

BOSTON UNIVERSITY LEGISLATIVE POLICY AND DRAFTING CLINIC

SPRING, 2010

SYLLABUS FOR DRAFTERS

NOTES:

- (1) This syllabus, like all their ilk, is a work in progress. We may – collectively – amend it as seems desirable.
- (2) Especially if we (collectively) elect to go with the S.A. possibility, we must amend the schedule of submission of papers, noted below at various points.

WEEK 1.

CLASS 1. Tuesday, January 12: Using Law to Solve Problems.

In class we will:

- Describe the organization of the Clinic.
- Discuss the issues suggested below.

Preliminarily, consider the following:

“A moth flutters up to the Wise Old Owl. ‘Owl,’ she says, plaintively. ‘The Fall nights are already cold, and getting colder. Winter comes apace. I know I shall not live through that cold, dark winter -- unless you help me. Oh, tell me, Wise Old Owl, what shall I do? Help me!’

WOO answers in a wise, old voice: ‘Child, that is not a problem. Turn yourself into a bee, and hibernate through the long winter months.’

The moth stops sobbing, sighs with relief, and turns away. Suddenly she flutters back, and speaks again. ‘Wise Old Owl, *how* do I turn myself into a bee?’

WOO looks down at her for a moment, wisely, then shrugs, and answers:
‘Ask the implementation guys. I do Policy.’”

(We will discuss the relevance of this piece of profound wisdom before the end of this first class meeting.)

Be prepared to discuss:

1. “A few years ago, a severe earthquake hit Turkey. It killed tens of thousands of people as high-rise structures in major cities fell down. Emergency services –ambulances, hospitals, emergency rescue crews, the supply of emergency food and shelter, etc. -- worked as well as could be expected. Nevertheless, only a few days after the quake, mass protests developed in major cities.

“You serve as a member of Turkey’s legislature. What sort of legislation might you introduce to address the people’s concerns?”

2. What functions does the drafter perform in the bill-creating process? Obviously, the drafter chains together the words that constitute the bill. Does the drafter also *design* the detailed substance of the bill? Can one accurately assert that the legislative drafter does more than merely chain words together. In practice, she plays an important part in the *policy-making* process?

3. Elsewhere we have written:

“For a metaphor for the drafter’s role in the law-making process, consider the architect’s role designing a family’s new house:

A family identifies a poor dwelling as a problem that requires a solution. It decides on its ‘policy’: to build a new house. At that point, the family members can define the word ‘house’ only in general terms. They retain an architect. They discuss budget, the rooms needed, the preferred style of architecture, the location of the house on the land, a myriad of issues. The architect produces plans and specifications that define their new home in detail. Now, if one asks the family what they mean by the word ‘house’ (that is, of what their family ‘policy’ consists) they point to the plans and specifications.

“Who determined the family’s ‘policy’: The family or the architect?”

Consider this hypothetical: A client instructs a drafter to develop legislation to make it likely that a woman, imprisoned for prostitution, on her release from jail does not return to prostitution. The client works out a detailed bill, requiring the releasing authority to deliver the woman to a hostel or similar refuge dedicated to the rehabilitation of former prostitutes. Who developed the policy of requiring physical delivery to a protective hostel – the client or the drafter? Is it a stretch to say that, “just as an architect does not serve as a mere draftsman, skilled only in making accurate blueprints, the legislative drafter does not serve merely as a mechanic who cobbles words together into an acceptable ‘legal’ form. Rather, a person who *designs* the detailed substantive rules required to ameliorate a specified social problem – usually denoted as a ‘legislative drafter’ – serves as a key policy-maker?”

This Clinic rests on the proposition that a legislator *of course* usually uses legislation instrumentally, i.e., for a purpose extrinsic of the law itself. In this Clinic we do not consider ‘symbolic’ law. By that term we mean legislation enacted only for the sake of enacting the legislation, i.e., for its ‘symbolic’ effect.

Consider, for example, a statute prohibiting a man from going through the ceremony of marriage with a second wife, while his first wife lives and the first marriage still in force – i.e., committing the crime of bigamy. Who is legally injured by that second ‘marriage’? Not the first wife; the second ‘marriage’ is void. Not the inheritance claims of the children of the first marriage; the second marriage being void, the children of the second marriage are illegitimate. Nor does setting up a household with the second ‘wife’ constitute an offense recognized by the law. If he does not go through a second ceremony of marriage, a married man who keeps a mistress violates no positive law. No wonder that an English judge once proclaimed that bigamy was a crime “against the sacred name of marriage.” Bigamy constitutes ‘symbolic’ law.

