Good criminal laws: drafting with the user in mind

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It is rare that undergraduate law students have the great privilege of having their minds opened by a profoundly gifted, wonderfully intellectually challenging, and gently encouraging professor. I had that privilege. Professor Courakis, this is as innovative and visionary as I can make it. It will never match you but I hope that you enjoy it nonetheless.

Amidst a bombardment of criminal legislation catapulted to citizens from their national legislatures, the EU,[1] and international fora, little debate is spent on what constitutes good criminal legislation, how good criminals law can be drafted, and what constitutes best practice. The only scratch on the surface of criminal legislative study is with the wide agreement that criminal legislation is currently failing to produce tangible results, at least to the extent intended by its drafters and ultimately its policy visionaries.

The objective of this chapter is to apply innovative drafting practices to the field of criminal law as a means of inviting further debate both by legislative experts but mainly by criminal law experts, where application of legislative principles is empirically available, already well researched, and ultimately useable under the legislative studies umbrella.

The chapter begins with the definition of good criminal legislation

[1] See 'How much legislation comes from Europe?', *House of Commons Research Paper* 10/62, 13 October 2010.

and the identification of its constituting elements. It continues with the application of plain language as a crucial element of legislative quality, mainly under the prism of innovative thinking and application: identifying the legislative audience of criminal laws and pitching criminal laws to their level of legal awareness. The chapter continues with 'blue sky' proposals for criminal legislation: a layered structure, use of typography and pictures in criminal laws, the use of IT tools to enhance an understanding of the architecture of the whole criminal law, and, ultimately, the acceptance of phronetic legislative drafting as a theoretical umbrella for good criminal law.

What is Good Criminal Legislation?

Defining good legislation is no easy task. And much of the answer depends on the lens under which the question is asked. My view is that good legislation is legislation that manages to achieve the desired regulatory results.[2] In other words, good criminal laws are laws that contribute to the achievement of the policy aims pursued by the criminal regulators, to the extent set by these regulators, and within the timeframe imposed by them.

And so there is a direct link between criminal regulation and criminal legislation. Their precise relationship is mainly identified within an academic, non-functional[3] context. Mousmouti and Voermans distinguish between legislative quality as an issue closely linked to the constitutional principles of legality, effectiveness and legal certainty; and regulatory quality as an issue related to the success of legislation in promoting economic development.[4] And so legislation is not synony-

[2] See H. Xanthaki, *Drafting Legislation: Art and technology of rules for regulation* (2014, Hart Publishers, Oxford), Chapter 1.

[3] See S. T. Trautmann, 'Empirical knowledge in legislation and regulation: a decision-making perspective' [2013] 1 *The Theory and Practice of Legislation* 533, 538-539.

[4] See M. Mousmouti, 'Operationalising quality of legislation through the effectiveness test' (2012) 6*Legisprudence* 191, 194; also, W. Voermans, 'Concern about the quality of EU legislation: what kind of problem, by what kind of standards?' (2009)

mous to regulation. Criminal regulators, as indeed all regulators, use legislation as a tool of successful governing[5;] or a tool for putting into effect policies that produce the desired regulatory results[5]; or as the qualitative measure of successful legislation, which is the extent of production of the desired results.[6] Provided of course that the regulators' choice is indeed put a policy to effect rather than only on paper.[7]

Within this context, criminal regulation is the process of putting criminal policies into effect to the degree and extent intended by government.[8] Criminal legislation, as one of the many regulatory tools available to the regulators,[9] is the means by which the production of the desired regulatory results is pursued. In application of Stefanou's

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2 *Erasmus Law Review* 59, 223 and 225; and R. Baldwin & M. Cave, *Understanding Regulation: Theory, strategy and practice* (Oxford, Oxford University Press, 1999) 85.

[5] See OECD, 'Recommendation of the Council on improving the quality of government regulation', 9 March 1995, C(95) 21/Final.

[5] The executive branch of government is no longer expected to confine itself to the mere making of proposals: it has to see them through. See J. Craig Peacock, *Notes on Legislative Drafting* (Washington, REC Foundation, 1961), p. 3.

[6] See N. Staem, 'Governance, democracy and evaluation' (2006) 12(7) *Evaluation* 7, 7.

[7] And the choice is the governments not the drafters: see P. Delnoy, 'Le rôle des légistes dans la détermination du contenu des norms', *2013 Report for the International Cooperation Group*, Department of Justice, Canada, http://www.justice.gc.ca/fra/apd-abt/gci-icg/publications.html, 3.

[8] See National Audit Office, Department for Business, Innovations and Skills, 'Delivering regulatory reform', 10 February 2011, para 1.

[9] Tools for regulation vary from flexible forms of traditional regulation (such as performance-based and incentive approaches), to co-regulation and self-regulation schemes, incentive and market based instruments (such as tax breaks and tradable permits) and information approaches. See Better Regulation Task Force (BRTF), 'Routes to better regulation: a guide to alternatives to classic regulation', December 2005; also see J. Miller, James, 'The FTC and voluntary standards: maximizing the net benefits of self-regulation' (1985) 4 *Cato Journal* 897; and OECD Report, 'Alternatives to traditional regulation', para 0.3; and also OECD, *Regulatory Policies in OECD Countries: From interventionism to regulatory governance* (Paris, OECD, 2002).

scheme on the policy, legislative, and drafting processes,[10] legislative quality is a partial but crucial contribution to regulatory quality.[11] This promotes the synergetic approach to legislation eloquently expressed by Richard Heaton, former First Parliamentary Counsel and Permanent Secretary of the Cabinet Office in London:

> I believe that we need to establish a sense of shared accountability, within and beyond government, for the quality of what (perhaps misleadingly) we call our statute book, and to promote a shared professional pride in it. In doing so, I hope we can create confidence among users that legislation is for them.[12]

