THE MEMORANDUM OF LAW

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I. Introduction

As a guide to writing legislation, legislative drafters everywhere use checklists.[1] What follows began in a legislative drafting program at Boston University. In that program, legislators and government agencies propose legislative projects, which the students drafted. Each student was required to accompany her proposed bill with a Memorandum of Law justifying it. This paper provides guidelines for writing that Memorandum.

Anyone who proposes legislation or regulations must explain why the bill contains what it does. That implies that the drafter must accompany a bill with a memorandum *justifying* it. In many Western countries that is called a Memorandum of Law—a misnomer, because the Memorandum includes a great deal more than merely a description of "the law." This paper deals with the structure and the content of the Memorandum of Law for a major piece of legislation.[2] In Part II, this paper addresses issues relating to making the argument understandable and powerful; in Part III, this paper addresses issues of content and format.

II. Making the Argument Understandable and Powerful

Every paper should have both a major and a minor theme. The major theme addresses the subject-matter. The minor theme, which constitutes the subject-matter of this Part, addresses the question of making the argument understandable and

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[1] *See, e.g.*, Caldwell, *Planned Research Protocol*, in R. DICKERSON, MATERIALS ON LEGAL DRAFTING 115 (1981); *Questionnaire to be Answered in Preparing a Memorandum as the Basis for Drafting a Bill*, in READ, MACDONALD, FORDHAM AND PIERCE, MATERIALS ON LEGISLATION (3d ed. 1973). In some texts on legislative drafting, checklists play a major role. *See, e.g.*, G. THORNTON, LEGISLATIVE DRAFTING (2d ed., 1979).

[2] The Memorandum of Law justifying legislation that makes only relatively minor changes in the existing legal order need not contain all the information suggested in this paper.

powerful. The minor theme informs the reader about the logic and structure of the Memorandum. In addition, the power of the paper derives also from the facts that warrant your substantive claims—that is, the data. This section addresses first, the minor theme, and second, the problem of data.

A. *The Logic and Structure of the Memorandum*

A Memorandum of Law constitutes a project in *teaching*. You, the drafter of the bill and the author of the Memorandum of Law, know a great deal about the subject-matter. Your reader, however, knows nothing, or almost nothing. How can you best teach the reader what the reader must know to understand your bill and the Memorandum?

To teach the reader about the subject-matter of your bill and to explain why you as drafter made particular choices, you must of course present a great deal of substantive material. The reader, however, will only understand that material if you present it to him in a logical form. The reader will best understand your memorandum if from time to time in the memorandum you carefully tell the reader about the logical structure of the argument, and where at each point in the memorandum the reader stands in relationship to that argument.

Everyone who has listened to a lecture in school knows that unless the teacher constantly tells the students where they stand in the argument, the student loses the thread of the argument, and little learning occurs. In the same way, when you write a Memorandum of Law, you must constantly tell the reader *where the argument stands*.

Two devices bear the burden of keeping the reader informed about where the argument stands: Connectives, and discussions of theory.

1. Connectives

Connectives consist of brief statements that appear throughout the discussion, directly telling the reader where the arguments stand. The drafter accomplishes this by seven devices.

a. *The Introduction*

The Memorandum must have a brief introduction which tells

the reader the main headings that your paper will consider. The Introduction constitutes a brief outline of the paper, foreshadowing what the paper contains and suggesting the main points of the argument.

b. *The Connectives Proper*

When you leave a major section you need a graceful sentence or phrase that warns the reader that you have completed this section and will now launch into a new one. Within this sentance or phrase, you should state (or at least suggest) the logical connection between both sections.

c. *Headings*

Use headings freely throughout the paper. They help the reader orient herself with respect to the argument.

d. *Mini-Introductions*

At the beginning of each major section, you need a mini-introduction outlining the content of the section. (For example: "To explain the behavior discussed above, I will consider the following explanations: Rule, opportunity . . . etc.," or something of that sort).

e. *Mini-Conclusions*

Similarly, at the end of each major section you should summarize in a sentence the points made in the section. (For example: "The causes for the failure of automobile passengers to wear seat-belts consist of the vagueness of the law, the relative invisibility of the behavior, and the lack of implementation by the police"). Frequently, the mini-conclusion and the connective leading to the next section constitute a single sentence.

f. *Topic Sentences for Paragraphs*

You need a lead ("topic") sentence for each paragraph. Each paragraph should discuss only one major idea.

g. *Conclusion*

Every Memorandum should conclude with a *brief* restatement of the main points made in the body of the Memorandum.

In effect, the Memorandum tells the reader what it has to say at least three times. In the Introduction the Memorandum tells the reader what it will tell him later. In the body of the paper, it tells the reader the substance of the paper in detail. In the Conclusion, it tells the reader what it has already told the reader.

If a Memorandum follows these seven rules concerning connectives (introduction, connectives properly so-called, headings, mini-introductions and mini-conclusions, topic sentences and conclusion), one can read all of them in isolation, and they will form a connected narrative: the minor theme. In addition to connectives, however, the reader must be instructed about the logic of the argument through a discussion of *theory*.

