

§ Law in Context

THE MAKING SENSE OF POLITICS, MEDIA, AND LAW

Rhetorical
Performance
as Invention,
Creation,
Production

GARY WATT



The Making Sense of Politics, Media, and Law

From Trump's 'make America great again' to Johnson's 'build back better', performative politicians use *The Making Sense* to persuade their public audiences. Law 'makers' do it too: A courtroom trial is a 'truth factory' in which facts are not found but forged. The 'court of popular opinion' is another such factory, though its processes are often flawed and its products faulty. Where courts of law aim to make civil peace, 'trial by Twitter' makes civil strife. Even in 'mainstream' media, journalists make news for public consumption, so that all news is to an extent 'fake news'. In a world of making, how can we separate craft from craftiness? With insights from disciplines including law, politics, rhetoric, media studies, psychology, sociology, marketing, and performance studies, *The Making Sense of Politics, Media, and Law* offers a constructive way to approach controversies from transgender identity to cancel culture. This title is also available as open access on Cambridge Core.

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Law in Context

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Rhetorical Performance as Invention, Creation, Production

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To Michael

We create things to watch them grow . . .

To take pleasure in seeing that which we love

become more than it was before – Vin

Keep growing.

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Part I

The Making Sense

The Making Sense

Introduction

I went to the hand-workers. For I was conscious that I knew practically nothing, but I knew I should find that they knew many fine things. And in this I was not deceived; they did know what I did not, and in this way they were wiser than I.¹

Plato, *Apology*

[E]very carpenter, and workemaster . . . and they that cut and grave seales . . . The smith also sitting by the anvill . . . the potter sitting at his worke . . . All these trust to their hands: and every one is wise in his worke . . . they shal not sit on the Judges seate, nor understand the sentence of judgement: they cannot declare justice, and judgement . . . But they will maintaine the state of the world.

Ecclesiasticus 38:27–34 (King James Bible, 1611)

To make sense of our world we must first make sense of making. Whatever one's conception of planet Earth may be, as a thing made by deity or by chance, our social world is undeniably a human construct. We form and reform the world that we might perform our lives upon it. All the world's a stage, and all the places on it – including law, media, and politics – are places where we play our parts. The world of humanity seldom demonstrates the schematic order we associate with deliberate design, but it is in manifold ways made and maintained by the work of human minds and human hands. 'Maintained' is a handy word. It derives from *manu tenere* – to hold in hand. George Washington expressed the hope in his 1796 farewell address to the American people 'that the free Constitution, which is the work of your hands, may be sacredly maintained'.² Similar imagery of maintenance and making has been employed to express constitutional claims in very different contexts, including those concerning First Nations peoples. Consider the words of Noel Pearson, a campaigner for the rights of the Aboriginal people of Australia,

¹ Plato, *Apology*, in Harold North Fowler (trans.), *Plato in Twelve Volumes*, Vol. 1 (Cambridge, MA: Harvard University Press; London: William Heinemann Ltd., 1966) section 22c–d.

² 'Farewell Address, 19 September 1796,' Founders Online, National Archives, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002>. (Original source: *The Papers of George Washington, Presidential Series*, Vol. 20, 1 April–21 September 1796, David R. Hoth and William M. Ferraro (ed.) (Charlottesville: University of Virginia Press, 2019) 703–722.

who said, ‘our project with the empowered communities is about nothing less than carving out a power for ourselves to maintain the distinctness of our people’.³ Nations, constitutions, and laws are all made things. That claim isn’t new – we have seen that it goes back to Plato and the Old Testament – but this book presents a new understanding of what ‘making’ means and argues for the centrality of crafting as a way of making sense of the world and the place of law, media, and politics within it. When Elaine Scarry recounted the great range of candidates that have been put forward for the category ‘artefacts’, she noted as possibilities that ‘nation states are fictions (in the sense of created things), the law is a created thing, a scientific fact (many argue) is a constructed thing’.⁴ Peter Goodrich writes similarly that ‘a significant part of the substantive law is comprised of *fabulae*, stories, plays, fabrications, images, and fictions’.⁵ Alain Pottage, employing an anthropology of Roman law, postulates that ‘what are taken as overarching *social* categories (the sex, gender, kinship, capacity, or creativity of persons, and the quiddity of things) are specialised artefacts’.⁶ This book takes such possibilities seriously, and considers how the notion of manufactured truth can inform our understanding of the tradition of making judgments in law and the trend of making judgments in society at large.

