If officials understand the purpose behind particular legislation, they will be more likely to interpret the new rules in accordance with the government’s objectives. A drafter can help ensure a sympathetic interpretation of legislative rationales in several ways: in the British tradition, by the creative use of long title and preamble;<sup>64</sup> in the U.S. tradition, by legislative findings;<sup>65</sup> and in the tradition of those countries that value it as an interpretive tool, by creating an appropriate legislative history.<sup>66</sup>

63. See generally Seidman, *The Communication of Law and the Process of Development in Anglophonic Africa*, 1972 WIS. L. REV. 682; COMMUNICATIONS AND POLITICAL DEVELOPMENT 665 (L. Pye ed. 1963).

64. G. THORNTON, LEGISLATIVE DRAFTING 143, 147 (2d ed. 1979); cf. 42 U.S.C. § 4331 (1982) (use of a declaration of national environmental policy as preamble).

65. See, e.g., 15 U.S.C. § 1062 (1982).

66. For discussions of legislative history as an aid to interpretation, see Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624 (1954); Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886 (1930); Finley, *Crystal Gazing: The Problem of Legislative History*, 45 A.B.A. J. 1281 (1959).

### 4. Interest

A great deal of official goal-substitution arises because officials see it as serving their self-interest. In devising sanctions to counter bureaucratic self-interest, a drafter can rely on a system of either punishments or rewards. In general, punishments tend to stifle, while rewards stimulate, creativity.<sup>67</sup> In developing countries, creativity comes in short supply. Where possible, then, a drafter should devise a system resting not on punishments but on rewards.

To combat bureaucratic self-interest, the criminal law usually comes first to a drafter's mind, but usually serves that purpose least well. Unless a citizen reports official illegality, police and prosecutors rarely uncover it. As a practical matter, prosecutors and police have more pressing problems to consider—murder, rape, robbery. Moreover, constables are unlikely to police the same civil servants who determine their budget and rewards.<sup>68</sup> Judges do not easily convict members of the elite or subject them to serious criminal penalties.<sup>69</sup> Other sanctions, mainly those concerning employment and career, are more likely to work.

The private interests of officials seduce them to three sorts of distorted decisions. First, self-interest induces officials to respond to those best positioned to advantage the official. In a stratified society, this means that unless countered, those with power and privilege will exert a disproportionate influence on government decisions. If a drafter proposes a statute that aims to help the populace at large (in a Third World country, the poor), she must devise ways by which the poor can offer rewards or create difficulties for an official charged with implementing the statute. This will increase the likelihood that the statute's populist goals are met. In conventional democratic theory, of course, periodic appeals to the electorate purport to ensure that elected officials will act in the interest of the majority. Since, in theory, the bureaucracy constitutes a neutral tool to carry out the demands of the elected government, periodic elections are also thought to ensure that the bureaucracy will comply with the laws that the elected representatives enact.<sup>70</sup> By electing our leaders periodically, we supposedly tame not only elected officials, but also bureaucracy. Experience, however, teaches that the threat of "throwing the

67. See generally *BEYOND THE PUNITIVE SOCIETY* (H. Wheeler ed. 1973).

68. For a discussion of specific social conditions which make arrest more or less likely, see Black, *The Social Organization of Arrest*, 23 *STAN. L. REV.* 1087 (1971).

69. For example, in 1973 Zambia convicted a former Permanent Secretary for receiving bribes when he procured citizenship for Asian businessmen who feared measures requiring Zambian citizenship for ownership of small enterprises. The crimes of which he was convicted carried a maximum sentence (on five counts) of 25 years. The court imposed only a fine. In Zambia, the courts are normally harder than this on petty thieves. See R. SEIDMAN, *supra* note 24, at 177.

70. See J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 289-96 (1950).

rascals out of office" some years from now is not enough to guarantee legality.

A drafter concerned with making it more probable that officials will make decisions in favor of the disinherited must develop devices by which the poor, instead of just the rich, can appeal to an official's self-interest. The rich and powerful always have goodies to dangle before bureaucrats—outright bribes, directorships in local subsidiaries of multinational corporations, promises of employment after retirement from office, well-paid lectures to friendly groups, and vacations at corporate hideaways. By definition, the poor cannot offer these perks; therefore, a drafter must develop other means by which the poor can affect officials' self-interest. In some cases, it may become possible for a drafter to devise a system in which an official's tenure depends upon client approval. For example, the government might nominate the manager of a public corporation, with final approval subject to a vote of the workers at the plant; or the local agricultural extension agent may hold tenure at the discretion of a majority of the local farmers (thus making it less likely that the agent will favor the most successful farmers); or client assessments of bureaucrats might count in making promotion decisions (just as in many universities today student assessments have some weight in tenure decisions).