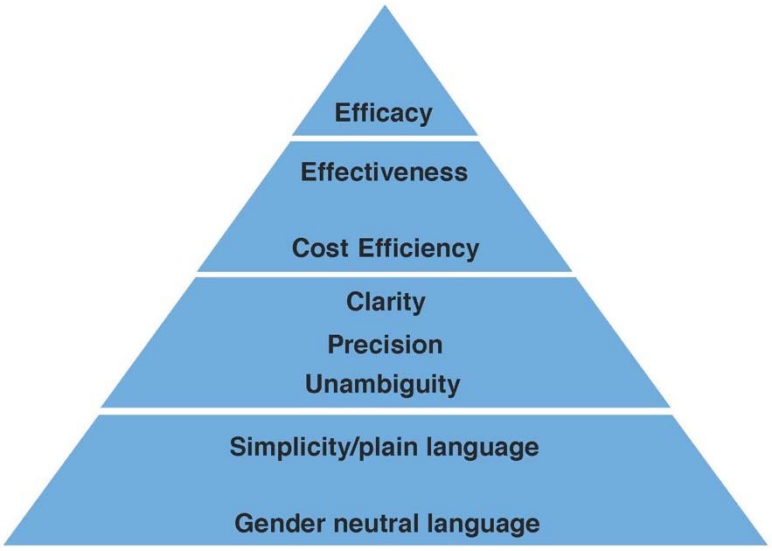
This approach feeds into this diagram of elements of regulatory and legislative quality.[13]

[10] See C. Stefanou, 'Legislative drafting as a form of communication' in L. Mader & M. Travares-Almeida (eds.), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; see also C. Stefanou, 'Drafters, drafting and the policy process' in C. Stefanou & H. Xanthaki (eds), *Drafting Legislation: A modern approach* (Aldershot, Ashgate, 2008), p. 321.

[11] In fact, there is an emergence of a public interest in good quality of rules: see M. De Benedetto, M. Martelli & N. Rangone, *La Qualità delle Regole* (Bologna, SE il Mulino, 2011), p. 23.

[12] See R. Heaton, 'Foreword' in Cabinet Office, Office of Parliamentary Counsel *When Laws Become Too Complex*, 16 April 2013.

[13] See H. Xanthaki, 'On transferability of legislative solutions: the functionality test' in C. Stefanou & H. Xanthaki (eds.), *Drafting Legislation: A modern approach – in Memoriam of Sir William Dale*, above, n. 12, 1.



The ultimate goal for regulation is efficacy. Efficacy is the extent to which regulators achieve their goal.[14] It is often misnamed 'effectiveness', especially by experts outside the field of legislative studies, who have nonetheless much to offer in the analysis of the concept. W. Bradnee Chambers for example offers a unique systematisation of the conceptual spectrum of what he calls effectiveness[15] and I call efficacy: the measure to which the performance data of the legislation match its objectives.[16] Bradnee Chambers distinguishes between rule based positiv-

[14] See *ibid*., 126; also see M. Mousmouti, above, n. 4, 200.

[15] Also see A. Flückiger, 'L'évaluation législative ou comment mesurer le ficacité des lois' (2007) *Revue Européenne des Sciences Sociales* 83.

[16] See W. Bradnee Chambers, 'Towards and improved understanding of legal effectiveness of international environmental treaties', 16 (2003-2004) *Geo Intl Envtl L Rev* 501, 531.

ist models of efficacy that look at the level of compliance achieved; social legal models[17] that assess efficacy by reference to the compliance of rules with societal norms and values falling within the "established milieu"[18] or to their legitimacy leading to compliance;[19] the economic legal model that include cost efficiency to the measure of efficacy;[20] and international relations models that call for clearer distinctions between efficacy, implementation, and compliance. From the point of view of drafting, efficacy is the capacity of criminal laws to achieve the regulatory aims that they are set to address.[21] Efficacy, as a measure of quality of legislation for the purposes of achieving the desired regulation, is not a goal that can be achieved by the drafter alone.[22] A wonderful draft may be capable of producing the desired regulatory effects, but bad implementation[23] and bad judicial application may interfere with

[17] Based on the theory that legislation is a tool for changing behaviour: see H. Kelsen, 'Law as a specific social technique' (1941) 9 *University of Chicago Law Review* 75, 79–80.

[18] See Iredell Jenkins, *Social Order and the Limits of Law: A theoretical essay* (New Jersey, Princeton University Press, 1980) 180.

[19] See T. M. Franck, 'Legitimacy in the international system', (1988) 82 *Am. J. Intl. L.*, 705.

[20] See O. K. Young & M. A. Levy, 'The effectiveness of international environmental regimes' in O. R. Young et al (eds.), *The Effectiveness of International Environmental Regimes* (Massachusetts, MIT Press, 1999) pp. 1, 4-5; also see OECD, 'Regulatory policies in OECD countries; from interventionism to regulatory governance', 2002, OECD, Paris; and also 'Background note to the OECD reference checklist for regulatory decision making' of OECD, 'Recommendation of the Council on improving the quality of government regulation', *C* (95) 21 final.

[21] See N. Gunningham & D. Sinclair, 'Designing smart regulation', http://www.oecd.org/dataoecd/18/39/33947759.pdf, 18; and also R. Baldwin, 'Is better regulation smarter regulation?' (2005) *Public Law* 485, 511.

[22] See J. P. Chamberlain, 'Legislative drafting and law enforcement' (1931) 21 *Am. Lab. Leg. Rev.* 235, 243.

[23] See D. Hull, 'Drafters devils' (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm.

its actual results.[24] Of course one has to accept that the extent of the margin for incorrect implementation and judicial application is directly linked to the quality of the draft,[25] but it is quite possible that the error in the draft may be attributed to a fault in the content of the pursued policy or in the calculations of the regulatory impact assessment made for the allocation of resources for implementation.

Within the umbrella of efficacy the drafter pursues effectiveness in legislation.[26] The term is used widely but often without a definition. For example the EU calls for accountability, effectiveness, and proportionality as a means of achieving better law-making, but the term is not defined at all.[27] Similarly, the UKs Office of Parliamentary Counsel repeat their aspiration to effectiveness as a contribution to or in balance with accuracy, but do not define the term.[28] Mader defines effectiveness as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.[29] Snyder defines effectiveness as "the fact that law matters: it has effects on political, economic and social life outside

[24] See U. Karpen, 'The norm enforcement process' in U. Karpen & P. Delnoy, (eds.), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden, Nomos, 1996), pp. 51, 51; also L. Mader, 'Legislative procedure and the quality of legislation' in U. Karpen & P. Delnoy (eds.), *Contributions to the Methodology of the Creation of Written Law*, above, n. 35, pp. 62, 68.