2. Theory

For the reader to understand your argument, you must tell the reader why you include particular materials and not others. The decision of which materials to include depends upon the theory that underlies your argument. In the next section, this paper will discuss, first, the function of theory in legislative research, and, second, the theory's ingredients.

a. *Theory's Function*

An adequate justification must persuade the reader that its propositions make sense. Legislative drafters accomplish this by appealing to the facts. In this sense, at least, we all "learn from the facts."

In analyzing the existing situation, theory can never substitute for facts. Sometimes drafters examine an existing situation, and then offer explanations for it that depend entirely upon some ideal-type drawn from theory, that in some respects seemingly resembles the situation that the proposed legislation addresses. This appears frequently where the proposed legislation undertakes to provide a market solution for the perceived difficulty. Too often, the writer assumes that the real world resembles in all critical respects the ideal-type of a free, competitive market, and fashions her legislative remedy accordingly. That is to say, she takes the ideal-type free market as equivalent to the real world, without conducting the empirical research necessary to determine if that analogy holds. Many real-world situations, however,

resemble a truly free market only in the most superficial sense. A legislative solution without empirical research into the specific situation at hand holds great potential for failure.

If theory cannot substitute for the search for facts, what constitutes theory's true function? The researcher faces a vast amount of facts that exist in the real world, coupled with severe constraints on research resources. What facts ought we examine?

The questions posed above raise the question of *relevance*. Instead of searching for facts at random, we need some systematic way of discovering *in advance* which facts will likely prove useful in explaining the difficulty, and which will not. Theory serves that function. It contains three criteria of relevance: Methodology, Categories and Grand Theory. These criteria form the ingredients of theory.

b. *Theory's Ingredients*

Methodology concerns the agenda that the Memorandum follows in reaching a decision. For example, does the Memorandum start with an objective that it proposes that the legislation accomplish, so that it only demonstrates how the legislation will achieve that objective? Or does the Memorandum start with a difficulty or social problem, examine its causes, and then show how the legislation addresses those causes?

Categories concern the concepts that you use in deciding which data are important, and which are unimportant (for example, the ROCCIPI categories this paper discusses below).[3]

Perspectives concerns the overall philosophy or ideology that governs your choices in research—for example, in economic matters, Marxism or neo-classical economics; in issues of criminal law, deterrence, retribution or rehabilitation; in questions of judicial procedures, an adversarial or inquisitorial system.

A Memorandum's content obviously depends upon which methodology, categories and perspectives the drafter adopts. For the reader to understand your memorandum, you must tell him what methodology, categories and perspectives underlie your memorandum of law, and (briefly) why you have adopted

[3] See below, p. 340.

these and not some others. You should include this material wherever you think appropriate.

B. *Supporting the Argument with Data*

Without data, a Memorandum cannot persuade the reader. Where do drafters find the data? Usually, of course, drafters do not do the empirical research themselves. Instead, they mostly either search libraries—and not only law libraries!—to find existing research that others have done on the problem, or they interview knowledgeable individuals—government officials, academics, entrepreneurs, labor leaders, engineers, and so forth. In any event, one way or another, you must document your claims (usually in a footnote). You cannot expect a government to enact a new law merely because you, the drafter, think it a good idea! You must *persuade* the decision-makers—and the most persuasive argument of all consists of the facts (data).

To summarize: an adequate Memorandum of Law must constantly inform the reader where the arguments stands, through the use of connectives and brief theoretical discussions, and document its important propositions by references to the data. We turn now to the content of the major theme, that is, the substantive justification of a proposed bill.

III. The Substantive Theme

A Memorandum of Law supporting legislation aims at *justifying* the proposed bill. In this the Memorandum bears an analogy to an opinion of an appellate court. Such an opinion constitutes more than a mere statement of the law. It purports to *justify* the court's decision.

Justifications obviously bear systematic relationships to methodologies of decision-making. For example, in order to learn how judges go about making decisions, lawyers tend mainly to study judicial (especially appellate) opinions. An opinion, however, usually does not even pretend to constitute an account of how the judge in fact came to the decision. The opinion constitutes the judge's attempt to *explain* or to *justify* that decision. Why, then, do lawyers study justifications of judicial decisions in order to learn about how judges make decisions? They do so

because a systematic relationship exists between justifications and decision-making.

In the same way, a check list for an adequate Memorandum of Law concerning a bill—a *justification* for the proposed legislation—constitutes a check list of matters to which the drafter should turn her attention in deciding what to put into her bill. What follows next in this paper constitutes a check list for a drafter to consider for inclusion in her Memorandum of Law, and therefore also a guide to thinking about the substance of the bill.

When deciding upon a law, lawmakers must take into account two interrelated but conceptually distinct factors: *power* and *ideal element*. Issues of power concern who supports a bill and who opposes it, their relative bargaining strength, what procedural devices will increase possibilities of enactment, what interest groups require appeasement, and so forth. The ideal element concerns the social problem that the proposed legislation addresses, and how well it will attend to that problem.

In general, because of relative competence, legislative drafters ought to leave to politicians issues of power. The peculiar professional responsibility of a drafter lies in her capacity and position to give advice on the ideal element of legislation. The politician stands much better equipped and positioned to deal with issues of power. If, because of those issues, the drafter's client requires a bill somewhat different from that which a drafter recommends as ideal, the drafter can change the bill as the client requests. At least initially, however, the drafter ought to give the client the bill that will best address the social problems at which it aims.

