In Praise of Simplicity

By Irving Younger

Irving Younger died on March 13, 1988. We reprint this article from 62 ABA J 632 (1976) as a way of remembering his contribution. — Editor

I write in praise of a virtue — an intellectual virtue called simplicity. It has long been understood by practitioners of disciplines other than the law that simplicity marks the master. Simplicity walks hand in hand with high seriousness, not as a child better left behind, but as the very herald of large intention and great accomplishment.

How stands simplicity with us, the lawyers and judges? Not well, I fear. Walk through a law library and observe the shelves bulging with treatises, statutes, law reviews, regulations, digests, and case reports. Whatever its other charms and virtues, the law is hardly simple.

Worse, the law has made of simplicity a vice, the shameful badge of a mind too lazy or too weak to be suitably complicated. Who doesn't recall a professor at law school saying, "Really, that won't do, it's just too simple"? Or an appellate court saying, "The judge below apparently failed to grasp the complexity of the problem"? Or a judge saying to a lawyer, "Counselor, isn't your argument far too simple"? If lawyers, judges, legislators, and law professors were only brave enough to be simple, the law would be improved in five different ways.

Lucidity Is an Essential

First, lucidity. Much of what lawyers and judges say is incomprehensible. Here is an example drawn from a recent issue of a leading law review. One of our most distinguished professors writes an article about entrapment, from which I quote a footnote: "However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute appropriate police conduct." What does this mean? One can discover the author's thought only by shoveling away the rubbish of complexity, and that is an undesirable state of affairs. A legal system, like any system of thought, should be clear. Lawyers and judges have an obligation to the public to speak lucidly about the law, to practice simplicity of language.

Candor Should Have a Place

Second, candor. Lawyers and judges should call things by their right name and state the real reasons for what they do. Only then will it be possible to engage in intelligent analysis and criticism, exposing and correcting error, eliminating irrationality, and transmitting to our successors a body of law better and more coherent than the one we inherited. Yet many of us have fallen into a habit that dishonors candor. Things are not called by their right name but by elaborate wrong names. Decisions are not explained as what they are but as something else, easier and always more complicated than the truth.

Here is one example from a recent Supreme Court decision. In *Warth v Seldin*, 422 U.S. 490 (1975), various petitioners sued the town of Penfield, a suburb of Rochester, New York, claiming that its zoning ordinance unlawfully operated to exclude persons of low and moderate income from living there. The Supreme Court dismissed for lack of standing. Read the majority opinion and ask yourself whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormously sensitive issues of race and economic class the Court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law of standing.

But wouldn't it have been better for the Court to say straight out that some issues can be decided only when the time is right and that the time was not right for the issues in this case? The simple approach serves where the disingenuous fails. Candor is appreciated in judicial opinions, as elsewhere.

Aesthetics and the Internal Revenue Code

Third, aesthetics. Beauty may exist in a legal system as well as in a saltcellar by Cellini. We should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute. Here is Section 2-302(1) of the Uniform Commercial Code. It says simply that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscion-

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able clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." That section is a thing of beauty.

Contrast it with the Internal Revenue Code. The aesthetic pleasure we take in our profession would be vastly increased were some federal judge one fine morning to announce the following opinion (which I freely give to any judge who wishes to use it):

"This is a class action in which the plaintiff-taxpayer, on behalf of himself and all others similarly situated (which includes, I suppose, roughly 100 per cent of the population of the United States), sues for a judgment declaring the Internal Revenue Code unconstitutional. His argument is (1) that he does not understand it, (2) that no one can understand it, and hence (3) that it is invalid. The theory is novel, to be sure, but not for that reason necessarily wrong.

"Let us examine the code.

"Item. I doubt that the ordinary citizen can grasp the meaning of a sentence more than fifty words long. The code contains sentences of 385 words (Section 6651[a]), of 379 words (Section 170[b][1][A]), and of 506 words (Section 7701[a][19]).

"Item. Apart from mere length, I doubt that the ordinary citizen can grasp the meaning of a sentence which does not run more or less in a straight line from beginning to middle to end. What then is he to make of the last sentence of Section 509(a): 'For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in Section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in Section 501(c)(3)'?

"Item. One of the great achievements of our technological society is an arithmetic based on units of ten, thus permitting the easy manipulation of decimals. Yet the code fixes the accumulated earnings credit for certain groups of commonly controlled corporations at $83,333 for 1970 and $66,667 for 1971. It fixes the multiple surtax exemption at $20,833 for 1970 and $16,667 for 1971. It fixes the retirement income credit for years before 1969 at 15 per cent of $1,524.

