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Workarounds in Law: User and Designer Perspectives

*Adam M. Samaha**

Introduction

Workarounds are clever and sometimes little more. According to a typical understanding of the concept, workarounds often are good for the worker and not plainly bad for anyone else.[1] The workaround's inventor fully or mostly circumvents a bothersome limitation in a system without breaking rules but without really eliminating the obstruction.[2] So these are occasions for congratulations rather than regret or resistance. But working around *the law* prompts distinctive concerns, even when people use one law to work around limitations in another law rather than more blatantly disregarding legal constraints. The trade-offs can be troubling, especially when people fear the general degradation of an otherwise defensible legal system. And arguments

* Inez Milholland Professor of Civil Liberties, New York University School of Law. Thanks to Adam Cox, Jonathan Gould, and Chris Sprigman for constructive discussions in advance of this essay, and to Shawn Avidan for excellent research assistance. All remaining bugs are my responsibility.

1. *See Work-around*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/work-around [https://perma.cc/2K39-4VVL] ("[A] plan or method to circumvent a problem (as in computer software) without eliminating it.").

2. In some fields of inquiry, "workaround" depends on rule-*breaking*. *See* NANCY BERLINGER, ARE WORKAROUNDS ETHICAL? 38 (2016) (investigating healthcare systems and suggesting "workarounds are part of normal work, are not part of official work, and have the status of violations, which keeps them from being looked at openly and critically"). But I don't take that as a typical meaning and, regardless, we can use the term "workaround" usefully in legal studies where formally law-abiding yet potentially problematic behavior is an interesting subject.

over these moves persist without accepted ways to evaluate the legality of proposals. We should be asking when and why workarounds for law bother us, and whether bothersome workarounds can be prevented as well as flagged.

This essay begins with a simple analogy from ordinary life that foregrounds designer as well as user perspectives on imperfect systems. The essay then follows Daniel Farber, Jonathan Gould, and Matthew Stephenson's outstanding contribution, *Workarounds in American Public Law*,[3] which lays foundations for conceptualizing and evaluating workarounds where proponents invoke one law to avoid the demands of another. Most of the essay is devoted to adding a legal designer perspective and to extending and partly questioning the authors' approach to the legality of workarounds.

The discussion below observes that not all legal designers do or should oppose subsequent workarounds in law, and it offers a few design-stage ideas for influencing the later demand and availability of such workarounds. The discussion also tries to refine our sense of how different approaches to law and interpretation can affect the legality of workaround proposals. Farber, Gould, and Stephenson suggest, for example, that certain versions of textualism and formalism tend to permit workarounds, while purposivist approaches may lean against them.[4] The implications change and may reverse direction, though, if we believe that legal designers themselves aren't especially opposed to workarounds, and if we consider some plausible foundations for textualist, formalist, purposivist, and functionalist approaches to law. More broadly, introducing a legal design perspective on workarounds, and reconsidering how such

3. Daniel A. Farber, Jonathan S. Gould & Matthew C. Stephenson, *Workarounds in American Public Law*, 103 TEXAS L. REV. 503 (2025).

4. *See id.* at 548–51, 554, 556; *infra* text accompanying notes 21–26 (summarizing the authors' suggested implications for the legality of workaround proposals across different approaches to law).

innovation might be evaluated for legality, should help us make progress on how best to handle workarounds—before and after they emerge.

I. Tech Workarounds: Simple Stories of Imperfect Goods

Software is everywhere and never perfect, from either a user or designer perspective. Some feature won't achieve what the user wants and for no apparently good reason, while a bit of user effort that combines existing features will do the trick.[5] From the user's perspective, this sort of "workaround" is not ideal: The bug was there in the first place, after all, and the clever workaround is not necessarily a lasting "fix" or "patch" for the bug.[6] But these workarounds don't take on the ethical, moral, or other normative shade of a "hack," in the traditional programmer sense of an unauthorized user breaking through security features

5. One of many examples can be found in certain versions of Microsoft Excel, which contained alternative functions that could surmount the constraints of a look-up function that retrieved only a limited number of characters from other spreadsheet cells. *See How to Correct a #VALUE! Error in the VLOOKUP Function*, MICROSOFT SUPPORT, https://support.microsoft.com/en-us/office/how-to-correct-a-value-error-in-the-vlookup-function-1fabc766-32ae-4f7f-a2c4-d095153e6894#:~:text=Solution%3A%20Shorten%20the%20value%2C%20or,or%20CTRL%2BSHIFT%2BENTER [https://perma.cc/5G2T-VYY7] (suggesting a combination of INDEX and MATCH functions "as a workaround").