Or consider the 18th Amendment to the U.S. Constitution (the prohibition amendment). Scholarship has demonstrated that that amendment constituted the dying gasp of a decaying rural elite, who, to legitimate their position, wanted some assertion of their superiority. They sought – and found – it in an amendment embodying a key doctrine of their own, largely hard-shell Baptist, morality. Nobody apparently expected the Amendment significantly to change behaviors. None of the Amendment's proponents advocated spending anything close to the resources required to enforce the Amendment. Alcohol consumption did not significantly decrease as a result of its adoption. Prohibition became the very archetype of 'symbolic' law.

Consider the current spate of laws against same-sex marriage, declaring that 'marriage' means a marriage between one man and one woman. Would you characterize these as 'instrumental' or 'symbolic'?

In this Clinic we do not consider 'symbolic' law. We instead focus exclusively on the larger and more significant category of truly 'instrumental' law.

Instrumental laws seek to change the behaviors of its addressees. Many scholars and others assert that the instrumental use of law is either impossible, immoral, or useless (see handout). Do you agree or disagree? Why?

CLASS 2. Thursday, January 14: The Problem-Solving Methodology.

Read for class:

- MANUAL: read pp. 85-93; 115-123.
- Handbook: read Ch. 1, Ch. 4, and "Developing the Report" (from Ch. 5).
- Read "The Research Report" (under 'Course Documents' on the website), under the headings "The Introduction to the Research Report" and "The Statement of the Difficulty the Bill will Address." Consider especially the sample research reports set out in these two sections of this reading.

Be prepared to discuss:

1. Consider the following problem:

“A client instructs a drafter as follows: ‘The Charles River may not unfairly be described as an open-air sewer. It is disgustingly polluted, containing a mess of mixed pollutants – household garbage, sewerage, oil, industrial chemicals, paint, harmful mineral residues (e.g., lead), PCBs, and many, many more – with all sorts of adverse consequences for the community. Please prepare legislation to deal with this problem. Please have the bill on my desk by Monday.’

If you were the drafter, what preliminary questions would you ask the client?

2. What do you understand constitute the four steps of the problem-solving methodology? What alternative methodologies might you conceive? (Hint: note that problem-solving does not include a step for articulating the policy-maker’s ‘vision’ with respect to the matter at hand.)
3. Legislation, as does the law generally, consists of a set of commands, permissions and prohibitions – i.e., a set of statements about what *ought* to be the case. (Frequently policy-makers define these in a ‘vision’ statement.) For many, these imbricate ‘values.’ For many, that they do so implies that the drafter should first specify the ‘end’ or ‘objective’ of the legislation, and then develop the means to accomplish that end. The problem-solving methodology, however, begins with a detailed description of what *is* the case. It proceeds from that to propositions about what *ought* to be the case. What arguments might be made *for* and *against* a drafting agenda that begins not with a ‘vision’ but with a description of the present situation?
4. What do you conceive as the purpose of the checklist at MANUAL, pp. 118 et seq.? How might you use that checklist in writing your own research report?

5. Does that checklist reflect the four steps of the problem-solving methodology? How or how not?
6. “Properly understood, the problem-solving methodology serves three distinct purposes. It guides a drafter in developing a legislative solution for a specified social problem. It guides a legislator or a citizen in assessing legislation. Finally, it guides the proponent of a bill in writing a justification for legislation.” Discuss.
7. Note that the problem-solving methodology asks two questions concerning the social problem that it addresses: What constitute its ‘surface appearance’ and of ‘whose and what behaviors’ does it consist? What do you understand distinguishes those two questions? Why does the methodology include them both?
8. Does the “Introduction” to the sample research report from Pakistan, included in the assigned readings, adequately:
 - a. summarize, in *two*, maximum *three* sentences, the social problem which the bill will target, and the bill’s proposed solution;
 - b. describe the relevant information about the larger country-specific context within which the social problem has arisen (may include history, comparative law and experience);

[Query: What is the relevance of this section? What information should the author include? Why?]