"Item. A statute should be at least moderately straight forward. The code, however, sets up no less than fourteen different categories of charitable foundation subject to thirty-four different benefits and burdens, for a total of 476 separate combinations.

"I do not wish to expand this opinion unduly, and so, for additional illustrations, I refer interested persons to any page of the Internal Revenue Code selected at random. ►

"The due process clause means many things. One of them, assuredly, is that the enactments of Congress, whatever their subject matter, be comprehensible to a citizen of average intelligence upon the application of reasonable diligence. I find that the Internal Revenue Code does not meet that standard.

"This may be the first case holding a statute void for rampant complexity. I hope it will not be the last. The Internal Revenue Code is declared unconstitutional under the due process clause."

Law Needs Efficacy

Fourth, efficacy. Much of the law would work better were it simpler, and here is a sketch of the reason why.

There are two kinds of legal rules. One speaks primarily to lawyers. For example, the rule against perpetuities governs a lawyer sitting at his desk calmly drafting a will or trust indenture. It tells him what he may do and what not; but it affects the conduct of lay persons only from a distance, through its effect on the conduct of lawyers.

The other kind of rule speaks primarily to lay persons, telling them directly what they may do in their own lives. *Mapp v Ohio*, 367 U.S. 643 (1961), is an example of this. It excludes in a criminal case evidence obtained by policemen in violation of the Fourth Amendment rights of the defendant. At first glance, this might seem a rule of the first kind, telling lawyers and judges what evidence is admissible or inadmissible at trial. But really it is a rule of the second kind. Assuming that the purpose of the rule is deterrence — to deprive law enforcement officers of the advantage of illegal searches and seizures and hence to deter them from committing illegal searches and seizures — we see that the rule's primary concern is to regulate the conduct of policemen on the street, not of lawyers and judges in the courtroom. Then shouldn't the rule be simple? If a policeman can't understand it or with certainty apply it in the hectic circumstances of an arrest, he will ignore it — not out of malice, but because it's human nature to ignore the inexplicable. And when the policeman ignores the rule, constitutional violations will occur.

Now look at the exclusionary rule and see how it measures up. The rule excludes illegally obtained evidence. But when is evidence illegally obtained? That is the real question, and to it, as we all know, the Supreme Court has given answers so numerous, so inconsistent, and so complicated that no lawyer and certainly no policeman can understand them. Take *Coolidge v New Hampshire*, 403 U.S. 443 (1971), a case involving run-of-the-mill police conduct. The nine justices produced five opinions and a proliferation of explanations that make it impossible to state the holding of the case. With search-and-seizure law at such a pass, can we say that the exclusionary rule deters? It can't be understood. Therefore, it can't deter. Yet we want it to deter.

Then we must change the rule so that it works, and the way to change it is to make it simple. Instead of a tangle of exceptions, qualifications, exceptions to the qualification, and qualifications to the exceptions, we need a rule something like this: No search is good unless supported by a search warrant; no arrest is good unless supported by an arrest warrant; only when there is insufficient time to secure one will the requirement of a warrant be excused; when the requirement of a warrant is excused, the test of legality is the policeman's good faith. That, I submit, is a better rule than the rat's nest the Supreme Court has given us. Policemen will comply with it, and it's the job of a moment for a judge to apply it. The source of these benefits, note, is simplicity. A simple rule — at least one of the second kind, speaking primarily to nonlawyers — is more effective than a complicated rule. It simply works better.

Is There No Place for Elegance?

Fifth, elegance. Six and a half centuries ago, William of Occam wrote, "Pluralites non est ponenda sine necessitate." We know this as Occam's Razor: given two ways of saying or doing or explaining something, one simpler than the other, always choose the simpler. This is an axiom of all intellectual work. The simple is more likely than the complex to be "true," and if "truth" is too complex a measure, then put it that the simple is more elegant than the complex.

For example, the keystone rule in the law of evidence is the rule against hearsay. Hearsay is not admissible — with exceptions, of course. In the Federal Rules of Evidence, there are twenty-seven specific exceptions and a catch-all, essentially for any other hearsay as good as that which the rules specifically make admissible. That's complicated, and because it's complicated, it's inelegant. Why not reformulate the rule to say that hearsay is admissible unless the trial judge in his or her sound discretion thinks it fair to exclude it. That's the rule judges apply most of the time anyway. It's as much as any appellate court can do with hearsay. And it turns a clumsy contraption of exception piled upon exception into an object of plain and simple elegance.

Let's Recognize the Virtue of Simplicity

Simplicity is a virtue good in itself, as artists and scientists long have known. It would make our craft and mystery more lucid, candid, beautiful, effective, and elegant. I want simplicity for the law because I love the law, and if this praise seems overfond and foolish, call it lover's folly and be patient with me for my love's sake. ■