This check list, therefore, considers only issues relevant to the ideal element in drafting. Most bills, however, will not require explicit mention of every item in this check list. With respect to each item, however, the drafter should ask herself whether the bill calls for its explicit consideration in the Memorandum. We begin with the brief discussion of methodology, and then (with the exception of a brief discussion of the Executive Summary and Introduction) organize the remainder of this paper in terms of that methodology.

A. *Methodology*

In principle, we can define three agendas for justifying legislation: *Ends-means*, *incrementalism* and *problem-solving*.

The ends-means methodology assumes the desirability of a defined state of affairs, and then shows how the proposed bill constitutes the best way of achieving that state of affairs. No justification appears for choosing that end. Since justifications depend upon research, the ends-means methodology places the end—the most important question in considering any legislative intervention—beyond the scope of research.

Incrementalism assumes that human beings can never understand a problem sufficiently to justify a major legislative intervention. To avoid the risks of failure, therefore, incrementalism holds that the best legislative intervention attempts not the greatest improvement in the present situation, but rather the *smallest* possible improvement. Incrementalism thus constitutes another name for muddling through. Incrementalism is a useful device in those cases where the drafter cannot acquire sufficient data upon which to base a decision, but where the situation nevertheless calls for improvement.

This paper recommends in general the use of a problem-solving methodology. That methodology has four steps: Identification of the difficulty, its explanation (or "causes"), a proposal for solution, and implementation and monitoring. Except for a preliminary Executive Summary and an Introduction, you will frequently find it useful to organize the Memorandum of Law in terms of these four steps.

B. *Executive Summary and Introduction*

After completing the rest of the Memorandum, the drafter should write a one-page Executive Summary that will become the first page of the Memorandum. The Executive Summary consists of a brief summary of the Memorandum, for the harassed reader who cannot find time to consider it at length. As discussed earlier,[4] the Memorandum proper also requires an introduction that briefly foreshadows and outlines what will follow. Frequently

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[4] See *supra*, p. 320-21.

you will also find it easier to write the Introduction after you have written the body of the Memorandum.

C. *The Difficulty*

Nobody writes legislation merely for their own amusement. Legislation arises because its sponsor (your client) perceived a social problem—a set of behaviors that seemed wrong or at least problematical. The first task of the memorandum lies in defining—that is, describing—the social problem. Here we discuss, first, social problems as issues of behavior; second, the question of history; third, the issue of who benefits from the existing situation; and, fourth, the question of empirical warrant.

1. Social Problems as Behavioral Problems

Social problems *always* consist of behaviors of some people that somebody defines as a difficulty. Superficially, the social problem may appear as an abstraction, such as inflation, too great an increase in the money supply, pollution of air or water, or a crisis in energy supplies. All result, however, from human behaviors. Sellers increase prices; bank managers make too many loans; industrial managers authorize the release of toxic wastes; the managers of electricity companies have not anticipated rising demands for energy. To solve a social problem, legislation aims at changing the social behaviors that constitute the problem, either by direct prescription, or by various roundabout methods. The first task of a memorandum, therefore, lies in identifying precisely *whose* and *what* behavior constitutes the social problem that the legislation purports to remedy. We denote the person whose behavior is at issue as the "role occupant."

Notice that the difficulty never consists of existing legislation—it *always* consists of somebody's behavior. If your client has asked you to prepare a revision of existing legislation, that request arises because existing legislation permits undesirable behavior. The "Difficulty" section must identify the behavior at issue, and who constitutes the actors.

Where the social problem consists of the behavior of a collectivity (for example, a corporation or a cooperative or a legislature), the behavior of the collectivity results from the activity of various key individuals. That means you must identify not one,

but several role occupants. For example, to explain water pollution by a large industrial enterprise, you may have to address the behavior not merely of the enterprise as a collectivity, but the different behaviors of key players such as directors, chief executive officer, foremen and perhaps even the workmen who actually dump the toxic wastes into the streams. You may therefore end up with several role occupants whose behavior your legislation, and therefore your Memorandum, must address.

A description does not constitute an explanation.[5] For example, suppose that, in a jurisdiction where no water pollution control law exists, you must write a memorandum to justify a bill to create a new Water Purity Control Commission with power to control pollution. That Bill necessarily arose because some people polluted water supplies and continue to do so. That constitutes the social evil that the bill addresses, namely, the behavior of water polluters. The "Difficulty" section of the Memorandum would likely not even mention the proposal to create a new Water Purity Control Commission.

New laws often arise to help solve difficulties that emerge in connection with older laws addressed to the same subject. For example, suppose you must write a Memorandum to justify a bill creating a Water Purity Control Commission, in a jurisdiction where an ineffective Water Pollution Control Act already exists. In terms of the problem solving methodology, the monitoring of the implementation of the old law has revealed a new difficulty. The Introduction of your Memorandum might well discuss this background. The Difficulty section, however, would still focus on polluting behavior as the social problem with which your Bill concerns itself.