- c. show how that the bill may help to resolve a *part* of the country’s larger social problems, especially if the law-makers incorporate it into a legislative program designed to alter or eliminate the other aspects of those larger problems; and
- d. describe the problem-solving methodology, and provide a ‘table of contents’ paragraph, which, following the problem-solving methodology, informs readers of the underlying logic of the research report’s subsequent parts? (NOTE: You can usually usefully combine in

a single paragraph these two topics – methodology and ‘table of contents’.)

[Query: What is the purpose of this section? Is its role clear in the paper?]

9. Why does the problem-solving methodology include two items: The social problem’s ‘surface appearance’, and ‘whose and what behaviors’ constitute that problem?
10. Does the sample research report included in the readings under the heading “Statement of the Difficulty the Bill Will Address” section adequately:
 - a. describe the social problem’s surface appearance, including relevant facts as to its nature and scope;
 - b. describe the relevant evidence as to whose and what behaviors comprise the social problem – that is, the institutions that comprise it (including both the primary role occupant(s) and the implementing agen(cies); and
 - c. provide facts as to who benefits and who suffers as a result of the social problem?
11. Frequently, it seems that the behavior that constitutes the social problem addressed consists of a *failure* to take appropriate action. For example:

Your client asks you prepare legislation to solve the following social problem:

“The credit card companies have launched an assault on college students, loading them up with credit cards. Those young people have never had a course in the management of personal credit, not in grade school, not in high school, not in College. Please prepare legislation that will equip young college students with knowledge about how to manage their personal credit, so that we can avoid the pitiful lifelong consequences to those who do not know how to do that – stifling debt

burdens, bankruptcy, poverty. One more thing: I must have the bill on my desk by Monday.”

In that example, how did the client state the *narrow* social problem at issue?

To state the social problem as the *absence* of the solution, however, leads to an ‘ends-means’ methodology. The social problem becomes the *failure* to take action; the ‘end’ becomes to achieve the opposite of the current situation; the solution becomes to take the action that to date relevant actors have failed to take. How to state the social problem and the relevant behaviors to avoid falling into that ‘ends-means’ trap? In the example given, how might the drafter state ‘whose and what behavior’ constitutes the social problem – in the affirmative, not in the negative? (*Suggestion: Action always involved choice. Try stating the choice the actor makes when she fails to do something.*)

12. Consider two models for dealing with a client: The wise, grey, behind-the-scenes councilor who, under the guise of giving advice, in fact tells the Sovereign what to do, and the ‘waitress,’ who gives the Sovereign a list of alternatives, making no recommendation. Which of these models seems appropriate for the legislative drafter?

ASSIGNMENTS DUE: Completed by Tuesday January 19, 5pm, latest:

- Schedule client interview.
- Draft interview questions, and vet with editor.
- Conduct background research on your topic.

WEEK 2.

Tuesday, January 19: NO CLASS – MONDAY SCHEDULE

CLASS 3. Thursday, January 21: Explaining Behavior – The ROCCIPI Factors.

Read for class:

- Manual: Chs. 1 and 2; Ch. 4, pp. 93-99.
- Handbook: Ch. 3.
- Read, “The Research Report” (under ‘Course Documents’ on the website), under the heading “Explaining the Behavior of Primary Role Occupants.” Consider especially the sample research report set out in this section of this reading.

Be prepared to discuss:

1. In a ‘feed-in tariff’ system, an individual electricity user may install voltaic cells to provide for the individual’s own use. The feed-in tariff law requires the electricity distribution company to buy and distribute to the entire grid any surplus electricity generated by those solar panels. For that, the grid company pays a price as fixed by law (or, in some versions, by the Public Utilities Commission), at a rate sufficient to pay back the capital investment in the solar panels over twenty years, with reasonable interest. Since solar is more expensive to install than carbon-based fuel generators, the law also provides for a small surcharge on everyone’s electricity bill to reimburse the distribution company for that extra cost. Germany has had such a system for a number of years; it is said that 25% of Germany’s electricity is now generated by solar energy.)

Imagine yourself as a lawyer who has never drafted legislation and has never studied legislative drafting. Your client instructs you to draft a bill providing for a ‘feed-in tariff’ for solar electrical energy – and to have it on his desk by Monday. How do you think you would go about drafting that bill?

2. What is the significance for the drafter of the proposition that “a social problem by definition concerns a problematic institution.”
3. Discuss the importance of the ‘explanations’ step in the problem-solving methodology for (a) designing a bill and (b) justifying a bill.

