

The Drafters' Dance: The Complexity of Drafting Legislation

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Who am I and what is my background in complexity and public policy?

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- I have been working on complexity for 18 years.
 - To me, complexity is a meta-theoretical framework with implications and applications at various levels!
 - Stressing the importance of visual metaphors
 - Most of my work is focused on making complexity relevant and accessible to policy actors.
 - Key areas of interest: health and social policy, local policy, diabetes and drug advertising policy, GP commissioning, international relations, some aspects of development and now law and policy.

Why is complexity so interesting and important? Three key points

- A fundamental challenge to the major science and social science frameworks.
- An important framework for understanding policy making and law.
- It can be a practical tool for understanding, managing and coming to terms with the inherent complexity of drafting law
 - The case of ‘Plain Language/Good Law’ initiatives and the Stacey Diagram.

What do I mean by a fundamental challenge?

- The 20/21st century ‘pursuit of order’ -
 - The classical mechanical vision and age of order
- Extreme versions of final orders
 - Soviet Communism
 - Nazism
- Moderate versions in ‘normal’ states?
 - World Bank/IMF Structural Adjustment policy
 - War on Terrorism and restructuring of Iraq
 - Range of rigid internal policies (particularly against weaker social actors)

Where does the orderly framework come from – a **VERY** short review?

The Enlightenment and the “paradigm of order”

- Rene Descartes (1596-1650) and Sir Isaac Newton (1642-1727)
- Pierre Simon de Laplace (1749-1827):
If at one time, we know the positions and motion of all the particles in the universe, then we could calculate their behaviour at any other time, in the past or future (Celestial Mechanics).

Implications: The world is knowable. Once know, there is no change (end of history)

Phenomena in the Paradigm of Order

DISORDER



ORDER

TIME



EXAMPLES:

Unknown or not fully understood phenomena

Gravity or motion in a vacuum.

Four Rules of the Paradigm of Order

- *Causality*: given causes lead to known effects at all times and places.
- *Reductionism*: the behaviour of a system could be understood, clockwork fashion, by observing the behaviour of its parts. The whole is the sum of the parts.
- *Predictability*: once global behaviour is defined, the future course of events could be predicted by application of the appropriate inputs to the model.
- *Determinism*: processes flow along orderly and predictable paths that have clear beginnings and rational ends.

A Clockwork Universe!!!

Ripples of doubt in the orderly view of the physical world

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- Henri Poincare (1854-1912) early chaos theory.
 - Albert Einstein (1879-1955) relativity theory.
 - Werner Heisenberg (1901-1976) uncertainty principle.

 - Key point: what were assumed to be universal laws, aren't so universal anymore.

The rediscovery of Complex Systems in the physical world

- Recognising the difference between complicated and complex systems
 - A pendulum, mechanical clock and jet engine
 - Vs.
 - A snowflake, sand piles and water vortices

The range of physical phenomena in a Complexity Paradigm

DISORDER

Zone of
Unknown/
Discovery.

COMPLEXITY

Fluid dynamics.
Weather
patterns

ORDER

Gravity.
Motion
in a vacuum.

Modified Rules for physical systems in a complexity paradigm

- Partial Causality: phenomena can exhibit both orderly and chaotic behaviours, cause may not lead to effect.
- Reductionism and Holism: some phenomena are reducible others are not.
- Predictability and Uncertainty: phenomena can be partially modelled, predicted and controlled.
- Probabilistic: there are general boundaries to most phenomena, but within these boundaries exact outcomes are uncertain.

Another layer of complexity, complex systems in a biotic world

- Peter Coveney and Roger Highfield (*Frontiers of Complexity*, 1995)
“Life is also an **emergent** property, one that arises when physiochemical systems are organized and interact in certain ways”
- James Lovelock and the concept of *Gaia*.

Rules of biotic systems in a complexity paradigm

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- Partial Causality
 - Reductionism and Holism
 - Predictability and Uncertainty
 - Probabilistic
 - **Emergence: they exhibit elements of adaptation and emergence.**

Range of biotic and physical phenomena

DISORDER

COMPLEXITY

ORDER

Biotic Complexity Physical Complexity

EXAMPLES:

Zone of
Unknown/
Discovery

Plant and
animal
interaction/
evolution.
Gaia

Fluid
dynamics.
Weather
patterns.

Gravity.
Motion
in a
vacuum.