[25] See G. Teubner, 'Regulatory law: chronicle of a death foretold' (1992) 1 *Social Legal Studies* 451.

[26] See C. Timmermans, 'How can one improve the quality of community legislation?' (1997) 34 *Common Market Law Review* 1229, 1236–7.

[27] See 'European governance: better lawmaking', communication from the Commission, *COM* (2002) 275 final, Brussels, 5.6.2002; also see High Level Group on the Operation of Internal Market, 'The internal market after 1992: meeting the challenge – report to the EEC Commission by the High Level Group on the operation of internal market', *SEC* (92) 2044.

[28] See Office of Parliamentary Counsel, 'Working with OPC', 6 December 2011; and OPC, 'Drafting guidance', 16 December 2011.

[29] See L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' (2001) 22 *Statute Law Review* 119, 126.

the law – that it, apart from simply the elaboration of legal doctrine".[30] Teubner defines effectiveness as term encompassing implementation, enforcement, impact, and compliance.[31] Muller and Ulmann define effectiveness as the degree to which the legislative measure has achieved a concrete goal without suffering from side effects.[32] In Jenkinss socio-legal model effectiveness in the legislation can be defined as the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address.[33] Voermans defines the principle of effectiveness as a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted.[34] Mousmouti describes effectiveness as a measure of the causal relations between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.[35] For the purposes of drafting in its narrow sense, therefore, effectiveness is the ultimate measure of quality in legislation.[36] It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory re-

[30] See F. Snyder, 'The effectiveness of European community law: institutions, processes, tools and techniques' (1993) 56 *Mod. L. Rev.* 19, 19; also F. Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) p. 3.

[31] See G. Teubner, 'Regulatory law: chronicle of a death foretold' in Lenoble (ed.), *Einfuhrung in der Rectssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

[32] See G. Muller and F. Uhlmann, *Elemente einer Rechtssetzungslehre* (Zurich, Asculthess, 2013) pp. 51-52.

[33] See I. Jenkins, *Social Order and the Limits of the Law: A theoretical essay* (Princeton, NJ: Princeton University Press, 1981) p. 180; see also R. Cranston, 'Reform through legislation: the dimension of legislative technique' (1978-1979) 73 *Nw. U. L. Re.v* 873, 875.

[34] See W. Voermans, above, n. 4, 230.

[35] See M. Mousmouti, above, n. 4, 200.

[36] See H. Xanthaki, 'On transferability of legal solutions' in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n. 19, p. 6.

sults.[37] If one subjects effectiveness of legislation to the wider semantic field of efficacy of regulation as its element, effectiveness manages to hold true even with reference to diverse legislative phenomena, such as symbol legislation, or even the role of law as a ritual. If the purpose of legislation is to serve as a symbol, then effectiveness becomes the measure of achieved inspiration of the users of the symbol legislation. If the legislation is to be used as a ritual, effectiveness takes the robe of persuasion of the users who bow down to its appropriate rituality.

In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.[38]

But what about the means used for the achievement of effectiveness? Effectiveness can be achieved by use of two sets of tools: first, by efficiency, namely use of minimum costs for the achievement of optimum benefits of the legislative action;[39] and second, by clarity, precision, and un ambiguity. Efficiency refers to the choice of the most financially appropriate solution: as a result it is a preoccupation for the economists of the multi-disciplinary drafting team. In the context of legislation as a tool of regulation efficiency is a quality sine qua non of the regulation, and consequently the legislation that has been selected as the tool for the achievement of the regulatory goals. Clarity, or clearness,[40] is the quality of being clear and easily perceived or under-

[37] See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Government's Approach*, March 2008, para. 2.4.

[38] This is Mousmouti's effectiveness test: M. Mousmouti, above, n. 4, p. 202.

[39] See R. Posner, 'Cost benefit analysis: definition, justification, and comments on conference papers' (2000) 29 *The Journal of Legal Studies* 1153.

[40] See Lord H. Thring, *Practical Legislation: The composition and language of Acts of Parliament and business documents* (London, John Murray, 1902), p. 61.

stood.[41] Precision is defined as exactness of expression or detail.[42] Unambiguity is certain or exact meaning:[43] semantic unambiguity requires a single meaning for each word used,[44] whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses.[45] Clarity, precision, and unambiguity offer predictability to the law. Predictability allows the users of the legislation, including enforcers[46] to comprehend the required content of the regulation. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law.[47] Thus, compliance becomes a matter of conscious choice for the user, rather than a matter of the users' subjective interpretation of the exact content of the legislation and, ultimately, the regulation.

At the third level of the hierarchy of goals for the drafter comes plain language and gender neutral language.

And so good criminal laws are laws that, with the synergy of the other actors in the legislative process, are capable of producing the desired policy results. This presupposes that criminal regulators have set a realistic achievable and sound criminal policy aim, with equally achievable and sound mechanisms for its achievement. If this is in place, a good criminal law can express the aim, the mechanisms, and ultimately the demands made to citizens in a manner that can communicate the regulatory message adequately. A good criminal law facili-

[41] See *Compact Oxford English Dictionary of Current English* (Oxford, Oxford University Press, 2005).

[42] *Ibid*.

[43] *Ibid*.

[44] J. MacKaye, A. W. Levi & W. Pepperell Montague, *The Logic of Language* (Hannover, Dartmouth College Publications, 1939), chapter 5.

[45] For the distinction between semantic and syntactic ambiguity, see R. Dickerson, *The Fundamentals of Legal Drafting* (Boston, Little-Brown, 1986) 101 and 104; for an application of rules of logic to resolve syntactic ambiguities, see L. E. Allen, 'Symbolic logic: a razor-edged tool for drafting and interpreting legal documents' (1956-1957) 66 *Yale L J* 833, 855.