4. Discuss how the research reports in the assigned readings might have used the ROCCIPi categories appropriately to:
 - a. consider the several possible causal hypotheses to *explain* the problematic behaviors of each set of *primary role occupants*, with sufficient evidence to warrant those hypotheses;
 - b. consider the possible causal hypotheses that may *explain* the problematic behaviors of each set of *implementing agency officials*; and
 - c. to *predict* the behaviors the new bill will likely induce.
5. A research report on the problem of the feed-in tariff problem states that “the explanation for the very low rate of homeowner-installed ‘green’ electrical generators lies in part in the absence of a law providing financial incentives to the homeowner to install ‘green’ generators.” Critique that formulation.
6. The same research report states that “A second explanation for the very low rate of homeowner-installed ‘green’ electrical generators lies in the absence of knowledge by the homeowners about how to go about having ‘green’ generators installed to supply their domestic needs.” Critique that formulation.
7. What do you conceive constitutes the function of the ROCCIPi categories in the problem-solving methodology?
8. Can you suggest at least one other category to add to the seven specified in the ROCCIPi mnemonic?
9. In a well-known paper on “the semi-autonomous social field,” Sally Falk Moore, an anthropologist with an interest in the sociology of law, holds that the commands of instrumental law so frequently fail to induce their prescribed behaviors in large part because we all behave partly in response to norms of behavior that we have learned as part of a ‘semi-autonomous social field.’ For example, many norms define our roles as children of our parents, part of the semi-autonomous social field of the

family. We likely obey those ingrained norms, and not necessarily the norms prescribed by law (nor even the claims of material incentives, as Law and Economics frequently suggests constitutes the principal explanation for human behaviors). Is that assertion consonant with the claims about why people behave as they do made in the MANUAL? (Some economists make a similar assertion, *sub nom.* “embedded norms’.) Under what category of the ROCCIPI mnemonic, if any, would you subsume Moore’s claim?

ASSIGNMENT DUE:

- You should have met with your client by the end of the week. After meeting with your client, write your “scope note.” The scope note is due to the instructors, and your editor, within 48 hours of interview.

WEEK 3.

CLASS 4. Tuesday, January 26: Explaining the Decision-Making Process within a Complex Organization.

Read for class:

- MANUAL, pp. 126-140.

Be prepared to discuss:

1. “To prove effective, a law must specify not only the behaviors of its primary addressee, but also the behaviors of the relevant implementing agency.”
2. A law states in its entirety that “It is an offense, punishable by a fine of not more than fifty dollars, to spit on the sidewalk within the city limits.” Is that law complete? In what sense?
3. Criticize the following statement: “The Enron disaster occurred because Enron was greedy.”
4. A great many decisions affecting citizens result from action of what some call “street-level bureaucrats”: The policeman on a lonely night

beat, the teacher in a public school classroom with no principal or supervisor in the classroom, the social worker interviewing a crippled applicant for welfare services in the applicant's home. Where do these 'street level bureaucrats' fit into the model of decision-making by a complex organization? To what extent *can* the commands, permissions and prohibitions of the law affect the behavior of those street level bureaucrats?

5. Your client gives you a newspaper story. It states that, when vagrants sleep in a park the police beat them with their clubs quite brutally – ostensibly, to waken them. A local NGO has called for legislation to prevent the practice. The client asks you to draft the necessary legislation – and to have the bill on his desk by Monday. How would you analyze the problem? What possible solutions might you suggest?

ASSIGNMENTS DUE:

- Your editor and professors will provide feedback on your scope note at the front of the week. We will set aside some time during this session to discuss your projects. This discussion will largely focus on answering any questions you may have about your research report's "general context" section, who your role occupants are, and which behaviors you need to describe. We will discuss probable primary and secondary role occupants.
- **Your Social Problem statement is due Tuesday, January 26.**

CLASS 5. Thursday, January 28: Designing and Evaluating a Solution.

Read for class:

- MANUAL: Ch. 4, pp. 99-115; Ch. 5, pp. 141-166.
- Handbook: in Ch 3, review chart "Using Explanations to Design Solutions"; in Ch 5, "A Guide to Preparing a Research Report" and "Outline of a Research Report."