The work of human hands makes the world, remakes the world, and maintains the world. There are many handy words associated with the subjects covered in this book. They include ‘manual’ (pertaining to the hand), ‘manufacture’ (make with the hand), ‘manipulate’ (fill the hand), ‘mandate’ (issue by hand), ‘emancipate’ (hand over), ‘legerdemain’ (sleight of hand), and ‘manure’ (derived from the French *manoeuvre*, the word originally referred to the manual work of cultivating the soil). It says something about the manner (another handy word) in which we have become estranged from manual labour that the word ‘manure’ has become a term of contempt. Indeed, it is remarkable how many words for perfectly respectable activities of manual making have evolved to become pejorative terms with implications of falsehood. Examples from a long list include ‘crafty’, ‘cunning’, ‘colouring’, ‘synthetic’, ‘fabrication’, ‘made up’, ‘cosmetic’, ‘fake’, ‘figment’, ‘fiction’, and ‘manipulation’. Even ‘rhetoric’, which in the classical and renaissance periods was generally acknowledged to be an art of making things beautiful, is

³ Noel Pearson, ‘Empowered Communities – Responsibility, Reform and Recognition’, Garma Festival 2014 (<https://youtu.be/TJsPxIBicmo> at 6’41). For this reference, I’m grateful to Marianna Ypma.

⁴ Elaine Scarry, ‘The Made-Up and the Made-Real’ (1992) 5(2) *The Yale Journal of Criticism* 239–249, 239.

⁵ Peter Goodrich, *Advanced Introduction to Law and Literature* (Cheltenham: Edward Elgar, 2021) 12.

⁶ Alain Pottage, ‘Introduction: The fabrication of persons and things’, in A. Pottage and M. Mundy (eds), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2004) 1–39, 12, emphasis in original.

nowadays frequently treated with suspicion and dismissed as ‘mere rhetoric’, and yet the philosopher Hans-Georg Gadamer has claimed that ‘[r]hetoric is the universal form of human communication, which even today determines our social life in an incomparably more profound fashion than does science’.⁷ The workers mentioned in the quotations from Plato and the Old Testament at the top of this chapter were deemed wise because they trusted to their hands. What does it mean today to trust to our own hands? What dangers lie in trusting, or not trusting, to the hands of others? In answer to these and other questions, this book is offered as a manual – a handbook – in self-defence against manipulative arts that seek to mould popular opinion and make our minds up for us. More positively, it is a manifesto (another ‘handy’ word) for a way of making better social judgments on controversial issues ranging from transgender rights to the iconoclastic destruction of colonial-era statues. Through the Making Sense of it all we might learn to make civil peace and to make a better society. Society is made stronger when we make better connections between people and between people and the things that people have in common. One of the most important things we have in common is language, and we can expect that improved contact with language will foster improved contact with each other. A key obstacle in the way of improved handling of intangible words is that we are becoming unpractised in the careful handling of tangible stuff. Think how much conflict and controversy in the modern world arises from the material power of language and casualness in language use when craft and care are what is required. This book can be read as a call to careful handling of language through and alongside respect for the careful crafting of physical materials, for no matter made by humans matters more than words.

Digit-ill

An increasing number of us live and work in ways that divorce us from the hands-on experience of making with materials. As a social species we are still *Homo faber* – the toolmaker – but for most of us our toolbox is now an electronic interface (this laptop, for example), where tools are accessed and employed not with a strong grip but with micro-clicks on drop-down menus (the ‘Tools’ tab at the top of this Word document). Even before the Covid-19 pandemic insisted upon it, we had become accustomed to staying in touch with each other without touching each other. Many of our most valuable modern forms of assets are intangible and exist only in virtual space. So-called digital assets such as cryptocurrency and non-fungible tokens have no physical contact with the actual digits of our hands. This document, as I type it, is just an electronic image on a screen that reflects the electronic image in my mind.

⁷ Hans-Georg Gadamer, *Relevance of the Beautiful*, N. Walker (trans.) R. Bernasconi (ed.) (1977) (Cambridge: Cambridge University Press, 1986) 17.