Second, if officials become part of the economic ruling class, they may acquire an interest in advancing the interests of the rich and powerful. In a populist or socialist polity, this may result in goal-substitution. To alleviate this problem, the general orders of the civil service in many African countries—even those not explicitly populist or socialist—usually preclude civil servants from owning more than one house or shares in a company that does business with the government.<sup>71</sup> Tanzania<sup>72</sup> and Zambia<sup>73</sup> have enacted leadership codes precluding officials from buying into the entrepreneurial class.

Finally, the structure of bureaucracy produces general, pervasive distortions of inputs to upper-level decisions. Because bureaucratic superiors tend to give promotions and larger salary increases to subordinates who tell them what they want to hear, the very nature of hierarchical administration generally tends to defeat sensible decision-making.<sup>74</sup> De-

71. See, e.g., General Orders, Issued by the Permanent Secretary [Zambia] (Lusaka 1966), Orders 60(a), 61.

72. Tanzania: The Interim Constitution of Tanzania (Amendment No. 2) (Act No. 40 of 1967), cited in Rahim, *Legislative Implementation of the Arusha Declaration*, 4 E. AFR. L.J. 183, 186-94 (1968).

73. The Leadership Code, reprinted in ZAMBIA DAILY MAIL, Oct. 26, 1973, at 6, col. 2. Zimbabwe's ruling party, ZANU, intermittently promised such a code (and actually published a draft), but never enacted one.

74. See, e.g., H. SIMON, D. SMITHBURG & V. THOMPSON, PUBLIC ADMINISTRATION 233-37 (1950).

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isions based not on what street-level bureaucrats observe, but on what they think their superiors want to hear, will not usually produce decisions which conform to a law's purpose. A drafter should seek to avoid this result, perhaps by providing officials with automatic seniority increases in pay and rank (a solution that may, however, reduce initiative).

### 5. Process

The process by which we learn of a rule and decide whether or how to obey it often determines our responses.<sup>75</sup> The more authoritarian the process—the more a superior gives orders for inferiors to read and, on pain of punishment, to obey—the less likely ungrudging official obedience. Most people are less likely to understand and obey an order that is given in writing than one given orally and face-to-face. Greater secrecy in the decision-making process increases the likelihood that an official's decisions will reflect her personal perspectives. In short, the more higher authorities communicate to officials by way of participatory, two-way, face-to-face, oral and open communications channels, the less likely goal-substitution becomes.

### 6. Ideology: Domain Assumptions, Values, Attitudes, and Philosophies

Experience teaches that civil servants will more likely accomplish the objectives of legislation if they subjectively support those objectives. This raises two issues: how to devise institutions likely to recruit new candidates for the bureaucracy who support the objectives of development; and how to create institutions that will socialize existing bureaucrats into the ways of thinking for which the new government stands. To catalogue the range of possibilities, however, exceeds the scope of this article.<sup>76</sup> Here we note only that a drafter will need to take these issues into account.

#### B. *The Structure of Decision-Making*

Officials make decisions; that is their job. Drafters should draft laws making it likely that an official's decisions actually carry out the letter

75. See P. LAZARSFELD, B. BERELSON & H. GAUDET, *THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN* 120-37, 150-59 (3d ed. 1968) (electronic media have more influence than print media on voters in election campaigns). *But see* Bostian, *The Two-Step Flow Theory: Cross Cultural Implications*, 47 *JOURNALISM Q.* 109, 115 (1970) (arguing that mass media have less influence in developing countries).

76. A rich public administration literature considers at length the problems of recruitment and socialization of African public administrators. *See, e.g.*, Kirk-Greene, *The Higher Public Service*, in *THE POLITICS AND ADMINISTRATION OF NIGERIAN GOVERNMENT* 213, 236-38 (L. Blitz ed. 1965).

and objectives of the law. This is more likely to happen if the input, feedback, and conversion processes facilitate that result.