2. History

History may enter the Memorandum at several different points. As mentioned earlier, history may appropriately find a place in the Introduction, to set the stage. It frequently appears in the Difficulty section, to explain why the social problem has reached the point where it requires legislative attention. Sometimes history has relevance to the explanations for the difficulty, because the peculiar history of the difficulty may help explain it.

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[5] Descriptions are discussed in *infra* at page 339.

Finally, history frequently appears in the solutions section, as discussed below. Whether the drafter should include one section on history or several, and where in the Memorandum it should be included, varies from case to case.

3. Who Benefits?

Every problem is *somebody's* problem—and somebody's blessing. Every situation has winners and losers. The behavior of some water polluters constitutes a difficulty for somebody, but a benefit to the polluter. Your memorandum should identify those winners and losers.

4. Empirical Warrant

Finally, as suggested above, the drafter should support her definition of the difficulty by introducing data to support her claim. In doing so, of course, the drafter should suggest the dimensions of the difficulty.[6]

D. *Explanations*

Unless legislation addresses the causes of a problem, the legislation can do no more than poultice symptoms. The second step in the problem-solving methodology (and therefore of your Memorandum), consists in identifying those causes. As we have seen, all legislation ultimately looks to change the behavior of particular sets of people, that is, the role occupants. The task lies in identifying the *causes* of their undesired behavior.

In the simplest model of behavior, individuals and collectivities make choices within a range of constraints and resources in the milieu in which they live—that is, constraints and resources thrown up by their society and their own personalities. The law can change behavior only by changing those constraints and resources. As the first step in drafting a law to change behavior, the drafter must identify those constraints and resources. Identifying them *explains* the behavior at issue.

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[6] Frequently, governments enact legislation that addresses a problem that exists not in the real world, but in somebody's mind. That constitutes one form of "symbolic" legislation. Demonstrating that the data support the claim that a social problem exists, and that it has substantial dimensions, constitutes one device for demonstrating that the proposed legislation constitutes more than a mere symbol.

Everyone today agrees that social problems have multiple causes. The range of explanations a drafter suggests limits the search for data to those proposed. That necessarily excludes from consideration other possible causes, about which the drafter proposed no hypotheses for testing. Using a range of potential hypotheses to explain phenomena becomes the first requisite of discovering the specific causes that the legislation will address.

The milieu of any set of role-occupants contains myriad factors. To examine all of these lies far beyond the capacity of any researcher. Before deciding what facts she should capture, the researcher needs a set of *categories* to define the sort of data she should investigate. That is, she needs a theory to help her generate some hypotheses that identify the key constraints and resources in the role-occupant's milieu which explain the behavior at issue.[7] In this section, therefore, we examine various categories that the drafter may want to discuss in her Memorandum of Law to help explain the behavior of the role occupant that constitutes the social problem at issue. We discuss here:

1. Grand Theory (or perspectives);
2. The difference between "causes" and "conditions";
3. The causes of behavior in the face of a rule of law, consisting of:
    a. the rules of law as causes of behavior;
    b. other, non-legal causes and conditions of behavior;
4. implementing agencies and conformity-inducing measures as causes of behavior; and
5. the problem of data-collection.

1. Grand Theory (or "Perspectives")

All legislation represents a value-choice. Discretionary choices exist in selecting the difficulty, in deciding on the range of alternative explanation to analyze, in determining how to weigh costs and benefits in assessing solutions, and so forth. Different Grand Theories that purport to explain the world (or large portions of it), like Marxism, Neo-Classical Economics, Weberian

[7] Categories, and the ideal-types frequently used to define and justify them, in this view constitute only *heuristics*, that is, propositions that focus the researcher's attention on those facts that past experience and logic advise will likely have relevance in explaining the difficulty.

sociology, and the like, offer guides to these discretionary choices. At least with respect to legislation that addresses large-scale problems (for example, land reform legislation, or legislation creating a new central bank for a country), the drafter ought to make clear the basis for her value-choices. If the proposed legislation concerns something less far-reaching, for example, a bill requiring that automobile passengers wear safety-belts, the drafter can frequently omit this section. She ought also clearly to distinguish between causes and conditions.

2. Causes and Conditions

On casual inspection, some of the constraints in the role occupants' social and physical milieu will seem plainly beyond the reach of legislative solution. We will call those "conditions." Other constraints seem at least conceivably susceptible to legislative intervention. We will call those "causes." To write competent legislation that will actually improve the situation, the researcher must identify both causes (the subject of change), and conditions to devise solutions that accomodate them.

The division of constraints and resources between causes and conditions seems like a factual issue. Appearances deceive. Whether a set of facts constitute a condition or a cause constitutes a normative judgment. For example, suppose that you must devise a legislative solution for the problem of low agricultural productivity by farmers in a particular region. If one asked a geographer to explain that behavior, the geographer might well respond that the cause lay in the area's excessive aridity. More than likely, however, the researcher looking for a legislative solution would take aridity as a condition, not a cause. She will likely treat it, therefore, as something beyond the reach of legislative change.

That constitutes a normative, not a technical judgment. No doubt, if the will to do so existed, the State could change the region's aridity, by irrigation, or by digging deep wells, or perhaps even by chemically seeding clouds to cause rainfall. The example does teach us to take care lest we treat as a technical issue what in fact constitutes a preliminary policy decision. Conditions as well as causes help explain behavior; both require elucidation.