Another layer of complexity, complex systems in the human world

- Human complex systems are, ‘not reducible to a mechanical system.... for which the assumptions of average types and average interactions are not appropriate and are not made. Such systems coevolve with their environment, being “open” to flows of energy, matter, and information across whatever boundaries we have chosen to define. These flows do not obey simple, fixed laws, but instead result from the internal “sense making” going on inside them, as experience, conjectures and experiments are used to modify the interpretive frameworks within. (Peter Allen 2001)
- **Mapping a human complex system is like throwing a duck!**

Rules of conscious systems in a complexity paradigm

- Partial Causality
- Reductionism and Holism
- Predictability and Uncertainty
- Probabilistic
- Emergence
- **Interpretation: the actors in the system can be aware of themselves, the system and their history and may strive to interpret and direct themselves and the system.**

The range of physical, biotic and conscious phenomena

DISORDER

Conscious
Complexity

COMPLEXITY

Biotic
Complexity

Physical
Complexity

ORDER

EXAMPLES:

Zone of the
Unknown/
Discovery

Norms.
Values.
Language
Narrative

Plant/
animal
interaction
and
evolution.

Fluid
dynamics
and
Weather
patterns

Gravity.
Motion
in a
vacuum.

How does complexity relate to the social sciences and policy making – another **VERY** short review?

- Thomas Hobbes (1588-1678) *Leviathan*.
- Francois Quesnay (1694-1774) the economic system as a mechanical clock.
- Condorcet (1743-1794):
“The sole foundation for belief in the natural sciences is the idea that the general laws directing the phenomena of the universe, known or unknown, are necessary and constant. Why should this principle be any less true for the development of the intellectual and moral faculties of man than for other operations of nature?”

Public policy and the paradigm of order: 20th and 21st centuries

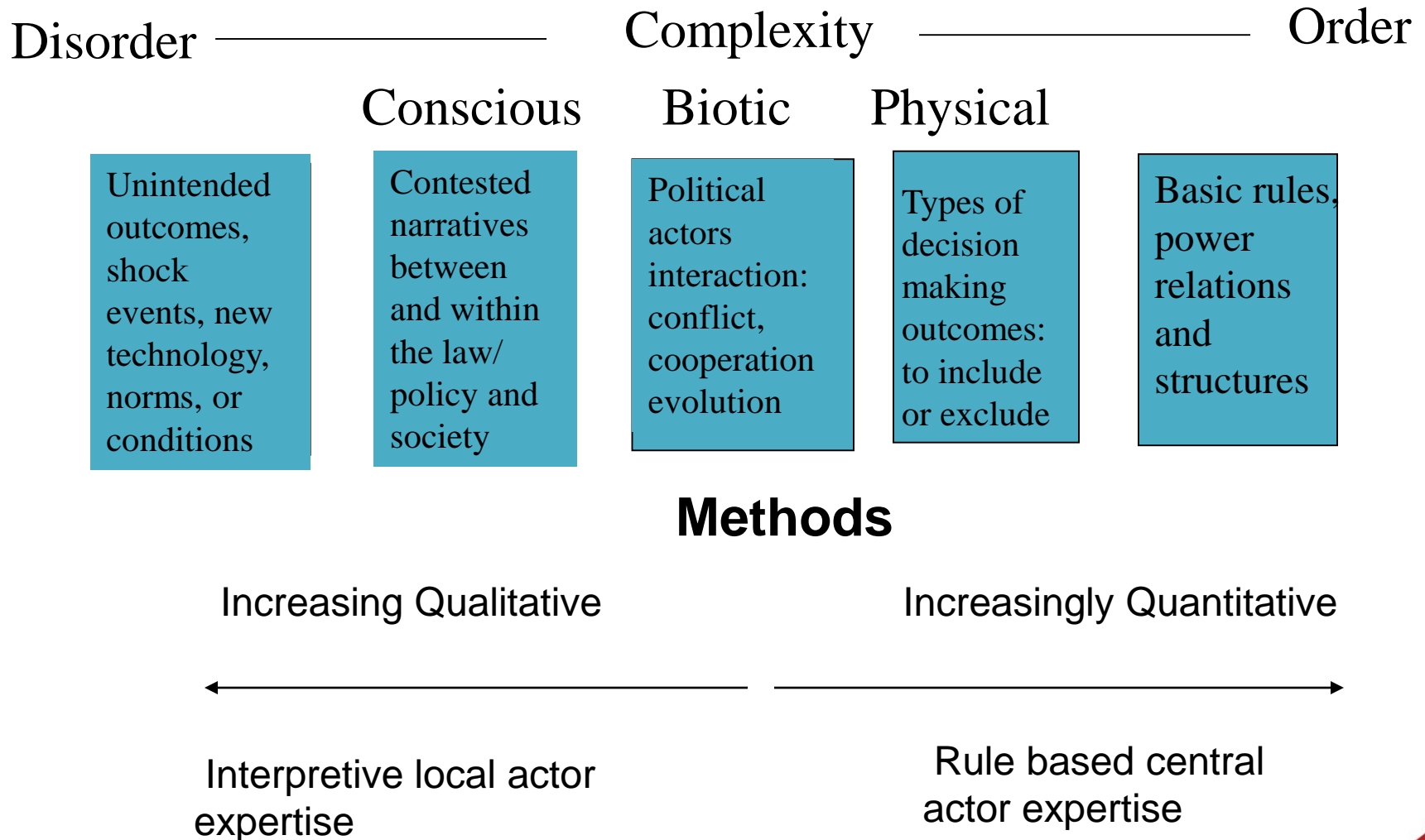
- Traditional bureaucracy and managerialism - hierarchical command and control approaches
- The 'Westminster model' of public policy – centralisation of power
- Rational Actor Model-utilitarian/economistic
- New public management – emphasis on economistic and accountancy culture
- EBPM and the targeting/audit culture
 - Better evidence = better policy
 - Better/more targets and audits = better policy