Be prepared to discuss:

1. What steps ought your research report take in justifying the solution embodied in your bill?
2. Why is it important to include a menu of potential alternative solutions? Where might one go to find those alternatives?
3. Alan Watson has written extensively about “legal transplants.” The history of the development of the law, he holds, consists of innumerable instances of copying law from one jurisdiction to another – i.e., what Watson denotes as ‘legal transplants.’ ‘Society,’ he holds, does not determine the content of the law. On the contrary, since the earliest days of written history, legal professionals have determined the content of law. All but invariably, historically, those professionals have relied on legal transplants.

Watson is a profound comparative law scholar. He certainly proves the point that a great deal of law has had its origins in legal transplants. He makes no claim that legal transplants are wise or foolish, or that in one sense or another they ‘work’ or do not ‘work.’ He only asserts, as an historian, that the law has changed by a process of legal transplants, and that legal professionals – not ‘society’ – determined which law was transplanted, where and when.

Do you agree or disagree with Watson? Why or why not? As a drafter, what can you learn from Watson? What is the proper place of comparative law in the bill-designing and bill-drafting process?

4. Consider the following problem:

“Your client instructs you that it appears that post-partum depression seems far more wide-spread than previously thought. (Post-partum depression constitutes a psychological state of severe depression that many mothers go through immediately and shortly after giving birth. It is not unknown to lead to suicide by the post-natal mother, or her murder of her new-born child.) He asks you to prepare

legislation to ameliorate the problem (and, as usual, to have the bill on his desk by Monday). Your research discloses the following:

- a. In Boston about 25% of all post-natal mothers suffer some degree of post-partum depression. About 1% of those mothers suffer dangerously severe depression.
- b. Post-partum mothers have very little accurate information about the incidence or symptoms of post-partum depression.
- c. Most obstetricians have had little or no training in diagnosing or treating post-partum depression.
- d. Obstetricians typically conduct a physical examination of the post-natal mother immediately prior to discharge from hospital, and six weeks thereafter. In that examination, only very exceptionally does the OB-GYN turn her attention to the symptoms of post-partum depression.
- e. Like other MDs, their professional body requires an obstetrician to attend a stated number of hours of educational courses or seminar each year.”

How would you state the social problem at issue? Whose and what behavior constitutes that problem? How would you explain those behaviors? What alternative potential remedies might you suggest (and do not omit consideration of the agency to implement your solution!) How would you choose among those alternatives? How would you justify your choice?

How would you defend your choice of a solution for the post-partum depression bill in terms of cost-benefit analysis? Could you use ‘soft law’ to solve it? How might a soft law solution work – or not work?

5. Your client instructs you as follows:

“Milton collects for recycling about 80% of recyclable material. Boston recovers only 9%. Please draft legislation to improve our

recovery of recyclable materials – and do have the bill on my desk on Monday.”

Research discloses that Boston has three centers that receive materials for recycling, all relatively remote from districts of heavy residential occupancy. These are open Monday-Friday 8 a.m. to 5 p.m., holidays excepted. The Street Cleaning Department collects rubbish from residences and multi-family dwellings once weekly, but the collectors make no distinction between recyclables and other rubbish. Milton has very few multi-family residences; Boston has many. Milton requires its residents to place their recyclables into distinctive transparent plastic bags, so that a rubbish collector can see what it contains. (The bags are quite large. Only the Town of Milton sells those bags. They cost about \$1 each.)

What alternative solutions might you propose to solve the problem? How did you develop those alternatives?

6. In the Boston Recyclable hypothetical, can you suggest a ‘soft law’ solution? What potential might there be for solving the problem adequately with a ‘soft law’ solution?
7. An adequate analysis of a bill usually requires two sorts of cost-benefit analyses. One might be termed a ‘*pill-counters*’ cost benefit analysis: How much will a proposed law cost government out-of-pocket? How much in dollars-and-cents will it return to government? Another kind of cost-benefit analysis might be termed a *social* cost-benefit analysis: What constitute the *social* costs and benefits of the proposed bill? That question raises a very intractable issue: How to assign monetized costs and benefits to essentially intangible items?

For example, consider the Boston Recyclable hypothetical. What elements would you include in a cost-benefit analysis of the alternative potential solutions? For example, suppose one were to include among the alternatives the development of street-corner collection centers to receive recyclables. How might a *pill-counter* calculate the costs and benefits of such a center? How might one calculate its *social* costs and benefits?