3. Causes of Behavior in the Face of the Rules of Law

As we have seen, people behave by making choices within a range of constraints and resources thrown up by their milieu. Here we suggest some categories that a researcher should consider in explaining behavior and (as we shall see) in designing a legislative solution for the defined difficulty: the rules of law; non-legal constraints and resources; implementing agencies; and conformity-inducing measures ("sanctions").

a. *The Rules*

By definition, the existing rules of law constitute part, but only part, of the milieu within which the role occupant chooses. Many other constraints and resources exist within that arena. Part of the milieu, of course, consists of incentives and disincentives, the usual issues on which lawyers tend to focus, but we can make egregious errors unless we spread our net more widely. Without forgetting that an adequate Memorandum must look at non-legal explanations for behavior, the Memorandum must first in some detail elucidate the present state of the law.

Adequate solutions address causes, not conditions. Since our solution—legislation—always constitutes a change in the law, then *part of the cause of the difficulty must always lie in the existing legal order*. People act—that is, make choices—within a whole framework of existing laws and implementing agencies. For example, water polluters act not only in light of the sort of laws conventionally labelled "water pollution law," or "environmental law," but also within a framework of property law, with all the rights and duties, powers and liabilities which that body of law attaches to the ownership of property; of contract law; of the laws concerning streams and rivers; perhaps even in light of tax laws. Every legal system includes the following proposition: that which the law does not forbid, it permits. Unless the property law or some other law forbids a landowner from polluting a stream that runs through her property, she has every right to pollute it. Moreover, the legal order includes not only the texts of the rules, but also implementing agencies. If the agencies that supposedly enforce anti-pollution laws do not adequately do so, in choosing how to act the polluter will take that into account.

In short, role occupants act within, among other constraints

and resources, those thrown up by the legal order itself. The legal order consists (roughly) of normative rules, implementing agencies and the conformity-inducing measures the legal order uses to channel role occupants into desired behavior. As its first cut at explanation, therefore, every Memorandum must contain a statement of the rules of law that purport to affect the behavior at issue.[8] The drafter should consider not only the varieties of substantive law involved, but (where relevant) constitutional issues, tax considerations, appropriations problems and procedural law affecting the issue. You should specify how these laws affect the behavior involved.

b. *Non-Legal Conditions and Causes of Behavior*

It may help to conceptualize behavior in terms of the hypothesis that people behave as they do because they take into account not only the constraints and resources of the law, but also the following non-legal factors:

(1) Whether the actor has *opportunity* to behave as he or she does, that is, whether the environment external to the role-occupant offers her possibilities for obeying or not obeying a rule (for example, the existence of an open stream through a landlord's property gives her the opportunity to pollute it);
(2) Whether the role-occupant has *capacity* to do the act involved, that is, whether the role-occupant has the skills to do the task (for example, if preventing pollution requires capital resources beyond those a role-occupant can muster, she may not have the capacity to obey a law requiring her to cease polluting);
(3) Whether the rule has been *communicated* to the actor (for example, if a law exists prohibiting pollution, but the landlord does not know of the law, she will obey it only accidentally);
(4) Whether the behavior at issue lies in the *interest* of the role-occupant, including the probability of sanctions (for example, polluters act as they do because they save money by doing so, taking into account the possibility of an implementing agency punishing them);[9]

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[8] The Memorandum should discuss later the question of implementation and conformity-inducing measures.

[9] Where the subject-matter of the proposed bill relates directly to economic affairs, sophisticated economic analysis based on the economic interest of the role-occupant frequently becomes relevant. For example, in legislation relating to re-

(5) Whether the role-occupant has come to decide about the behavior at issue by a *procedure* likely to produce socially responsible behavior (for example, when landlords privately decide to pollute a stream in a profitable but socially undesirable way, public opinion hardly bears upon their decision); and
(6) Whether the actor's subjective *ideology* tends to move her to conform to the desired norm (for example, a landlord will more likely refrain from polluting streams if she has a strong value of saving the environment, rather than one of individual acquisitiveness).

The mnemonic ROCCIPI may help you remember these legal and non-legal factors: *R*ule, *O*pportunity, *C*apacity, *C*ommunication, *I*nterest, *P*rocess, *I*deology. In thinking about explanations for the behavior at issue, the drafter should turn her mind systematically to each of these seven variables, generate hypotheses based on each, and then examine the factual situation at hand to see if her hypotheses withstand empirical testing.[10] That does not mean, of course, that her Memorandum should address each of those variables in turn. It should address only those variables that the drafter thinks worthy of testing. She must also consider implementing agencies and conformity-inducing measures, more usually called "sanctions."

c. *Implementing Agencies*

As we have discussed, some law invariably structures the role-occupants' milieu. Frequently, the law does not effectively control the behavior at issue because the implementing agencies fail to do their jobs. Here we discuss aspects of explaining implementing agency behavior: first, general theory, and second, two specific aspects of implementing agencies that warrant attention, that is, gatekeepers and the proactive/reactive dimension.