6. For more on patches and the importance of deploying them quickly to address security flaws, see, for example, Jake Peterson, *Apple Just Released a New Security Patch*, LIFEHACKER (Feb. 11, 2025), https://lifehacker.com/tech/apple-released-new-security-patch [https://perma.cc/EJ59-TLQ5]. *But cf.* Asa Fitch & Sam Schechner, *The Software Patch that Shook the World*, WALL. ST. J. (July 22, 2024), https://www.wsj.com/tech/cybersecurity/crowdstrike-outage-software-patch-78d05df2 [https://perma.cc/8PMR-RLMF] (describing an errant CrowdStrike update that crashed operating systems).

that system designers erected against the uninvited.[7] And these workarounds seem better than using a "backdoor" that a subset of the system designers left for their own possibly surreptitious use but not for others.[8]

On this account, workarounds themselves aren't regrettable—unlike the bugs they overcome without a full fix—and they don't stoop to the level of hacking. Workarounds are just clever but imperfect, second-best DIY ways for users to make do without giving up on the product. And their burdens fall on system users rather than system designers.

The imperfection and associated burdens likely affect designer incentives, though. Compared to unmanageable program bugs, the prospect of cheap and advertised workarounds by tech-savvy users probably reduces material incentives for software

7. Today "hack" has been appropriated by promoters who want to seem edgy yet recommend behavior that is simply useful and not normatively problematic—as in "life hacks," *see, e.g.*, Hannah Loewentheil, *24 Real-Life Cheat Codes People Swear by for Making Everything So Much Easier—from Cooking to Cleaning*, BUZZFEED (Oct. 19, 2024), https://www.buzzfeed.com/hannahloewentheil/24-wish-i-knew-this-yesterday-life-hacks-that-changed [https://perma.cc/B3GT-K628] (including pouring in creamer before coffee), and perhaps even "hackathons" in coding and beyond, *see* Ben Heller, Atar Amir, Roy Waxman & Yossi Maaravi, *Hack Your Organizational Innovation: Literature Review and Integrative Model for Running Hackathons*, 12 J. INNOVATION & ENTREPRENEURSHIP, Mar. 2023, at 1, 2 (2023) ("At these events, diverse groups gather to solve a defined problem or create a joint project that meets a specific need determined by the event organizer."). I am not following that meaning of "hack" in this writing, so as to keep "workaround" separate.

8. *See* Sean Dahlberg, *What Is a Backdoor? [Word of the Week]*, CISCO CMTY. (May 31, 2023), https://community.cisco.com/t5/devnet-general-discussions/what-is-a-backdoor-word-of-the-week/td-p/4846473 [https://perma.cc/39HE-8ZX3]; WARGAMES (MGM 1983) ("Whenever I design a system, I always put in a simple password that only I know about. That way, whenever I want to get back in, I can bypass whatever security they've added on. That's basically what it is.").

companies to eliminate bugs or produce patches (even if their incentives to prevent hacks remain unaffected). Someone else might mostly fix the problem after product launch, when unforeseen bugs can appear anyway. With a complex program or app, it's not worth the effort and frequently impossible to code prospectively for every potential user complaint.

On the flipside, companies with sufficient market power might attempt to thwart workarounds and suppress any claimed or proposed "right to repair."[9] Their motivations might be to ensure digital security and protect proprietary information, or to force users to wait and pay for fixes or new versions of apps produced by the companies' designers. These designer constraints and incentives might complicate one's normative analysis. But in any event, we can profitably integrate the perspectives of system designers as well as users when attempting to understand the significance and value of workarounds in product markets.

Moreover, it might be productive to think about laws and legal institutions in these terms, accounting for both system-user and system-designer perspectives.[10] We could start by thinking that laws and legal institutions as they stand will be more or less imperfect for the people who are supposed to generally follow and respect them. Perhaps ideally those laws will be formally revised, and quickly, to better reflect on their surfaces the justified

9. *Cf.* Robert Cunningham & Darby Hobbs, *The Evolution of the Right to Repair*, GPSOLO, Nov./Dec. 2023 at 80, 80–81 (noting physical and nonphysical constraints on repair employed by manufacturers, and reasons for favoring and opposing legal rights to repair); Lars Lindgren, Aaron S. Kesselheim & Daniel B. Kramer, *The Right to Repair Software-Dependent Medical Devices*, 50 J.L. MED. & ETHICS 857, 857–58 (2022) (explaining that "software designers try to block end-users from engaging third-party service providers by encoding 'digital locks' within their devices" through methods including "passwords, service keys, and encryption").