[46] See A. Seidman, R. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague, Kluwer Law International, 2001), p. 255.

[47] See Sir S. Laws, CALC Conference 2009, Hong Kong.

tates the user's understanding on what they have to do, for what reason, and in what way. This incites compliance, at least amongst those citizens who are inclined to comply. It also enhances accountability on the basis of the visibility of the legislative aim, the reasoning behind the mechanisms chosen, and the legislative quality: citizens know what is the be achieved by when and can therefore question if that has happened or whether it has not.

Plain Language: Existing Debate and Modern Trends

The plain language movement offers a wide range of principles that can lead to a legislative text that can be understood by the legislative users. But the blessing of its ambitious mandate constitutes its great weakness: plain language cannot be reduced to a standard ised technical list of linguistic rules that apply uniformly. Reflecting the vagueness of plain language as a concept, Eagleson defines it as clear, straightforward expression, using only as many words as are necessary; language that avoids obscurity, inflated vocabulary and convoluted sentence structure.

Plain language is … not only about language. Words, syntax, punctuation are very important elements. But so are the structure of the legislative text, its layout on paper and screen, and the architecture of the whole statute book as a means of facilitating awareness of the interconnections between texts. And so plain language begins the kick in during the analysis of the policy and the initial translation into legislation, with the selection and prioritization of the information that readers need to receive. It continues with choices related to structure during the selection and design of the legislative solution, with simplification of the policy, simplification of the legal concepts involved in putting the policy to effect, and initial plain language choices of legislative expression (for example, a decision for direct textual amendments combined by a Keeling schedule, or a repeal and re-enactment when possible). Plain language enters very much into the agenda during composition of the legislative text. And remains in the cards during the text verification, where additional confirmation of appropriate layout

and visually appeal come into play. And so plain language extends from policy to law to drafting.

And so the existing concept of plain language relates to a holistic approach to legislation as a text, as a printed or electronic image, and as part of the statute book, which conveys a regulatory message to the users. Recent innovation in the UK has advanced the plain language further by finally addressing adequately past criticisms of vagueness: empirical data now identify concrete parameters for its application to the extent that the audience of the specific communication requires. Plain language is a tool promoting uninhibited communication between the text and its users or, to personify the communication, between the drafter and the user. The drafter is, at least in the UK, a trained lawyer with drafting training and experience. The user of the legislative text can be anything from a senior judge to an illiterate citizen of below average capacity: the inequality in the understanding of both common terms (whichever they may be) and legal terms renders communication via a single text a hopeless task. What can facilitate communication is the identification of the possible precise users of the specific legislative text: identifying who the users of the text will be allows the text to 'speak' to them in a language that tends to be understood by them. Until now identifying the users was a hypothetical and rather academic exercise. Recent empirical data offered by a revolutionary survey of The National Archives in cooperation with the Office of Parliamentary Counsel have provided much needed answers.[48]

But is there one audience of legislation? Can a drafter rely on the common notion of the 'lay person', the 'average man on the street', the 'user'? The theoretical debate over this point has now been answered by the Good Law Initiative survey: at least three categories of people constitute the audience of legislation, and these are lay persons reading the legislation to make it work for them,[49] sophisticated non-lawyers

[48] See https://www.gov.uk/good-law

[49] See J. J. E. Gracia, A *Theory of Textuality: The logic and epistemology* (Albany. NY: State University of New York Press, 1995), pp. 159-163, and 164-165; also see G.L. Pi & V. Schmolka, 'A report on results of usability testing research on plain

using the law in the process of their professional activities, and lawyers and judges. In more detail in the UK there are three categories of users of legislation:

a. Non-lawyers who needs to use legislation for work, such as law enforcers, human resources professionals, or local council officials; the 'Mark Green' of the survey represents about 60% of users of legislation;
b. Lay persons who seeks answers to questions related to their personal or familial situation; 'Heather Cole' represents about 20% of users of legislation; and
c. Lawyers, judges, and senior law librarians; the 'Jane Booker' persona represents about 20% of users of legislation.[50]

Identifying who are the audience of law is not enough. Being aware of whom the criminal drafter is speaking to is not enough. The additional parameter that needs to be taken into account when deciding the pitch of criminal legislative expression is the topic of the legislative text. Criminal laws are not all aimed at the same readers. Their primary audience varies. For example, the main users of rules of criminal evidence are probably judges and lawyers.[51] So the language and terminology used can be sophisticated: paraphrasing the terms 'intent' or 'mens rea' with a plain language equivalent such as 'meaning to' would lead the primarily legal audience to the legitimate assumption that the legislation means something other than 'intent' and would not easily carry the interpretative case-law of 'intent' on to 'meaning to'.

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language draft sections of the Employment Insurance Act: a report to Department of Justice Canada and Human Resources Development Canada' (un published, August 2000); and V. Schmolka, 'Consumer fireworks regulations: usability testing,TR1995-2e (Department of Justice Canada, unpublished, 1995).

[50] See A. Bertlin, 'What works best for the reader? A study on drafting and presenting legislation' [2014] *The Loophole*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326937/Loophole_2014-2_2014-05-09_-What_works_best_for_the_reader.pdf, pp. 27-28.

[51] See B. A. Garner 'Guidelines for drafting and editing court rules' [1997] *Federal Rules Decisions* 169, 187.

And so rules of evidence can be drafted in specialist language, albeit with a caveat: a primarily legally sophisticated audience cannot serve as a 'carte blanche' for legalese, since non-lawyers may need to, and in any case must, have access to the legislation too. As audiences become more specialized and more educated in technical areas, they expect texts that are targeted to their particular needs.[52] Moreover, since accessibility of legislation is directly linked to Bingham's rule of law,[53] passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. And so there is an argument for either the continued use of legal terminology or for the provision of a definition of the new plain language equivalent referring to the legal term used until now.

