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## The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex

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# THE ILLUSION OF SIMPLICITY: AN EXPLANATION OF WHY THE LAW CAN'T JUST BE LESS COMPLEX

R. GEORGE WRIGHT\*

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## I. INTRODUCTION

Complexity in the law inspires much confusion. In some respects, however, we are quite sure of ourselves. We think, for example, that we can easily recognize legal complexity when we see it. We are also sure that the law is often too complex.<sup>1</sup> We do allow for the possible advantages of complexity in certain cases.<sup>2</sup> Generally, though, we assume that what is simple is both readily recognized and desirable.

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1. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995); see also PETER W. HUBER, *LIABILITY* ix (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION* 138 (1991) ("When the law takes the form of clear, comprehensive, objective, and preannounced rules, litigation is mostly a waste of time."); Craig J. Albert, *The Deceptive Allure of Simplicity*, 26 SETON HALL L. REV. 1414, 1414 (1996) ("[T]he drive for simplicity has been the motivating force behind the major movements in legal scholarship of this century, beginning with Legal Realism."); Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 12-13 (1974); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1268 (1990); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 195 (1998) (arguing that the complexity of the minimum contacts test "has hampered rather than improved the test"); Ellen Wertheimer, *Calabresi's Razor: A Short Cut to Responsibility*, 28 STETSON L. REV. 105, 105 (1998) (noting that Ockham's Razor of simplification is "even more applicable in the legal realm than in the scientific"); Ellen Wertheimer, *Pursuing Health in an Era of Change: Emerging Legal Issues in Managed Care*, 43 VILL. L. REV. 321, 321 (1998).

2. See Albert, *supra* note 1; see also Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules For a Complex World*, 72 CHI.-KENT L. REV. 987 (1997); Eric W. Orts, *Simple Rules and the Perils of Reductionist Legal Thought*, 75 B.U. L. REV. 1441 (1995) (book review); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 8 (1992).

Culturally, we have long linked the simple with the true and the good.<sup>3</sup>

But all this is overly simple. Complexity in the law is much more complex than we imagine. There are, it turns out, any number of more or less separate and independent kinds of complexity in the law. We can reduce legal complexity in one respect without also reducing the law's complexity in other respects, and usually only at the cost of greater complexity in other respects. Which forms of complexity in the law are most important will require highly contestable value judgments. These value judgments are often deeply political. Even when we do seem to reduce legal complexity in accordance with our own debatable value preferences, we often only succeed in shifting inescapable complexities forward or backward in time, or to a different stage of the law making and law enforcement process. Ultimately, to say in any given case that we have simplified the law is at best to oversimplify what we have done, and at worst to mislead our audience.

The discussion below begins by inventorying some of the forms of complexity in the law and then introducing some of the complications of legal complexity. After a brief nod in the direction of complex litigation<sup>4</sup> and complexity theory in mathematics and science,<sup>5</sup> we contrast Lon Fuller's discussion of 'polycentricity' with Richard Epstein's emphasis on the costs of complying with some legal provision.<sup>6</sup> We then focus on legal complexity as a matter of sheer number. In particular, we consider complexity as a matter of the sheer number of elements or components of a legal code or system, the number of assumptions underlying a legal rule, the number of proscriptions imposed upon legal actors, and the number of distinctions or exceptions

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3. Ockham's Razor suggests that we not multiply entities or hypotheses unnecessarily. See, e.g., Lewis Feuer, *The Principle of Simplicity*, 24 PHIL. SCI. 109, 109 (1957); Elliott Sober, *The Principle of Parsimony*, 32 BRIT. J. PHIL. SCI. 145, 145 (1981). More positively, it has been argued that "[t]he most persuasive lines of reasoning . . . are usually fairly simple trains of thought." THOMAS V. MORRIS, MAKING SENSE OF IT ALL 66 (1997). Historically, simplicity was often thought of as a divine attribute. See, e.g., ARISTOTLE, METAPHYSICS 1088B28, 304 (Richard Hope trans., 1960); ST. AUGUSTINE, THE CITY OF GOD 153 (Gerald G. Walsh et al. trans., 1958); BRIAN DAVIES, THE THOUGHT OF THOMAS AQUINAS 44-45 (1993); MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED OF MAIMONIDES 89 (M. Friedlander trans., 1956); Katherin Rogers, *The Traditional Doctrine of Divine Simplicity*, 32 RELIG. STUD. 165, 165 (1996). Whether simplicity is actually a useful guide to the truth, however, has been doubted. See, e.g., Steven O. Kimbrough, *On Simplicity as a Guide to Truth*, 9 KINESIS 55, 70 (1979); Keith Lehrer, *Against Simplicity in Philosophical Analysis* 119, 122 (David F. Austin ed., 1988); ROBERT NOZICK, *Simplicity as Fall-Out, in HOW MANY QUESTIONS?* 105, 105 (Leigh S. Cauman et al. eds., 1983) ("It is difficult to think of any reasonable explanation for why . . . a simplicity maxim should help . . . arrive at the truth.").

4. See *infra* text accompanying notes 22-25.

5. See *infra* text accompanying notes 26-31.

6. See *infra* text accompanying notes 42-44.

embodied in a legal rule or code.<sup>7</sup> This sort of numerical complexity can occur at any level of a legal system, from individual judicial cases to statutes to codes to the legal system as a whole. Even these sorts of purely numerical determinations by themselves are not particularly easy. How many assumptions, for example, underlie our current tax code, the Constitution, the free speech clause, or, for that matter, the French Constitution? Will these numbers ever be objective and uncontroversial?

A further complication is that undeniably, legal complexity is not simply a matter of sheer number. All else equal, the greater the variety or differences among its parts, the more complex something is.<sup>8</sup> The number of elements of a legal system, for example, does not tell us much about the diversity of those elements. But even this complication is too static. The complexity of any portion of a legal system, or of the legal system itself, is also partly a matter of its functional or operational complexity.<sup>9</sup> There is a difference between the variety of a system's elements and the complexity of their mutual interaction. We can hardly understand legal complexity without considering, in particular, the legal system's supposedly layered, hierarchical complexity,<sup>10</sup> and more broadly the legal system's interrelational and organizational complexity.<sup>11</sup>

Cutting across these forms of legal complexity are, inescapably, the intimidatingly named dimensions of ontological, epistemic, and pragmatic complexity.<sup>12</sup> We shall define and address these forms of complexity in turn. Related to epistemic and pragmatic complexity are the more familiar ideas of formal, notational, and stylistic complexity.<sup>13</sup> Stylistic complexity, in turn, is subdivided into semantic and syntactic complexity.<sup>14</sup> Legal complexity, it turns out, is almost endlessly subdividable, and itself almost indefinitely complex.

These dimensions of legal complexity are not exhaustive, but they will suffice to illustrate the major problems. We will then discuss the crucial factor of the typical absence, at best, of any positive correlation among the various forms of legal complexity.<sup>15</sup> Judgments as to what is legally complex and what is legally simple are therefore indeed mere judgments, somehow reflecting the strength and weakness of the various interests at stake and potentially quite contestable.<sup>16</sup>

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7. See *infra* text accompanying notes 45-49.

8. See *infra* text accompanying note 50.

9. See *infra* text accompanying notes 55-58.

10. See *infra* text accompanying notes 59-62.

11. See *infra* text accompanying notes 63-70.

12. See *infra* text accompanying notes 76-78, 88-90.

13. See *infra* text accompanying notes 104-106.

14. See *infra* text accompanying notes 111-116.

15. See *infra* Part II.

16. See *infra* Part II.

These sorts of typically political judgments are thus deeply evaluative<sup>17</sup> and deeply complex themselves. To these complexities we add another: what appears to be "really" complex may seem simpler, and vice versa, if we translate or merely redescribe the particular law into other terms.<sup>18</sup>

As it turns out, legal complexity is more complex, and more unavoidable, than even this much suggests. Even if we could all agree that through some reform we are simplifying a particular law in some particular respect, often we would only be displacing the legal complexity we started with, by shifting that complexity backward or forward in the legal system, or onto some other stage of the broader political process.<sup>19</sup> We may fairly conclude that for all these reasons, complexity in the law cannot simply be reduced in any reasonably uncontroversial way. Simplifying the law in general, or even some particular area of the law, takes on the profitlessness of the proverbial wild goose chase.

## II. SOME DIMENSIONS OF COMPLEXITY: LEGAL COMPLEXITY AS ITSELF COMPLEX

There are a number of kinds of complexity to be found in the law. The number of different kinds of legal complexity reflects the variety of interests we may have at stake in the law. As our legal interests are not entirely permanently fixed,<sup>20</sup> we should not expect to produce an exhaustive list of all of the dimensions of legal complexity. As our interests conflict and evolve, new forms of complexity in the law may arise, or, at the very least, old forms of legal complexity may take on greater or lesser importance. A complete and final assessment of all of the kinds of complexity in the law is therefore impossible.

### A. *Ambiguous Complexity*

An initial complication is that the very idea of complexity in the law is itself already ambiguous. For example, an area of law designated "complex litigation" already exists.<sup>21</sup> *Complex litigation* in this

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17. See *infra* Part II.