Drift to centralised control and criteria but constantly limited by lack of local knowledge and uncertainty

What about the Law and the role of drafters?

- Like policy making, law making exhibits similar struggles and tendencies. The classic one is between black letter law and socio-legal law.
- This tension/balance takes a wide variety of forms depending on the particular context/system.
- Complexity argues that there is no final form/policy/legal structure, but a bounded range of constantly emerging ones based on time/context.
- The role of drafters is a particularly interesting one from a complexity perspective since it is at the nexus of policy and law making.

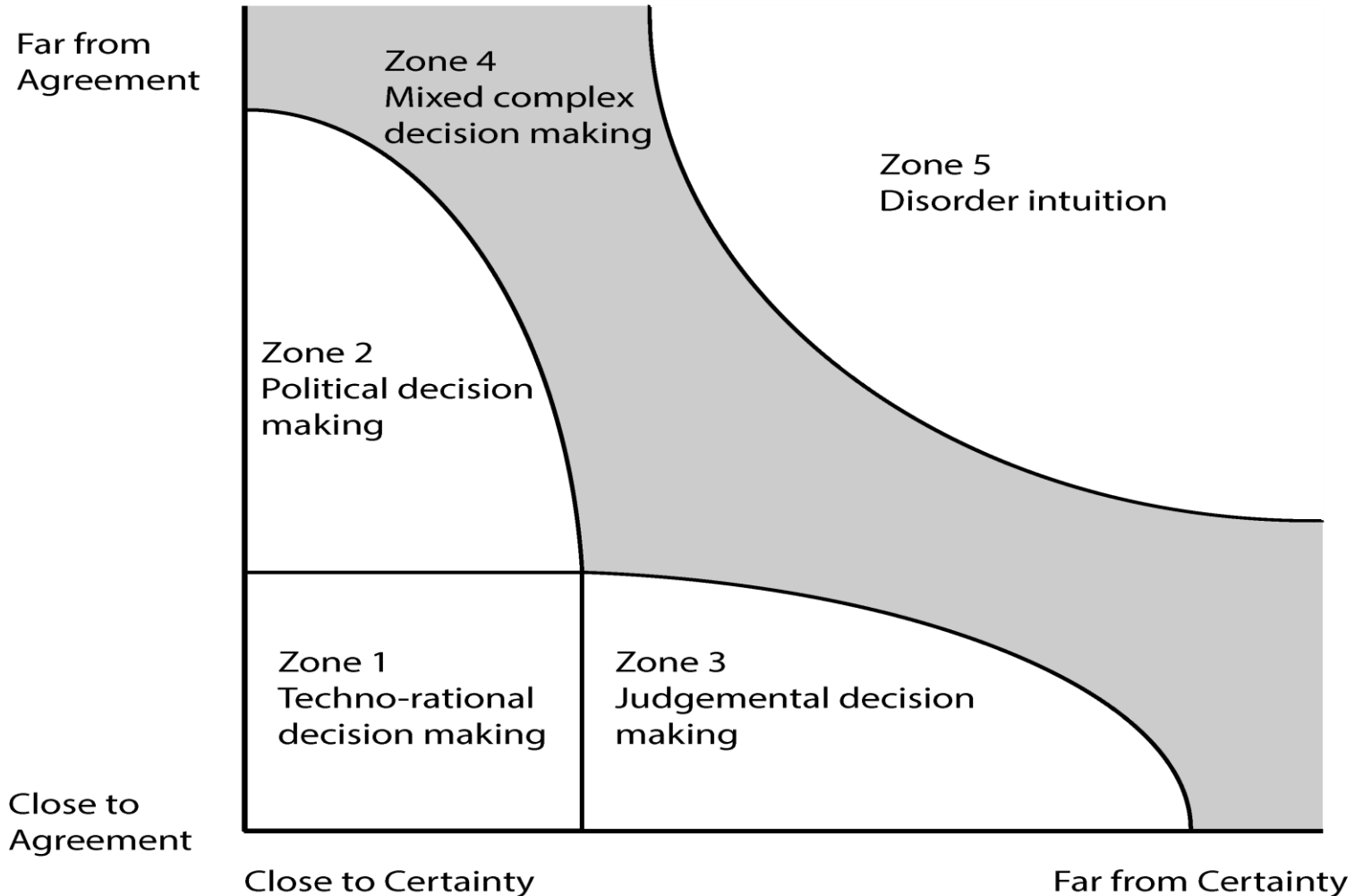
Complexity Mapping: the role of the drafter