10. I refer to user and designer perspectives with the understanding that those roles may overlap, where the same people are part of the design and usage of law.

needs and legitimate preferences of the relevant population (a fix or patch). Those fixes should reduce inclinations and demands for outright lawbreaking (a hack)—which some consider intrinsically troubling for undercutting a valued rule of law, and which can destabilize at least part of a legal system relied upon by others to achieve social welfare gains and protect people's rights. We might think of such fixes as re-engaging the legal system's recognized designers to better serve the legal system's current users.

But legal patches don't always appear quickly or at all. An acceptable second-best response might be a less-obvious, unconventional, and clever use of existing law or a combination of existing laws to fully or mostly achieve these ends (a workaround). A thorough normative evaluation of a proposed workaround within law should include not only the benefits of success but also the effort required and any plausible downsides of circumventing rather than formally eliminating law's obstructions for current users. Still, in parallel with the account above, maybe law's users shouldn't care very much about any original designer's preferences against workarounds: To the extent those designers considered the subject, they might have been receptive to such innovation and, if they were opposed, their reasons might be illegitimate or insubstantial from the user-perspective today. At the same time, the ready availability of cheap legal workarounds tends to reduce pressure on law's designers to predict and solve for the widest range of imperfections through formal drafting efforts.[11] That demotivating effect on redrafting should give us reason to hesitate before generally endorsing workarounds in law. Nonetheless, on this opening account,

11. *Cf.* Farber et al., *supra* note 3, at 545 (explaining how the use of a workaround can lessen political pressure to "alter or abolish the problematic rule").

many workarounds for law as well as many workarounds for tech are clever, useful, and little more.

II. Law's Workarounds: Complex Questions for Legality and Design

Perhaps workarounds should be understood differently within law and legal institutions, in ways that make them more troubling. In those settings we shouldn't quickly import ideas from markets and technology, even if we should consider the interests of those who work under as well as those who directly shape formal law and the operations of legal institutions. Farber, Gould, and Stephenson's broad and stimulating contribution concentrates on a user perspective, and we can usefully expand the frame beyond that. Some of their suggested implications might be refined or reconsidered. But, more importantly, the authors crack open the analytics for evaluating public law workarounds, rightly leading us to consider consequentialist assessments in the short term and long term as well as potentially distinctive rule-of-law concerns from multiple interpretive perspectives. That much is a welcome foundation for great progress.

A. Definition and Evaluations

Simplifying, Farber, Gould, and Stephenson attempt to distinguish workarounds in law from straightforward compliance with existing law, changes in that law, and disregard of that law. They define a "workaround" that invokes law's procedures or exceptions to require (1) apparent consistency with formal law but (2) apparent inconsistency with the purposes, intentions, or expectations associated with formal law.[12] The authors compile

12. *See id.* at 515–16; *cf.* Mark Tushnet, *Constitutional Workarounds*, 87 TEXAS L. REV. 1499, 1503 (2009) ("Finding some constitutional text obstructing our ability to reach a desired goal, we work around that text using *other* texts—and do so without (obviously) distorting the tools we use." (emphasis in original)).

examples such as proposals or practices to soften the bite of the U.S. Constitution's Electoral College,[13] the statutory debt ceiling,[14] procedures for issuing binding agency regulations,[15] and the Senate's cloture rules[16]—situations where formal law seems to offer both a conventional harder way as well as an unconventional easier way to achieve the same or similar goal, but where the latter arguably conflicts with one or more of law's purposes.[17]

Prescriptively they recommend, first, a consequentialist assessment of whether the proposed workaround is good or bad on net, for the short and longer term but in light of limited information to reliably predict effects. This includes norms of restraint and the credibility of legal commitments.[18] To the extent this assessment omits rule-of-law values, they offer, second, supplementary guidance on what those commitments entail for legal workarounds.[19] On legal constraints, the authors propose a somewhat familiar methodological split. They depict a relatively narrow formalist or textualist approach that seems permissive toward workarounds, in contrast with a functionalist or purposivist

13. Farber et al., *supra* note 3, at 524–25 (discussing the multi-state compact response to the Electoral College).

14. *Id.* at 506–07 (describing the trillion-dollar-coin response to the debt ceiling).

15. *Id.* at 530–31 (describing agency guidance documents as partial alternatives to agency rulemaking through the Administrative Procedure Act's notice-and-comment process).

16. *Id.* at 522–23 (describing the so-called nuclear option procedure for limiting the supermajority cloture rule and formal amendment rule).

17. I do have questions about the reasons for connecting legal workarounds to unconventional moves, if this means that legal workarounds end once they become generally accepted. I wonder whether many people think about nonlegal workarounds in that way, and surely not everyone interested in legal workarounds is the type of conservative who would much care whether a clever move has achieved general acceptance. But in this essay, I'll leave aside further consideration of those questions.

18. *See id.* at 539–45.