Now suppose Boston perceives an urgent need both for new park facilities and for new hospital facilities, but must choose between them. For a social cost-benefit analysis of these two proposals, how might you assign a dollar value to their respective benefits?

ASSIGNMENTS DUE:

- Statement of social problem for your project – Due electronically, Monday, January 25.
- Meet with editor to discuss problem statement. Based on editor's comments, begin outlining and researching research report.

WEEK 4.

CLASS 6. Tuesday, February 2: Designing and Justifying an Intransitive Law

Read for class:

- MANUAL: Ch. 5, pp. 155-166; Ch. 8, pp. 207-209.
- Handbook: in Ch. 6, "The Architecture of a Bill."

Be prepared to discuss:

1. What do you understand by a 'transitive' law'? By an 'intransitive' law?
2. Before deciding to draft an intransitive law, what considerations ought a drafter take into account?
3. A perennial problem: The client wants wide-scale institutional change (e.g., in the health care delivery system, or in the way in which government can control large financial institutions.) In the nature of things, however, legislatures have great difficulty in dealing with large bills. What devices (of which intransitive laws constitute one) might you suggest to resolve the 'drafting small for large institutional change' dilemma?
4. An intransitive law requires an authority to make rules. That requires the existence of the authority. Frequently the law creates an agency to serve

as the rule-making authority. What factors ought one consider in a bill creating such an agency?

5. A client instructs a drafter as follows: “The State University lies within my district. It appears that although the University has of course employed professional staff since its earliest days, it has been doing so, and setting salaries and tenuring professors, in a hit-and-miss fashion. Its President has sent me a letter stating that it would make it easier to make and impose those rules if the University had explicit legal power to do so. She therefore requests that the University law be amended to include provisions granting the University the power to make rules concerning tenure and conditions of employment of the teaching staff. What factors should the University take into account in making those rules? I have a meeting with the President set for Tuesday, so please let me have your answer on Monday latest.” How do you reply to the client?
6. The client sends further instructions: “In your reply to my earlier letter, please let me have your views on the procedures by which the University should adopt these rules, and especially, what groups or categories of persons should in one sense or another participate in the rule-making process, and how to make that participation *work*.” How do you reply to the client’s new instructions?

ASSIGNMENT DUE:

- Submit current research report draft to your editor. This draft should include updated descriptions of the problematic behaviors, “explanations” for why each role occupant does what it does in the face of the law, and a *basic* solution. (Focus on filling in the explanations this week.)

NOTE:

We will have our first Critique Group Tuesday, 16 March, to discuss the first research report and bill. The Critique Group draft research report and bill for that session are due 5:00 p.m., Tuesday, 9 March. (That is in the middle of Spring break. If you are a drafter whose bill and research report the Critique Groups will discuss on 16 March or 18 March, be sure to send every member of your group your Critique Group draft of your bill and research report on or

before Tuesday, 9 March!) (More on the organization and schedule of Critique Groups later).

FURTHER NOTE:

In general, we can be reasonable if for good reason you miss one or another of the dates on which an assignment is due, *with one exception*: This clinical course largely rests on the Critique Group meetings. Those meetings in turn depend crucially on your getting your Critique Group draft out to the members of the Group in time for them to read it and to prepare their comments. If you fail to get your research report and draft bill to the members of your Critique Group on the specified date, you will discover an unhappy truth: **That no matter how reasonable your excuse may appear, with respect to the sacred and indeed holy character of your Critique Group draft due date, we become completely UNREASONABLE!**

CLASS 7. Thursday, February 4: The research report: Capturing evidence and questions of form.

Reading for class:

- MANUAL, Chs. 6 and 7.

Be prepared to discuss:

1. Problems you have encountered in capturing evidence for your research report.
2. Problems you have encountered in connection with the form of the research report.

WEEK 5.

CLASS 8. Tuesday, February 9: In a Bill, the Unity of Form and Substance / Moving from Research to a Bill: The Nine-Point Checklist for Legislative Completeness ('RIC-D-FRETT').

Read for class:

- MANUAL, Ch. 8, pp. 205-229.

Be prepared to discuss:

I. THE UNITY OF FORM AND CONTENT

You sit as members of the local City Council. At a meeting, general agreement exists that dogs in the City park constitute a nuisance, and should be banned unless on a leash. The Council members offer their several proposed versions of the bill. As a Council member, what version would you offer?