But how 'plain' must legislation be? Even within the 'Heather Cole' persona there is plenty of diversity. There is a given commonality in the lack of legal training, but the sophistication, general and legal, of Heather Coles can range from a fiercely intelligent and generally sophisticated user to a rather naïve, perhaps illiterate, and even intellectually challenged individual. Which of those Heather Coles is the legislation speaking to? It certainly is not the commonly described as 'the average man on the street'. To start with, there are also women on our streets, and they are users of legislation too. And then, why are the above or below averages amongst us excluded from legislative communication?[54] Since effectiveness is the goal of legislative texts, should legislation not speak to each and every user who falls within the subjects of the policy solution expressed by this specific legislative text? This includes the above average, the average, and the below average people.

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[52] See K. A. Schriver, 'Plain language through protocol-aided revision' in E. R. Steinberg (ed.), *Plain Language: Principles and practice* (Detroit, MI: Wayne State University Press, 1991), 148, 152.

[53] See Lord Simon of Glaisdale, 'The Renton Report – ten years on' (1985) *Statute Law Review* 133.

[54] See J. Kimble, 'Answering the critics of plain language (1994-1995)', 5 *The Scribes Journal of Legal Writing* 51, 59.

This is a rather revolutionary innovation. Identifying the users of legislation has led to not one but two earthquakes in legislative studies: yes, the law does not speak to lawyers alone; but the law does not speak to the traditional plain language 'average man' either. If applied in practice, this new knowledge will change the way in which legislation is drafted.

Recent UK Innovations and 'Blue Sky 'Possibilities

Having established the concept of effectiveness as synonymous to good legislation, and the new holistic mandate of plain language in legislation, and armed with the new empirical data offered by TNA and OPC, let us discuss further possibilities. I have identified three blue sky mechanisms for better law. They respond to widely accepted *faiblesses* in UK legislation stemming from the newly identified need for legislation to speak to three diverse user groups with a single text: the layered structure promotes a three tier structure for legislative texts each addressed to each of the three user groups; the typography inspired presentation and layout responds to the need to bring to light the main regulatory messages in legislation; and the interactive electronic statute book highlights the interconnectivity between legislative texts within the statute book as a whole.

1. *The layered approach to structure*

Currently legislative texts are structured in application to Lord Thring's Five Rules of Drafting[55] that offers precedence to provisions declaring the law versus provisions relating to the administration of the law; to simpler versus the more complex proposition; and to principal versus subordinate provisions. Exceptional, temporary, and provisions relating to the repeal of Acts, and procedure and matters of detail should be set apart.

The application of Thring's rules have led to a traditional legislative

[55] See Lord Thring, *Practical Legislation: The composition and language of Acts of Parliament and business documents* (London, 1902), 38; also see V. C. R.A. C. Crabbe, *Legislative Drafting* (Oxford, Cavendish Publishing, 1998),pp. 148-150.

structure of preliminary provisions [long title; preamble; enacting clause; short title; commencement; duration/expiry; application; purpose clause; definitions; interpretation]; principal provisions [substantive; administrative]; miscellaneous [offences and provisions ancillary to offences; miscellaneous and supplementary]; and final [savings and transitional; repeals; consequential amendments; schedules]. Current plain language interventions have led to a bare top text that leads the user straight to the main regulatory message: preliminary [introductory text/long title, enacting clause, start/expiry date with a hanging clause for a Schedule, hanging clause for definitions, application]; substantive and administrative [principal, subordinate] and final provisions [savings, duration/expiry where not in preliminary of Schedule, transitional, repeals, consequential amendments, purpose clause with tangible criteria for effectiveness that are applied in pre and post legislative scrutiny, short title, Schedules [definitions, other].

But there is much scope for blue sky innovation by use of the layered approach.[56] The rationale behind the modern approach lies with the logical sequence of provisions within the text, which reflects logic, and philosophical and linguistic approaches to language and thought. This basis has now been overcome by the crucial evidence on the three user groups for legislation. Heather Cole, Mark Greene, and Jane Booker are diverse users that require diverse pitches of the legislative text. Speaking to all three of them at the same time is a rather complex, for some impossible, task. Introducing three versions of the same legislative text is a possibility but it is a recipe for disaster on such a diverse range of grounds, moral, ethical, constitutional, practical: rule of law, issues of interpretation between versions, identifying which version corresponds to each user, using that version as opposed to the one selected by the user, who subjects each user to their corresponding persona, ethical and moral consequences of the application of a diverse

[56] The term, and to a certain extent, the concept is attributed to John Witing, Tax Director at the Tax Simplification Office. I am very grateful to John for his inspiration and the generosity with which he has shared it with me.

version for each user. And the parallel existence of three different texts could be counter-productive: users currently choose to use the complex but official legislative text over any of the many interpretation aids offered by government. If the plethora of attractive user friendly manuals and policy documents are shunned in favour of legislative texts, what makes it probable that users will go to the simple Heather Cole text as opposed to the legal Jane Booker one that reflects users' perception of legislation? And so remaining with a single text is really the only option. But this is exactly what has imprisoned legislative drafters in the struggle for simplicity within legislative texts.

It is now possible to see that each user group has its individual requirements for legislative information that are distinct from those of the other user groups. Identifying the needs for legislative information for each user group at a provision, rather than text, level would allow drafters to imitate oral communication, and pitch the legislative text to specific abilities and requirements. Drafters of legislative texts can now begin to think what regulatory or legal message is relevant to each group, and structure the text accordingly.

The layered approach promotes the division of legislation into three parts, corresponding to each of the three profiles of legislative users. Part 1 can speak to lay persons: the content is limited to the main regulatory messages, thus conveying the essence of law reform attempted by the legislation, focusing gravely on the information that lay persons need in order to become aware of a new regulation, to comply with new obligations, or to enjoy new rights. Here the prohibition is the main message. Along with the main elements of the behaviour that is being prohibited. And the sanctions for the prohibition. Part 2 can speak to non-legally trained professionals who use the legislation in the course of their employment. Here one can see scope for further detail in the regulatory messages introduced, and for language that is balanced [technical, yet approachable to the professionals in question]. Here belongs for example the requirement to know your client within anti-money laundering legislation. Part 3 of the legislation can then deal with issues of legislative interpretation, issues of procedure, and

issues of application, in a language that is complex but not quite legalese, as there is nothing to prevent all groups from reading all parts.