### 1. Input Processes

A variety of processes determine the sorts of output that officials will produce. First, if officials receive inputs mainly from the elite, they are likely to make different decisions than if inputs come from the mass. Elites always have open channels to officials, whether formal or informal. In countries that flaunt populist goals, the drafter must devise ways to ensure by rule that the poor will supply inputs. In relatively formal proceedings, issues of ripeness and standing (for example, to bring a lawsuit or to be heard on administrative rule-making) define who may supply inputs. (They do not, however, define who will in fact have the capacity to do so.) Other devices may be more suitable for informal decision-making. A statute may require the appointment of an official with a specific responsibility to search out a particular class of clients, to gather their inputs, and to ensure that they reach official ears.<sup>77</sup> For example, where a welfare agency makes frequent decisions about children, a drafter may find it desirable to create a role of children's advocate to represent their interests. In drafting cooperative law in a male-dominated society, a statute may require the committee (the cooperative analog to a corporate board of directors) to contain a certain percentage of women.<sup>78</sup> Where a land reform ministry must select settlers for settlement projects, a bill might require that the minister receive suggestions from a board charged with representing potential settlers. Because the poor seldom have representative organizations, a drafter who conscientiously seeks to secure participation by the poor must consider how to organize them.

77. Dublin, Rotterdam, Munich, Marseilles, Stockholm, and Vienna are among cities which have assigned community services representatives to various districts to "provide direct assistance with social problems and public services, but . . . also [to] serve as an informal communication channel, aid in the development and successful functioning of cooperative neighborhood organizations, [and] encourage the growth of local leadership." Moran, *Communication with Citizens: The Movement in European Cities*, NAT'L CIVIC REV., Oct. 1984, at 441-42. The public interest lawyer in the United States sometimes performs an analogous function. The USSR has made similar provisions in its constitution and statutes. The Soviet Constitution states that a citizen has "the right to submit to state agencies and public organizations proposals on improving their activity." KONST. SSSR art. 49 (USSR).

78. Cf. 2 G. MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 1338 (1968) (In Southeast Asia, credit cooperatives became "mainly the preserves of the upper strata in the villages." (footnote omitted)). Everywhere, those with power take advantage of whichever institutions will serve their interests. In Africa, for example, men have utilized cooperatives to the detriment of women. See Henne, *Women in the Rural Economy: Past, Present and Future*, in *AFRICAN WOMEN SOUTH OF THE SAHARA* 1, 17 (J. Hay & S. Stricter eds. 1984).

Second, without knowledge nobody can supply inputs relevant to decision. Secrecy precludes popular participation. A drafter concerned that the populace at large supply inputs to decision must draft provisions that ensure openness in official deliberation and decision and public access to government data upon which a decision may rest.

Third, input processes for some sorts of decisions filter through various gates and gate-keepers. If an equal employment agency only has offices in locations far from rural areas, agricultural workers may have no recourse to the agency, and the agency's decisions too easily can ignore them—whatever the personal values or attitudes of those in the agency. If a statute requires a government minister to hold public hearings, and, in default of statutory direction, she holds them all in the capital, she may receive inputs from urban workers and employers but none from the rural poor. If an industrial health and safety act provides for court actions as its principal sanctioning process, and lawyers are expensive, many just claims may never come to court—and the judges will fail to produce the decisions desired by the drafters.

Fourth, hearing procedures serve to filter input. A restrictive hearsay rule may prevent survey evidence from reaching the decision-maker. An opinion rule may prevent her from learning about the values and attitudes of people affected by the decision. Whether a party may obtain discovery may determine whether evidence later appears in the proof. An adjudicator in an adversarial system under some circumstances may learn less than one in an inquisitorial system.

Finally, input processes include not only matters of fact, but theories to control decision—in lawsuits, theories of the case; in administrative rule-making, explanations of the problem and proposals for solution. Plainly, *who* proposes theories makes a difference in outcomes. Theories formulated only by men can disadvantage women. Whether a decision-maker may call on expert opinion can determine whether her decision is informed by technical knowledge or by conventional, uninformed lay notions. A governmental ministry all of whose consultants graduated from Harvard Business School may make different decisions from one whose consultants have an Eastern European perspective.

## 2. Feedback Processes

As the bare-bones systems model suggests, feedback constitutes an essential steering mechanism for decision.<sup>79</sup> Through feedback channels, the decision-maker learns the consequences of her decisions. Feedback channels institutionalize learning through doing. Unless a government

79. See generally Deutsch, *supra* note 45, at 497-502.

can evaluate its own performance, it can only stumble blindly into the future.

Like all input channels, feedback channels influence decision in favor of those who have access to them. With respect to feedback, therefore, drafters have a dual task. First, they must ensure regular evaluation of governmental actions. Second, they must take care that those who have access to feedback channels will represent groups or strata that the legislation purports to help.

A variety of techniques exist with which drafters can ensure systematic evaluation. A sunset provision, for example—providing that, unless re-enacted, a law will expire after a given time-period—helps to ensure that the legislature will review the law's effectiveness.<sup>80</sup> Requiring that the administrator of a program make periodic reports to the executive or the legislature achieves much the same result.