18. See *infra* Part II.

19. See *infra* Part III.

20. The stakes that various groups have in either promoting stability in the law or in destabilizing the law may change over time. See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 614 (1983) (discussing the problem of instituting destabilization rights).

21. See, e.g., AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION (1994); BOARD OF EDITORS OF THE FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 8-9 (1970); RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS

technical sense has itself proved difficult to define precisely.<sup>22</sup> It seems to involve, at a minimum, multiple party and multi-district litigation.<sup>23</sup> These factors by themselves certainly do not nearly exhaust the various dimensions of legal complexity in the broader sense we are concerned with. There is, however, some degree of overlap between the complexity of complex litigation and legal complexity in our broader sense. The multiplicity of parties and jurisdictions in litigation are certainly forms of complexity in our sense, and it seems reasonable to suppose that increasing the number of parties and jurisdictions involved in a lawsuit often tends to complicate the legal issues involved or to raise some costs for some parties.<sup>24</sup>

There is also complexity in the sense of "complexity theory," as developed by mathematicians and scientists to describe some behaviors of dynamic systems.<sup>25</sup> Complexity in this mathematical sense typically involves systems with an irreducibly large number of elements, evolving dynamically over time without reaching a stable long-term equilibrium.<sup>26</sup> Crucially, such systems often feature "short-range" or "neighborhood" interactions among their elements that result in dramatic discontinuities, "tipping," "avalanches," or emergent properties and disproportional effects,<sup>27</sup> with the locally interacting elements commonly not "aware of" the overall effect on the system.<sup>28</sup>

Something akin to this mathematical sense of complexity may well be exhibited in legal systems.<sup>29</sup> At the very least, we can think of

ON ADVANCED CIVIL PROCEDURE (1998); JAMES L. STENGEL & ANDREW M. CALAMARI, *COMPLEX LITIGATION* (1994).

22. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1692 (1992) ("Other than the rich diversity of the proposals, the most striking feature of the commentary on complex litigation is the lack of agreement about a definition for the subject."); see also Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1463 (1987) (stating that "[c]omplex litigation' means different things to different people"); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 785 n.12 (1998) (quoting Burbank, *supra*).

23. See Stempel, *supra* note 22, at 786.

24. Cf. Burbank, *supra* note 22, at 1481 ("Litigation may be called complex because of the joinder of multiple parties, the difficulty of the issues involved, or the volume of discovery and evidence necessitating substantial court administration. Sometimes, however, cases take on complexities by virtue of their relationship to other cases.")

25. See, e.g., Hope M. Babcock, *Democracy's Discontents in a Complex World: Can Avalanches, Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?*, 85 GEO. L.J. 2085, 2086 (1997) ("Complexity theory, which includes chaos and catastrophe theory, is an overarching field of mathematical analysis of the behavior of nonlinear dynamic systems."). For popular treatments, see, for example, JOHN L. CASTI, *COMPLEXIFICATION* (1994); James P. Crutchfield et al., *Chaos*, in *CHAOS AND COMPLEXITY* 35 (Robert John Russell et al. eds., 1995).

26. See, e.g., PAUL CILLIERS, *COMPLEXITY AND POSTMODERNISM* 3-4 (1998).

27. See *id.*

28. See *id.*

29. See J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); see also Eric Kades, *The Laws of Complexity and the Com-*

some important legal phenomena as analogous to the processes examined by mathematical complexity theory. Consider, for example, a large corporation sued in connection with the manufacture and sale of a widely used but allegedly defective product.<sup>30</sup> The first few plaintiffs might, conceivably, recover compensatory and even punitive damages in independent, uncoordinated actions. It is also imaginable, however, that at some point the addition of a single otherwise indistinguishable plaintiff may "tip" the defendant into filing for Chapter 11 bankruptcy protection, representing a dramatic discontinuity in the legal relationships of all the parties.

We shall not, however, focus solely on circumstances that can be analogized to this mathematical sort of complexity. We will, nevertheless, continue to use the term "complexity," understanding that complexity in our broad sense might be synonymous with something like "complicatedness" beyond complexity in any technical sense.

Complexity in our own homespun, garden-variety sense of "complicatedness" can be found in the law at many different points. This is itself a complication, as there is no guarantee that complexity will mean the same thing, or even have similar effects, regardless of what kind of element of the law it is attached to. We can certainly think of litigation as being complex,<sup>31</sup> but it is also possible to think of the pretrial,<sup>32</sup> trial,<sup>33</sup> and post-trial remedy or appeal<sup>34</sup> stages of litigation as themselves complicated, though perhaps in different ways. More analytically, we can see complexity as an attribute, in one way or another, of legal rules,<sup>35</sup> legal processes,<sup>36</sup> legal institutions,<sup>37</sup> and of the supporting culture.<sup>38</sup>

### B. Polycentricity vs. Cost of Compliance

Many aspects of the law thus can be described as complex. Admittedly, this concept by itself cannot show that complexity in the law is

*plexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403 (1997) (focusing on computational complexity theory in particular); J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administration*, 30 U.C. DAVIS L. REV. 405, 460 (1997).

30. See, e.g., *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988) (discussing *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (Bankr. S.D.N.Y. 1984).

31. See *supra* notes 22-25 and accompanying text.

32. See Tidmarsh, *supra* note 23, at 1701.

33. See *id.* at 1704.

34. See *id.* at 1707.

35. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 3 (1992).

36. See *id.*

37. See *id.*

38. See *id.* Substantively, Professor Schuck distinguishes among "density, technicality, differentiation, and indeterminacy or uncertainty" as dimensions or features of legal complexity. See *id.*

a complicated idea. Complexity shows up in many different legal contexts, but more importantly, legal complexity also takes on many guises. Legal complexity means a number of different things, along a number of different dimensions. These diverse meanings of legal complexity clearly cannot be reduced to one, or even a few, more basic general meanings. Even more importantly for our purposes, these various meanings of legal complexity certainly do not all strongly positively correlate with one another, and may not positively correlate with each other at all.

Consider, merely for the sake of an initial example, two mutually irreducible forms of complexity in the law. First, think of Lon Fuller's idea of polycentricity in the law. A polycentric dispute is, roughly, one in which any resolution is likely to have difficult-to-predict, indirect consequences for the parties and for other groups perhaps not directly represented in the legal dispute.<sup>39</sup> As Fuller expressed it, "the more interacting centers there are, the more the likelihood that one of them will be affected by a change in circumstances, and, if the situation is polycentric, this change will communicate itself after a complex pattern to other centers."<sup>40</sup>

Fuller is thus clearly discussing a general form of complexity that may characterize the law, or at least some aspects of the law. This form of legal complexity cannot be reduced to or somehow translated into all of the other forms, however. Consider, for example, Richard Epstein's understanding of complexity in the law. Professor Epstein specifies that on his view, "[a]ny rule that explicitly begins with [the words 'unless otherwise agreed'] cannot . . . constitute a complex rule, for those who do not like what it provides will run and hide from its application."<sup>41</sup> In applying Epstein's approach, then, variables like the unavoidable costs of complying with a rule will be crucial to assessing the degree of complexity of the rule, along with whatever else legal complexity may involve.<sup>42</sup>

Neither Fuller's nor Epstein's approach need be held out as the basis for a full and comprehensive understanding of complexity in the law. Our point is, first, that even with the greatest ingenuity, polycentricity cannot be reduced to anything like rule compliance

39. See, e.g., Kades, *supra* note 30, at 476-78; Edward L. Rubin, *Legal Reasoning, Legal Process, and the Judiciary As an Institution*, 85 CAL. L. REV. 265, 284-85 (1997) (reviewing CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996)); Tidmarsh, *supra* note 23, at 1728.

40. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 397 (1978).

41. EPSTEIN, *supra* note 1, at 27.

42. See *id.* at 25-27; Joseph P. Tomain, *Book Review: Simple Rules for a Complex World*, 36 JURIMETRICS J. 409, 411 (1996); see also Ruhl & Ruhl, Jr., *supra* note 29, at 470 (citing compliance costs as one element of "structural complexity" in the law); McCaffery, *supra* note 1, at 1271-72 (distinguishing "structural complexity" in his sense of the term from "compliance complexity").



costs. Similarly, rule compliance costs cannot be reduced to anything like polycentricity. More crucially for our purposes, polycentricity certainly does not seem even to be strongly associated or correlated with relatively high compliance costs. Either form of legal complexity might well be present without the other.

Suppose, for example, we have a statute that is quite simple in Epstein's sense. Consider a broad federal statute extensively regulating, pensions, labor relations, or the sale of securities but prefaced by Epstein's opt-out language allowing the most directly affected parties to agree simply not to be bound by the remaining statutory terms, and to substitute their own agreement. Or consider a no-fault divorce statute that admits of no opt-out, but which can otherwise be complied with at low cost. Accordingly, these statutes are simple on Epstein's understanding. But does this mean that the statutes are also not complex in Fuller's sense of polycentricity? Hardly. Even with their opt-out provisions and low compliance costs, these statutes may well have unpredictable and important indirect long-term consequences for many persons other than those most directly involved.