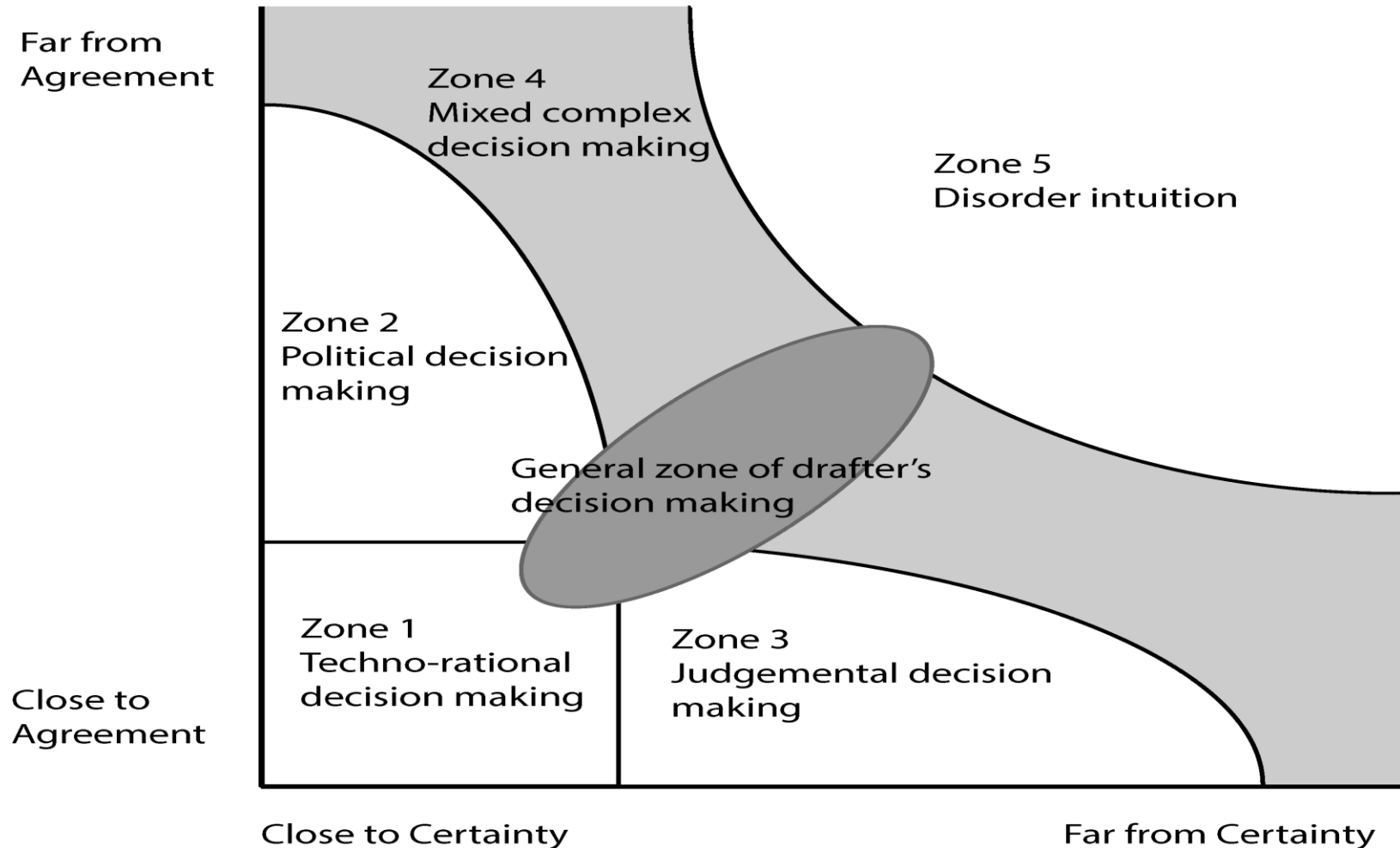
A case study: Plain Language/Good Law initiatives