Evaluation takes a variety of forms. Too often, someone from outside the project or program descends upon it to see whether it has achieved the goals originally set by its ministerial creators. For a program aimed at improving the lot of its clients, this type of evaluation may or may not succeed in calling the ministry's attention to factors which the clients believe relevant. Evaluation of that sort may lead only to new ways of improving ministerial control over the project instead of the lot of the clients. An alternative—some call it a "learning process"—requires participation in the assessment by the clients themselves.<sup>81</sup> Because feedback constitutes the steering mechanism of decision, teaching clients to assess their own projects empowers them to control their own lives.

### 3. Conversion Processes

The processes by which officials turn inputs and feedbacks into decisions also helps predetermine the range of decisions which are made. A collegial decision-making process (in the U.S. appellate court style) makes idiosyncratic results less likely than individual decision-making by a set of appellate judges (in the British style). If a decision-maker or a judge must write down the reasoning behind particular decisions, an arbitrary law or ruling becomes less likely.<sup>82</sup> Further, requiring decision-

80. See generally D. ROEDERER & P. PALMER, *SUNSET EXPECTATION AND EXPERIENCE* 2 (1981).

81. A. SEIDMAN, *EVALUATING AID TO DEVELOPMENT: A PARTICIPATORY LEARNING PROCESS IN SOUTHERN AFRICA* (forthcoming 1987) (on file with the author).

82. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."). The Administrative Procedure Act, 5 U.S.C. § 553(c) (1982), requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." See also G. EDLES & J. NELSON, *FEDERAL REGULATORY PROCESS: AGENCY*

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makers to articulate the considerations behind their decisions helps ensure that they overlook nothing of major importance.<sup>83</sup>

### C. *Institutions to Implement Official Behavior*

As a specific technique to induce conforming behavior, the legal order relies upon implementing agencies that administer stipulated measures. These measures are of three general sorts: punishments and incentives (“direct” measures); changes in the institutions that affect the addressee’s choice (“roundabout” measures); and educative or propagandistic measures.<sup>84</sup> A drafter, of course, must decide which measures will most likely induce the desired behavior and which agency can best implement them. (In practice, the policy-maker most often leaves these crucial decisions up to the drafter.)

#### 1. The Range of Implementing Institutions

What implementing agencies can the drafter invoke to induce individual officials or official bodies to conform? What relative advantages and disadvantages do these different agencies possess? Six general types of institutions suggest themselves.

##### a. *Civil Courts*

Traditionally, to enforce the rule of law, the common law relied upon bright-line rules and the ordinary courts and employed mainly the prerogative writs (mandamus, habeas corpus, prohibition), which in many places are now expanded by actions for declaratory judgment and injunctive relief.<sup>85</sup> Today, use of the civil courts remains a central means by which citizens seek redress against illegal official behavior. Without extensive procedural changes, however, courts cannot easily control the abuse of broad discretionary powers.<sup>86</sup> In any event, the utility of the civil courts to patrol official misbehavior is limited by the frequently prohibitive expense of bringing a legal action. Except where public interest

PRACTICES & PROCEDURES 64-67 (Supps. 1985 & 1986); Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486, 489 (1930) (“Undoubtedly [the requirement of written opinions] will . . . result in well considered opinions. . . .”) (quoting Samuel M. Wilson, discussing the Supreme Court during the debate over the California Constitution of 1879).

83. See, e.g., 42 U.S.C. § 4332 (1970) (environmental impact statement).

84. See R. SEIDMAN, *supra* note 24, at 146-64.

85. See J. GARNER, *ADMINISTRATIVE LAW* 201-15 (5th ed. 1979).

86. In recent years the federal courts in the United States have undertaken oversight of a wide variety of institutions, ranging from prisons to hospitals for the mentally ill. This effort has required extensive changes in federal court procedures. For a discussion of these developments, see generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

lawyers or agencies intervene, litigation remains a remedy available only to sophisticated and wealthy plaintiffs.

In the United States, two procedural devices and one structural one have somewhat ameliorated this problem. Class actions<sup>87</sup> make possible the lumping together of many small claims so that a lawsuit becomes economically viable. Statutory counsel fees for successful plaintiffs in effect make every lawyer a potential "private attorney general," prepared to act in an entrepreneurial role to litigate a complicated case for a poor plaintiff (more frequently, a poor class of plaintiffs), in the hope that a pot of gold lies at the end of the long travail.<sup>88</sup> Finally, in the United States, the government has financed a legal services corporation to supply lawyers for the poor, often in litigation against the government itself.