The layered approach is revolutionary, as it shifts the criterion for legislative structure from the content and nature of provisions to the profile of the users. It switches on a user centred structure, thus promoting both a link between policy and its effecting legislative text but also enhancing and personalising the channel of communication between drafters and users. And it applies and reflects the modern doctrine of contextualism in language and philosophy. But it cannot be viewed as a complete departure from tradition, as it continues to apply Lord Thring's five rules. By requiring that Part 1 includes the primary regulatory message, it promotes Lord Thring's rules that give precedence to the simpler proposition. And by structuring legislation into three parts, the layered approach complies with the other Thing rules that require division of provisions declaring the law [in Part 1 or 2] with provisions administrating the law [in Part 2 or 3 accordingly]; that principal provisions should be separated from subordinate [in Parts 1 and 2]; that exceptional, temporary, and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings [in Part 3]; and that procedure and matters of detail should be set apart by themselves [either in Part 3 of the layered approach, or in a Schedule].

The layered approach seems to be one of the promising initiatives in the field of legislation. But there are three points that need to be clarified. First, the layered approach may, but will not necessarily, lead to a partial, fragmented, or incomplete legislative communication to Heather Cole. There is no doubt that an erroneous application of the approach could result to that. But the placement of the main messages in Part 1 per se must be seen as an added bonus to lay users compared with the current state of affairs: in the layered approach the now frequently elusive main regulatory message will be easily identified, will be brought forward in a pronounced place at the beginning of the legislative text, and will be expressed in a language that is accessible to lay users. Compared to the current state of affairs, where the main

message is communicated somewhere within the legislative text and is expressed in the layered approach's Part 2 or 3 language, this is certainly an improvement. And of course, there is nothing preventing Heather Cole from reading the rest of the text: in fact, an inviting Part 1 can only encourage Heather Cole to keep reading, whilst offering her a clear context within which her understanding of complex and detailed messages can only be enhanced.

Second, although Part 1 carrying the main regulatory message is distinctly different from Parts 2 and 3, it may be unclear what really distinguishes between Part 2 data and Part 3 data: both Mark Green and Jane Booker are able to handle complexity and technicality of legislative data. However, they do not both require the same data, as demonstrated by their motives when using http://www.legislation.gov.uk/: Mark Green is interested in answers that allow him to perform his professional but non-legal duties, whereas Jane Booker seeks legal information. As a result, what Mark Green needs is a clear understanding of substantive and procedural requirements imposed by the legislation, whereas Jane Booker seeks deeper statutory interpretation often coupled with a holistic view of the statute book. As a result, Part 2 of the layered approach involves answers to questions such as who must do what by when, and what happens if they don't. Part 3 will delve deeper into intricate distinctions and possible exceptions that relate to statutory interpretation and interconnections between legislative texts within the statute book. There are two caveats here. One, Mark Green must still read the text as a whole. And Part 3 cannot be viewed as a mere shell of definitions, repeals, and consequential amendments: this would deprive the readers from at least part of the benefits of the layered approach.

Third, it would be inappropriate to consider that the simplification serviced by the layered approach would result to an abolition of the need for explanatory materials for legislation. In fact, as the layered approach results in an inherent fragmentation of data, it renders the use of explanatory materials and notes reinstating the fluidity of information and the cross-fertilisation between parts an ever so crucial

requirement. The new style of explanatory notes[57] introduced by Good Law and showcased in the Armed Forces (Service Complaints and Financial Assistance) Bill [HL] Explanatory Notes[58] enhance the layered approach by introducing a clear table of contents that is thematic rather than provision based, with information on the policy and legal context of the Act, and with simple narratives on the main regulatory messages for all three user groups.[59]

Ultimately, the proof of the layered approach is in its application. User testing can prove whether it works, which user group for, and how it can be amended or fine-tuned to serve users better.

2. *Legislative image: presentation, layout, pictures*

Looking now in the image of the legislative text, namely at the picture that the user receives when looking at the text, plain language has always advocated the need to rethink the layout of legislative texts.[60] The single font, the lack of adequate contrast between paper and text, the unique format are elements of the current legislative image that prevent the user from identifying the important aspects of the regulatory message thus reducing readability of legislative texts. Legislative texts attempt to convey a 'legislative story' to the user, thus allowing them to identify and then understand the underlying policy, the legislative choices made, and the rationale behind the text. This offers them the ability to read and interpret the text in context, thus making accessibility easier and more secure.

Here there is plenty of scope for further progress. One can mention

[57] See Office of Parliamentary Counsel, 'Explanatory notes pilot: response to consultation', April 2015, https://www.gov.uk/government/uploads/system/ uploads/attachment_data/file/427779/explanatory_notes_response_to_consultation_on_pilot.pdf

[58] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377467/new-formatexplanatory-notes.pdf

[59] See http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0003/en/15003en.htm

[60] See Office of Scottish Parliamentary Counsel, 'Plain language and legislation', February 2006, http://www.gov.scot/resource/doc/93488/0022476.pdf

the example of Australian criminal laws that are often drafted in a tabular rather than narrative format: offence, penalty. But layout alone cannot respond to a complex text, to a complex regulatory message, or indeed to a complex policy. It will contribute to simplification but with the aid of additional visual tools.

One of those tools that have been ignored by even the most visionary of legislative academics and practitioners is the use of image in legislation. Images have been used in legislation that introduces national flags, traffic signs, or planning regulations. But the relationship between picture and legislation has not been explored fully. The visual arts could play a significant role here: there is nothing more direct, relevant to a wide range of users, and time resistant than Cain swinging his club above the prostrate Abel in Titian's painting in Santa Maria della Salute in Venice. The visual representations of themes relating to wrongdoing are so emotionally charged and the characters shown in such magnification that, combined with beauty and other aesthetic values, picture has had tremendous impact on the viewer.

Perhaps the inclusion of images in legislation can enhance the quality of communication. An example could be drawn from criminal provisions. The picture accompanying the legislation in the form of a Schedule may show:

- what behaviour is to be condemned (show the action; and specify if the person knows that this is bad, suspects that this is bad, or is ignorant of the badness of the behaviour); and
- that this is an offence (for example show a stop sign or show societal disapproval); and
- that it carries a sanction (for example show the penalty and its adverse effect).