II. MOVING FROM RESEARCH REPORT TO A BILL: THE RIC-D-FRETT CHECKLIST

[**NOTE:** We developed the RIC-D-FRET analysis since we wrote the *Manual*.]

The 'RIC-D-FRETT checklist purports to help you ensure that your proposed bill *taken in conjunction with existing law* includes the commands, prohibitions and permissions necessary to make it likely that your bill will induce the functions a complete legislative program must include. That does not mean that a drafter must include these functions in a single bill. Many, usually most of them the drafter will find covered by existing law. The drafter must search existing law, ascertain whether it covers the function involved, and, given the new task, whether the existing law suffices.

For example, suppose that the drafter proposes to use existing courts as the implementing agency. The 'I' in 'RIC-D-FRETT' refers to rules directing their addressees to organize and operate the implementing agency. In the suggested hypothetical (below), probably the existing law on the organization of the courts (detailing the appointment of court clerks, and stenographers, assignment of judges, etc) adequately covers the matter. The drafter need not include those matters in the new bill because existing law already covers these functions.

The RIC-D-FRETT checklist asks: Are there in existing law or in the new law adequate prescriptive statements (rules) addressed to the following:

- ✓ **ROLE OCCUPANT** - a person to change whose behavior constitutes the bill's principal purpose

- ✓ IMPLEMENTING AGENCY – GENERAL Someplace in the law, do adequate rules exist to make it likely that the relevant agency exists and functions?
- ✓ CONFORMITY-INDUCING MEASURES – Measures implemented by a responsible agency. Do Rules exist that direct an implementing agency to take actions to make it likely that the role occupant does what the new rules prescribe?
- ✓ DISPUTE SETTLEMENT – Rules establishing a dispute settlement institution to deal with disputes arising under the new legislative regime, and prescribing its procedures.
- ✓ FUNDING – Rules concerning the creation, organization and operation of a funding agency, and providing for the funding of the new function.
- ✓ RULE-MAKING—Rules empowering some official or agency with power to make relevant administrative regulations.
- ✓ EVALUATION -- Rules to make it likely that some authority monitors and evaluates the new law, and directing it to do so.
- ✓ TRANSITIONAL PROVISIONS –Provisions concerning the transition from the present state of affairs to the state of affairs brought about by the new bill.
- ✓ TECHNICAL – Rules addressed to officials who keep the corpus of the law in order (for example, coming-into-force provisions; amendments and repeals required by enactment of the new bill, savings clauses, etc.).

For example: A legislator has received complaints from constituents about oily waste appearing in the Charles River. She instructs you to prepare a law addressing that problem. After research, you determine that some of the oil in the Charles River comes from car owners who themselves change the lubricating oil in their cars. In doing so, they let the old oil drain into the street. It finds its way to the storm sewers and thence into the river. You learn that the same problem came to a head some years ago. Then, the legislature enacted a law (a) prohibiting a person from draining oil from an automobile or motorcycle into a street, and (b) requiring a gas station, on pain of a small fine, to maintain an uncovered barrel into which anyone could pour used oil. You also discover that that law failed to specify an implementing agency. As a result, less than 5% of gas stations actually maintain the required waste oil disposal barrel. What provisions ought you,

as the drafter, include in a bill to ameliorate the problem of oil-in-the-Charles? Try the RIC-D-FRETT checklist:

1. *Rules addressed to the role occupant*: Laws already exist prohibiting discharge of oil into the streets, and requiring a gas station to maintain a waste oil disposal barrel for public use.
2. *Rules addressed to the organization and general operation of the implementing agency*: Under other laws, the Department of Consumer Affairs inspects gas stations regularly to ascertain that their pumps accurately measure the amount of gas dispensed. (That is the only state agency that regularly inspects gas stations.) Adequate laws already exist concerning the existence, internal organization and procedures of that Department.
3. *Conformity-inducing measures by the implementing agencies*: New rules seem required instructing the Department, on its regular inspection of a station's gas pumps, to include in its report a notation that the gas station on the occasion of its inspection had a waste oil disposal barrel available for public use.
4. *Dispute settlement*: The courts serve as the default dispute settlement agency. They seem adequate to resolve disputes concerning the existence of waste oil disposal barrels.
5. *Funding*: The Department is already funded in the Massachusetts state budget. If the new function causes any extra expense (which seems doubtful), existing laws concerning the budgeting process seem adequate to include that new function.
6. *Rule-making (i.e., 'subordinate legislation')*: The Department may find it necessary to issue rules addressed to gas stations concerning such matters as the placing of the waste oil disposal barrel conveniently to public access, limiting the amount that any one person can place in that barrel, and the like. The new bill should contain a provision expressly giving that power to the Department, and stating the procedures and criteria by which it may make those rules.