#### b. *Criminal Courts*

These suffer from the gatekeeper and other problems discussed earlier.<sup>89</sup>

#### c. *Employment Sanctions*

In Britain, senior civil servants nominally serve at the minister's pleasure.<sup>90</sup> The threat of unemployment presumably suffices to coerce officials into performing their tasks legally. In reality, though, ministers almost never fire a senior civil servant, suggesting either that these officials have an unbelievably low rate of goal-substitution or—much more likely—that the sanction has little bite.<sup>91</sup> In Africa, political control over senior civil servants has become even more attenuated. In 1931, under pressure from organized civil servants, the government of Rhodesia created a Civil Service Review Board with the sole power to discipline civil servants. By 1965, all the Board's members were retired senior officials.<sup>92</sup> The Board did not serve as a scourge of the bureaucracy. In most of the English-speaking independent African states, Britain insisted that the African independence constitutions provide for an independent

87. English procedural law served as the model for procedural law in all of the English-speaking states in Africa, except those countries in southern Africa—Zimbabwe, Swaziland, Lesotho, Botswana, and South Africa—in which Roman-Dutch law became the model. Neither system employs class actions.

88. See *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968).

89. See Black, *supra* note 68; text accompanying notes 68-69.

90. See J. GARNER, *supra* note 85, at 40.

91. Without adequate ministerial supervision, the threat of ministerial discharge can hardly serve greatly to influence official behavior, just as even the most severe criminal sanctions, without adequate implementation, will not effectively deter criminals. In Britain, "well under" one percent of ministerial decisions actually pass across the minister's desk. K. WHEARE, *MALADMINISTRATION AND ITS REMEDIES* 5 (1973).

92. C. PALLEY, *THE CONSTITUTIONAL HISTORY AND LAW OF SOUTHERN RHODESIA, 1885-1965, WITH SPECIAL REFERENCE TO IMPERIAL CONTROL* 472-73 (1966).

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civil service commission with powers analogous to those of Rhodesia's Board.<sup>93</sup> The civil service commissions, however, have rarely exercised disciplinary power. In practice, therefore, governments have precious few employment sanctions against senior civil servants. If a drafter wants to invoke them, she must devise ways of doing so despite civil service rules.<sup>94</sup>

### d. *Ombudsmen*

Many states have introduced special bodies to police the administration: ombudsmen in the Scandinavian states, New Zealand, and Zimbabwe; procurators in Eastern Europe; Permanent Commissions of Inquiry in Tanzania and Zambia; Parliamentary Commissioners in Britain; and *Mediateurs* in France.<sup>95</sup> Their powers, organizations, and procedures vary widely. All three affect the ombudsman's relative effectiveness. For example, whether an ombudsman may demand government documents defines her investigative power; whether of her own motion she may initiate court action defines her independence from the current government; whether she can object only to individual cases of maladministration defines her power both to restructure governmental organizations (schools, hospitals, prisons) and to review the exercise of discretionary policy-making. Even where the drafter does not wish to create an all-purpose special policing body, she may want to create an advisory or review council for the particular institution at hand (for example, a civilian review board to consider complaints of police illegality).<sup>96</sup>

### e. *Administrative Courts*

France, West Germany, and Austria, among others, have found administrative courts useful to review government action for alleged arbitrariness.<sup>97</sup> These courts have the advantages of tribunals generally—mainly that they lack the complexity and rigidity of the ordinary courts. They are, however, more formal than the ombudsman.

93. See, e.g., ZAMBIA CONST. arts. 114, 115(3) (1964); ZIMB. CONST. art. 75 (1980).

94. That government corporations supposedly have more power over their employees became a principal reason for hiving off government functions to them. See R. SEIDMAN, *supra* note 24, at 258-85.

95. On the Tanzania Permanent Commission of Enquiry, see R. MARTIN, *PERSONAL FREEDOM AND THE LAW IN TANZANIA* 181-220 (1974); R. SEIDMAN, *supra* note 24, at 120.

96. See generally A. BLACK, *THE PEOPLE AND THE POLICE* (1968).

97. See C. HANSON, *EXECUTIVE DISCRETION AND JUDICIAL CONTROL: AN ASPECT OF THE FRENCH CONSEIL D'ETAT* 207-15 (1954); Questiaux, *How Administrative Courts Meet the Need*, in *THE OMBUDSMAN: CITIZEN'S DEFENDER* 217-25 (D. Rowat ed. 1968) (discussing French administrative courts).

f. *Parliamentary Oversight*

Parliament cannot easily oversee the administration's day-to-day activities. In the British tradition, parliamentary questions purport to perform that function. They work only moderately well in Britain and hardly at all in Africa.<sup>98</sup> A drafter can, however, provide for periodic review of particular administrative functions, either by requiring periodic reporting to Parliament by the agency or the responsible ministers or by providing a "sunset clause" under which the agency will die after a stated period unless renewed by parliamentary vote. In the General Accounting Office, the U.S. Congress has created a full-time agency to assess the operations of the executive branch on Congress's behalf.