19. *See id.* at 548–50.

approach that pulls in a broader range of considerations and that may impeach workarounds.[20] The upshots will be jarring for some readers. The authors suggest that legal decision-makers who use strict versions of formalism or textualism cannot identify let alone resist workarounds.[21] After all, the authors' "workaround" definition requires at least apparent compliance with formal law somehow specified—the apparent conflict is only supposed to involve law's purposes, intentions, or expectations.[22] Those latter considerations may seem incoherent, nonexistent, or illegitimate for interpreting law to such legal decision-makers, who might care only whether the proposed action is consistent or inconsistent with formal law somehow specified. On the same logic, legal decision-makers who employ purposivist and related approaches probably should adopt a general presumption against the legality of otherwise socially beneficial workarounds.[23]

There are caveats to that last point about purposivism, for when formal law permits the workaround with adequate clarity,[24] or when the formal law to be worked around furthers no legitimate purpose or itself is being used in conflict with its legitimate purposes.[25] But the sense of unease seems to follow from

20. My understanding of Farber, Gould, and Stephenson's claims here reminded me of observations about certain forms of interpretivism contrasted with judicial discretion in efforts to address legislative tyranny in Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786–89 (1983).

21. *See* Farber et al., *supra* note 3, at 551 (focusing on adjudicators who oppose the attribution of purposes to legal texts and consideration of subjective intentions or expectations of those who adopted legal norms).

22. *See id.* at 513, 550. Assuming we can separate these considerations from formal law's meaning.

23. *See id.* at 554, 556.

24. *See id.* at 556.

25. *See id.* at 557–58.

the authors' workaround definition. This puts heavy pressure on that definition, which includes forms and tensions that probably won't resonate with those in tech or other non-law fields. If readers are comfortable with the authors' understanding of legal workarounds, then a purposivist if not a functionalist leaning against them is understandable, too. Indeed, the antagonism probably should be systematic: If legal decision-makers develop the operative meaning of law consistent with their understanding of the purposes of those laws, conflict with those purposes is essentially ruled out if we want to follow the law, whether we call the target of assessment a workaround or not. The authors' limitations on the anti-workaround presumption might be the only justifiable exceptions to purposivist opposition.

B. Legal Designs for Later Workarounds

Suppose all the foregoing is true and persuasive. Farber, Gould, and Stephenson's analysis concentrates on legal-system *user* perspectives—that is, people who might support or oppose a given workaround but who are working within a legal system that is already designed and operating. Their definition and evaluation of legal workarounds is supposed to distinguish formal legal change,[26] which does seem difficult to achieve as a response to many of the examples the authors address. This is especially true for constitutional changes through Article V and where judicial review is not an available alternative.[27] But of course legal programs and small-scale legal systems are developed and redeveloped nearly constantly in situations where the users are not yet fixed and innovators are at work.

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26. *See id.* at 505, 513.

27. *See* Tushnet, *supra* note 12, at 1514 ("[O]ur practice of judicial interpretation uses Article III to work around the obstruction to good governance produced by the difficult amendment procedures of Article V.").

What should legal-system *designers* think and do about the prospect of workarounds? Some collection of people had the opportunity to design a given system in Time 1 that included familiar hard ways to produce results and currently novel easy ways to produce the same or similar results now in Time 2. That has happened repeatedly, and Farber, Gould, and Stephenson help us count the ways. Whether or not that part of the legal system can be restructured from the studs up, some other part will be designed and operationalized in the future. If not within constitutional law, then through statute, legislative rule of procedure, agency regulation, or some other component of law and legal institutions. When those parts of the legal system are designed and we account for the frequency of past workarounds, what positions might or should system designers take toward future workarounds?

Let's follow the suggestion that formalist or textualist approaches to law make workarounds relatively easy to validate, while purposivist and perhaps functionalist approaches make workarounds relatively easy to invalidate. Then a more formalist or textualist approach at Time 2 increases the likelihood of accepted workarounds through the formal legal options embedded by designers at Time 1. A more purposivist approach at Time 2 supposedly decreases that likelihood while perhaps increasing the chance of adherence to the basic purposes preferred by designers at Time 1. To the extent future populations of decisionmakers take seriously the work and views of past legal system designers, those Time 1 designers' views about Time 2 workarounds become relevant. The authors' analysis leaves space for original design as a recognizable activity,[28] and, again,

28. Otherwise the authors' references to original intentions, expectations, and purposes would not make sense. *See* Farber et al., *supra* note 3, at 516–17 (suggesting such inquiries are incorporated into their definition of workarounds); *id.* at 560–61 (exemplifying such an inquiry by

opportunities for legal design will recur. As well, if Farber, Gould, and Stephenson make a persuasive case that different methodological approaches impose different legal risks for workarounds, designers have solid reasons to think about which approaches are likely to predominate later on.

