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ORIGINAL ARTICLE

The crafty power of text: methods for a sociology of legislative drafting

EMILY GRABHAM

Kent Law School, Eliot College, University of Kent, Canterbury, CT2 7NS, England

Correspondence
Emily Grabham, Kent Law School, Eliot College, University of Kent, Canterbury, CT2 7NS, England
Email: e.grabham@kent.ac.uk

Abstract

This article proposes that socio-legal scholars study statutes and legislative drafting on their own terms. Legislative drafting may seem to have little relevance within approaches that emphasize law's wider social effects. Yet statutes can be defamiliarized, and the dynamics through which they are drafted better understood. This can help statutes to answer for their legal and social power and also assist scholars working in law and other disciplines to grasp the distinctiveness of legal doctrine. Drawing on findings from my current research, I argue that sociologies of legislative drafting could contribute to, and be informed by, two contemporary debates: first, the status of legal technical expertise, and second, the aesthetics of law. Unpicking these thickly knotted ontologies of law and drafting could be achieved through historical, ethnographic, and experimental visual methods. These methods potentially help us to tackle something akin to an 'obviation of legal form' through which statutory text is seen to be distinct from, and subservient to, law's legal and political substance.

> In the case of legislation, the medium consists not only in the materiality of text but in the cultural techniques of authorship and interpretation that are implicated in this materiality.[1]

1 | INTRODUCTION

Legislative drafters are highly skilled government lawyers who create the text of primary and, increasingly, secondary legislation. They pay extremely close attention to legal detail, syntax, sentence construction, coherence, and grammar in a creative process that produces powerful legal documents and social effects.[2] They constantly think about the wider public audience and users of their writing. They are employed to write clearly and well because the legal effects of not doing so are significant. Yet sociological and anthropological attention to the practices, expertise, and legal ontologies associated with legislative drafting remains thin on the ground. In an influential article published in 2011, Ilana Gershon noted that ethnographers of cultural pluralism have spent more time and attention studying courts than they have researching the executive and legislative branches of government.[3] While many scholars analyse statutes, and statute making, as part of their broader research, we are still coming to terms with the craft of legislative drafting on its own terms and assessing what might be needed, methodologically, to explore, in depth, the technical expertise of drafters. Historical studies have considered the development of gendered dimensions of drafting[4] and the means by which statute law and its associated legal techniques spread throughout the British Empire.[5] Qualitative empirical studies have uncovered drafters' narratives of professional expertise and their influence on public policy.[6] Anthropologists have long been attentive to processes of negotiation in international legal forums and their relationship with legal documents through multi-party drafting sessions,[7] while drafting handbooks have been revealed as textual and material technologies of state formation that attempt to regulate the political.[8]

In this article, I propose that socio-legal scholars pay more attention to legislative drafting. This is necessary, in part, because the craft of putting statutory text to the service of legal meaning (and vice versa) is central to fabricating and maintaining law's power. However, analysing legislative drafting also raises tricky questions about how to explore legal meaning and form, which are also inherently dilemmas of how to conceive and practice socio-legal methodologies, the subject of

[1] A. Pottage, 'Response to "Exploring the Textual Alchemy of Legal Gender"' (2020) 10 *feminists@law* 1, at 1.

[2] D. Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (2011); E. Page, 'Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis' (2009) *Public Law* 790; S. Petersson, 'Gender Neutral Drafting: Recent Commonwealth Developments' (1999) 20 *Statute Law Rev*. 35.

[3] I. Gershon, 'Critical Review Essay: Studying Cultural Pluralism in Courts versus Legislatures' (2011) 34 *Political and Legal Anthropology Rev*. 155.

[4] S. Petersson, 'Gender Neutral Drafting: Historical Perspectives' (1998) 19 *Statute Law Rev*. 93.

[5] D. Hay and P. Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (2004).

[6] Page, op. cit., n. 2.

[7] A. Riles, 'Infinity within the Brackets' (1998) 25 *Am. Ethnologist* 378.

[8] S. Kendall, 'Inscribing the State: Constitution Drafting Manuals as Textual Technologies' (2020) 11 *Humanity: An International J. of Human Rights, Humanitarianism and Development* 101.

this Special Supplement. An immediate observation is that statutory texts are archetypal – almost parodical – examples of legal doctrine. For this reason, studies of legislative drafting could shed new light on the promises and risks that we face in opening up legal doctrine to sociological analysis. In their widely cited 1998 debate, Roger Cotterrell and David Nelken tackled many of the key issues in this area: for example, the argument that sociology cannot effectively grasp legal doctrine on its own terms or has no particular insight that could prevail over others; the observation that law has powerful means of interpreting the world and telling its own truth that are impervious to translation, resulting in the co-existence of law and sociology but no meaningful inter-relationship or explanatory potential; the observation by some critical legal scholars that law is responsible for creating social concepts, categories, and distinctions and, for some, even helps to constitute social reality; and, by contrast, the concern that sociological interpretations of doctrine may misapprehend its particularities and threaten the way in which law works in the world.[9]