2. New or Existing Institution

Whichever type of implementing institution the drafter selects, she must decide whether to create a new one or to make do with an existing one. That decision raises two principal issues. First, new institutions often generate high start-up costs. Adding new functions to old institutions, however, adds some increment of cost to their operations as well. Second, existing institutions come complete with existing procedures and personnel which may not deal appropriately with new functions. Frequently only in a new institution can a drafter provide appropriate new procedures and personnel with the requisite crusading spirit.

3. Allocation of Discretion

How should the drafter divide discretion between the implementing agency and the official? When the legislature endows an official with discretion, presumably it wants the official, with all his special expertise, to exercise that discretion, rather than a reviewing court, ombudsman, or civil service commission. In most cases where a client complains about an official, the official justifies his action by attempting to demonstrate that his decision lay within the range of his discretion, and that he acted for rational reasons. A variety of procedural devices exist by which the drafter can regulate the relationship between an official and the reviewing agency: she can stipulate the bases for agency review, adjust the quantum of evidence required to support official determinations, or prescribe procedures for appellate review.

D. *Guarding the Guardians: The Imperative of Control from Below*

All implementing institutions raise the question of guarding the guardians. This question arises for two reasons. First, no state can afford end-

98. R. SEIDMAN, *supra* note 24, at 439.

lessly to proliferate institutions responsible for implementing norms prescribing official conduct; in any event, at the end of that regression sits the unguarded guardian. Some theorists stress the importance of a self-regulating set of senior officials—in Britain, the senior civil services;<sup>99</sup> in the United States, the federal judges.<sup>100</sup> Alternatively, a drafter might make review bodies collegial in nature. In a collective setting, it becomes more difficult to substitute individual for group goals; in a collegial institution, each member serves to guard against goal-substitution by his colleagues.

The question of guarding the guardians arises for a second reason. Powerful subjects of regulatory agencies often co-opt the very institutions designed to discipline them.<sup>101</sup> How might a drafter prevent an ombudsman from so falling under the sway of the official culture that he smothers civilian complaints instead of vindicating them? Can she prevent judges from so deferring to their social peers (the senior civil servants) that judicial review becomes an expensive exercise in futility? Can she ensure that the civil service commission maintains sufficient distance from senior civil servants so that the threat of sanction carries some bite?

These questions raise the ultimate issue for a polity looking towards development in favor of the mass. No matter how many control institutions a cautious drafter may pyramid one above the other, tentacles of power and privilege reach out to subvert them. In the end, policy-makers must still address the problem of how to guard the guardians.

The answer plainly lies in the institutions which empower the masses directly to control the bureaucratic organizations responsible for development.<sup>102</sup> Wherever possible, this calls for the decentralization of power and the devolution of control to small, local groups. In face-to-face

99. See, e.g., E. GLADDEN, *CIVIL SERVICES OF THE UNITED KINGDOM, 1855-1970*, at 11-14, 146-48 (1967) (distinguishing the civil service from bureaucracy and emphasizing its important role as a "balancing factor" in a developing democracy, dedicated to the impartial service of the nation).

100. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (as an elite corps removed from majoritarian pressures, federal judges are more likely than state judges to give judgments in accordance with constitutional mandates); cf. *United States v. Butler*, 297 U.S. 1, 79 (Stone, J., dissenting) ("[T]he only check upon our own exercise of power is our own sense of self-restraint.").

101. For example, in colonial Rhodesia, by 1965 the Public Service Board (with broad powers over the public service) consisted predominantly of members who had spent time in the public service. C. PALLEY, *supra* note 92, at 472.