Still, the most likely and best designer approaches to the prospect of future legal workaround attempts are nonuniform and debatable. Roughly like software designers, legal designers should have some good reasons to appreciate clever workarounds that don't overtly hack into the formal legal system. They present formally non-defiant improvements to suboptimal legal arrangements that can take advantage of current information and priorities. Surely not everyone who works to develop new legal systems opposes legal innovations using existing formal legal materials, which should relieve some pressure to perfectly design socially important systems and all the permissible routes to update them. That is unrealistic anyway.

For the same reasons and assuming purposivist approaches to law tend to resist such workarounds, the original designers themselves might prefer a more formalist or textualist approach to their own work. Or they might well hope that any purposivist at Time 2 will consider any plausible account of pro-workaround leanings among Time 1 designers. Often it is awkward or self-undermining to expressly confess limited foreknowledge and endorse innovation beyond one's own efforts in law, but those views are hardly irrational. Any legislator who has supported legislation while expecting others to hammer out the details is not far from the substance of such pro-workaround views.[29]

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turning to the "origins" of the Senate filibuster in assessing the anti-workaround presumption's application in that context).

29. *See* John Paul Stevens, *Foreward* to WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW v, v (2016).

Alternative and potentially sensible designer responses to the prospect of workaround attempts are to minimize the demand for them or attempt to thwart them at the design stage. Accepting that relevant circumstances change over time, designers might just try hard to prescribe an excellent legal system at Time 1 to minimize people's dissatisfaction and demands for innovation at Time 2. Relatedly, others might adopt formalist or textualist rather than purposivist approaches to law in hopes of encouraging high levels of care during design efforts; on Farber, Gould, and Stephenson's account, those methods will tend to allow workarounds. Now, no one should assume a strong chance of building enough timely and sustained support for an interpretive method that will significantly influence designer behavior.[30] Nonetheless, designers might predict a fair chance of indifference to workarounds later on and therefore try earnestly to reduce demand for them by crafting a sound system in the first place.

Either way, legal designers who oppose workarounds should be able to anticipate some pressure for them in the abstract without knowing the specific problems or clever solutions that people will confront in the future. Such designers might predict formalist and textualist permissiveness toward workaround attempts that are not explicitly barred, in accord with the authors' claims, and they might believe that both formalists and purposivists will respect adequately clear and formalized directives against the use of certain procedures or exceptions under specified conditions.[31] So in a spirit similar to minimizing future dissatisfaction, legal designers might attempt to rule out workarounds as much as possible. Fortunately for them, an exhaustive

30. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 124–29 (2006).

31. *See* Farber et al., *supra* note 3, at 556–57.

and itemized list of prohibited evasions is probably not strictly necessary.

One old anti-workaround drafting tactic is to communicate that a specified procedure or power is exclusive for achieving a specified outcome. A model is the Constitution's Article I, Section 7, Clause 3, which declares that "the Rules and Limitations prescribed in the Case of a Bill" likewise govern "[e]very Order, Resolution, or Vote" where a concurrence of the Senate and House is necessary, except on a question of adjournment.[32] Whatever significant interpretive questions there may be for that clause, it is an anti-workaround provision that at minimum should be taken to rule out legislators announcing they are approving not a "bill" but a "schmill" and that the latter isn't subject to Article I, Section 7 demands.[33]

Another anti-workaround tactic, drawn from environmental and other regulation, is to communicate performance standards rather than, for instance, procedural steps to achieve some range of possible results.[34] Codifying an outcome, where measurable, can avoid disputes over processes toward the goal, including

32. U.S. CONST. art. I, § 7, cl. 3.

33. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945–47 (1983); Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEXAS L. REV. 1373, 1373–74 (2005) (characterizing the clause as at least partly an anticircumvention provision to guard against convenient labeling).

34. *See, e.g.*, Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 338–39 (D.C. Cir. 1989) (regarding administrative law); Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U. L. REV. 1581, 1597–603 (2011) (regarding environmental regulation); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 268 (1996) ("Industry will understandably choose a method that is cheapest."). The difference depends on a judgment regarding the relevant end (so that "performance" can be identified in a standard) that differentiates relevant means or procedure (so that "design" can be identified in a standard).

whether we should be troubled by clever new deployment of an old formalized procedure. Of course, disagreement or uncertainty over the right outcomes can recommend an attempt to choose proper procedures instead. And declaring in law that slavery shall not "exist within the United States" alongside a congressional enforcement power did not mean liberation on the ground, we know.[35] But a law's orientation toward valued results might, under favorable conditions, reduce the chances of certain kinds of workarounds becoming accepted as lawful later.[36] Sometimes our disagreements about appropriate procedures for generating social policy aren't much easier to resolve.