Among the risks of studying legislative drafting using methods from sociology (and other disciplines) is the possibility that we might erase or obscure doctrinal specificity by treating specialist, technically rich legal craft and enunciations as mere extensions of social relationships, professional values, and expertise. On the other hand, we might better understand the possibilities and limits of a 'reflexive sociology of law' by subjecting it to the challenge of examining the processes by which statutes are produced. As such, it is possible, as Emilie Cloatre and Dave Cowan have suggested, that a 'proficiency in the interdisciplinary tools needed to explore broader social patterns' could result in studies of drafting that neither reduce doctrine to yet another form of social knowledge, nor privilege it such that its social constitution and effects are difficult to identify.[10]

In my ongoing research on legislative drafting, my aim has been to find a way of exploring the distinct *legal* power of legislative drafting, but through (not alongside or despite) registering its political constitution and effects. For example, studies of legislative drafting can shed further light on what Annelise Riles has termed the 'agency of legal form',[11] which I have attempted to discern through observing and interviewing legislative drafters and 'seeing' and 'reading' statutory text differently. My hope has been to develop distinct and fine-grained analyses of the creation and status of statutory law and to explore how doctrine emerges both conceptually and in material terms through drafting. Yet along the way, I have been challenged, in methodological terms, by my ongoing findings (as many of us are). These include, first, the observation that legislative drafters prefer not to claim for themselves the power of 'creating' law, and second, the observation that the form of law – the statute – seems to be understood merely as something like a very important container. I propose that we interpret these observations as raising (among other questions), first, debates about the status and wider effects of technical legal expertise,[12] and second, debates about

[9] R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *J. of Law and Society* 171; D. Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *J. of Law and Society* 407.

[10] E. Cloatre and D. Cowan, '"Indefensible and Irresponsible": Interdisciplinarity, Truth and #reviewer2' in *Routledge Handbook of Socio-Legal Theory and Methods*, eds N. Creutzfeldt et al. (2020) 97, at 107.

[11] A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005–2006) 53 *Buffalo Law Rev*. 973.

[12] A. Pottage, 'Law after Anthropology: Object and Technique in Roman Law' (2014) 31 *Theory, Culture & Society* 147; Riles, id.; M. Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory' (2009) 18 *Social & Legal Studies* 139.

the materiality and aesthetics of law.[13] We need to understand what drafters are doing. Among the many methods that could be used to find this out, I argue that historical, ethnographic, and visual methods are particularly fruitful.

2 | SETTING THE SCENE

2.1 | In the shadows

In my interviews with legislative drafters, participants often express confoundment with the attention that I am paying to their craft. They are thoughtful about the social context of legislation and the institutional dynamics of its production; they are willing to talk about the expertise that they must cultivate; and they happily relate the intense discussions that they have about the structure, syntax, grammar, and expression used in draft bills. However, there is always a sense of hesitancy. Theirs is a skill of translation or communication rather than creation, they suggest. The essence of law is in the substantive legal content that the bill conveys. As the Drafting Guidance of the Office of the Parliamentary Counsel (OPC) puts it: 'The medium is not the message.'[14] Why I am following these drafters around, asking questions about their daily practice – their discussions, processes, problems, and arguments? What could this possibly have to do with researching law, even if in a wider sociological sense? After all, understanding how the text is drafted does not change the policy decisions that others have made in determining the content of the law.

Alain Pottage has recently described this reticence among drafters to acknowledge the material power of legislative text as playing the role of juridical 'shadow' to political 'substance': 'Doctrinally, legislative authorship is supposed to be merely instrumental, to efface itself in the service of a political purpose. However intelligent or creative it is, drafting always plays juridical "shadow" to political "substance".'[15] This attitude is deftly characterized in a quotation that the political scientist Edward Page highlights from his study of drafting in the Office of the Parliamentary Counsel: 'Our remit is to be mere technicians. To put in a legal form the policy idea generated elsewhere. In a formal sense this is true as we have no authority to take policy decisions.'[16] Thus, drafters are doing their job when they efface the effects of their work, even as they acknowledge the craft and skill that they must demonstrate in performing it. However, in effacing their role, there is a tendency to keep it in the shadows, both epistemologically and politically. My research over the past few years has been to follow the shadows, trying to understand what drafters do to conjure them. Shadows are created by movement and positioning; they are difficult to avoid and impossible to catch. Shadows have power too; they move at strange angles to both light and object, changing shape as they go.

[13] T. Giddens, 'Keeping Up Textual Appearances: The Road Vehicles (Display of Registration Marks) Regulations 2001' (2020) 2 *Law, Technology and Humans* 9; L. Moran et al., *Law's Moving Image* (2012); L. J. Moran, 'Researching the Visual Culture of Law and Legal Institutions: Some Reflections on Methodology' (2021) 48 *J. of Law and Society* S44; L. Mulcahy, 'Eyes of the Law: A Visual Turn in Socio-Legal Studies?' (2017) 44 *J. of Law and Society* S111; A. Perry-Kessaris, 'The Case for a Visualized Economic Sociology of Legal Development' (2014) 67 *Current Legal Problems* 169; A. Pottage, 'The Materiality of What?' (2012) 39 *J. of Law and Society* 167.