That a statute permits the most directly affected persons to contract around the remainder of the statute hardly means that other individuals are not indirectly affected. If a statute allowed employers and employees to contract around an elaborate pension system in exchange for higher current income, spouses, dependents, and other more remote third parties could be substantially and unpredictably affected. Conversely, suppose a statute is inescapable and otherwise has high compliance costs. From Epstein's standpoint, the statute is therefore complex. Does this mean, necessarily, that the statute and its implementation and enforcement are more polycentric than other sorts of statutes? Why could a statute not be costly to comply with but largely focused, in its effects, on the parties involved?<sup>43</sup>

Thus we should hardly expect legal complexity in Fuller's sense and in Epstein's sense to be inseparable. Instead, we may well encounter either form of complexity in the absence of the other. When we consider the variety of other forms of legal complexity, we find, certainly, no broad pattern of any positive mutual correlation. Some forms of complexity may well tend to positively correlate with certain other forms. However, some forms of legal complexity will not tend to vary along with other sorts, or may even vary inversely.

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43. Arguably all statutes generate polycentricity issues. Surely, however, not all statutes are equally polycentric in their effects. However overdrawn it may occasionally be, the distinction between legislation that is mainly paternalistic and legislation that is less paternalistic is not simply an illusion. See generally JOEL FEINBERG, *HARM TO SELF* (reprint ed. 1989); JOHN KLEINIG, *PATERNALISM* (1983); DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE* (1986).

### C. Variance and Numbers

Complexity in the law is often thought of, for example, in terms quite remote from either Fuller's polycentricity or Epstein's compliance costs. Perhaps most obviously, we often associate complexity, whether of a legal rule, an opinion, a judicial code, an entire legal system, or apart from the law, with something like the number of elements or components involved.<sup>44</sup> The greater the number of parts the greater the complexity, all else equal.<sup>45</sup>

Once we recognize that the number of constituent elements of some broader object bears on its complexity, however, we are likely to conclude that this dimension, too, cannot be the sole measure of complexity. If we were asked, for example, whether one mosaic tile pattern was more complex than another, we might well care about the sheer number of tiles constituting each mosaic, but that would hardly exhaust the matter. If we think about the complexity of legal theories, statutes, codes, or even of legal systems, we might ask not only about the number of their elements, but also about the number of assumptions or postulates underlying the theory, provisions, or system at issue.<sup>46</sup>

Surely there is a difference between the number of component parts of a system and the number of assumptions or postulates we must entertain in order to explain or justify the operation of that system. If the free speech clause has, let us simply assume, only one part—and this itself is debatable—would we therefore assume that there can also only be one important assumption, value, or purpose underlying the free speech clause? If we detected four assumptions underlying the free speech clause, would we also expect to find four parts to that clause?

There can be variations on the legal complexity theme as a matter of sheer number. We might, for example, combine the concern for number with Professor Epstein's emphasis on compliance costs to see the law's complexity as a matter of the number of prohibitions embodied in the law.<sup>47</sup> Or we might choose to see complexity also as

44. See, e.g., NICHOLAS RESCHER, *COMPLEXITY: A PHILOSOPHICAL OVERVIEW* 1, 9 (1998); Janice Toran, *Tis a Gift To Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 361 (1990).

45. Recognizing that complexity is partly a matter of the sheer number of elements or components involved hardly suggests that this is the only form of, or all that matters with respect to, complexity. See RESCHER, *supra* note 44, at 1, 9; Toran, *supra* note 44, at 361.

46. See, e.g., RICHARD SWINBURNE, *THE EVOLUTION OF THE SOUL* 12 (rev. ed. 1997); George Schlesinger, *The Principle of Simplicity and Verifiability*, 26 PHIL. SCI. 41, 41 (1959). For commentary on Swinburne's approach, see Don Fawkes & Tom Smythe, *Simplicity and Theology*, 32 REL. STUD. 259, 259 (1996).

47. See, e.g., EPSTEIN, *supra* note 1, at 27 ("If under one legal system a factory . . . may be built without any prior government approval, then that system is simpler than one which requires approval by a local zoning board . . ."); Ruhl & Ruhl, Jr., *supra* note 29, at 470.

partly a matter of the number of distinctions drawn by, or exceptions built into, a law.<sup>48</sup> It seems evident that the number of exceptions and distinctions built into a set of legal rules need not be a function of the sheer number of rules. Consider a variant of the game of checkers with an enormous number of pieces, but in which no functional or operational distinctions are drawn among the pieces. Each player has, let us say, hundreds of identical pieces, moving in one single invariant fashion. Surely, we would not see this game as extreme in its complexity.

Complexity, though, cannot be confined to matters of sheer number. If we think again of the mosaic's complexity, we will want to consider not just the *number* of tiles, but something like the *variety* of tiles as well. Similarly, the complexity of a legal code or legal system will depend in part on the degree of variety or differences among its constituent parts.<sup>49</sup> Just as the greater complexity of chess—relative to checkers—is, in part, a matter of the greater variety of chess pieces, so legal complexity reflects the degree of variance among constituent parts.

The number of elements constituting a legal rule or system, thus, need not be strongly correlated with the degree of differentiation among those elements. A game of checkers, as modified above to provide for hundreds of identical checkers on both sides, would, in this respect, be numerically far more complex than an ordinary game of chess. Chess, on the other hand, would still be more complex than any version of checkers with respect to differentiation among kinds of pieces.

### 1. Tax Code Example

Correspondingly, we can imagine a tax code that carefully listed, for each dollar increment in income, the ultimate tax due. This tax code could have millions, if not billions, of component sections, corresponding to every level of income in dollar units. We might wish to say that this code *really* involves merely one very large tax table, but there is no reason in principle why it could not formally be arranged as a series of separate sections governing each single dollar income

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48. See, e.g., *Nelson v. Freeland*, 507 S.E.2d 882, 884-85 (N.C. 1998) (quoting O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977)) (noting that a number of categorical exceptions and distinctions render premises liability law complex and confusing); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. & ECON. ORG. 150, 150 (1995) (recognizing complexity as "the number and difficulty of distinctions the rules make"); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 268 (1989); Lance W. Rook, *Laying Down the Law: Canons For Drafting Complex Legislation*, 72 OR. L. REV. 663, 670 (1993) (statutory cross-references as adding to complexity).

49. See, e.g., RESCHER, *supra* note 44, at 1, 9; SWINBURNE, *supra* note 46, at 13-14; Toran, *supra* note 44, at 361.

level. A person with a taxable income of, say, \$27,253 would simply go to the single corresponding line of the tax table.

This possibility suggests two useful points. First, what is on some definitions quite complex—as a million section tax code would be complex in terms of sheer number of elements—may be easily rewritable in far fewer sections, involving one large tax table. As easily rewritten, a code loses its complexity in this numerical sense, and becomes much simpler. Thus millions of code sections can easily be reduced to one single, comprehensive code section. This begins to suggest the superficiality, or the mere stylistic conventionality, if not the sheer arbitrariness of some judgments of complexity.

Second, while the tax code with millions of separate sections is complex in some senses—it has many working parts, and may be difficult or impossible to evade or contract around<sup>50</sup>—in other respects, such a code is relatively simple. The millions of separate provisions are not, for example, all qualitatively different possible ways in which one's interest income or capital gains might be treated, all of which one may need to consider.<sup>51</sup> Instead, one should, by our assumption, be able to move quickly to the single section corresponding to one's own income level<sup>52</sup> and instantly read one's final tax obligation from that section. The code sections, while numerous, are simple in some respects that we have already seen and in other respects we have yet to examine.<sup>53</sup> Here again, various senses of complexity, even when they are not being reformulated in ways that make them simple, do not positively correlate with other senses of complexity.

To this point, however, we have still left the problem of legal complexity vastly oversimplified. Imagine again a mosaic with a large number of tiles, and this time with a large variety of colors of tiles, but in which the tiles were arrayed in one simple endlessly repeated pattern: in the order corresponding to the visible light spectrum. Surely we would not see this simple and endlessly repeated pattern as approaching anything like the maximally complex mosaic.<sup>54</sup> But even a more interesting pattern is not the end of the complexity story.

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50. Cf. EPSTEIN, *supra* note 1, at 27 (noting that non-evadable provisions are more complex than those that can be contracted around).

51. See *id.* (hypothetically referring to twenty-five possible tax treatments of interest income).

52. We shall set aside the simplicities, or complexities, involved in determining one's taxable income in the first place.

53. Crucial, of course, is that anyone can turn immediately to the single relevant section, and quickly and easily grasp its decisive import.

54. For discussion of alternative mosaic tiling patterns that are simple in some respects, yet rather more complex in others, consider the concept of Penrose tiles, as developed by Roger Penrose. See Joseph Malkevitch, *Tilings and Patterns*, 236 SCIENCE 996 (1987); see also John Horgan, *Quantum Consciousness: Polymath Roger Penrose Takes On the Ultimate Mystery*, 261 SCI. AM. 30 (1989).