The use of typographical and visual aids in legislation can enhance readability[61] immensely. They can address textual limitations and can

[61] See G. Jones, P. Rice, J. Sherwood & J. Whiting 'Developing a tax complexity index for the UK', https://www.gov.uk/government/uploads/system/ uploads/ attachment_data/file/285944/OTS_Developing_a_Tax_Complexity_Index_for_the_ UK.pdf

take the user further by banishing the barriers or written textual communication.

3. *The statute book as a whole*

Reforming the structure and layout of individual criminal laws may bear little fruit without changes in the criminal code (or the criminal law part of the statute book) as a whole. Addressing the issue of legislative volume that enhances complexity[62] has been at the forefront of UK and OECD agenda salt hough the volume of legislation, including primary and delegated, seems to be fighting its ground in practice.[63] The recent OECD Review[64] has identified as points of excellence the effective balance between policy breadth and the stock and the flow of regulation; and the extensive application of EU's Better Regulation initiatives in the UK.[65]

But of course innovations to the statute book do not end with legislative volume. Blue sky proposals include the approach of the criminal statute book as a set of searchable big data.[66] This allows a search of the statute book from the census that allows counting for example the number of 'shall' in UK legislation throughout the years to the introduction of methodology tools that provide empirical data on aspects of

[62] See Office of Parliamentary Counsel 'When laws become too complex: a review into the causes of complex legislation', March 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_ report_8April _AP.pdf, 6-7.

[63] And not just in the UK: see R. Pagano *Introduzione alla legistica – L'arte di preparare le leggi* (Milano, Giuffre, 1999), p. 6.

[64] See http://www.oecd.org/dataoecd/61/60/44912018.pdf

[65] For a listing of such policies and their implementation in the UK, see http://www.bis.gov.uk/policies/bre/improving-eu-regulation/guiding-principles-eu-legislation

[66] The project team was led by John Sheridan, TNA, as Principal Investigator; D. Howarth, University of Cambridge, and I were Co-Investigators; the Advisory Board was chaired by Sir Stephen Laws, KCB, QC, LLD former First Parliamentary Counsel.

the statute book or the whole of the statute book.[67] This entirely new and free resource for the research community offers pre-packaged analyses of the data, new open data from closed data, and creates the capability of identifying pattern language for legislation, which would encapsulate commonly occurring legislative solutions to commonly occurring problems thus facilitating legislative communication. The project feeds into the great efforts led by The National Archives to review the way in which legislation is 'served' to users by offering unprecedented capabilities of identifying relevant legislative texts, such as delegated legislation, cross referenced texts, definitions of terms used in a legislative text, and, in the long term, even case-law clarifying or applying the text to cases. There are already two prototypes of the new screen for legislation. Both have been tested in user testing undertaken by Bunny Foot and including iris trackers as a means of assessing how long a user's eye spends in each part of the text, where the eye is searching for further information and where on the screen, and where the user fails to understand the text or the cross reference completely. This work is of profound importance. What is missing for the purposes of legislative readability is context, and this is what the new screen can provide. This, along with the new format of explanatory notes, can finally offer the user an accurate picture of the labyrinth of legislative data in all their complexity and cross-wiring. Would this facilitate the user? Of course it will: it will depict an accurate image of legislative regulation on the topic searched, thus demonstrating if clear answers can be found or if it is time for the user to accept that statutory interpretation by a trained legal professional is what is really needed in that case.

The Theoretical Umbrella: Phronetic Legislative Drafting

So legislative studies and legislative practice is rapidly progressing to its age of maturity. Legislative innovation is happening all over the world. This rampage of fresh and innovative thinking is not haphaz-

[67] http://tna.bunnyfoot.com/LDRI/#p=home

ard: it reflects, and is evidence of, academic innovation in legislative studies theory. Until recently legislative drafting was viewed as a mere skill, normally and mostly, served by government lawyers. But things have changed. Legislation became the focus of regulation replacing the common law. There are a number of possible causes for this phenomenon: the Europeanisation of law offered common law systems the opportunity to appreciate more the feared statutory law; legal globalisation led to an emphasis on international statutory law (treaties etc.) that required national implementation via national statutory law; and finally the realisation that regulation was passed for the purposes of achieving measurable results led to the inevitable [and not always fortunate] use of statutory law as a method of regulation. Whatever the reason, it invited a detailed study of statutory law from its conceptualisation to its implementation. And paved the way for a new theory for legislative drafting.[68]

The traditional view, mostly within the common law world, is that drafting is a pure form of art[69] or a quasi-craft;[70] if drafting is an art or a craft, then creativity and innovation lies at the core of the task; rules and conventions bear relative value. In the civil law world drafting is viewed as science[99] or technique.[71] it carries formal rules and conventions whose inherent *nomoteleia* manages to produce predictable results. But, if drafting is viewed as a sub-discipline of law, then there is a third option: law is not part of the arts, nor is it part of the sciences[72]

[68] See H. Xanthaki, 'Duncan Berry: a true visionary of training in legislative drafting' [2011] *The Loophole,* 18-26.

[69] See B. G. Scharffs, 'Law as craft' (2001) 45 *Vanderbilt Law Review*, 2339.

[70] See C. Nutting, 'Legislative drafting: a review' (1955) 41 *American Bar Association Journal*, 76. See *contra* 'Editorial review', 22 [1903] *Can. L. Times*, 437.

[71] See *contra* J.-C. Piris, 'The legal orders of the European Union and of the Member States: peculiarities and influences in drafting' [2006] *EJRL*, 1.