[14] Office of the Parliamentary Counsel, *Office of the Parliamentary Counsel Drafting Guidance* (2020) 2, at <https://www.gov.uk/government/publications/drafting-bills-for-parliament>.

[15] Pottage, op. cit., n. 1, p. 4.

[16] Page, op. cit., n. 2, p. 803.

2.2 | Legislative text as 'container'

The drafting expert Helen Xanthaki states that effectiveness should be the drafter's highest goal:

> The crucial measure of quality for legislation is, therefore, whether 'it does what it says on the tin', namely whether it achieves its purpose clause in the case of common law, or whether it achieves the will of the legislator in the case of civil law.[17]

In later work, Xanthaki has elaborated on this goal: 'The task of a drafter is to "speak" the regulatory messages to the legislative audiences in a manner that enables them to receive them as they were intended.'[18]

However, speaking to the audience is not straightforward. A few years ago, I became captivated with qualifying periods. I had been interviewing women in precarious jobs about how they managed their work alongside caring for their children or for elderly or disabled adults. The women often talked about feeling 'too new' to ask for flexibility, even some time into their employment, and I wondered whether this had anything to do with the 26-week qualifying period on many 'family-friendly' rights. This feeling of newness, this qualifying period: was one the 'ghostly analogue' of the other?[19] What did these resonances suggest about the social power or effectiveness of legal text and drafting techniques?

Following these insights, I could interpret the sense of newness as evidence of some kind of effectiveness on the part of the 26-week qualifying period in relation to one of its intended audiences: precarious workers. Yet in interviews, these workers indicated little knowledge of the substance of family-friendly rights, focusing, if anything, on the power that their managers held to give or withhold future work.[20] Riles might suggest that my question – whether and how a qualifying period exerts social effects – is worthy, in itself, of interrogation. This is because of her research on the obviation of legal form, through which it is possible to analyse apparently natural boundaries between the material and metaphorical aspects of law.[21] Riles draws on Roy Wagner's work to suggest that sociologists of law might hold much less tightly onto received knowledges about differences between legal form and substance:

> Wagner's work revolutionised the anthropology of knowledge where it demonstrated convincingly that the 'objects' one sees as material, and hence different in kind from 'representations', are in fact the effects of particular objectifying symbolic practices. Hence the 'natural' boundary between metaphorical and material realities is itself an effect of symbolic obviation.[22]

[17] H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (2014) 16.

[18] H. Xanthaki, 'Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham' (2020) 10 *feminists@law* 1, at 1.

[19] E. Grabham, 'Another Sense of the Project' (2020) *PoLAR: Political and Legal Anthropology Rev.*, Festschrift for Carol Greenhouse, at <https://polarjournal.org/2020/07/06/another-sense-of-the-project/>.

[20] E. Grabham, *Women, Precarious Work and Care: The Failure of Family-Friendly Rights* (2021). Clearly, this might suggest that the managers, or at least the managers' bosses, might have been aware of the qualifying periods, but, given the parameters of the research, I was unable to explore this question.

[21] Riles, op. cit., n. 11.

[22] Id., p. 1022.

In this sense, a sociology of legislative drafting might seek to understand how it comes to be that the legislative text, and the work of creating it, is understood to be separate from, and subservient to, something else, understood to be the text's political or substantive purpose. We might similarly ask about the extent to which such divisions 'operationalize' (to use a term proposed by Pottage) distinctions that otherwise seem obvious between legal meaning, materiality, and legal form.[23] In other words, we might enquire into the very movements that create drafting as the shadow to the substance of law. For this kind of inquiry, we need an 'ethnology of legal rhetoric'[24] that can exert critical pressure on the epistemological moves that lawyers, anthropologists, and sociologists commonly make in constructing and encountering our objects of inquiry.[25] Legislative text might be just what it is: the linguistic, typographic, and/or digital expression of pre-settled political propositions – a tin, to use Xanthaki's term, or vehicle, or container. Perhaps these containers can help us to understand the moves of symbolic obviation that we make in relation to legislative texts.

3 | WHAT ARE DRAFTERS DOING?

Is it possible to understand statutes as anything other than containers and to bring drafters, and drafting, out of the shadows? To what extent is the text and form of statutory law capable of analysis on its own terms? How can we discern and overcome what could be termed the 'obviation of legal form' – the epistemological separation of text, meaning, and materiality that prevents interrogating how the statute's material form helps to shape its legal power? These questions bring with them dilemmas about both the methods that we use and how to conceptualize statutes and their associated processes of creation and revision. For example, investigating the reticence of drafters to claim creative 'ownership' of statutory text requires methods that help us to understand the histories and current contextual circumstances (such as institutional dynamics) that contribute to drafters' technical repertoire and expertise. If it is not always possible to observe legislative drafters at work, what sorts of methods can capture the fabrication of statutes as text, object, and source of law? Furthermore, challenging the idea of statutory text as merely a container for legal meaning arguably requires methods that can help us to come to terms with the material and aesthetic form of statutes. Overall, this kind of work inevitably alters our appreciation of our object of analysis. In the following sections, I outline the literatures that can help to contextualize these dilemmas and the methods that might provide rewarding ways of analysing them.