## 2. *Functional/Operational Complexity*

At a minimum, we must now add the idea of the functional or operational complexity of the elements of a legal system. If we think of chess as more complex than checkers, this is not merely because chess pieces vary more in their appearances or shapes, or even because the pattern of their initial deployment is more complex, but because chess pieces vary more in their functions, uses, and powers of movement.<sup>55</sup> In this respect, a legal system that relied solely on a series of decrees would be less complex than a legal system in which constitutional provisions, statutes, regulations, judicial opinions, executive orders, attorney general opinions, decrees, and other sorts of law all played their diverse roles.<sup>56</sup> These elements of a legal system could be diverse not only in content, but in their function or operation as well. They could vary along the dimensions of their jurisdictional scope, the actors addressed by the law, the officials authorized to carry out the law, the degree of authoritativeness of the law, or even the degree of coerciveness involved.<sup>57</sup>

Functional or operational complexity is partially a matter of hierarchy, either within a particular statute,<sup>58</sup> for example, or more broadly, as among the varied elements of a legal system.<sup>59</sup> The greater the number of hierarchical legal levels, all else equal, the more functionally or operationally complex the system is likely to be. Thus, federal constitutional provisions, federal statutes, and federal regulations addressing equality, along with state law at various levels on the same subject, add complexity to the law of equality. But then, interestingly, any blurriness or equivocality in what might superficially seem to be a clear vertical legal hierarchy<sup>60</sup> can also be a form of complexity. The presence of clear hierarchical levels in a legal system may add to its complexity, but so does lack of clarity or lack of "strictness" in a purported hierarchy of levels.<sup>61</sup>

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55. This example is used in RESCHER, *supra* note 44, at 9.

56. For some of the complexities involved in sorting out the genuine differences in legal function or operation, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991).

57. Some laws, such as those prohibiting theft, are mandatory and coercive at their essence, whereas others, such as those establishing the essentials of a valid, legally enforceable will, are more directly a matter of empowerment or social coordination. See H.L.A. HART, *THE CONCEPT OF LAW* 27-28 (2d ed. 1994).

58. See, e.g., Rook, *supra* note 48, at 670 ("[T]he more tiers there are in a provision, the more complex it will be.").

59. See RESCHER, *supra* note 44, at 9 (referring to "elaborateness of subordination relationships in the modes of inclusion and subsumption"). For some historic discussion, see *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (discussing federal-state judicial relations) and *McCulloch v. Maryland*, 17 U.S. 316 (1819) (discussing federal-state legislative relations).

60. See Wright, *supra* note 56, at 1381.

61. Relationships of authority can be difficult to trace because what appear to be strictly hierarchical relationships really involve mutual incorporation or mutual influence.

Functional or operational complexity, however, is hardly exhausted by matters of hierarchy. Broader issues of the degree of organizational elaborateness and interrelatedness also arise. The parts of a legal system may be related to each other in more or less complex ways, whether they are arranged in a neat hierarchy or not. A system might be organized, for example, in a neat pyramidal structure, with a strict hierarchy of levels. But this may tell us little about the degree of the system's complexity. If we build a pyramid out of sugar cubes as a school project, have we built a complex entity?

A pyramid of sugar cubes, even if multi-layered, does not suggest variety of constituent elements, or, more crucially, any sense of intricacy, elaborateness of organizational or structural scheme, or anything like richness and profusion. The sugar cubes do not interact among one another in a variety of interesting ways, qualify or amplify each other's impact, feed back on one another, or cross-reference one another.<sup>62</sup> Some cubes might even be removed without much affecting distant or even nearby cubes.

#### D. Organizational and Relational Complexity

Complexity, whether of a legal or nonlegal sort, is, in some measure, a matter of organizational complexity.<sup>63</sup> Organizational complexity in turn may be a reflection of something like the elaborateness of structural<sup>64</sup> interrelationships<sup>65</sup> among the parts of a system. The greater the number and variety of ways in which the parts of a legal system interact, all else equal, the greater the complexity.<sup>66</sup> Structural or relational complexity may even involve a sense of extravagance,<sup>67</sup> intricacy,<sup>68</sup> or elaborateness.<sup>69</sup>

Relational complexity in a system may sometimes be associated with great numbers of elements of the system. But as the sugar cube pyramid suggests, we may also find great numbers of elements of a system, but little interactive complexity. On the other hand, everyday experience with other people teaches us that relational complex-

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62. We have already referred above to the density of cross-referencing among provisions as a dimension of complexity. See Rook, *supra* note 48, at 670.

63. See, e.g., RESCHER, *supra* note 44, at 1, 9 (referring to the "variety of different possible ways of arranging components in different modes of interrelationship").

64. See, e.g., Richard Rudner, *An Introduction to Simplicity*, 28 PHIL. SCI. 109, 110 (1961) (referring, *inter alia*, to a structural dimension of simplicity or complexity).

65. See, e.g., Kades, *supra* note 29, at 413 (referring to "interconnectedness" as a dimension of tax law complexity) (quoting John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 12 (1993)).

66. See, e.g., SWINBURNE, *supra* note 46, at 13.

67. See S.F. Barker, *On Simplicity in Empirical Hypotheses*, 28 PHIL. SCI. 162, 165 (1961).

68. See RESCHER, *supra* note 44, at 8.

69. See *id.*

ity can be found in the absence of great numbers of system elements. Notoriously, we can find great complexity of relationship between as few as two individual persons.<sup>70</sup> We should not, therefore, expect a particularly strong correlation between complexity as sheer number and complexity as intricacy of relationship.

One could easily argue, for example, that there is greater complexity in the relationship between two elements of the first amendment—the Free Exercise Clause and the Establishment Clause<sup>71</sup>—than there is between either of these clauses and the Second through Eighth Amendments combined.<sup>72</sup> But then, the first eight amendments may seem complex in some ways that may largely evaporate merely by changing our conventional frames of reference, or by translating one language of description into another.<sup>73</sup> The first eight amendments may involve complex interrelationships that may come to seem less important if we reconceive of that series of separate provisions as, instead, an underlyingly unified single entity known as the Bill of Rights.<sup>74</sup>

### E. *Ontological and Epistemical Complexity*

As it turns out, even the various forms of legal complexity relate to one another in complex ways. Cutting across all of the above forms of complexity is a distinction between what we might call ontological complexity and epistemic complexity.<sup>75</sup> A system, including a legal system, is ontologically complex if it is somehow in itself complex,

70. See, e.g., the relationship between Dorothea and Mr. Casaubon in GEORGE ELIOT, *MIDDLEMARCH* (David Carroll ed., 1986), between Anna and Count Vronsky in LEO TOLSTOY, *ANNA KARENINA* (Constance Garnett trans., 1939), or between Edmund and Fanny in JANE AUSTEN, *MANSFIELD PARK* (1995).

71. See generally Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990); Scott J. Ward, Note, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739 (1989).

72. The relationship between the Establishment Clause and, say, the bearing of arms, the quartering of soldiers, or the right to grand jury indictment seems not so much complex as merely contingent, or generally uninteresting. See, respectively, U.S. CONST. amends. I, III, IV & V.

73. See, e.g., Mario Bunge, *The Weight of Simplicity in the Construction of Assaying of Scientific Theories*, 59 J. PHIL. 120, 121 (1962) (referring to the possibility of reducing many postulates, by merely conjoining them, to one).

74. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). This is not to deny that in light of other interests we may have, the complexity of relationships among the first eight amendments, or between one or more of those amendments and other provisions of the Constitution, may seem more important. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); see also, Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143 (1998). Professor Amar refers to both "intratextual" cross-references within the Constitution, and "intertextual" cross-references between the Bill of Rights and earlier historical documents. See *id.* at 1143.

75. This distinction is widely recognized and discussed, but it is emphasized in RESCHER, *supra* note 44, at 9.

apart from how simple or complex it is to understand (epistemically) or linguistically describe that system.<sup>76</sup> This distinction seems controversial: Is there really a way that a legal system is, in itself, apart from the ways it is described? Ultimately, though, this often seems to be a valid distinction, in that we can think of simple objects that are difficult to describe and complex objects that can be easily described. A photon, the basic unit of light, no less than, say, the concept of what is legally obscene, seems simple enough in itself, but describing either a photon's behavior or the bounds of the legally obscene in an understandable, genuinely articulate way is surprisingly difficult.<sup>77</sup>

This distinction between the object and its description or understanding does however seem especially complex or even doubtful in the legal context. In some respects, it seems difficult, if not impossible, to separate what the law *is* from someone's *understanding* or *description* of the law. Is there really a law of future interests apart from what someone understands that law to be?<sup>78</sup> The laws of future interests cannot, in this sense, be like a genuine, but as yet undiscovered, law of nature. On the other hand, it is easy to believe that the real operation of our legal system in its sociological and psychological dimensions could be partially unknown to us, and discoverable only through special effort.<sup>79</sup> In some respects, ontological and epistemic legal complexity are inseparable, but in other respects, they are not.

Where ontological and epistemic legal complexity can be separated, should we nonetheless assume that they will be strongly posi-

76. See, e.g., Steven O. Kimbrough, *On Simplicity as a Guide to Truth*, 9 KINESIS 55, 63-64 (1979); Daniel N. Osherson & Scott Weinstein, 57 PHIL. SCI. 266, 267 (1990) (distinguishing, in parallel fashion, between metaphysical simplicity and formal simplicity); Rudner, *supra* note 64, at 110.