Recognizing such anti-workaround drafting tactics may be modestly significant for another reason. They aren't obscure even if they aren't guarantees. Sometimes we are impressed by what we take to be clear signals of formal law's resistance to creative alternatives, other times we pick up no such surface-level messages. It is true that pro-workaround drafting options are available as well, such as efforts to communicate that expressly endorsed procedures or exceptions are nonexclusive, and frequently those signals do not appear either. At the same time and to the extent we care about Time 1 designer preferences, we may at least wonder whether the absence of fairly obvious anti-workaround drafting tactics represents designer doubt or a weak commitment against them.

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35. *See* U.S. CONST. amend. XIII, §§ 1–2. The Thirteenth Amendment includes an express exclusion in favor of criminal punishment, *see id.* § 1, and former slaveowner and government adaptations to approximate the earlier slave regime are well-known, *see, e.g.*, James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1506–09 (2019) (discussing convict leasing practices).

36. A third drafting tactic against workarounds, of debatable value, is to formally encode designer purposes. That move presumably will influence purposivists at Time 2, but might have less effect on formalists and textualists depending on the basis of any misgivings about relying on a law's asserted purposes.

C. Rethinking Implications of Methodology

We should not, then, quickly or strongly assume that actual or sensible legal designers oppose legal workarounds going forward. Those leanings probably will vary somewhat for any complex project with a sufficient number of participants—on the reasons indicated above and in Farber, Gould, and Stephenson's development of consequentialist arguments that qualifiedly support workarounds.[37] Times change, including values and value-relevant circumstances that are not predictable, and laws are considered obsolete or unjust or otherwise intolerable as those changes occur. At least some designers working on at least some parts of a legal system will recognize all that and should act accordingly—not to protect all their formally expressed work along with all their later-discernible purposes, intentions, and expectations, but instead to leave room for clever workarounds.

The last major point to reinforce in this space is less intuitive: Basic reasons for law's designers and users to favor significant flexibility for workarounds can be associated with functionalism or purposivism, which the authors contend are associated with methods that tend to *dis*favor the legality of those same workarounds. If so, this raises hard questions about the relationship between these methods and legal workarounds. The sense that Time 1 drafters and drafting processes are imperfect, that not all future problems can be foreseen, that circumstances and values change, that legal decision-makers at Time 2 are capable and generally trustworthy actors who can ascertain the general objectives of Time 1 drafters and adapt contemporary elaborations of law to contemporary situations and populations—those are subheadings in the brief against legal decision-making that is

37. *See* Farber et al., *supra* note 3, at 533–34 (suggesting a need to "reconsider the intuitive distrust that workarounds provoke in some quarters" and proposing a framework for evaluating workarounds based on their consequences as well as the consequences of the circumvented obstacles).

too literal, too categorical, too committed to developing legal analysis as sophisticated linguistics or professional wordplay rather than a practice that attempts to account for both older objectives and newer situations in life outside of courts. And those inclinations align fairly well with positive normative evaluations of workarounds, which permit relatively easy patches for current dissatisfaction with old standard operating procedures.

But the methods of purposivism tend to backfire on their proponents, under Farber, Gould, and Stephenson's logic. Adopting standard purposivist if not functionalist approaches will lean the legal system against the legality of workarounds, they contend. So if a system designer agrees with those underlying inclinations toward purposivism at Time 1, maybe she should start rooting against purposivist approaches at Time 2.[38] There might well be effective ways for humble Time 1 designers to communicate their general support for later workarounds, at minimum by avoiding expressly exclusive language in enumerating the procedures and exceptions they adopt or by inviting supplementation,[39] and a presumption against workarounds will not always hold.[40] Regardless, today's purposivists are presented with an apparent dilemma. Some of the core reasons they have for acting as purposivists will tend to defeat the kind of workarounds that seem the most defensible on purposivists' own foundations. That some Time 1 system designers might well have preferred room for some workarounds yet failed to clearly communicate that position in formal law should strike purposivists as entirely plausible, which only makes the dilemma worse for them.

38. With regard to the issue of "workarounds" if not all other issues.

39. *Cf.* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

40. *See* Farber et al., *supra* note 3, at 556–62 (discussing limits to the anti-workaround presumption).