(1). General Theory of Implementing Agencies

Every law in effect addresses two different actors: the role occupant, and an implementing agency. The law that prohibits the role occupant from polluting may also instruct an implement-

strictions on competition, developing new transportation routes or systems and the supply of energy, economic analysis becomes necessary.

[10] The ROCCIPI categories constitute heuristics, propositions that do not announce immutable truth, but rather advise the researcher where to look for information likely to prove useful in the search for explanations.

ing agency, such as a water pollution commission, to investigate polluters, and may require courts to try to punish the polluters. The following figure illustrates this point:

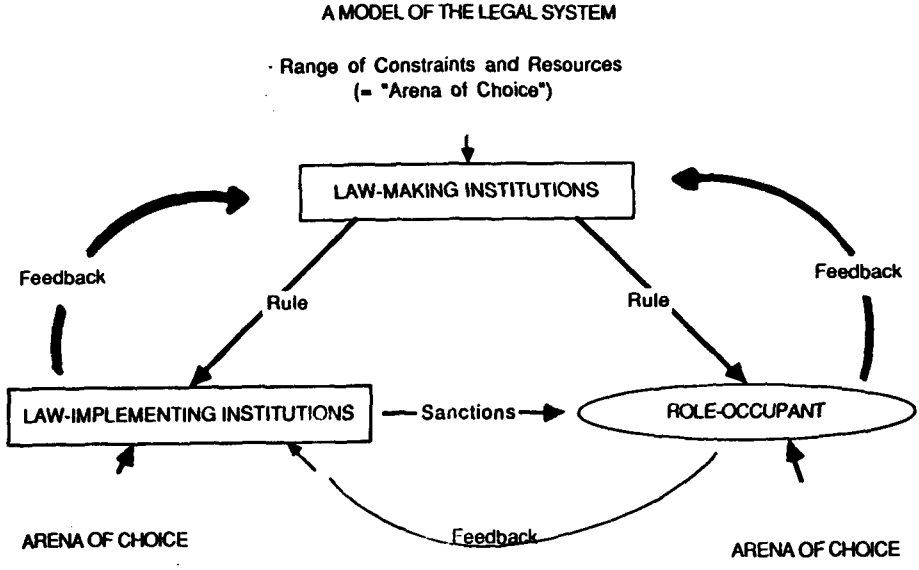

FIG. 1.

To explain implementing agency behavior, it becomes necessary to examine the particular role-occupants within the implementing agency. For example, if judges do not try to punish polluters, the Memorandum should ask the ROCCIPI questions about the judges.

Implementing agencies are usually relatively complex organizations. The *capacity* of a complex organization to make decisions of a certain desired sort frequently depends not merely upon the capacity of the individuals involved, but also upon the structure and processes of the organization. We can capture the problem involved by a simple input-output systems model:

This model tells us that the range of decisions of a complex organization results from:

(1) The sorts of inputs (issues, facts, theories, personnel) that go into the decision;

(2) The feedbacks that go into the decision (that is, what

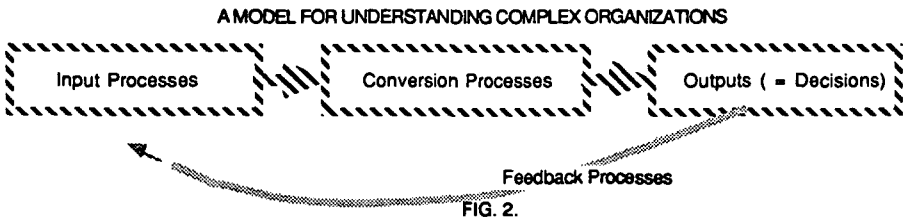

FIG. 2.

the institution learns about the consequences of previous decisions); and

(3) The conversion processes (how these various elements come together).

Social problems, however, never consist of individual decisions or actions. Rather, they consist of repetitive patterns of behavior. We must therefore enquire not merely about how specific inputs, feedbacks and conversions explain specific, individual decisions, but more generally about the processes that filter inputs and feedbacks, and determine how the conversion processes work.

Processes consist of the behaviors of the role-occupants who man the various posts in the implementing agency. To explain the behavior of implementing agencies (and collectivities generally), therefore, the model outlined in Figure 2 gives us an additional set of questions to ask about the several role-occupants involved in the implementation processes.

(2). Gatekeepers and Proactive/Reactive Institutions

Two aspects of implementing institutions require special mention. First, various *gatekeepers* sometimes prevent implementing agencies from doing their job. For example, if a water pollution agency requires that a complainant fill out a specified complaint form before it will take action, dilatory action by clerks charged with the responsibility of sending out the forms to those requesting them may make it impossible for the agency to perform its prescribed tasks. That constitutes a gatekeeper failure.

An analogous failure sometimes affects various *reactive* implementing agencies. On the one hand, a *proactive* agency goes out looking for opportunities to implement the law, either by punishing violators or by helping people to achieve compliance by non-punitive means. On the other hand, a *reactive* agency waits until private citizens bring a complaint to their attention.