77. See, e.g., 1 R. FEYNMAN, R. LEIGHTON & M. SANDS, THE FEYNMAN LECTURES ON PHYSICS §§ 37-2 to 37-9 (1963) (discussing wave/particle dualism). One might contend that our verbal or mathematical description of a photon and its behavior is in itself simple, but that we do not know what to make of that simple description. Even if we say this, we are still left with a contrast between narrow descriptive simplicity and the difficulties involved in really understanding either our own description or the underlying phenomenon, the photon itself. In the context of obscenity, consider the oft-quoted assertion of Justice Potter Stewart that hard-core obscenity is both readily recognizable and difficult to legally define. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). This may not show that obscenity in itself is simple, but difficult to both know and describe. It may instead suggest a further complication: it may be simple to know or recognize a legal idea, but complex to describe or articulate it.

78. For a possible alternative, see THOMAS AQUINAS, SUMMA THEOLOGICA I-II, question 91, art. 1, in THE POLITICAL IDEAS OF SAINT THOMAS AQUINAS 11, 11-12 (Dino Bigongiari ed., 1953).

79. Consider, for example, the study conducted by David Baldus concerning the racial dimensions of death penalty cases referred to in *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987), or, at a broader level, the study of economic and class dimensions of the law in CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 33 (1913), and on the question of the authority of the law, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).



tively correlated? Where the law in itself is simple, should we expect our descriptions of that law to be simple also? Light may be simple, but its description may not. As it turns out, any such general assumption grossly oversimplifies legal reality.

One problem is that there are likely to be various ways of accurately describing any legal reality. Perhaps none of these descriptions of legal reality is simply wrong. Some may seem relatively simple, others more complex, and they may or may not also be mutually translatable. Different social groups may reasonably emphasize different legal dimensions. Police procedure in an arrest may be described differently on different sides of town. In such cases, we can hardly say that the description of legal reality is just simple. Nor can we say that the legal reality is just complex. One dimension of the legal complexity may be that some social groups perceive the law as relatively simple. Consistent group oppression, for example, may not require much descriptive complexity or much nuance. Some sort of choice, or choices, among alternative descriptions of simplicity and complexity, based on value judgments, must be made instead.

Consider a very loosely corresponding problem in mathematics. Assume there is a number called *PI* and that we want to describe it. Verbally, we can characterize *PI* as the ratio of a circle's circumference to its diameter. Numerically, we can characterize *PI* as equal to 3.1415926 . . . with a potentially endless succession of refining digits. Whether we choose the verbal or the numerical approach depends upon our interests, and we can certainly translate one approach into the other.

But we cannot say, however, that the two approaches are equally complex. At the very least, they are not equally complex in the same respects. The numerical approach is, depending on our interests, of potentially endless length, with an infinite number of digits involved. Beyond some point, the numbers cannot readily be memorized. The numerical approach is in these respects complex. In contrast, the verbal formula for *PI* is simpler in that it is compact and can readily be memorized. The verbal formula may also be easy to visualize. On the other hand, if we want to do some sort of practical calculation, using the numerical formulation of *PI*, to all the decimal places we need, is a good deal more manageable and less complex than trying to use a visual image or a verbal formula.<sup>80</sup>

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80. A bit more realistically, early twentieth-century physicists faced a choice, based on their own interests, between two actually equivalent, but more and less complicated approaches to the development of quantum mechanics. See, e.g., David C. Cassidy, *Heisenberg, Uncertainty, and the Quantum Revolution*, 266 *SCI. AM.* 106, 109 (1992) (contrasting Erwin Schrodinger's wave mechanical approach with Werner Heisenberg matrix mechanical approach, with each taking the other's approach to be generally more complicated, if not repellent).

Consider, now, an example from the law. Let us assume that there is a difference between free speech law and descriptions, understandings, or declarations of free speech law. In this case, the ontological complexity of free speech law (in itself) might then either mirror or depart from its epistemic (or descriptive) complexity. Is there any reason to suppose that the ontological complexity of free speech law must march in lockstep with its epistemic complexity? Is it not equally plausible to argue that given its phrasing and underlying purposes, free speech law, itself, may actually be simple, and its interpretation or description quite complex? We often suppose that we are trying to somehow correctly interpret what amounts to a brief, readily memorized, simply formulated passage in the First Amendment.<sup>81</sup> For whatever reasons, our attempts at interpreting what is in several respects a simple constitutional command in the first amendment have resulted in a remarkably complex descriptive enterprise.

Thus while the text of the Free Speech Clause, and perhaps even its purposes, may seem simple enough, a search of a standard legal research database turned up 14,515 federal court decisions at least referring to "free speech" or "freedom of speech," most presumably interpreting and applying that apparently simple constitutional clause.<sup>82</sup> Many of these cases are not purely mechanical exercises. In this respect, we seem to have both ontological legal simplicity and epistemic legal complexity. These two forms of legal complexity thus do not seem to march hand in hand.

It is certainly possible to try to establish a stronger correlation between ontological and epistemic legal complexity. It is perfectly natural, for example, to say that the 14,515 federal free speech cases are themselves part of the "being" or entity of free speech law itself, rather than merely epistemic attempts to interpret, report, or describe an underlying entity known as free speech law. On this justifiable approach, free speech law is apparently quite complex. However, no interesting correlation is established between the degree of ontological complexity and the degree of epistemic or descriptive complexity of free speech law. On such an assumption, we are now assuming that free speech law itself is monumentally complex.

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81. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."). For some complications even at this textual level, see, for example, Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U.L. REV. 1156, 1158 (1986) (discussing the apparent textual focus on congressional action); John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) (arguing that the presence of the article 'the' suggests a reference to some identifiable institution, practice, or subset of the broader category of speech).

82. The Westlaw "ALLFEDS" database retrieved this remarkable number as of January 30, 1999.

If the case law interpretations are just part of the underlying entity of free speech itself, we would then have to ask whether our description or understanding of that large body of free speech case law must be comparably complex. This is hardly assured. Complicated things, such as the numerical *PI*, may have quite simple verbal or visual descriptions. By comparison, a parallel search for federal cases referring to "second amendment" or to the phrase "bear arms" yielded 1,526 cases,<sup>83</sup> or only about one-ninth of the total free speech cases. Can we conclude both that the Free Speech Clause is much more complex than the Second Amendment, and that the Second Amendment is easier to grasp than free speech?

We might ask whether our leading theories and interpretations of this assumedly complex free speech law are themselves proportionately complex. It is hard to see why we must say so. Admittedly, most of our rather diverse leading theories of free speech law are not especially difficult to capulize.<sup>84</sup> Many of their more detailed conclusions may not flow from their basic premises any more rigorously than some alternative conclusions. The theories often agree on much and thus substantially overlap. That free speech theorists differ does not make their theories complex. Even if we choose to call our leading free speech theories complex, it is not easy to see why they are more complex than our leading theories of the assumedly less complex Second Amendment. Is it clear that we understand the Second Amendment better than the free speech clause?

Undoubtedly, there is far greater academic or theoretical interest in free speech law than in Second Amendment law.<sup>85</sup> Our stake in free speech is doubtless higher. Free speech cases are understandably litigated far more often. But this hardly means that our leading free speech theory is much more complex than our leading second amendment theory. It is not as though there is some patent understanding of the Second Amendment, applicable by consensus to the major Second Amendment contexts. However we come out on this comparison, it is but one example.

83. This figure was also obtained from the Westlaw "ALLFEDS" database on January 30, 1999. Admittedly, these two searches are not comprehensive in formulation and scope, or even structurally parallel, but the basic proportions seem evident.

84. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

85. A search of the Westlaw Journals and Law Reviews database on January 30, 1999 yielded a total of 574 articles with either "free speech" or "freedom of speech" in their title, and only 84 articles with either "second amendment" or "bear arms" in their title. *But see supra* note 84.

In general, and more broadly, we do not see any clear association between the complexity of the law itself and the complexity of any given attempt to describe or justify that law.<sup>86</sup> Again by way of analogy, a remarkably complicated decimal series might be quite simply described, perhaps, as the square root of two. If, on the other hand, we deny any contrast between ontological and epistemic legal complexity, we still cannot escape epistemic legal complexity in a broadly pragmatic sense.<sup>87</sup>

This pragmatic sense of epistemic complexity focuses on the "resources . . . of time, energy, [and] ingenuity"<sup>88</sup> required for the "cognitive domestication"<sup>89</sup> of a legal system, code, rule, or opinion. A system, whether legal<sup>90</sup> or non-legal,<sup>91</sup> that is easier to understand than another is, in that pragmatic respect, simpler. For instance, it has been said that one form of simplicity involves memorability.<sup>92</sup> In this sense, "[t]he simpler statement is easier to remember."<sup>93</sup> Alternatively, epistemic complexity in the broad pragmatic sense may take the form of relying on "transcendent or generalized"<sup>94</sup> concepts. In some sense, deep or transcendent ideas obviously involve complexity. It seems undeniable that legal rules that are easy to remember—whether we include the Free Speech Clause or not—may be complex in one or more other respects. Legal rules regarding perpetuities, cause-in-fact, or proximate cause, for example, may be easy to state or memorize but difficult and costly to use and apply.