- Various types in the UK, EU, Canada, US and Australia
- Significant variation, but the underlying assumption is that **clarifying, simplifying** and improving the **accessibility** of legislation will lead to better law, improve individuals' understanding of it and reduce the burden of complying with it – particularly for business.
 - Mirrors orderly EBPM (data, evidence, targets)
- From a complexity perspective, these are reasonable goals but carry interrelated tensions.

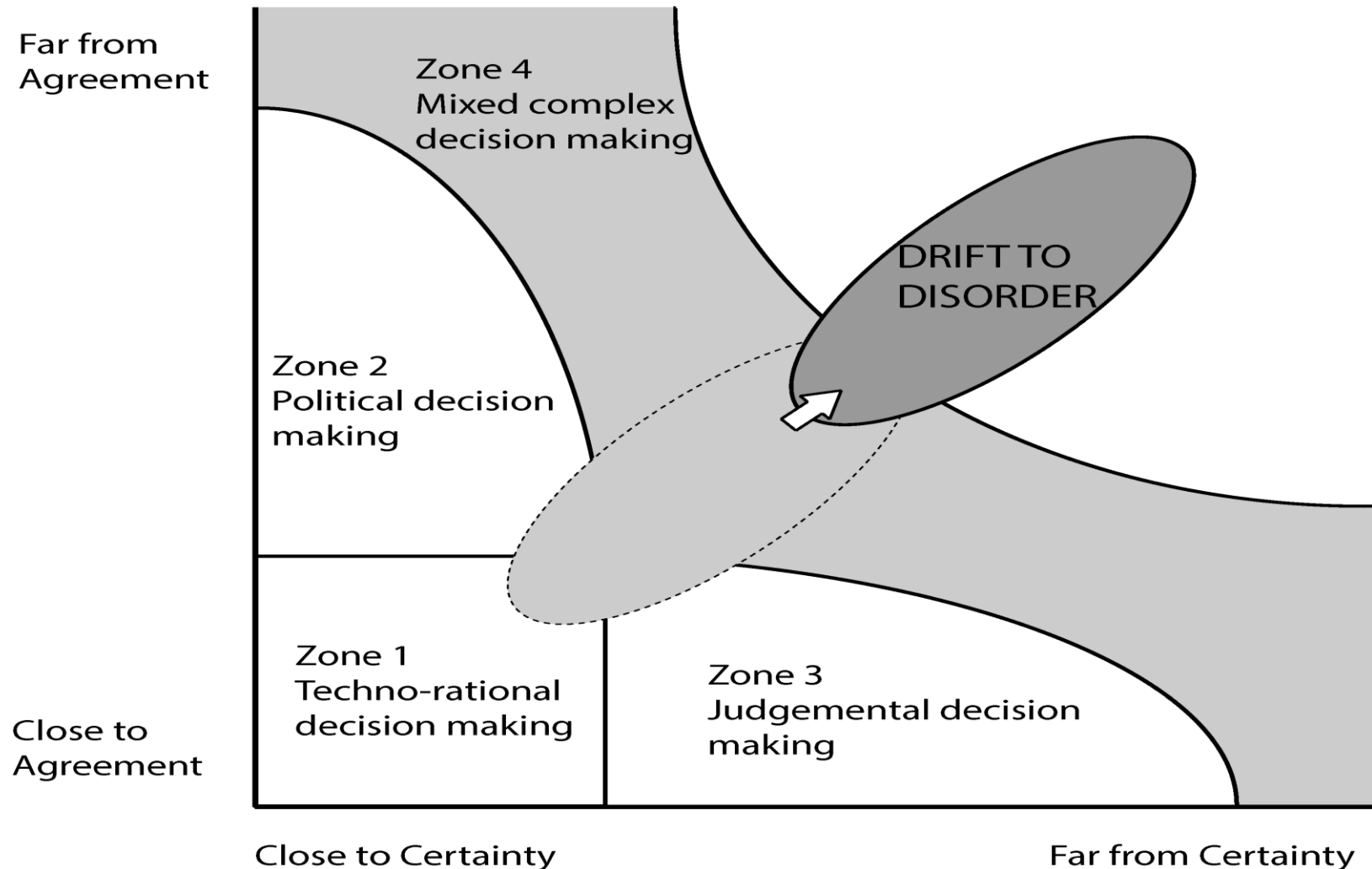
The Stacey Diagram



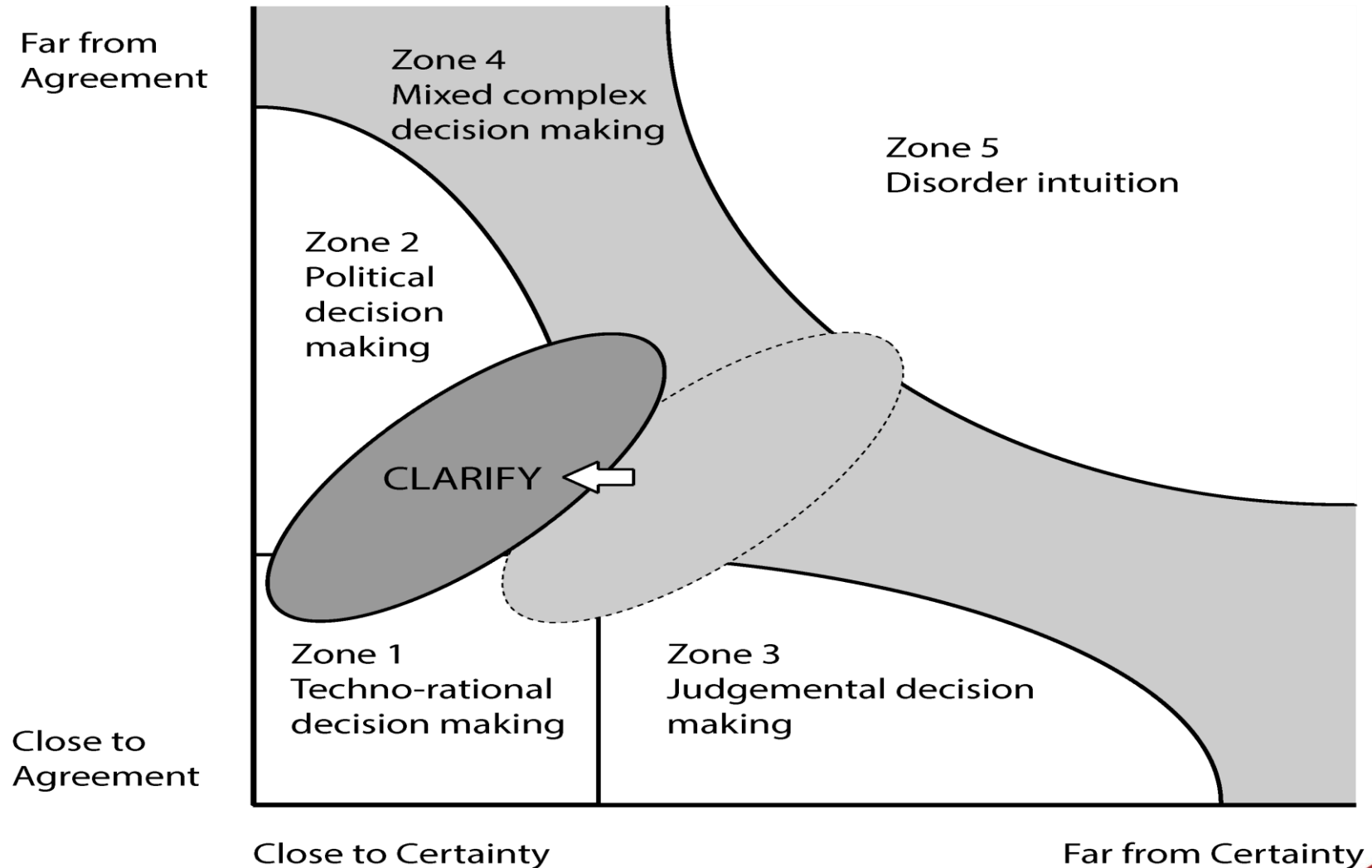
The position of drafters in the Stacey diagram