3.1 | Drafting as technical legal expertise

Bringing drafting out of the shadows means recognizing its power as a form of legal technical expertise.[26] As readers will be well aware, an increasing body of sociological research explores the important role of 'legal technicalities' in social and political life, challenging the idea that

[23] Pottage, op. cit., n. 1, p. 3.

[24] Pottage, op. cit., n. 12, p. 149.

[25] J. Law and J. Urry, 'Enacting the Social' (2004) 3 *Economy and Society* 390.

[26] Riles, op. cit., n. 11; M. Sylvestre et al., 'Spatial Tactics in Criminal Courts and the Politics of Legal Technicalities' (2015) 47 *Antipode* 1346; Valverde, op. cit., n. 12.

technicalities are 'excrescences of ordinary language'[27] and instead exploring how they help to resolve political dilemmas or create new dilemmas of their own. Studies of how legal technicalities are created and used have focused on a wide range of legal actors, such as Riles' research on the work of 'back-room' collateral experts in the banking sphere[28] and Leila Kawar's study of the role of International Labour Organization bureaucrats in the formulation of rights for domestic workers.[29] Yet within the body of scholarship on legal technicalities in both common and civil law jurisdictions, there has been much less research to date focusing on the work of government legislative drafters. For this reason, a sociology of legislative drafting could contribute new insights about the cultivation and significance of legislative drafters' work as a distinct type of technical expertise exercised at a different point to judges, for example, in the 'making of law'. This could animate debates about the meaning and creation of legal technicalities mobilized in and through statutory drafting and how they 'travel'.[30] It could also challenge arguments that techniques of statutory drafting have little bearing on law's social effects.

The questions that we might ask as part of an inquiry into the technical legal expertise of drafters might focus on the skills, behaviours, and identities that drafters cultivate and value through experience and training. We could follow the problems, controversies, and mistakes that drafters encounter and the ways in which they respond. We might also seek to understand the impact that institutional dynamics have on drafting, and we might want to follow and analyse how statutory legal form travels across jurisdictional contexts.

3.1.1 | Understanding the past: historical methods

Historical studies provide a grounding for such inquiries and also bring new perspectives and methodological possibilities for analysis. We could examine the legal history of drafting techniques, for example. As Sandra Petersson has shown, the gendered dimensions of drafting have shifted over the centuries with changes in the use of gendered pronouns and innovations such as interpretation acts, the 'masculine rule', and gender-neutral drafting.[31] We might gain further perspective on technical developments in drafting by understanding the organizational history of offices of parliamentary counsel.[32] Yet we could also treat statutes themselves as the archive that we should seek to study. Sally Sheldon and colleagues have shown how using biographical techniques can help us to explore statutes as 'living things', attached in complex ways to disjunctive interpretations and stories about law as well as to their changing contexts.[33] Renisa Mawani has suggested that law itself can be understood as an imperfect, fragmented, yet powerful archive, performing its own violent exclusions: '[T]o scrutinize law as archive is also to ask how we produce ourselves as modern subjects, presumably distinct from the past we study and enfolded in the

[27] Pottage, op. cit., n. 12, p. 152.

[28] A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (2011).

[29] L. Kawar, 'Making the Machine Work: Technocratic Engineering of Rights for Domestic Workers at the International Labour Organization' (2014) 21 *Indiana J. of Global Legal Studies* 483.

[30] S. Milyaeva, 'Tipping the Balance' (2014) 7 *J. of Cultural Economy* 209.

[31] Petersson, op. cit., n. 4.

[32] Page, op. cit., n. 2.

[33] S. Sheldon et al., 'The Abortion Act (1967): A Biography' (2019) 39 *Legal Studies* 18.

futurity of law's deferred promises, despite its immeasurable failings.'[34] In this sense, it is important to reflect on how the history of the United Kingdom (UK) as a colonial power has helped to shape idioms of legal form, technicalities, and legal 'fixes' that are viewed as part of an apparently commonsense approach to drafting that have ongoing effects today. For example, Sarah Keenan has shown how colonial experimentation with land registration in South Australia through the Torrens system contributed to the dispossession of Indigenous people by legally extinguishing their historical relationship with land. Keenan has termed the Torrens title registration system – and its associated techniques of the 'mirror' and the 'curtain', which produce fresh, forward-looking title – a 'tool of colonial governance'.[35] She observes that this legal form – statutory as much as anything else – continues to shape current land registration techniques and processes within the UK and other Commonwealth states.