An ordinary civil court constitutes an archetypical reactive agency. If the existing law utilizes a reactive agency, a failure of implementation may arise because private citizens do not bring complaints to the agency. The researcher must then seek explanations for that citizen behavior.

d. *Conformity-Inducing Measures*

The specific technique of the law in channeling behavior consists in the application of conformity-inducing measures by implementing agencies. Although sometimes narrowly conceived as punishments, these run the whole range not only of punishments, but also of rewards, roundabout measures educational measures and others. These come in many forms: for example, in the criminal law, punishments; in contract and tort law, damages; in the law of agricultural development, frequently administering a land reform program or a program of price supports for agricultural products, or even running an agricultural bank to provide credit for farmers; in the law relating to industrial development, running programs for post-graduate education in mining engineering. Part of the explanation for behavior in the face of a specific law frequently lies in the sorts of conformity-inducing measures that the law authorizes or prescribes, and those actually imposed by the implementing agency.

4. Data Collection

The first stage of generating an explanation consists of proposing hypotheses to define its causes. Frequently these will seem inconsistent. In any event, proposing the hypotheses constitutes only the preliminary step. The second step consists in trying to find data to determine which of these hypotheses hold, and which do not. Experience teaches that confirming data usually does not help very much. The drafter must conscientiously look for facts that *prove her hypotheses wrong*, not data that prove them correct. A drafter must assure her client that she has searched for contrary data, but could not find any.

5. Summary

After defining the behavior of the role occupant that constitutes the social problem that the legislation will address, the next

task becomes to analyze its causes. That calls for an understanding of what constitutes causes and what constitutes conditions, an analysis of the framework of rules within which the role-occupant acts, and an analysis of the other, non-legal constraints and resources of the role-occupant's milieu, including the actions of the implementing agencies and the conformity-inducing measures those agencies impose. Only with that information can one properly proceed to the next step, that is, to discover an adequate legislative program that will likely resolve the original difficulty.

E. *The Proposed Legislation As a Solution*

Having explained the behavior that constitutes the social problem, your Memorandum must also demonstrate how your proposed legislation will solve the problem in the most efficient manner. The Memorandum must describe first, alternative possible solutions; second, the proposed legislation and how it addresses the causes earlier explicated; and third, how the proposed legislation will induce the behavior it prescribes. Finally, it must include a cost-benefit analysis of the proposed legislation.

1. Alternative Possible Solutions

The drafter can find alternative possible solutions from many sources, including history, comparative law, and other alternative solutions.

a. *History*

We learn through experience. The problem that our proposed legislation addresses rarely arises like Athena, fully dressed and fully grown at birth. As a society, more frequently than not, we have addressed the same problem, and tried other solutions for it. Addressing our history becomes a learning device. History teaches what has worked and what has not, and why. For example, landowners have polluted for many decades. States everywhere have tried to correct that problem. A review of these early efforts may help reveal what works, and what does not work. Because history has relevance at almost every stage of the argument, it becomes a matter of judgment where, as a matter of form, one ought to include it in the Memorandum.

b. *Comparative Law*

No law works the same in one place as another, for the arena of choice of its addresses in one place will never precisely duplicate the arena of choice elsewhere. We can, however, learn from the experience of other states and countries addressing analogous problems. This constitutes another way of learning from experience. A discussion of other jurisdiction's efforts to solve the problems will almost always turn up interesting material.

A mere description of the black-letter texts of foreign laws dealing with similar subject-matter never suffices. For all one knows, those laws fail in their countries of origin, and properly should serve as examples of what *not* to do. One must try to learn how the foregoing laws work in their own milieu. That analysis can inform the proposed solutions advanced in the Memorandum.

c. *Other Alternative Solutions*

What alternative solutions occurred to you? Why did you reject them in favor of the solution selected? Having described and discussed these alternative solutions and the merits or faults that the drafter finds in them, she should turn to her preferred solution.

2. General Description of the Proposed Bill

This section of the Memorandum describes the bill, and shows how its prescriptions on their face address the causes defined in the explanations section. It must do so in some detail, by discussing each significant provision and explaining the reason for its inclusion. In particular, this section should show how the proposed bill will address the causes identified in the Explanations section.

3. Will the Proposed Solution Likely Induce the Behavior It Prescribes?

Unless legislation induces the behavior it prescribes, it remains a paper tiger. To support her bill, the drafter must persuade the reader that the bill has teeth enough to induce the prescribed behavior. The drafter can do that by invoking the same categories that she used in explaining existing behavior in

face of laws, that is, the factors identified by ROCCIPI, the proposed implementing agency and the proposed conformity-inducing measures.

a. *ROCCIPI*

The ROCCIPI categories purport to direct attention to data that will likely explain why people behave as they do in the face of a rule of law. The categories also serve to help make *predictions* about how people will likely behave in the face of a rule of law, and to direct the search for data to support those predictions. The drafter should justify her proposed Bill in terms of those categories.

b. *The Proposed Implementing Agency*

The choice of implementing agency raises a number of issues:

(1) Type of agency;
(2) Old or new agency;
(3) Gatekeepers and proactive or reactive agency;
(4) Input and feedback processes;
(5) Discretion and its control; and
(6) Monitoring the implementing agency.

(1). *Type of Implementing Agency*

In general, only five types of implementing agencies exist: courts, non-judicial tribunals, departments/administrative agencies, public corporations and those which contract out to private business. The memorandum should include a brief justification for the choice of agency.