102. A variety of scholars reach the same general conclusion, frequently by asserting "the primacy of politics." See, e.g., H. VAN GUNSTEREN, *supra* note 40, at 151 ("A political process, in which a plurality of citizens can appear and influence their common history, is not only a democratic value and an ethical imperative, but also a necessary condition for any kind of rational government."). To leave the matter on that broad level of generality, however, helps little more than to advocate "participatory democracy."

groups, participatory decision-making becomes, if unusual, at least not inconceivable.<sup>103</sup> Many countries have tried to implement this solution, with mixed results.<sup>104</sup>

The great difficulty lies in devising institutions likely to lead to popular control over those bureaucracies that make central government decisions on complex matters involving either large amounts of capital or a high degree of expertise. Such decisions, by nature, require experience and know-how often lacking in the general population. As suggested earlier, at a minimum the masses, as well as the elite, must have organizations to represent their specific interests.<sup>105</sup> Government should provide the means to strengthen existing people's organizations and to develop new ones, such as trade unions, peasant's associations, neighborhood collectives, and consumer cooperatives.

The thorniest question concerns mass political organization. Many Third World countries have embraced the one-party state. The justification for such a state as it has evolved in our time is, on the one hand, that its nerve ends reach deep into the population, and on the other, that in the mass's interests it monitors and controls government itself. To the extent that it fits its own description, the party can fairly claim to provide democratic control more useful by half than periodic elections dominated by those who provide the financial muscle for political contenders. Once it has destroyed whatever power representative democracy may have to control the state in the interests of the mass, however, then, to the extent that the party itself becomes bureaucratic and its nerve ends to the mass atrophy, the one-party state becomes Leviathan incarnate. In an effort to maintain the party's democratic character, Tanzania and Zambia have each appended the party constitution as a schedule to the national constitution.<sup>106</sup> (As it has never come before a court, the legal consequences of that move remain obscure.) The problems of the one-party state obviously stretch far beyond the reach of this paper.

103. See generally J. FINUCANE, *RURAL DEVELOPMENT AND BUREAUCRACY IN TANZANIA: THE CASE OF MWANZA REGION 83-107* (1974); *REPORT OF THE COMMISSION ON THE STRUCTURE AND RENUMERATION OF THE PUBLIC SERVICE IN GHANA* (Ghana 1972); R. SEIDMAN, *supra* note 24, at 315-19.

104. See, e.g., J. FINUCANE, *supra* note 103.

105. See *supra* p. 106.

106. For a comparison of party constitutions in Zambia and Tanzania (both one-party states), see R. SEIDMAN, *supra* note 24, at 442-54. Tanzania developed a genuinely innovative institution: competitive non-party elections within a one-party state. See *ONE-PARTY DEMOCRACY: THE 1965 TANZANIA GENERAL ELECTIONS* (L. Cliffe ed. 1967).

### Conclusion

Perhaps academics in the United States can escape the dark side of bureaucracy. Drafters in the Third World cannot. They must confront and tame it. Unless officials obey the law, whatever a government tries to accomplish in favor of the mass will most likely fail. The problems of the Third World (and increasingly those of the developed countries as well) call for the exercise of wide discretionary power by officials. Otherwise the institutional transformations required to bring about development in favor of the mass will occur only by chance. However, the supposed requirement of bright-line rules appears to oppose development's imperative of broad discretion. If law constitutes only an ideological device for creating legitimacy, developing countries must give up either the rule of law or development itself.

A drafter cannot resolve this dilemma by using British or U.S. experience to find textbook solutions to textbook problems. She cannot resolve it by adhering to traditional perceptions of the drafter's role. She does not serve as a mere scrivener to put into law's debatably precise but undebatably arcane language the policy prescriptions laid down by the political leadership. Nor can she resolve the dilemma by perceiving law as ideology or as a mere source of argument. She can resolve it only by drafting provisions that make it more likely than not that officials will use their discretion to carry out the purposes of the rules they implement.

That in turn requires us to change the way we conceptualize and justify law—that is, our ideology and legitimating myths about law. “By moving from an ideology of rule administration to one of goal orientation, public administration can no longer rely on legitimation by statutory powers. Rather, legitimacy must be sought through the very process of implementation.”<sup>107</sup> Their usual role forces drafters to think about the law not in terms of legitimation but in terms of its instrumental consequences. Official conduct conforming to the rule and its purposes, however, has as its flip side legitimacy. (We even characterize conforming official behavior as “legitimate” behavior.) By drafting laws which induce legal official behavior, that is, by drafting *instrumentally*, a drafter necessarily contributes to law's legitimating function.

Solutions to problems must rest upon explanations. We cannot propose new law to solve problems of illegal behavior unless we can explain that behavior in terms of existing law. The explanation put forward here rests upon a proposition made familiar by American realist and sociolog-

107. Blankenburg, *The Waning of Legality in the Concept of Policy Implementation*, 7 LAW & POL'Y 487 (1985).

ical jurisprudence: people behave as they do in the face of a rule of law by choosing among all the constraints and resources of their environment, including the threats and promises of the legal order. By building upon more particular explanations of how the legal order works and why people obey the law (the ROCCIPI categories) and on a simple systems model of decision-making institutions, a drafter has available a wide range of devices to encourage official conformity to law. At the end of the day, however, experience everywhere teaches that control from above works only moderately well. Without control from below, development and legality alike become improbable.