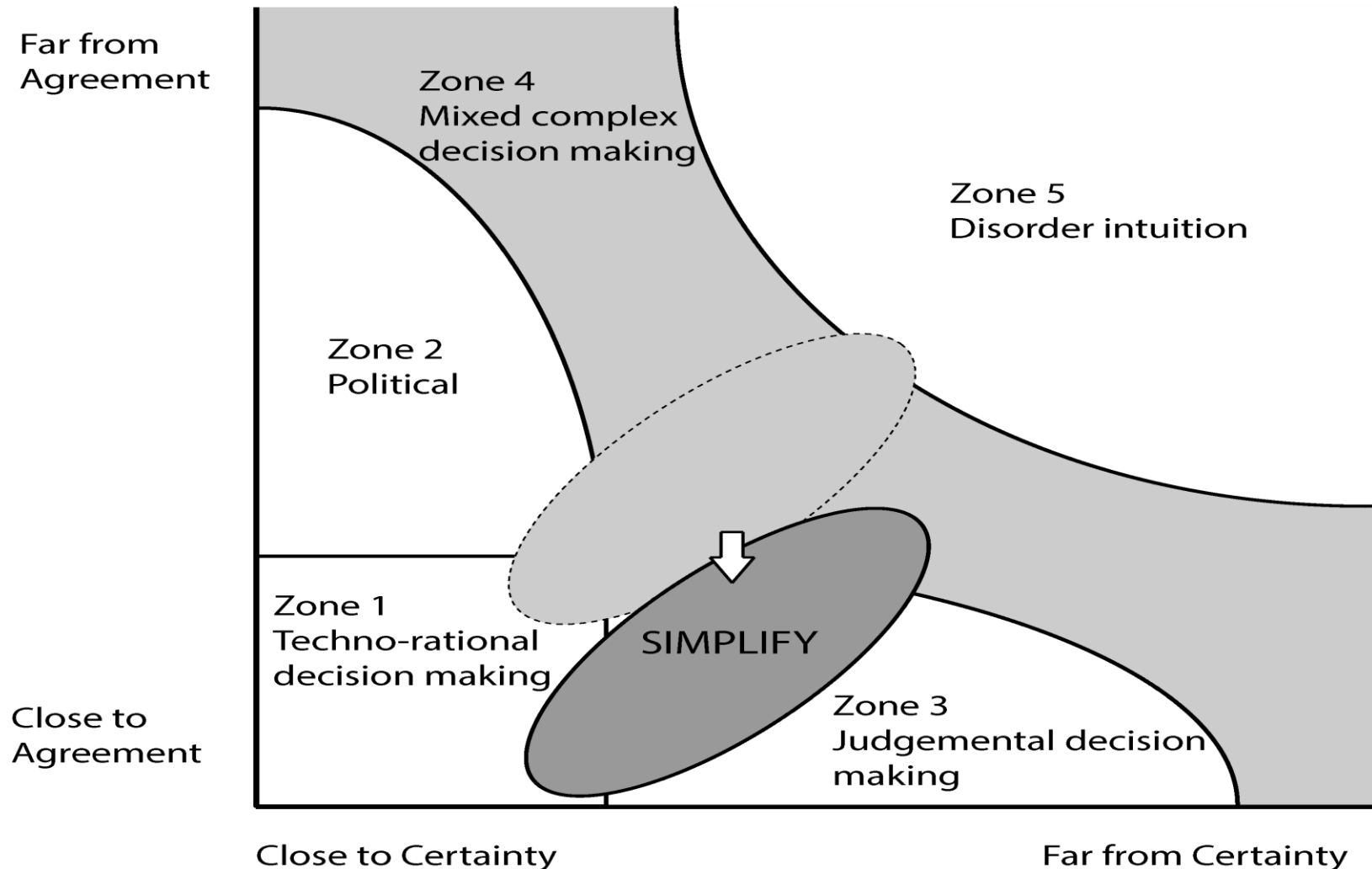
The tendency to disorder in all complex systems