We need distinct methodologies to follow how legal forms and techniques have travelled through and between colonial contexts. Douglas Hay and Paul Craven's edited book *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* is based on a close study of the voluminous statutory employment legislation governing master and servant law throughout 100-odd jurisdictions within the British Empire.[36] The contributions to the edited collection are based on a database of 2,000 statutes, and the book and its larger associated project aim to 'take statutes seriously'.[37] This is not to say that statutes reflect 'real life'; instead, Hay and Craven note that statute law was often misapplied and ignored. However, studying these statutes comparatively raises a number of important and generative questions:

> Taking the statutes seriously has profound implications for a comparative history of employment law. It requires us to search for explanations of similarities or differences in enforcement across time or geography, not only in political economy or the discourse of doctrine but in the language and policy of the statutes in force. The comparative investigation of the statutes raises questions about the organization of empire. How consistent was this body of law throughout the empire? To what extent were colonial enactments mere transcripts of the metropolitan statutes? What control did the imperial center exercise over colonial law? How were statutory provisions and policies transmitted?[38]

Hay and Craven wanted to identify how the wording and constructions within statutes travelled throughout the empire as one means of understanding the distribution and exercise of legal control and its application across diverse jurisdictional contexts. In setting out on such a study, they developed an approach that they call 'domain word in context' or 'DWIC', which allowed them to identify, compare, and follow the use and context of occupation words (such as 'servant') in statutes. This analysis involved identifying a 'term of art' in master and servant statutes, carefully examining the context in which it appeared, and then comparing these contexts with the others.

[34] R. Mawani, 'Law's Archive' (2012) 8 *Annual Rev. of Law and Social Science* 337, at 361.

[35] S. Keenan, 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' (2017) 28 *Law and Critique* 99.

[36] Hay and Craven, op. cit., n. 5.

[37] D. Hay and P. Craven, 'Introduction' in Hay and Craven, id., p. 1, at p. 10.

[38] Id., p. 11.

For each pair of contexts, the researcher counted the number of words in common. As Hay and Craven put it:

> By repeating the technique with a large number of domain words, we can identify similarities in language that suggest compelling hypotheses about patterns of statutory borrowing and adaptation, and about the extent of direct metropolitan influence on the language of colonial legislation.[39]

Honing this technique involved, among other things, finding ways of accounting for the direction of influence. Nevertheless, it permitted the observation, for example, that the statutory expression of Indian and Chinese indenture in the mid-1800s borrowed the legal form, enforcement methods, racial distinctions, and colonial oversight of indentured labour in the empire two centuries before.[40]

In this way, historical accounts of the development and organizational dynamics of statutory drafting, as well as approaches drawn from biographical work and DWIC studies, can provide fresh material for scholars seeking to understand how statutory form has evolved and travelled across jurisdictions, and how it continues to change. Such methods of analysis are not, however, limited to historical studies, as we can see from innovative ongoing work in corpus linguistics. A rewarding approach to contemporary drafting is analysing current statutes as a 'corpus', as Karen McAuliffe and Aleksandar Trklja have done with European Court of Justice and member state case law, for example, and others have done with case law in the UK, the United States, and Germany.[41]

3.1.2 | Understanding the present: ethnographic methods

When seeking to understand the contemporary formation of drafting as technical expertise, ethnographic methods provide a very promising route. Ethnographic research could give us a picture of the complex epistemological work that drafters perform in constructing order, legitimacy, and agreement,[42] and legal sense, through statutory text making in shifting policy landscapes. The dream might be of achieving something akin to Bruno Latour's *The Making of Law*, in which he was able to observe the practice of the Conseil d'État, the French supreme court, and analyse how legal reasoning was shaped.[43] In a similar vein, an ethnography of legislative drafting could try to

[39] Id., p. 16.

[40] Id., p. 25.

[41] K. McAuliffe and A. Trklja, 'The European Union Case Law Corpus (EUCLCORP): A Multilingual and Comparative Corpus of EU Court Judgments' in *Proceedings of the Second Workshop on Corpus-Based Research in the Humanities, CRH-2, 26–28 January 2018, Vienna, Austria*, eds A. Frank et al. (2018) 208; A. Trklja and K. McAuliffe, 'Formulaic Metadiscursive Signalling Devices in Judgments of the Court of Justice of the European Union: A New Corpus-Based Model for Studying Discourse Relations of Texts' (2019) 26 *International J. of Speech Language and the Law* 21; F. Vogel et al., 'Computer-Assisted Legal Linguistics: Corpus Analysis as a New Tool for Legal Studies' (2018) 43 *Law & Social Inquiry* 1340.

[42] L. Boltanski and L. Thévenot, *On Justification* (2006).

[43] B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2010).

understand the liveliness of creating legislative text, which First Parliamentary Counsel Elizabeth Gardiner has termed drafting 'to a moving target'.[44]

Emma Crewe's anthropology of the House of Commons dedicates a chapter to following the progress of one clause as it passed through both Houses of Parliament and was transformed, as she puts it, 'from an idea into law'.[45] She describes the multiple actors, structures, events, and values that shaped what became Section 11 of the Children and Families Act 2014 concerning 'shared parenting'. She brings to life the 'textual battle' that ensued, which included intense and at times rapidly updated briefings, skirmishes over amendments, and social media tactics used by members of Parliament to publicize the political implications of the legislative process. In doing so, however, she notes that the ambition of every minister to make a mark on the statute book is tempered by the understanding that it is legislative drafters who create the text of the bill.

An ethnography of legislative drafters could analyse the processes, epistemologies, and values that contribute to draft bills before they even reach Parliament for the first time. Yet the intense nature of the ethnographic encounter requires researchers to build trust and perform the often difficult and uncertain work of obtaining access to the right people and places. Why should working offices of parliamentary counsel grant a researcher such access? If they do grant access, what type of access is given or indeed possible, and could this allow observation of work on the more controversial bills? Given the obviation of drafting as a shadowy, technical, and for that reason unpolitical or uninteresting craft, is it even possible to gain purchase on the processes through which drafters construct statutes? The difficulty that I and others have faced in gaining access to these working environments might be related to the idea that observing the fabrication of statutory text could undermine its coherence or legal power.