As a tool to ensure legality, bourgeois democracy relies upon a central, sound insight and a fatally-flawed blueprint. Ultimately, government in favor of the mass must rest on control by the mass. The blueprint for bourgeois democracy tries to achieve this result by requiring the political leadership periodically to request and receive the approval of the electorate.

Whatever its success in the developed world, as a guarantor of legality in the Third World, bourgeois democracy has not succeeded. Of course, no system of control of government by the mass in its own interest is likely to succeed without requiring government regularly to nourish its roots with the juices of popular support. Periodic submission to elections alone, however, does this poorly at best. Unless the leadership becomes and remains "close to the soil and in touch with the people,"<sup>108</sup> regular elections will not prevent the development of the "big men," the tribe of WaBenzi,<sup>109</sup> and of officials who displace the nominally democratic objectives of the law with self-interested goals.

The requirement of bottom-up control becomes the *sine qua non* of development in favor of the mass. At the same time, without utilizing the state and its bureaucratic structures, development can hardly occur. Development cannot come about until a government representing the interests of the mass gains control over the machinery of state and seeks to use it to change social institutions to favor the mass. This type of change requires that officials do what the law commands them to do—that is, that they adhere to legality. Specifically, drafters must design legislation to ensure legality. They must draft instrumentally. Because a wise instrumentalism acknowledges that officials tend to follow not only the dictates of the law but also those imposed by their arenas of choice, in

108. E. Nwosu, *supra* note 16, at 37 (quoting 2 *Planning for Economic Development in India* 66, U.N. Doc. A/5533/Rev.1/Add.1 (1965)).

109. A common KiSwahili term, meaning those who drive Mercedes-Benz automobiles (a mark of elite status throughout Africa).

designing legislation a drafter must take those arenas into consideration. Even as she tries to utilize legislation to change society, the very legislation she employs must take into account the society it seeks to change. Law does not work like a vaccine, injected into an inert social body.<sup>110</sup> A law that does not respond to social dynamics will work only haphazardly.

Another name for bureaucracy is power. Of course, bureaucrats have power—its exercise constitutes their function. Unless they exercise power in appropriate ways, institutional transformations become unlikely, and undirected institutional change will tend to favor the rich and powerful, not the disinherited. Without legality, political democracy of any sort becomes an illusion. Africans fought for the democratic franchise because they believed, with Nkrumah, that they must first seek the political kingdom. Without legality, political power atrophies. Without legality, development in favor of the mass must fail.

Political devices exist which, if employed, can encourage a governmental orientation towards legality. The ultimate institutional guarantee of legality, however, probably lies in the structure and ideology of the political party that the government represents and in the extent to which its nerve ends retain contact with the popular mass. Good intentions on the part of the top leadership are not enough. Lawyers in the system—especially parliamentary drafters—must develop expertise to contribute to the enterprise of subjecting human conduct to the governance of rules.<sup>111</sup>

Confronted with the here-and-now task of drafting legislation likely to bring about development, vague prescriptions for participatory democracy in effect counsel Third World lawyers to give it up. “Participatory democracy” advocates tell us that we must destroy organized power and its usual form, that is, bureaucracy. Like ideologues of the extreme right, these advocates preach the emasculation of government itself. In the Third World, where the state trembles in its weakness, to tell lawyers to abandon bureaucracy is to tell them to turn the polity’s destiny over to the powerful—in the Third World, the transnational corporations. Development lawyers who take that advice seriously can hardly do more than assure each other how radical they really are.

Legality can work simultaneously with the discretionary powers required to solve development’s manifold problems, but only if drafters and lawyers refuse to permit the apparent deadlock to intimidate them. The problems of bureaucracy will not vanish before puff-balls of “par-

110. R. KIDDER, *CONNECTING LAW AND SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY* 114 (1983).

111. L. FULLER, *THE MORALITY OF LAW* 46 (rev. ed. 1969).

ticipatory democracy." Even if they were to do so, no one has figured out how, without bureaucracy, to carry out many of the tasks required for development. Third World governments must tame the beast. Taming it requires democratic participation in decision-making. Devising institutions to allow such participation, and drafting laws to create and bolster institutional structures, constitute the development drafter's highest calling.