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Do we need a ‘radical simplification’ of law?

By [David Post](#)

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A very interesting and thought-provoking [essay by Philip K. Howard over at the Cato Institute](#), on the need for a radically simplified legal system:

Too much law can have similar effects as too little law. People slow down, they become defensive, they don't initiate projects because they are surrounded by legal risks and bureaucratic hurdles. They tiptoe through the day looking over their shoulders rather than driving forward on the power of their instincts. Instead of trial and error, they focus on avoiding error. [And] modern America is the land of too much law. Like sediment in a harbor, law has steadily accumulated, mainly since the 1960s, until most productive activity requires slogging through a legal swamp. It's degenerative. Law is denser now than it was 10 years ago, and will be denser still in the next decade.

Howard attributes this — what he calls the “mutant root that has produced this impenetrable bureaucratic kudzu” — is “the idea that law can supplant human judgment.”

We have tried to create a hands-free legal code, without any risk of human frailty. Most legal detail is aimed not at important legal goals or principles, but at dictating daily implementation. That's why the Volcker rule is 950 pages. The Constitution, by contrast, is ten pages.

The broad solution he puts forward “is to restore human responsibility as the activating force of law and regulation.” Law should be radically simplified into goals and governing principles, like the Constitution, and leave to accountable humans the responsibility to achieve those goals fairly and sensibly. America, in short, “desperately needs a recodification.”

The way this works is that small committees are charged with coming up with simplified codes in each area of government, and then lawmakers decide whether to adopt them. This is how the Justinian and Napoleonic codes were created — it took only five months for Jean-Etienne Portalis and a small committee to propose a complete overhaul of French law. This is also how America's Uniform Commercial Code was created. Simplified codes unleash enormous productive activity — like replacing a muddy road with a paved highway. That's what happened in ancient Rome, and in 19th century France, and in post-war America with the UCC. People know where they stand. They feel free to act on their reasonable instincts of right and wrong. They don't go through the day looking over their shoulders.

I know that a lot of people find this kind of “big picture” opinionating uninteresting and off-putting; somehow, the idea that one short paper with a few ideas in it — even if they are good

ones — can somehow turn American law completely on its head seems hopelessly naive and pointless. But for what it's worth, I'm not among them. [As I said a few days ago](#), there are increasingly worrisome signs that our legal system is in a bad way, not just at the margins but at the core, and many crazier, and more radical, ideas than this one have, in the past, turned themselves into action, action that in retrospect looks like it was entirely foreordained. Well worth thinking about, in any event.

David Post taught intellectual property and Internet law at Georgetown Law Center and Temple University Law School until his recent retirement. He is the author of "In Search of Jeffersons Moose: Notes on the State of Cyberspace" (Oxford, 2009), a Fellow at the Center for Democracy and Technology, and an Adjunct Scholar at the Cato Institute.