(2). *Choice of Old or New Implementation Institution*

Existing institutions come complete with existing personnel and procedures. They may or may not meet the precise demands of the new legislation. On the other hand, the start-up costs of the new program loom greater when a new agency will implement it. The memorandum should justify the choice made.

(3). *Gatekeepers and Reactive or Proactive Agency*

The researcher should consider the various potential gate-

keepers that may impede the work of the agency, and the relative desirability that the agency should operate in a reactive or a proactive mode.[11]

(4). *Input and Feedback Processes*

Decisions depend in part upon who supplies information, theories, issues and personnel. For implementing agencies to produce decisions appropriate to the legislation, the bill must ensure that appropriate inputs and feedbacks enter the decision-making process. This usually requires a consideration of who may and who will supply input.

(5). *Discretion and Its Control*

The first element in the ROCCIPI mnemonic consists of the rule that defines behavior. If that rule gives the administrative agency broad discretion, the potential for abuse always exists. If the rule too tightly confines the agency, perhaps the rule will make it impossible for agency experimentation to find new ways to solve the problems the agency must address. Where appropriate, the Memorandum should address the question of discretion and its control.

(6). *Monitoring the Implementing Agency*

Implementing agencies require monitoring, or else they too may disobey the law. What provisions does the bill make for appeal or other review of implementing agency decisions? To what extent does that mean that the appellate institution will substitute its judgments for the primary agency? Why?

c. *Conformity-Inducing Measures*

The success of the new legislation depends in part upon whether, if implemented, the proposed new conformity-inducing measures will succeed in inducing the desired new behavior. The drafter must justify why she chose the measures she did, and not others. These enter into the calculation of costs and benefits.

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[11] See *supra*, p. 336.

4. Costs and Benefits

The drafter must make an estimate of the costs and benefits of the new law, including both those susceptible of money evaluation, those more difficult to quantify, and costs and benefits to various social groups as well as to the Government (that is, she should identify winners and losers). She should compare that estimate with the costs and benefits of doing nothing, and with the costs and benefits of the leading alternative candidate solutions.

a. *Dollars and Cents*

How much will the new program cost in budgetary terms? Remember, every time you add a new cause of action to an existing agency, that adds to the cost of running the agency (or court). Consider both capital costs and running expenses of the proposed program.

b. *Social Costs and Benefits*

Budgetary costs and benefits do not exhaust the costs and benefits of a program. In particular, be careful every time you propose creating a new bureaucratic structure. Whatever the monetary costs of a new bureaucracy, the very creation of more bureaucracies make some people shudder. Your bill may demand it, but surely you must justify it.

In her enthusiasm for her proposed bill, a drafter can very easily overlook social costs attendant upon it. For example, in drafting a bill to encourage economic activity, a drafter can easily forget to include in her cost-benefit analysis environmental costs. Similarly in her effort to prevent social evils like corruption or drug abuse, a drafter can too easily overlook human rights impairments embodied in her bill. A drafter must take special care to identify the negative as well as the positive aspects of her proposed legislation.

c. *Who Benefits? Who Loses?*

In a conflict society, intrinsically containing contradictory and conflicting interests, any proposition prescribing behavior hits different people differently. It must favor some and disadvantage others. Even a law changing driving from the right hand side to the left hand side of the road disadvantages those who

now own automobiles. A Memorandum ought to consider who benefits and who loses.

d. *Consequences for the Law*

One of the costs and benefits of new legislation consists of the changes it will bring in the existing body of law. For any law, those concerned with it—lawyers, bureaucrats, judges, persons engaged in the business—have learned the old law. Changing the law creates a host of problems. So far as possible, the drafter ought to identify the changes wrought in the law by the new bill, and assess the extent to which that change itself constitutes a cost that the accounting should include in the reckoning.

e. *Comparative Costs and Benefits: the Status Quo as an Alternative*

The drafter must demonstrate that her proposed bill has a greater net benefit than the alternatives. That requires at least a comparison with the costs of not changing the existing law—that is, of doing nothing. Frequently, it turns out that no proposal for solution will really improve the situation. In that case, a drafter may want to consider an incrementalist solution.[12] Having considered there solutions, the drafter must turn to the last step of the problem-solving methodology, that is, implementing and monitoring the new legislation.

f. *Monitoring Implementation*

We learn from experience. Unless we monitor a law, we never learn whether the explanations and solutions adopted serve the turn. Unless we so learn, not only can we never improve the legislation, but we can never benefit from experience in an organized way. All legislation should contain provisions which mandate periodic assessment of its performance. That can take a variety of forms: reports to the legislature by an administrative agency; a "sunset clause"; building in a special commission to assess the legislation after a specified period of time; and so forth. The memorandum should describe the monitoring device employed, and justify its use.

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[12] *See supra*, p. 326.

IV. Conclusion

This paper has put forward ideas that a drafter ought to consider in preparing a Memorandum of Law to justify proposed legislation, both in terms of style and content. They amount to a drafter's checklist. That same check list, however, can also serve her in shaping the research that she must undertake to develop the legislation. If the drafter bears these considerations in mind when thinking about the new legislation, she will likely find that more effective legislation will result.