Each of the dimensions of epistemic complexity is, at least in part, a matter of how the system, code, rule, or opinion is linguistically expressed.<sup>95</sup> Consider, for example, a hypothetical criminal code consisting, in its entirety, of the injunction to avoid evil.<sup>96</sup> This code is epistemically complex in relying on generalized or transcendent

86. Broadening the focus, in an admittedly rather speculative way, to constitutional theory more generally, it would be easy to argue that our leading general constitutional theories are not much more complex than are theories of any particular constitutional provision. Perhaps the most complex leading general constitutional theory is that developed by Professor Phillip Bobbitt. See PHILLIP BOBBITT, *CONSTITUTIONAL FATE* 7. (1982). Therein, Professor Bobbitt argues that there are no more and no less than six equal status modes of constitutional interpretation. See *id.* (referring to the historical, textual, doctrinal, prudential, structural, and ethical modes of constitutional interpretation).

87. See Bunge, *supra* note 73, at 121.

88. RESCHER, *supra* note 44, at 16.

89. *Id.*

90. See Kaplow, *supra* note 48, at 150.

91. See Raymond D. Havens, *Simplicity, a Changing Concept*, 14 J. HIST. IDEAS 3, 22 (1953) (noting one style of landscape architecture as "simpler in the sense of being more regular and having a more readily apprehended plan").

92. See H.R. Post, *Simplicity in Scientific Theories*, 11 BRIT. J. PHIL. SCI. 32, 35 (1960).

93. *Id.*

94. Levit, *supra* note 48, at 268.

95. See Osherson & Weinstein, *supra* note 76, at 267.

96. Cf. AQUINAS, *supra* note 78, at 57-59 question 94, art. 2 ("[E]vil is to be avoided.").

ideas,<sup>97</sup> but it is exceptionally simple in the dimensions of brevity and concision, and in number of elements.<sup>98</sup> It is also simple in the sense of being easily committed to memory.<sup>99</sup> Whether it is simple in the sense of having its concrete implications readily graspable<sup>100</sup> is another matter. This will, in part, be a function of the culture in which this rule is embedded. An unusually homogeneous, authoritarian, traditionalist culture may usually agree on what counts as avoiding evil; other cultures will not.

In the extreme case, any member of that assumed, unusually homogeneous culture may be able to translate the injunction to avoid evil into remarkably detailed, more or less culturally uncontroversial precepts. The general injunction to avoid evil may, for that culture, be nearly equivalent to some long, detailed code on which there is a consensus. So in which senses can we say that such a criminal code is, for any given culture, or across cultures, simple or complex? Some cultures may find that such a brief, general criminal code can be uncontroversially translated into a much more elaborate form, and uncontroversially applied. Some cultures may not even need to make any such conscious translation. Our culture, certainly, could not make an uncontroversial translation of 'avoid evil.'

We have seen that expressing the idea of *PI* in different ways—as a ratio, and as an irrational number—may involve different forms of complexity.<sup>101</sup> Notoriously, a given idea may be easily expressed in one language, but difficult to convey accurately in another language.<sup>102</sup> Difficult issues of what we might call formal,<sup>103</sup> or notational,<sup>104</sup> or even stylistic<sup>105</sup> complexity are inescapable.

One "translation" of a tax code provision may be complex in some respects, where another translation of the same provision may be simpler in those respects, yet more complex in others. Boris Bittker has argued for tax code provisions that are understandable, at least

97. See Levit, *supra* note 48, at 268.

98. See *supra* notes 44-46 and accompanying text.

99. See *supra* notes 92-93 and accompanying text.

100. See *supra* notes 88-91 and accompanying text.

101. See *supra* note 80 and accompanying text.

102. The words "quantum" and "theory" are themselves of ancient origin, but it would undoubtedly be rather difficult to translate WERNER HEISENBERG'S, *PHYSICAL PRINCIPLES OF THE QUANTUM THEORY* (Carl Eckart & Frank C. Hoyt trans., 1930) into Latin without creativity and inevitable cumbersomeness.

103. See Rom Harre, *Simplicity as a Criterion of Induction*, 34 *PHIL.* 229, 229 (1959) (seeking to distinguish formal simplicity from conceptual simplicity, or the fewness of concepts required to convey a given theory).

104. See Rudner, *supra* note 64, at 110 (seeking to distinguish notational from logical and structural simplicity).

105. See Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 *U. MIAMI L. REV.* 1, 12-13 (1974).

to legal non-specialists, if not to ordinary citizens.<sup>106</sup> He argues in particular that “[a]n individual may deduct” is simpler and better than “[i]n the case of an individual, . . . there shall be allowed as a deduction.”<sup>107</sup> We may assume that the former is indeed stylistically simpler. But it may, in another sense, be more complex. The admittedly cumbersome language of “in the case of an individual” suggests the exclusion of other kinds of taxpaying entities to a somewhat greater degree than does the reference merely to “an individual.” To merely say that an individual can do something does not suggest quite as strongly that other kinds of entities cannot also do the same thing. The stylistically simpler formulation thus invites more litigation on this important issue. One could thus argue more broadly that the stylistically simpler formulation holds open more issues and encourages more litigation, and is in a practical sense more complex.

It should not surprise us that stylistic simplicity may often leave open more avenues for litigation, and, in that sense, be more complex. At the very least, stylistic simplicity often shifts complex determinations into the future. We may say that plain language drafting often sacrifices some forms of simplicity over the long term for simplicity in the short term. Stylistic complexity today is usually easy to recognize and dislike. Adjudicative complexities postponed until tomorrow are less easy to recognize today. Failing to fully appreciate or admit such a tradeoff is certainly common. The federal government’s current regulatory policy, for example, embodies this illusion. An important executive order holds, in particular, that “[e]ach agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”<sup>108</sup> Maximizing stylistic simplicity and minimizing litigation born of uncertainty are both desirable, but they are not really compatible goals.

Plain and simple regulations typically invite litigation and interpretive struggle. A regulation requiring, for example, that a hazardous waste site be “cleaned up” would be stylistically simple, and easy to grasp superficially, but would give no guidance, for example, on

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106. See *id.* at 13; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 68 (1983) (“The desire to make legal rules more accessible motivates recurrent calls for ‘simplification’ of convoluted regimes like the tax code.”).

107. Bittker *supra* note 105, at 12.

108. Exec. Order No. 12866, 3 C.F.R. 638, 640 (1993). For a recent case in which constitutional due process issues hinge largely on drafting complexity, see *Walters v. Reno*, 145 F.3d 1032, 1042 (9th Cir. 1998). For discussion of some ideological uses of stylistic obscurity, see Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998). For extensive discussion of the related distinction between “mud” and “crystal” rules, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (distinguishing “fuzzy, ambiguous rules” as opposed to “clear, open and shut, demarcations”).

the crucial issue of "how clean is clean."<sup>109</sup> One might respond by saying that regulations that give little real guidance cannot truly be readily graspable, or genuinely simple in language, form, or style. But this is either not always true, or it shows that there are more, and more poorly correlated forms of complexity than we imagined. Simple language can sometimes give little concrete guidance, as in the case of the injunction to avoid evil. It is certainly possible, as well, to reduce litigation by providing clearly in the regulation itself for the proper outcomes of some common kinds of specific cases.

In fact, there is plainly more than one form of stylistic complexity, and these forms of stylistic complexity need not correlate well with each other. We commonly distinguish, for example, between semantic simplicity<sup>110</sup> and syntactic simplicity. Semantics refers to the meaning of some unit or level of a system, legal or otherwise.<sup>111</sup> Syntax, in contrast, refers to the grammatical or other structural relationships in a unit of legal or other expression. Somewhat different definitions of syntax and semantics are certainly possible.<sup>112</sup> We could, in any event, easily imagine a statute or other legal text that is semantically simple and syntactically complex, or vice versa. In this context, as in the others considered above, legal complexity is itself almost bewilderingly complex, with the various forms of legal complexity cutting across or otherwise failing to correlate with one another.

### III. OUR INABILITY TO MEASURE COMPLEXITY: SOME DEEPER ISSUES, ILLUSTRATIONS, AND CONCLUSIONS

Even at its barest and simplest, complexity has turned out to be complicated.<sup>113</sup> We have oversimplified by assuming generally that cases of most of the various forms of complexity will be obvious, when

109. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11-12 (1993). For the more general point that statutory or regulatory formal simplicity may simply shift complexity forward in time, to the forum of litigation, see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2010 (1989).

110. See, e.g., Levit, *supra* note 48, at 268; Bunge, *supra* note 73, at 121.

111. See, e.g., Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 276 n.62 (1993); Brian Leiter, *Incommensurability: Truth or Consequences?*, 146 U. PA. L. REV. 1723, 1725 (1998).

112. See *supra* notes 110-111 (linking syntax to form or structure, and semantics to presuppositions); REED DICKERSON, *MATERIALS ON LEGAL DRAFTING* 33 (1981) (semantics, in part, as a matter of reference).

113. See discussion *supra* Part II. For a further puzzle from the more antiseptic realm of simple mathematics, consider which is simpler: the fraction 1/3, or the fraction 1/500. The first requires fewer digits, and is more readily memorized, but it is irrational, and for some purposes infinitely more complicated, or at least lengthier, when expressed as a decimal. See Robert Ackerman, *Inductive Simplicity*, 28 PHIL. SCI. 152, 154 (1961) (comparing 1/3 and 1/10).

in fact, legal complexities are sometimes "submerged."<sup>114</sup> Even an oversimplified analysis, however, can establish some useful conclusions. We cannot, for example, just decide that the law in general, or even some particular law, is too complex and should be simplified. Our point is not that just simplifying a law is politically difficult or undesirable. It is, instead, that it is conceptually impossible. By way of an extremely loose analogy, some things can be readily "simplified" in the sense of being compressed, and other things cannot. It is thus much easier, for example, to compact a cubic foot of household trash than a cubic foot of water. Our inability to just compress or simplify the law goes beyond practical difficulties to a more conceptual level.

