

Response to ‘Exploring the Textual Alchemy of Legal Gender’

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Emily Grabham’s paper deftly positions the process of legislative drafting as an object of social-scientific study. Her reconstruction of the use of gender pronouns anticipates so many lines of inquiry that it is difficult to hold to any one. In this brief comment I pick up on a theme that is suggested by Emily’s foregrounding of a statement issued by the Office of Parliamentary Counsel: ‘the medium is not the message’. It is impossible not to have in mind the questions of temporality that Emily’s work encourages us to see. 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. And time is an essential ingredient of these medial techniques; the grammatical and syntactical machinery of legislation and legislative drafting not only animates the pronouns used in statutes, it also constitutes a locus of authorship that might itself be a subject of experimentation.

From the perspective of gender, or a perspective that looks beyond gender, the grammatical routines of legislative drafting might be just as interesting as the pronouns that they choreograph. Legislative texts are articulated into a set of tenses – predominantly conditional – by means of which a normative programme or purpose is supposed to bind the future. As a legislative drafter might put it, a statute has to ‘provide’ for the future; to anticipate it (*providere*) by realising it into specified (contingent) events, and by specifying what will be the case if any these events should occur. The governing mood is the subjunctive: should a specified event occur, it will have been provided for. Indeed, the legislative drafter writes ‘as if’ specified events have already

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occurred; the future is brought ‘back’ into the present by means of grammatical and syntactical protocols that materialise it textually in the locus of legislative authorship.

First, conditional tenses function as (binary) switches which determine whether or when the time of a specified event will have come. Second, one effect of the syntactical-textual arrangement of statutes into clauses and subclauses is that, from the perspective of the drafter, ‘provision’ for the future is made through the composition of a textual plane. There is time in this synchronous plane: the grammatical and experiential time that is involved in constructing (or, for the interpreter, reconstructing) a complex pattern of clauses and subclauses. This work of composition is explicitly notified in phrases such as ‘where by reason of subsections (3) to (5) of section 4 of this Act ...’, but it is already implicit in the most fundamental premise of drafting and interpretation, which is that statutes should be addressed as coherent compositions. The spatiality of the text as a material body, and the time it takes to traverse that body, is the dimension within which conditional futures are fabricated and projected ‘forwards’.

What does this have to do with the question of gendered or non-gendered pronouns? Speculatively, there is in the English context a deep historical connection between the grammatical or syntactical techniques of legislative drafting and the grammatical techniques of patrimonial property. The period from the sixteenth century onwards in which a profusion of charters, ordinances, proclamations and writs began to resolve itself into what we now recognise as the form of the statute (in large part through the agency of print) was also the period in which the early modern form of the patrimonial settlement was taking shape. Treatises and decisions in the early modern period quite explicitly made the analogy between these two contexts of textual drafting. Figuratively, both applications of drafting technique sought to convey or pass something into the future, by means of grammatical, syntactical, and textual switches that materialised future occasions or events into textual elements that could be grasped and arrayed in the present. The temporalities of suspension, reversion, and ‘for so long as’ that defined patrimonial estates and

interests were ‘made of’ grammar. Property, as an economic, symbolic, and ethopoietic substance, was materialised and articulated grammatically, and worked its way into the social according to the capacities of technical grammar to channel time.

Patrimonial settlements are a familiar part of the history of sex, gender, and power, precisely because the channelling of time was premised on sexual difference. With legislative drafting in mind, what is relevant here is the implication of gender in grammatical technique. The association can be illustrated by reference to the drafting techniques that were used to give married women what was then called ‘separate property’, a form that generates the drama in Wilkie Collins’ *The Woman in White*.¹ A settlement might give a wife a power of appointment over ‘her’ property; that is, a right to select – ‘appoint’ – the beneficiaries. But the theory was that in exercising this power, the wife acted as the agent of the person who made the settlement; she was, as the lawyers put it, ‘a mere conduit pipe’. The writing by which she appointed beneficiaries was treated as if it had been a clause of the original settlement: ‘as if the limitation in that writing of appointment had been contained in [the] deed creating the power; for they take from the author of the power.’² So the ‘real time’ agency of the woman was erased, or rather eclipsed, by the inert, already-completed, temporalities that were fabricated by drafting technique. The figure of eclipse is clearly expressed in the lawyers’ distinction between ‘substance’ and ‘shadow’, between ‘the *passing* of the estate which is the *substance* of the deed [and] the *manner how* which is the *shadow*...’³