7. *Monitoring and evaluation.* The drafter of the new bill should include a provision to ensure that the legislature receives periodic evaluations of how the new law works (perhaps an annual report to the legislature by the Secretary for Consumer Affairs?)
8. *Transitional clauses:* Does the new law need a transitional provision? (It does not seem likely).
9. *'Technical':* Other law provides a default system for bringing a law into force; it seems satisfactory here. What definitions does the bill need? To ensure that existing laws harmonize with the new law, do they require consequential amendments? Does this law need a scope of application clause?

III. THE ARCHITECTURE FOR YOUR BILL: OUTLINING

An important part of your task as a drafter – conventionally, its First Commandment – is to *communicate* to the addressees of your new law the instructions that the bill contains. (That last sentence includes two constituent prescriptions – draft precisely, and draft unambiguously. We will be spending considerable time learning rules for doing that.)

The purpose of that First Commandment, of course, consists in making it likely that your readers will *understand* what behaviors the new law requires of them. (Without that understanding, whether those reader conform their behaviors to the new law rests in the gods of chance.) The architecture of your bill constitutes the first building block towards making that understanding more probable.

ASSIGNMENTS DUE: Electronically by 5pm, Monday, February 1:

- RIC-D-FRETT analysis of your project
- the preliminary outline of your bill

CLASS 9. Thursday, February 11: Drafting for the *Who* and the *What*, Part I.

Read for class:

- MANUAL, Ch. 9, pp. 231-241.

Be prepared to discuss:

- What is the content of a legislative sentence? What rules guide a drafter in specifying the '*Who*'?

WEEK 6.

CLASS 10. Tuesday, February 16: Drafting for the *Who* and the *What*, Part II.

Read for class:

- MANUAL, Chs. 9 and 10, pp. 241-255.

Be prepared to discuss:

- What rules guide a drafter in specifying the '*What*'?

CLASS 11. Thursday, February 18: Drafting for the *Who* and the *What*, Part I.

Review for class:

- MANUAL, Chs. 9 and 10.

Be prepared to discuss:

- What rules guide a drafter in specifying the '*Who*'?

WEEK 7.

CLASS 12. Tuesday, February 23: Drafting for the *Who* and the *What*, Part II.

Review for class:

- MANUAL, Chs. 9 and 10.

Be prepared to discuss:

- What rules guide a drafter in specifying the '*What*'?

CLASS 13. Thursday, February 11. Drafting for the *Who* and the *What*, Part I.

Review for class:

- MANUAL, Ch. 9

Be prepared to discuss:

- What is the content of a legislative sentence? What rules guide a drafter in specifying the '*Who*'?

WEEK 8.

CLASS 14. Tuesday, February 16. Drafting for the *Who* and the *What*, Part II.

Review for class:

- MANUAL, Chs. 9 and 10

Be prepared to discuss:

- What rules guide a drafter in specifying the '*What*'?

CLASS 15. Thursday, February 18. Drafting for the *Who* and the *What*, Part III.

Read for class:

- Review MANUAL, Chapters 9 and 10,

WEEK 9.

CLASS 16. Tuesday, February 23: Ensuring clarity and avoiding ambiguity, Part I.

Review for class:

- MANUAL, Chapter 10.

Be prepared to discuss:

- Issues raised in Chapter 10.

CLASS 17. Thursday, February 25: Ensuring clarity and avoiding ambiguity, Part II.

Review for class:

- MANUAL, Chapter 10.

Be prepared to discuss:

- Issues raised in Chapter 10.

WEEK 10 TO END OF SEMESTER: DETAILS TO FOLLOW

NOTE:

For these classes, we will divide into two groups. One group will hold a Critique Group on Tuesdays, the other on Thursdays. Critique Groups will be held in Room 920A. On the day that a group will not hold a Critique Group, it will meet in Room 832, where it will continue the classes in legislative techniques, **more?**