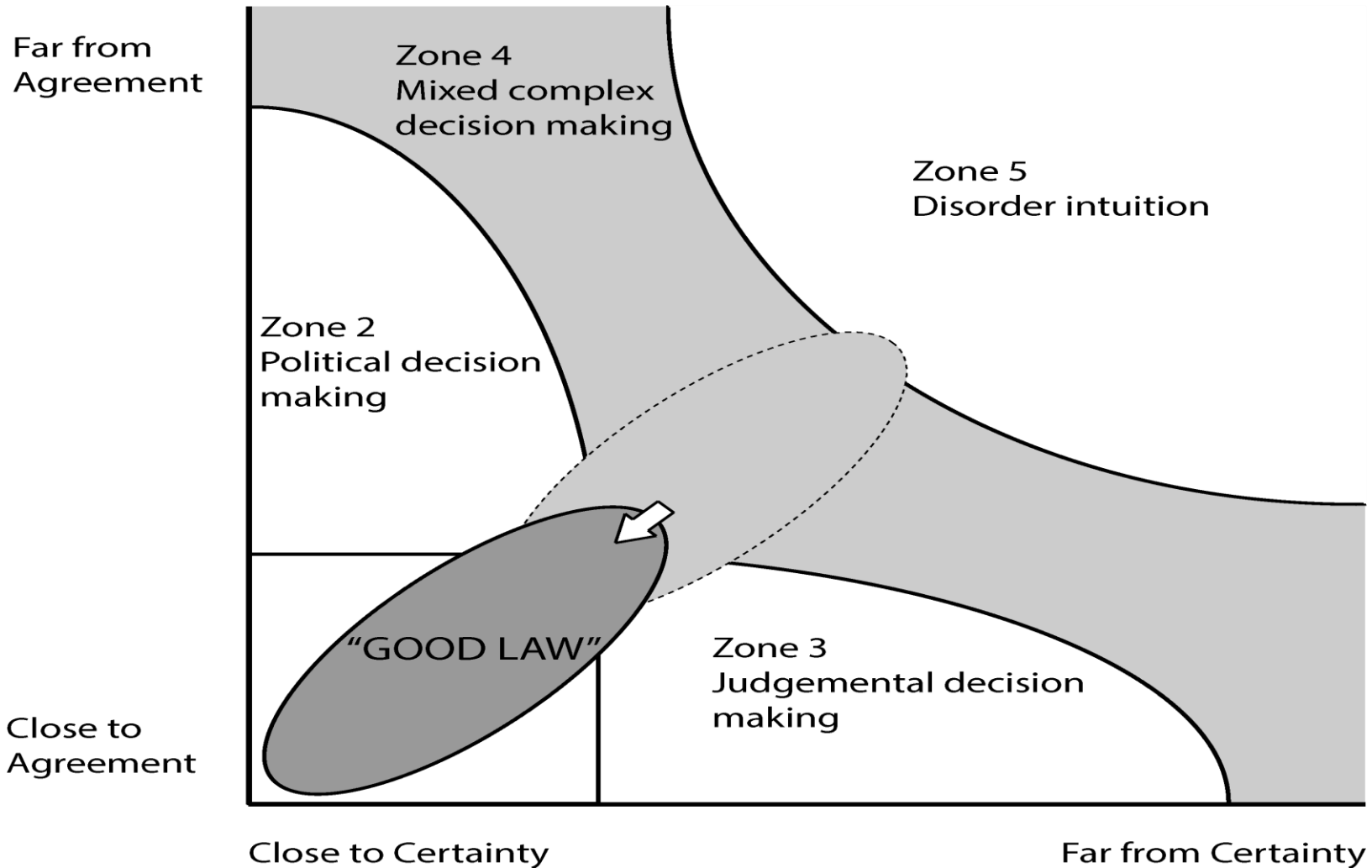
The implications of 'clarification'



The implications of 'simplification'



The underlying assumption of 'good/plain' law



Implications

- Given the dominant orderly framework of policy-making and the need to respond to the drift to disorder, efforts towards clarification, simplification and accessibility are very reasonable.
- The difficulty arises when:
 - These efforts are pursued too vigorously in the belief that a final good law can be created, ignoring the various balances and tensions (including politics issues) that they entail.
 - A mix of art and science – the drafters' dance

'Pragmatic Complexity' (Ansell/Geyer 2017)

Ian Sanderson (greatly influenced by Dewey and Majone), policy and regulation are primarily about continual:

- Experimentation - the capacity for learning and innovation through experimentation
- Modesty - policies are essentially 'conjectures' based upon the best available evidence
- Learning – focus on improving the learning capacity of the various organs of public deliberation
- Testing - policy hypotheses' must be continually tested with evidence and through democratic societal debate.
- Truth – can only be found through an engaged, democratic and open approach

Final points and things to ponder over the next 2 days

- Given that complexity expects variety in different contexts and times – how much can we learn from others/other systems/cases (free trade and cannabis legalization)?
- How do we create a culture of continual learning and openness while maintaining order/coherence over time?
- If we recognize that drafting/policy is complex, how do we balance issues of accountability and responsibility (Ansell and Geyer 2017)?
- What can be done about the political weakness of recognizing complexity and **‘being balanced’** in an age of populism?
- Similarly, what should drafters do when the media and society demand simple answers to complex problems?

And finally...

Thank you for your time and attention!

Thanks to the organisers: the CIAJ Legislative
Drafting Conference Committee

Join Tom Webb and me for a ‘working lunch’
discussion on our conference paper

Questions?