Formalists might face a complication, too. To the extent they believe, for instance, that Time 1 legal system designers are fairly good at drafting instructions and contemplating future developments, they might initially think that workarounds are no good. And if instead a formalist has no special confidence in the abilities or values of Time 1 designers but remains committed to existing and formalized mechanisms for legal change, that decision-maker might also tend to oppose workarounds. But on Farber, Gould, and Stephenson's view, these decision-makers are unable to attack the problem.[41] Some foundational reasons for leaning toward formalist approaches to law appear to suggest skepticism toward legal workarounds, yet a formalist approach might be permissive toward them. The authors do work through the possibility that existing formalist tools such as certain canons and structural considerations will condemn some range of attempted workarounds.[42] But these qualifications only somewhat reduce, without solving, the complication of foundations mismatched with methods.

The story for so-called formalists, textualists, functionalists, and purposivists might be even more complicated than that, however, and the dilemmas less severe. These are groupings of ideas among proponents who are not necessarily motivated by the same objectives, and their approaches toward formally adopted texts and apparent purposes may differ in important ways. Farber, Gould, and Stephenson indicate agreement with this sentiment,[43] and the observations here might merely reflect differing characterizations of prominent approaches to law. We

41. *See id.* at 551–53.

42. *See id.* at 552–53, 553 n.188 (referencing context, structure, and the *expressio unius* canon).

43. *See id.* at 550 n.181 (acknowledging that one-dimensional formalism/functionalism and textualism/purposivism divides are oversimplifications); *id.* at 551 (stating that formalism is a family of related ideas).

can nevertheless usefully divide out some familiar motivations with arguably divergent implications for legal evaluations of workarounds as defined by the authors.

For example, an inclination to purposive or functional understandings of law can be associated with (1) the Time 2 decision-makers' commitment to constraining their discretion by following the preferences, plans, or general purposes of Time 1 legal designers as much as possible,[44] *and/or* (2) the Time 2 decision-makers' commitment to opening up their judgment to match what they believe are the best conclusions for present circumstances, moderating the constraints of literal readings of formally adopted legal texts without necessarily following what Time 1 designers seem to have wanted.[45] Those two sets of

44. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("In the domain of statutory interpretation, Congress is the master. . . . [W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose . . . ."); Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 772 (2025) (contending that "a judge is more likely to discover what legislators meant by reading (rather than ignoring) relevant legislative history, considering statutory purposes and constitutional values, and confronting likely consequences in light of those purposes and values").

45. *See, e.g.*, Breyer, *supra* note 44, at 720, 772 (noting that an adjudicator may consider "the consequences—for example, for legal institutions—of one interpretation as opposed to another," and later concluding that "[t]o use text (or original meaning) alone is likely to drive a judge further from, not closer to, an *enduring, workable* interpretation" (emphasis added)). Functionalism has been specified in more than one way, certainly. For characterizations of functionalist approaches as involving practical considerations and contemporary consequences, see, for example, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998) (associating constitutional functionalism with standards, induction from practice, and certain pragmatic values such as adaptability, and associating constitutional formalism with bright-line rules, deduction from authoritative texts, and certain rule-of-law values such as predictability); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of*

commitments may suggest methods that produce similar patterns of results in terms of what law requires, allows, and forbids. But it seems the first kind of commitment, not the second kind, straightforwardly leads to "purposivist" leanings against workarounds. The second kind of commitment would be within the spirit, so to speak, of Hart and Sacks purposivism, operationalized as a strong presumption of designer "reasonableness" and significant interpreter discretion to specify reasonable goals and consider current circumstances.[46] That commitment also would easily fit with functionalist approaches to law, which are not the same as all versions of purposivism such as the first kind above.[47] At first cut, those approaches are not systematically at odds with legal workarounds.[48]

Even the first kind of motivating commitment for purposivist perspectives might be separated from a straightforward presumption against workarounds. As suggested above,[49] legal

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Presidential Oversight of State-Government Officers Enforcing Federal Law, 61 DUKE L.J. 1599, 1628 (2012) ("Practical advantages, however, are relevant only to a functionalist separation-of-powers analysis, not to the more categorical approach of formalism."); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 900 (2014) (indicating that a functionalist approach "considers practical effects on the balance of powers").

46. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1377–79 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

47. One kind of functionalist perspective might well conclude that workarounds do call into question law as a commitment device, or the extent to which it is, *cf.* Tushnet, *supra* note 12, at 1504, 1512–13 (raising questions about the commitment account of constitutions in light of workarounds), and endorse loose legal commitments.

48. I note that Farber, Gould, and Stephenson neither define "workarounds" to be in tension with "functionalism" but rather law's apparent purposes, *see* Farber, Gould & Stephenson, *supra* note 3, at 513, nor do they rule out the possibility of resolving or overcoming initial impressions that a clever proposal is at odds with law's purposes, *see id.* at 555–56.