Page wanted to understand the role of legislative drafters in the policy process. He had a hunch that drafters and drafting processes had a strong role in shaping policy but needed to understand more, so he examined Office of the Parliamentary Counsel files containing the correspondence between drafters and those instructing them from government departments in relation to four bills, and interviewed seven members of the Office.[46] Yet he ran into a similar conundrum as the one that I have just outlined:

> To set out how writing laws can affect policy is difficult. Here the research faces a central problem. Parliamentary Counsel have been most generous in sharing their experiences with me, and I was also able to look at some of the copious files of correspondence between Parliamentary Counsel and members of bill teams which offer blow-by-blow accounts of how legislation is taken through countless drafts before it is presented to Parliament and of what happens to the text during its parliamentary stages.[47]

[44] S. Brecknell, 'Law of the Land: Interview with First Parliamentary Counsel Elizabeth Gardiner' *Civil Service World*, 13 September 2018, at <https://www.civilserviceworld.com/in-depth/article/law-of-the-land-interview-with-first-parliamentary-counsel-elizabeth-gardiner>.

[45] E. Crewe, *The House of Commons: An Anthropology of MPs at Work* (2015) 183.

[46] Page, op. cit., n. 2.

[47] Id., p. 805.

We know that files have their own lives, epistemologies, and effects in the world.[48] Irene van Oorschot has analysed the 'truth-telling work' of legal case files in a Dutch criminal court: 'The case file, transporting and transforming evidence, is a crucial object doing both legal and truth-telling work.'[49] In this way, files of correspondence relating to drafting are their own characters in the drama of legislative drafting, requiring attention to the epistemological practices of inclusion (and exclusion), narrative, and documentation that they enact.

Having related the story of his research through the drafting files, Page then gets to one of the core issues with sociological work on legislative drafting – the problem of confidentiality:

> The central problem is that what goes on between the department and Counsel is confidential. Yet it is not possible to produce a coherent account of the types of influence [that drafters exercise over policy] by alluding to it in general terms – for example by saying a piece of legislation contained a provision 'that was shaped by Counsel's idea' or 'part of a high profile bill had to be recast because of the points Counsel raised'.[50]

Page manages to work around this problem of confidentiality by creating a 'fictitious' case, a composite of different bills but containing things that happened to a real piece of legislation from the past 30 years, and he uses quotations from a case file relating to a bill passed since 1977. By meshing this account with his own interview material, he is able to articulate ways in which legislative drafters exerted specific influences on policy that derived from their distinct role within the legislative process.

My own experience of requesting access to the everyday worlds of drafters has been unsuccessful, and when I have asked to review files within the Office of the Parliamentary Counsel this has not been possible. For that reason, I have focused on building a multi-sited ethnography of legislative drafting, using interviews with current and retired legislative drafters and drafting experts, alongside review of policy and professional documents, and other methods to further my understanding of drafters' technical expertise. Multi-sited ethnographies move away from conventional approaches requiring in-depth immersion in a particular site and instead aim to follow people, concepts, practices, associations, and relationships, achieving juxtapositions through encountering different spaces and/or juxtaposing diverse forms of data.[51] A multi-sited ethnography of government legislative drafters could allow us to understand the bureaucratic dynamics,[52] construction of legal knowledge, and professional subjectivities through everyday work practices and how these relate to the fabrication of particular technical styles and legal form. Such methods are time intensive and immersive, but extremely valuable in allowing a detailed understanding to emerge of participants' worlds: the mundane process of daily sense making, the controversies, the disjunctive or contradictory perspectives.

A core aspect of any qualitative empirical work on drafting, whatever the type of ethnography, is interviewing. When I have requested interviews with members of the Office of the

[48] Latour, op. cit., n. 43; I. van Oorschot and W. Schinkel, 'The Legal Case File as Border Object: On Self-Reference and Other-Reference in Criminal Law' (2015) 42 *J. of Law and Society* 499.

[49] I. van Oorschot, 'Doing Times, Doing Truths: The Legal Case File as a Folded Object' in *Law and Time*, eds S. Beynon-Jones and E. Grabham (2018) 229, at 244.

[50] Page, op. cit., n. 2, p. 805.

[51] M. Falzon (ed.), *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research* (2009).

[52] C. Hoag, 'Assembling Partial Perspectives: Thoughts on the Anthropology of Bureaucracy' (2011) 34 *PoLAR: Political and Legal Anthropology Rev*. 81.