Here, substance and shadow were not people, they were primarily operations or documentary forms. And these operations brought into existence the gendered attributes that they operationalised. Neither ‘he’ nor ‘she’ referred to a substantial person; the qualities and competences of the ‘shadow’ were strictly those that had to be assumed for this particular

¹ I highlight this novel partly because of the role it plays in Marilyn Strathern’s rediscovered feminist classic, *Before and After Gender. Sexual Mythologies of Everyday Life* (Strathern and Butler, 2016).

² *Southby v. Stonehouse* (1755) 2 Ves. Sen. 610, at p 612.

³ Case cited in counsel’s argument in *Tomlinson v. Dighton* (1711) 1 P. Wms. 149, at p 164.

transaction, for this particular moment, in order for this grammatically-defined estate to ‘pass’ along a temporal channel that was already written into the settlement. In this mode of gender coding, ‘there is no consistent dichotomy, only a matrix of contrasts’, or ‘a prism that yields different patterns as it is turned’ (Strathern, 1980, p. 177). The question of who or what turns the prism brings us back to the deep patriarchal logic of settlements, and also to the grammatical logic of legislation. Even if I am wrong in suggesting that the technique of legislative drafting originated with the technique of drafting settlements, even if the kinship is only analogical, the analogy illuminates one sense in which legislative drafting techniques ‘have helped usher in specific legal and textual formations with attached concepts and ontologies that have travelled far and combined with other long-lasting bureaucratic and wider social understandings of gender’ (Grabham, this issue).

If grammar and syntax have the capacity to animate pronouns, and to generate and recombine the attributes that are associated with them, then experiments in ‘drafting otherwise’ might also involve working with alternative modes of grammatical animation, modes which traverse the binarism that is essential to conditional moods or tenses. It might also involve reimagining the locus of legislative authorship itself. 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’. And drafting works instrumentally because language works instrumentally. To say, as do the legislative drafters, that ‘the medium is not the message’, is to understand technical drafting language according to ‘the theory of the postal system’ (Siegert, 1999). The other side of that theory is the reality of a medial system that has already cued up the agencies of writers and readers.

In the case of legislative drafting, the medial technology of grammar and syntax not only choreographs pronouns; it also interpellates the drafter into a particular authorial locus. The project of fabricating conditional futures locates the drafter themselves in the ‘time out of time’

that is generated by those conditional futures. Engagement with the grammatical machinery might allow one not only to reinvent the modes of existence associated with pronouns, but also to retemporalise this moment of authorship, to open it up to the possibilities of collaboration, displacement, or ‘desubstantialisation’ that would come from renouncing the position of ministerial mastery that drafters are still compelled to adopt. It might also allow one to take on the ancestrally patriarchal logic of drafting as the project of transmitting semantic capital into the future. Of course, legislation is also a political process, and judges are still the officially privileged interpreters of legislation, but with gender in mind experimentation with ‘legal form’ (to use Emily’s phrase) might be just the place to begin to unfold the political potential of legislation. To return to the theme of medium and message, the fact that legislative texts now exist as digital forms might open them up to the kind of transformative modes of authorship – distributed creativity – that are exemplified in practices such as fan fiction. In particular, and although it works as pornography or ‘postpornography’, the genre of slash fiction offers a sense of how writing practices in the digital era can perform or ‘entextualise’ gender otherwise (Willis, 2016).

References

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