#### A. *The Hearsay Rule Example*

To further illustrate these points, let us consider an additional example or two. We may profitably focus on areas of the law that are thought of as complex. Let us focus first on the hearsay rule, and then on a problem within free speech law. Certainly, the evidentiary hearsay rule, along with its many exceptions, is commonly thought of as relatively complex.<sup>115</sup> But even the hearsay rule cannot be complex in every respect. We may certainly rank the hearsay rule, with its exceptions, as complex in the sense of involving many exceptions.<sup>116</sup> Perhaps we can say that the hearsay rule with its exceptions is operationally complex.<sup>117</sup> The rule with its exceptions may also be epistemically complex, at least in the sense of being difficult to memorize, if not to grasp.<sup>118</sup>

The hearsay rule, even with its exceptions, does not on the other hand seem especially complex in other respects. We may think of the hearsay rule as having many parts, but we could easily reduce the number of parts of the rule by merely conjoining them into one (relatively long) formulation.<sup>119</sup> Do we think of the hearsay rule as having great variety among its parts?<sup>120</sup> Is the hearsay rule complex in a hierarchical or other organizational sense?<sup>121</sup> Can parties not often

114. The constitutional references to cases or controversies has, for example, been said to have "an iceberg quality, containing beneath their surface simplicity submerged complexities . . ." *Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747, 754 (1976) (quoting *Flast v. Cohen*, 392 U.S. 83, 94 (1968)).

115. See, e.g., *People v. Pennington*, 318 N.W.2d 542, 546 (Mich. Ct. App. 1982) (referring to "the complexity of the hearsay rule and the numerous exceptions thereto") (quoting *People v. Moncure*, 288 N.W.2d 675, 679 (Mich. Ct. App. 1980)); *Henslee v. Monks*, 571 P.2d 440, 442 n.2 (Okla. 1977) (referring to "the complexity of the subject" of hearsay) (quoting *Smith v. Munger*, 532 P.2d 1202, 1207 (Okla. Ct. App. 1974)).

116. See *supra* text accompanying notes 44-48.

117. See *supra* text accompanying notes 54-57.

118. See *supra* text accompanying notes 75-77, 87-89.

119. See *supra* note 119 and accompanying text.

120. See *supra* text accompanying note 49.

121. See *supra* text accompanying notes 58-69.



stipulate or "contract around" the hearsay rule?<sup>122</sup> Do more assumptions underlie the hearsay rule than other rules?<sup>123</sup> Is the hearsay rule semantically<sup>124</sup> or syntactically<sup>125</sup> complex? Could we not conclude that the hearsay rule is complex in some respects and simple in others, perhaps precisely because it is complex in those initial respects? Whether the hearsay rule is *really* complex is, at worst, irrelevant or unanswerable, and, at best, a matter of a contestable judgment of typically conflicting values and interests.

Thus, a lawyer who sees the complexities of the hearsay rule as a barrier to personal entry,<sup>126</sup> or as a disincentive to compete with established litigators, and who views this as important, will likely see the hearsay rule as complex. A law student who is required to memorize and apply all of the hearsay exceptions will likely see the rule as complex also. These may be the most commonly encountered perspectives on the hearsay rule, but they certainly do not exhaust all the potential perspectives. A litigator already an expert on hearsay, who faces low "compliance costs,"<sup>127</sup> may consider the hearsay rule simpler than other less easily grasped rules. Someone interested in the structure of the legal system<sup>128</sup> may not consider the hearsay rule particularly complex. A legal theorist who is interested in the purposes of particular laws may well believe that the purpose of the hearsay rule and its exceptions is relatively simple.<sup>129</sup> A legal semanticist may find the hearsay rule simpler than, say, most modern statutory provisions. The hearsay rule can be stated in relatively simple words; no special terminology or technical terms need be invoked.

The view that the hearsay rule is particularly complex is held more commonly than the opposite, but such a view is not, on that basis, more genuinely correct. Whether we see the hearsay rule as complex or as simple is instead a reflection of which of the various legitimate interests and perspectives we identify with most strongly. Neither general view is better than the other.

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122. See *supra* note 50 and accompanying text.

123. See *supra* text accompanying notes 44-49.

124. See *supra* text accompanying notes 103-05, 110-15.

125. See *id.*

126. For some informal discussion of this concept in other contexts, see *Panel Discussion: Market Power and Entry Barriers*, 57 ANTITRUST L.J. 701 (1989).

127. See *supra* notes 42-43 and accompanying text.

128. See, e.g., HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of California Press 2d ed. 1967).

129. Someone might imagine, for example, that both the rule itself and the exceptions reflect a moderate distrust of ordinary jurors. See, e.g., Kenneth Culp Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1365 (1970).

### B. *The Public Forum Debates*

We see a generally similar, but richer, pattern in the context of free speech law. The free speech clause of the Constitution<sup>130</sup> is itself short,<sup>131</sup> simply phrased,<sup>132</sup> and unitary.<sup>133</sup> Arguably, the Free Speech Clause may be viewed as having only a single underlying purpose.<sup>134</sup> On the other hand, one could equally argue that the primary purposes underlying the Free Speech Clause are irreducibly multiple.<sup>135</sup> It seems entirely sensible to argue that free speech law should, in some fashion, be "informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between individual rights and community needs is at the core of every First Amendment issue."<sup>136</sup> There are certainly a number of somewhat distinct free speech doctrines and judicial tests,<sup>137</sup> but the degree to which this apparent differentiation conceals a deeper unity is contested.<sup>138</sup>

Free speech law is thus complex in a number of respects, and simple in others. Whether we call free speech complex depends upon our contestable choices of the characteristics we wish to attach most weight to. The problem of assigning some particular degree of complexity to any area of free speech law is itself more complex. Some areas of free speech law, and some particular free speech tests, can easily be described as either simple or complex.

Consider, for example, the current state of the public forum doctrine, the law that purportedly controls the government regulation of speech by private parties on or through government-owned property.<sup>139</sup> Public forum doctrine recognizes three categories of public

130. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

131. See *supra* text accompanying notes 44-48.

132. See *supra* text accompanying notes 103-05, 110-15.

133. See *supra* text accompanying notes 44-48.

134. See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). In a broader sense, see Cass Sunstein, *Free Speech Now*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 255, 301 (Geoffrey R. Stone et al. eds., 1992).

135. See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1213 (1983).

136. *Z.J. Gifts D-2 v. City of Aurora*, 136 F.3d 683, 686 (10th Cir. 1998).

137. See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW 1087-1529* (3d ed. 1996) (discussing free speech tests for a number of contexts, including, subversive advocacy, speech by public school students, public employee speech, libel, commercial speech, labor union elections, pornography, hate speech, etc.).

138. See *supra* notes 139-40 and accompanying text. For an attempt, in another context, to reduce complexity in free speech law, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

139. See, e.g., *International Soc'y For Krishna Consciousness Inc. v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Cornelius v. NAACP Legal Defense*

fora. The first category is that of traditional public fora,<sup>140</sup> such as public parks and downtown sidewalks, where free speech is strongly protected.<sup>141</sup> More relevant for our purposes are the second and third: the designated public forum and the nonpublic forum.

The distinction between designated public fora and nonpublic fora is important, as the tests for permissible restriction of speech in these two types of fora differ significantly. Generally, restrictions on speech in designated public fora are strongly disfavored, ordinarily drawing strict scrutiny, as in the case of traditional public fora.<sup>142</sup> Thus, restrictions on access to designated public fora ordinarily are tested by requiring a compelling governmental interest and narrow tailoring—in other words, a close fit between the governmental purpose and the scope of the restriction on speech.<sup>143</sup> By contrast, the general constitutional test for restrictions on speech in nonpublic fora is more lenient. Such restrictions need only be “reasonable”<sup>144</sup> and not based on opposition to the restricted speaker’s point of view.<sup>145</sup>

Thus restrictions on, or exclusions from, designated public fora are more difficult to justify than in the case of nonpublic fora. But this difference will come into play only after we have decided that a given forum is either a designated forum or a nonpublic forum in the first place. And this choice, in turn, should depend upon the judicial definitions of these two kinds of fora. But it is these definitions, and the distinction between the two fora, that raise the difficult problems.

A designated public forum, we are told, refers to “property that the State has opened for expressive activity by all or part of the public.”<sup>146</sup> Even in a designated public forum, some portion of the range of potential speakers can be excluded.<sup>147</sup> Designated public fora,

& Educ. Fund, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

140. See, e.g., *Perry Education Ass'n*, 460 U.S. at 45 (recognizing that the government is limited when regulating speech in traditional public fora.)

141. See, e.g., *Cornelius*, 473 U.S. at 800 (permitting government exclusion of a speaker from such a forum only where “necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest”). See also *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 699-700 (7th Cir. 1998).

142. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-79 (1998) (recognizing that the government must have a compelling interest to regulate speech in a public forum.)

143. See *id.*; see also *Cornelius*, 473 U.S. at 800.

144. *Forbes*, 523 U.S. at 677-79.

145. See *id.*; *Sefick v. Gardner*, 164 F.3d 370, 371-73 (7th Cir. 1998) (“When deciding what may be displayed in a nonpublic forum, the government may exercise considerable selectivity . . . provided it does not transgress basic anti-discrimination rules.”).

146. *Forbes*, 523 U.S. at 677 (quoting *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

147. See *id.*

therefore, are typically available for only a particular class of speakers.<sup>148</sup> The law distinguishes between access for individual speakers and access for a class of speakers.<sup>149</sup> Whole classes of speakers can thus be excluded from designated public fora.

How, we might then wonder, does a nonpublic forum differ from a designated public forum? The distinction exists between general and selective access to the forum.<sup>150</sup> But what we have already said about designated public fora sounds like selective access.<sup>151</sup> What is the real difference between the accessibility of designated public fora and of nonpublic fora? To clarify the distinction, the Supreme Court has said that a designated public forum involves access for "a certain class of speakers,"<sup>152</sup> whereas a nonpublic forum involves access for "a particular class of speakers"<sup>153</sup> who must, as groups or individuals, obtain permission before using the facility for speech purposes.<sup>154</sup>

Thus, at this point there is either supposed to be a crucial difference between a "certain class" (designated public fora) and a "particular class" (nonpublic fora) of speakers, which seems highly unlikely, or between something like a need for repeated or particularized government permission to speak and the absence of such a requirement. On the latter theory, the select class would need some sort of permission to speak in nonpublic fora, but not in designated public fora. But the latter distinction seems doubtful at best. Surely, for example, college students must often, as groups or individuals, obtain permission to use public university facilities for speech purposes, even if the facility is classed as a designated public forum. College students, as groups or individuals, do not simply waltz into designated public fora such as public university auditoriums and begin speaking. Access to designated public fora typically requires permission.

At a minimum, public universities will want to require such permission in order to allocate limited space when potentially conflicting demands arise. Individualized permission requirements may be imposed regarding both designated public fora and nonpublic fora. Is the idea then that in the case of nonpublic fora, access may be denied on more substantive grounds, apart from scheduling conflicts? This idea will not help us distinguish designated from nonpublic fora. Ac-

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148. See *id.* at 677 (citing, among other cases, *United States v. Kokinda*, 497 U.S. at 726-27) (O'Connor, J., for the plurality)).

149. See *id.* at 677.

150. See *id.*; see also *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 700 (7th Cir. 1998) (indicating selectivity and restriction of access as marking a non-public forum).

151. See *supra* notes 151-154 and accompanying text.

152. *Forbes*, 118 S. Ct. at 1642.

153. *Id.*

154. See *id.* (discussing *Widmar v. Vincent*, 454 U.S. 263, 267 (1981)).

cess to designated public fora can be denied on substantive grounds as well, such as an insufficiently clear attachment to the university.<sup>155</sup>

If there is any real difference between a designated public forum and a nonpublic forum, that difference is, even at a theoretical level, modest, if not elusive.<sup>156</sup> The former kind of forum evokes a more rigorous constitutional test than the latter, but the difference between the two fora is minimal at best. Both can be restricted to a class of permitted speakers, and both can involve continuing non-trivial access permission requirements.

This quite minimal difference between designated and nonpublic fora thus leaves the outcome of many public forum cases almost completely indeterminate. As a practical matter, great discretion is held by courts in making this often decisive classification. What, then, can be said about the degree of complexity of free speech law in this respect? Unavoidably, we must again say that this aspect of public forum doctrine is both relatively simple and extremely complex. The distinction between the two kinds of fora is binary, is supposed to be expressed briefly in simple terms, and the doctrine evokes two clearly stated corresponding tests. On the other hand, the distinction between the two kinds of fora is elusive in practice, leading to enormous indeterminacy of judicial outcome. If we are able to predict how a judge will use this distinction, this reflects only minimally our knowledge of the facts and the law, and far more our knowledge of the particular judge's proclivities and practices.

In this respect, we may say that the apparent simplicity of this aspect of the public forum doctrine is largely an illusion. It may be quite simple for a cynical or realistic judge to choose a preferred classification and then rationalize the choice. The apparent simplicity is really a matter of displacing or shifting the complexity onto those actors who must predict what courts will do, and onto those actors who wish to make free speech law determinate in this area—and in that sense simple.

Matters are far from simple for those who must predict how courts in general will apply this distinction between the two kinds of fora. More broadly, we may say that both the real and apparent simplicity of the Free Speech Clause is mainly a matter of projecting the complexities across time onto those who devise constitutional doctrines and tests, and, then, onto those who must predict judicial outcomes

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155. See *id.*; see also *Widmar*, 454 U.S. at 268 ("We have not held . . . that a campus must make all of its facilities equally available to student[s] and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

156. For a broader critique of the public forum doctrine, see Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

and apply the doctrines and tests in their own lives as citizens and government officials.

Could the public forum doctrine, and other areas of free speech law, be made more determinate, and, at least in that respect, simpler? Certainly; but transforming the open-ended nature of public forum doctrine into a more determinate, more predictable form is itself complex work. More importantly, when we have finished this work, so that we now understand the boundary between designated and nonpublic fora in various contexts, in all their concrete particularity, we will unavoidably have a legal understanding of that distinction that has itself become quite complex. If such an understanding does not amount to a vast catalog of particular institutional and speaker circumstances of every variety, with the preferred outcomes for each, it must at least approach that cumbersome extreme.

#### IV. CONCLUSION

The law in general, and individual laws in particular, cannot be just simplified; this is not so much because the law in practice resists simplification, but for deeper reasons. As we have seen, simplifying a law in some respect hardly guarantees that the law will be simplified in all respects. Typically, as we have seen, legal complexity, in one respect, is at best uncorrelated with legal complexity in other respects.<sup>157</sup> Simplifying a law in one respect typically leaves the law complex in other respects. Indeed, simplifying a law in one respect may well make that law, or some other law, more complex in other respects, now or in the future.<sup>158</sup>

We face rather difficult questions of value and conflicting interests before we can, on the basis of those contestable value judgments, conclude that we have *really* simplified the law. To say otherwise would be like claiming that it is just *really* desirable that some particular baseball team win the next World Series. Contestable value judgments underlie such claims.

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157. See discussion *supra* Part II. For additional theoretical support, see, for example, McCaffery, *supra* note 1, at 1270 ("[S]ome very simple terms yield a dizzying array of interpretations . . . . In sum, there is no consistent correlation among statutory mass, abstruseness, and complexity.")

158. See discussion *supra* Part II. For additional theoretical support, see Steven Walt, Book Review, 109 ETHICS 193, 194 (1998) (reviewing RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) and noting that "[t]he different criteria sometimes work against each other") and John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 13 (1993) (explaining that, in tax law, "the use of elaborative complexity is intended to reduce judgmental [i.e., interpretive] complexity"). See also, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 746-47 (1987) (referring to Jacques Derrida's citation of the simple and the complex as a hierarchical opposition that is subject to inversion or temporary reversal).

Even this limited possibility for legal simplification assumes that what we take as a law's simplicity cannot be redescribed as complex. But this is itself an oversimplification. As we have seen, a description of the law as "simple" can often be translated into a description marking the law as complex.<sup>159</sup> This possibility further muddies the waters.

Finally, even if we can all agree that we have simplified the law in some respect, we may have only displaced the complexity of the law forward or backward in the overall lawmaking and implementation process, or we may have merely shifted the complexity to some other element of the broader political system. Simplicity in style or vocabulary may store up uncertainties for future litigation. Ultimately, the law is as simple or as complex as it is, in whatever respect, because that degree of simplicity or complexity is consistent with the current, broad balance of legal and political forces. Wanting the law to be simpler, in some respect, is merely a part of the play of such legal and political forces and does not transcend the play of such forces.

Determinacy and predictability in the law are thus purchased only at the cost of introducing great complexity in other arguably important respects. Substantial complexity in the law is, again, in this respect inescapable. The quest for real simplification in the law remains hopeless.

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159. See discussion *supra* Part II. For some additional discussion, see, for example, Balkin, *supra* note 158, at 746-47. Within a narrower Anglo-American philosophical tradition, see Bunge, *supra* note 73, at 121 (stating that the number of elements in a system can, at least in a sense, be reduced to one by merely combining them); Nelson Goodman, *Safety, Strength, Simplicity*, 28 PHIL. SCI. 150, 151 (1961) ("[W]e can always, by a calculated selection of vocabulary, translate any hypothesis into one of minimal length . . .") and Willard Van Orman Quine, *On Simple Theories of a Complex World*, 15 SYNTHESIS 103, 103 (1963) ("Simplicity is not easy to define. But it may be expected, whatever it is, to be relative to the texture of a conceptual scheme."); Howard L. Rolston, *A Note On Simplicity as a Principle for Evaluating Rival Scientific Theories*, 43 PHIL. SCI. 438, 438 (1976) (discussing Quine's argument that "simplicity is relative to a conceptual schema").