Parliamentary Counsel, I have been permitted to interview working drafters in pairs. I have not asked about the reason for doubling up but assume that it allows both safety and surveillance on the part of the drafters. My practice has been to use 'depth' interviews, which, in proceeding with the participants' own priorities in responding to the theme of the interview, generate powerful accounts of the participants' worlds.[53] These interviews have lasted between one and two hours and they have been useful in giving an overview of technical challenges and the reiterative processes of drafting, checking, innovation, and deliberation that drafters adopt in their everyday work. They have also permitted a collaborative, convivial approach to exploring ideas and building some sort of shared account of the technical expertise of drafting. Drafters have often come across as open, cheerful, alert, and helpful. When sent their transcripts and even drafts of articles for checking, they have engaged with me as they might do with someone instructing them on a draft bill: they have checked the work line by line, probed and challenged me on the rationale of a particular argument, and offered updates on drafting guidance or pointed me in the direction of interesting new practice-based articles. I have experienced these interactions as providing many more insights than just the interviews themselves into how drafters work.

Yet it has still been tricky to elicit details from drafters on the processes leading up to the adoption of the specific wording of an act or set of regulations, and, despite requests, it has not been possible, yet, for me to gain more extensive access to the day-to-day working environment of drafters. This has meant that I have 'prized' interviews in a way that probably has effects on the extent to which I have challenged drafters on what they are saying. The interviews have assumed much greater importance in the overall process of gathering data than would otherwise be the case in an ethnographic study, where observation and conversation would allow a more in-depth analysis. A further dilemma has been how to proceed with feminist, non-hierarchical approaches to interviewing when working with legal 'elites', who may have good reason to maintain some opacity in the accounts that they provide.[54] For these reasons, the task of pursuing ethnographic accounts of contemporary drafting practices remains fraught with methodological challenges.

3.2 | Visualizing legislative text: the aesthetics of statutes

The second proposed route for analysing legislative drafting is through studying the aesthetics of statutes. Such an approach could help to identify how the symbolic obviation that we see with statutory form comes about. Amanda Perry-Kessaris observes that visual methods help to transcend the disciplinary boundaries that could otherwise constrain our approach to law by placing a wide range of perspectives in shared spaces.[55] As such, we could engage with visual methods to apprehend statutes as text and material, and to fully appreciate and understand their significance in paper or digital form. This is important because statutes are increasingly oriented to be seen, read, and interpreted by members of the public. Powerful search engines, widespread use of mobile phones, and cuts to Legal Aid have created significant incentives for the public to access legislation directly via the internet without advice from lawyers. Legislation is now published online through sites such as legislation.gov.uk, managed by the National Archives.

[53] J. Ritchie et al. (eds), *Qualitative Research Practice* (2014).

[54] D. Souleles, 'How to Study People Who Do Not Want to Be Studied: Practical Reflections on Studying Up' (2018) 41 *PoLAR: Political and Legal Anthropology Rev*. 51.

[55] A. Perry-Kessaris, *Doing Sociolegal Research in Design Mode* (2021).

Legislation.gov.uk has over two million new visits per month.[56] A 2012 study commissioned by the National Archives and the Office of the Parliamentary Counsel found that the profile of users had broadened, but described readers' comprehension of legislation as 'low'.[57] And despite their continued effacement of statutes as legal medium, the Office of the Parliamentary Counsel and other offices of legislative counsel consider the textual appearance, clarity, and accessibility of legislation to be of paramount importance.

The problem that this raises for a sociology of legislative drafting is that of the status of text as the dominant medium of and for law. As Linda Mulcahy puts it: 'The increasing inclination of legal scholars to neglect the visual has been explained by the fact that over time law's authority has been inextricably bound up with the text to the exclusion of the image.'[58] She argues that by reifying legal text, we perform a separation between law, on the one hand, and politics and the visual, on the other: 'The reification of the authoritative text and written rule has long served to reinforce the idea of law as having an autonomous existence separated from politics, morality, emotion, and the visual.'[59] Mulcahy's observations help in reflecting on one of the central dilemmas that this article seeks to address: that of understanding the reticence of drafters to claim any creativity or power in authoring the written text of statutes. Could it be the case that the written textual form of statutes performs and hides its own power simultaneously? If text is understood as inherently authoritative and also as separate from politics and the visual (among other things), then what might it mean to challenge this separation by subjecting statutory text to visual analysis?

One route to this is via an analysis of legal writing and, specifically, the visual appearance and calligraphic features of modern legislative text. Marie Andrée Jacob has shown that legal textual marks such as the strikethrough can be 'found objects' showing the way to problems of regulation,[60] for example, and Riles has analysed the role of brackets in marking deliberations over international human rights texts.[61] I have been reflecting on what it is about my earlier observations about containers that helps us to understand the work of obviation in positioning legislative text, as text, in a place almost beyond legal meaning and certainly beyond the purview of sociological interrogation. Thom Giddens observes that 'legal understanding and practice rest upon the assumption that text is merely a vessel that carries the law; textual appearances only matter insofar as they enable the transmission of content'.[62] This idea of legal text as a vehicle (or, as Xanthaki might suggest, a tin) merely indicates how deeply sedimented is the assumption that text is a 'pragmatic container of meaning'. As he puts it: 'It is a sedimentation within the structures of law and legal study that is so compressed, so heavily settled, that it is rarely disturbed.'[63]

Drawing on these approaches, we might seek to disturb what Giddens has observed is so deeply sedimented in legal text by analysing statutes as aesthetic objects. This might involve exploring

[56] Office of the Parliamentary Counsel, *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (2013) (the 'Good Law report') 19, at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf>.