49. *See supra* Part II.B.

designers may have good reasons to support some range of legal workarounds later on, even if or because they know they cannot predict all relevant futures and innovations. Recall, too, that formally adopted legal texts sometimes convey degrees of commitments against workarounds.[50] And although both kinds of foundational commitments associated with purposive understandings of law might not take very seriously textual variations on the permissibility of alternative routes and the breadth of exceptions, the surface-level meanings of such texts still carry weight for many purposivist decision-makers. If the foregoing is basically correct, then we might pause before supporting an anti-workaround presumption of any breadth to allow those who follow originalist brands of purposivism to investigate whether Time 1 purposes, expectations, or intentions indicate a general intolerance for legal workarounds.

A parallel separation can be drawn up for formalist or textualist approaches. Those understandings of law may be associated with (1) the Time 2 decision-makers' commitment to practicing what interpretation just is, as a conceptual matter or an existing requirement of current law itself, without concern for the consequences, although perhaps informed by the decision-makers' sense of limited competence and their confidence in existing procedures for amending formal law,[51] *and/or* (2) the Time 2 decision-makers' commitment to disciplining current and future legal designers and incentivizing the use of existing procedures for amending formal law, such as by enforcing only meanings

50. *See supra* text accompanying notes 31–36.

51. *See, e.g.*, Am. Broadcasting Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 462 (2014) (Scalia, J., dissenting) ("It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes."); *cf.* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (associating formalism with decision-making according to rules derived from legal texts).

indicated by formally adopted texts using specified conventions.[52] As with purposivist underpinnings, those two sets of commitments might yield interpretive methods that generate similar patterns of results. Still it seems that only the first kind of commitment, not the second, might straightforwardly translate into "formalist" leanings that cannot identify legal workarounds as defined by Farber, Gould, and Stephenson, or that are otherwise indifferent toward workarounds as a category. That sort of law-following commitment might simply ask whether the proposal is formally lawful or not. But the second kind of commitment indicates a goal of channeling legal innovation through pre-existing and presumably conventional procedures for legal change. Workarounds seem at odds with that goal.

Formalists and textualists easily can be troubled by any number of workaround proposals. And many of those legal decisionmakers easily could prefer that some range of workarounds receive consideration through accepted procedures for changing existing law, such as the Constitution's Article V amendment processes; the Article I, Section 7 legislative process; or, assuming its constitutionality, the Administrative Procedure Act's

52. *See, e.g.*, VERMEULE, *supra* note 30, at 132, 134–35 (stating that textualists often argue their methods "force[] Congress to legislate more responsibly ex ante," although questioning the ability of courts to produce such effects); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("Yet the whole process of interpretation from intent is an end run around process."); *Aereo*, 573 U.S. at 462 (Scalia, J., dissenting) (noting Congress's ability to eliminate loopholes "in a much more targeted, better informed, and less disruptive fashion than the crude 'looks-like-cable-TV' solution the Court invents today"). On developments in textualist justifications toward, for example, constitutional concerns about circumvention of the legislative process, see John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1293, 1304–07 (2010). Those justifications do not necessarily require general opposition to workarounds that depend on formally enacted law, I acknowledge.

provision for notice-and-comment agency rulemaking.[53] At this point, though, our reasoning can rejoin the contributions of Farber, Gould, and Stephenson. Part of their point is that formalism and textualism in some typical specifications won't always knockout legal innovations, not without fairly aggressive resort to presumptions such as *expressio unius* or relatively undisciplined invocations of statutory structure.[54] So, whether or not many formalists and textualists will care, purposivists may observe that at least with regard to workarounds in law, there is a mismatch between some of formalists' and textualists' purposes and their articulated methods for carrying out their commitments. I would add that certain kinds of purposivists also face challenges in matching their preferred methods with some of their underlying commitments. But those challenges are qualified, too, because the diverse group of purposivists are likewise motivated by a bundle of commitments, only some of which can cut fairly hard against workarounds in law.

Conclusion

Thinking about workarounds in settings not directly related to law can build an initial appreciation for the imperfect good they deliver, while spotting implications and trade-offs for designers as well as users. Thankfully Farber, Gould, and Stephenson restate a relatively clear concept for flagging legal workarounds, and they offer a thoughtful framework for evaluating them. Adding a legal designer perspective extends the implications of their contributions, and that perspective combined with a range of approaches to understanding law generates some unexpected dilemmas with important qualifications. These observations about legal methods and dispositions toward legal novelty generalize beyond legal workarounds, to be sure. But Farber, Gould, and Stephenson have done better than anyone else at

53. *See* 5 U.S.C. § 553.

54. *See* Farber et al., *supra* note 3, at 551–53.

illuminating the opportunities and challenges for workarounds—bugs and all—in law.