[72] For an analysis of the contra argument on law as a science, see M. Speziale, 'Langdell's concept of law as science: the eginning of anti-formalism in American legal theory' 5 [1980] *Vt. L. Rev.*1.

in the positivist sense.[73] In science rules apply with universality and infallibility: gravity will always make an object fall down. Law is different: "All law is universal but about some things it is not possible to make a universal statement which will be correct... the error is not in the law nor in the legislator but in the nature of the thing".[103] But rejecting the view that drafting is a science does not necessarily confirm that drafting is an art. Art tends to lack any sense of rules. In the pursuit of aesthetic pleasure, art uses whatever tools are available. Art is anarchic. Drafting is not. Of course its rules are not rigid, but they are present. There may be exceptions to all rules of drafting, but this does not mean that there are no rules. And these rules carry with them a degree of relevant predictability, since the latter is one of the six elements of theory.[74]

For Aristotle[75] all human intellectuality can be classified as[76] science as episteme; art as techne; or phronesis[107] as the praxis of subjective decision making on factual circumstances or the practical wisdom of the subjective classification of factual circumstances to principals and wisdom as episteme.[77] Law and drafting seem to be classical examples of phronesis, as they are liberal disciplines with loose but prevalent rules and conventions whose correct application comes through knowledge and experience. Drafting as phronesis is "akin to practical wisdom that comes from an intimate familiarity with contingencies and uncertainties of various forms of social practice embedded in complex social set-

[73] See R. R. Formoy, 'Special drafting' 21 [1938] *Bell Yard: J. L. Soc'y Sch. L.* 3; but see *contra* C. Langdell, 'Harvard celebration speeches', 3 [1887] *LAW Q. Rev.* 123-124. See Aristotle, E.N., 5.10.1137b13-24.

[74] See B. Flyvbjerg, *Making Social Science Matter: Why social inquiry fails and how it can succeed again*' (2001, Cambridge University Press, Cambridge), p. 39

[75] See Aristotle, *Nichomachean Ethics,* Bk VI, chs. 5-11 (D. Ross trans. 1980).

[76] See M. Griffiths & G. Macleod, 'Personal narratives and policy: never the twain?' [2008] 42 *JPE* 121, 126. Aristotle, note 106.

[77] See S.-U. von Kirchmann, *Die Werlosigkeit der Jurisprudenz als Wissenschaft* (1848, Verlage von Julius Springer, Berlin).

tings".[78] The art of drafting lies with the subjective use and application of its science, with the conscious subjective Aristotelian application and implementation of its universal theoretical principles to the concrete circumstances of the problem.[79] Phronesis supports the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.[80] Phronesis is "practical wisdom that responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right. In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes".[81] And so drafting legislation simply involves the choice of the appropriate rule or convention that delivers the desired results within the unique circumstances of the specific problem at any given time. And, under this functional prism, successful drafting is the production of a good law, namely an effective law that contributes to regulatory efficacy.[82] There is nothing technical with qualitative functionality here: what counts is the ability of the law to achieve the reforms requested by the policy officers. In view of the myriad of parameters that are unique in each dossier, there are no precise elements of quality at this level.

This qualitative definition of quality in legislation respects and embraces the subjectivity and flexibility of phronetic legislative drafting.[114]

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[78] See B. Caterino & S. F Schram, 'Introduction' in S. F. Schram and B. Caterino (eds.), *Making Political Science Matter: Debating knowledge, research, and method* (2006, New York, New York University Press), p. 8.

[79] See W. Eskridge Jr., 'Gadamer/Statutory interpretation' [1990] 90 *Colum. L. Rev.* 635.

[80] See E. Engle, 'Aristotle, law and justice: the tragic hero' [2008] 35 *N. Ky. L. Rev.* 4.

[81] See C. Rideout, 'Storytelling, narrative rationality, and legal persuasion' [2008] 14 *Legal Writing: J. Legal Writing Inst.* 75.

[82] See H. Xanthaki, 'Drafting manuals and quality in legislation: positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?' [2010] 4 *Legisprudence* 111. See H. Xanthaki, 'Quality of legislation: an achievable universal concept or a utopian pursuit?' in Marta Travares Almeida (ed.), *Quality of Legislation* (2011, Nomos, Baden-Baden), pp. 75-85.

Phronetic legislative drafting does not ignore the elements of art and science identified within the discipline; it focuses on the subjectivity of prioritisation in the selection of the most appropriate virtue to be applied by the drafter in cases of clash between equal virtues. But subjectivity is not anarchic: it is qualified by means of recognising effectiveness as the sole overriding criterion for that choice. In phronetic legislative drafting one must be able to identify basic principles which, as a rule, can render a law good. The pyramid in the beginning of this chapter presents such principles: when applied, at least in the majority of cases, they lead to good law. Yet the ultimate criterion of good law is its effectiveness, at least under the prism of phronetic legislative theory, a theory that has innovated legislative study and legislative practice.

Conclusions

This chapter presented the definition and elements of good criminal law. It exposed the reader to recent developments in legislative studies and attempted to apply them to criminal legislation in specific. The study of legislation in general has been revolutionised by the availability of accurate empirical data on user profiles. Legislation is used by the legal professions, non-legal professions, and lay persons. Legislation has now found its audience, and clearly it is not just lawyers and judges.

The application of this new knowledge to the plain language requirements of knowing your audience and pitching legislation to their level of legal awareness has had, and is expected to have, earth shaking consequences to the structure of legislative texts, to the presentation of legislative texts, and to the focus on the statute book as a whole.

There are of course further, some could call them blue sky, innovations that rise through the horizon: the layered structure of legislative texts, the use of image or picture in legislative texts, the interactive prototypes of www.legislation.gov.uk.

But the biggest innovation in legislation and legislative studies is the realisation that the partnership between legislative and criminal

law professionals provides a dynamic combination of appropriate research methodology and internally available government held empirical legislative data: when the two gel, they can produce academically valid and practically useable know-how whose empirical impact can change our whole perception of legislation and the statute book. Challenging as it is, the new research agenda offers academics the comfort of a sound theoretical framework within which any cooperation is to flourish: phronetic legislative drafting views the study of legislation as a new sub-discipline of legal science, thus allowing it to benefit from the wealth of theoretical and empirical analyses in substantive fields of law that can serve as persuasive case studies for the further development of both the substantive law and the legislative fields of study. Blue skies await ahead, for those who are ready to grasp them. Professor Kourakis is certainly one of those.