[57] Id., p. 19, referring to National Archives and Office of the Parliamentary Counsel, *Legislation.gov.uk and Drafting Techniques: A Study by Bunnyfoot* (2012).

[58] Mulcahy, op. cit., n. 13, p. S117.

[59] Id., p. S119.

[60] M. A. Jacob, 'The Strikethrough: An Approach to Regulatory Writing and Professional Discipline' (2017) 37 *Legal Studies* 137.

[61] Riles, op. cit., n. 7.

[62] Giddens, op. cit., n. 13, p. 10.

[63] Id.

how drafters create the visual appearance of legislation, the extent to which deliberations around grammar, punctuation, and syntax engage visual concerns, and what these mean to drafters. For example, drafters pay significant attention to how syntax affects readability and hence clarity.[64] We might focus on how legislation takes shape on the page or screen and appreciate the visual power of punctuation, for example, in both establishing and potentially subverting dominant regimes of intelligibility.[65] This could facilitate new insights into the significance of statutes, among other documentary forms and practices, as 'artifacts of modern knowledge'.[66]

Inevitably, these enquiries engage with the practice of revision. Yet the very idea that writers – and drafters – should revise their texts is historically specific. The literary scholar Hannah Sullivan argues that practices of revision not only became much more widely used during the period of high modernism (1950s–1960s) but also signalled a shift in authorial values towards the association of multiple drafts with introspection and authorial integrity, which was a movement away from the values of spontaneity in nineteenth-century writing.[67] As she puts it: '[T]he association of revision and literary value is the legacy of high modernism and the print culture that nourished it.'[68] What, then, might we ask of drafters' practices of revision? How precisely are draft statutes revised and what reasons exist for revision practices? What are the values that drafters seek to demonstrate through revision? Sullivan remarks: 'Revision is sometimes understood to mean only textual change or fluidity, but it also implies the possibility of a text being fixed in some material form.'[69] With this in mind, we could also think about the fluid (or not) ontology of the legislative text: the extent to which revisions help to permit a sense of deliberation and finitude or contribute to law's meaning and purchase.

Doing this kind of analysis could involve an element of capturing the present through rhythmanalysis, the practice of 'understanding social life through the lens of rhythm'.[70] Dawn Lyon has used audio-visual montage of time-lapse photography and sound recordings to explore the everyday rhythms of market life in Billingsgate Fish Market, for example.[71] The montage consists of photographs taken at regular intervals from one place at the side of the market hall from one o'clock in the morning until midday – from before opening to just about closing time. These are then juxtaposed in a film that compresses the market day into slices of developing action, as people come and go, put out their stalls, buy and sell fish, and pack up and go home, with audio overlaid in 'real time'. Lyon's montage is part of a multi-methods study of the market, which also involves interviews, work shadowing, and photographs.

In a similar vein, we could create and use a rhythmanalysis approach to discern, stage, and analyse with audio and visual methods the work of drafters in either responding to a sample set

[64] See for example Office of the Parliamentary Counsel, op. cit., n. 14.

[65] Jacob, op. cit., n. 60; M. Shapiro, *Punctuations* (2019). A further set of questions and methodological challenges relates to the task of understanding how changing technologies such as internet publication and drafting software affect the way in which drafters approach writing and publishing for different audiences and platforms. In my future work, I hope to explore how the digital expression, presentation, and organization of draft statutes changes the ontological status of statutes themselves and participates in the reorganization of the legal subjectivities that surround them.

[66] A. Riles (ed.), *Documents: Artifacts of Modern Knowledge* (2006).

[67] H. Sullivan, *The Work of Revision* (2013). Thank you to Jose Bellido for directing me to Sullivan's work.

[68] Id., p. 2.

[69] Id., p. 4.

[70] D. Lyon, *What Is Rhythmanalysis?* (2018) 2.

[71] D. Lyon, 'Doing Audio-Visual Montage to Explore Time and Space: The Everyday Rhythms of Billingsgate Fish Market' (2016) 21 *Sociological Research Online* 57.

of instructions or even (and perhaps less likely) in the usual everyday pattern of their work. I hope to use such an approach in future research. If we engage with the sensory and material aspects of drafting, alongside the visual, we could surface and analyse the practices that contribute to the evacuation of legal meaning from the text of statutes.

4 | CONCLUSION

Socio-legal scholars might usefully reflect on how statutory texts have come to be understood as mere containers or vehicles for legal meaning. We can also challenge the idea that drafters are only technicians working on the expression of pre-settled legal substance. Tackling the obviation of legal form that we find in statutes and drafting requires attention to technique and aesthetics as only two of many potential areas of investigation. Empirical analyses of drafting techniques can help us to assess how doctrine assumes statutory form, how ideas become legal, and how the peculiarities of legal thinking travel inside and outside the domain of law. Turning to the aesthetic qualities of statutes can help us to challenge the reification of legal text and form as existing outside of legal meaning. Yet we need new methods, or juxtapositions of methods, in order to assess the production, material form, and liveliness of statutes in this light. What is apparently obvious about statutes and their production can become the prompt for further enquiry.

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