Yet we constantly fiddle with our phones and compulsively tap our keyboards because we still hanker for the feel of stuff. Our hands remember the primal comfort of hand on hearth: gathering wood, making fire, foraging for food, and making a meal of it. The popular appetite for cooking programmes on television is testament to the human hunger for handling and producing stuff and to the vicarious pleasure that is derived from seeing others doing productive manual work that deep down viewers desire to be doing themselves. Gardening programmes serve the same sublimated need, as do programmes like *The Repair Shop* and *Find It, Fix It, Flog It* that are devoted to the repair of broken things. Popular computer games devoted to world building, of which *The Sims* and *Minecraft* are leading examples, also cater to the same human impulse to participate in manual making.

Some of us have lost our grip on the world of making and have replaced that grip with materialist grasping. We have possessions, but we've lost purpose. We suffer from a psychological alienation from our stuff and our space. As the world has shrunk to the size of handheld devices it has become convenient, but it has lost its true handiness. The philosopher Martin Heidegger posited a distinction between things that are close-at-hand (*Vorhandenheit*) and things that are handy (*Zuhandenheit*).⁸ Suppose my hands are on my lawnmower in my kitchen. The lawnmower is spatially close-at-hand, but it is far from being handy in the sense of being practically useful to me.⁹ Anyone who keeps their lawnmower in their kitchen has evidently lost their grip.

The hit television series *Breaking Bad* (dir. Gilligan, 2008–2013) is about people on the make. It is about making money by making illegal drugs, but in a memorable moment in the episode 'Kafkaesque', one of the chief protagonists reveals his yearning for a more meaningful production and a purer product. Jesse Pinkman is in a group therapy session when the counsellor asks him, 'if you had the chance to do anything you wanted, what would you do?', to which he replies, 'I don't know. I guess I would make something.' When the counsellor asks, 'Like what?', Jesse responds, 'I don't know if it even matters, but . . . work with my hands, I guess.'¹⁰ It does matter. If, in the words of the old pop song, we 'hunger for . . . touch', and hunger for handling and craft, there is a danger that our hunger will open us up to manipulation. Cookery and gardening programmes may be harmless enough, but when a politician exploits the 'making' trope with a slogan such as 'Make America Great Again' or manufactures a photo-op of themselves wearing a hard hat and working in a factory, we are liable to be lured in by the subliminal need to make contact with stuff and seduced to join in with the politician's project. Do

⁸ See Simon Critchley, 'Being and Time, Part 3: Being-in-the-World', *The Guardian* (22 June 2009).

⁹ See, generally, Stephen Graham and Nigel Thrift, 'Out of Order: Understanding Repair and Maintenance' (2007) 24(3) *Theory, Culture & Society* 1–25, 2.

¹⁰ Michael Slovis (dir.), 'Kafkaesque', *Breaking Bad*, season 3, ep. 9 (Vince Gilligan for AMC, 16 May 2010).

we appreciate, as we take in the manufactured image of the politician at work on the factory floor, that it is us they are working on? We are the project. We are the product. Legal practitioners are generally less overt than politicians in their performative appeals to touch, but there is nevertheless craft in lawyers' concealment of rhetorical craft, and that craft is resolutely one of constructing a case, making judgments, and making peace by satisfying the parties, the press, and the wider public. Several scholarly authors engaged with later in this book, among them David Gauntlett (author of *Making Is Connecting*), Richard Sennett (author of *The Craftsman*), and Mihaly Csikszentmihalyi (author of *Creativity*), have alerted us in different ways to the human well-being and social capital engendered by engagement in manual crafting. The flip side to positive implications of manual craft is the possibility that the crafty might feed our hunger for touch and exploit our psychological susceptibility to handicraft by working their manipulative arts upon us.

Hunger for Touch

According to a study commissioned by the Wellcome Collection, and billed as 'The Touch Test: The World's Largest Study of Touch', around seven in ten of us have positive feelings about the touch of another human, whereas nearly three in ten report negative feelings.¹¹ To judge by the way we compulsively handle our mobile phones, keys, pens, hair, and so forth, the proportion of people deriving pleasure from the touch of inanimate stuff is also very high. Research has shown, for example, that despite the rise of electronic-format books, there is still an immense cognitive appeal to engaging with physical print.¹² One such piece of research was funded by the Royal Mail, and its finding in favour of direct paper-based advertising now contributes to the environmentally wasteful plague of unsolicited post that piles up daily in the mailboxes of people across the UK.¹³ Some research even suggests that the physical weight of printed material has a bearing on the gravity with which we regard the printed text.¹⁴ These findings have been borne out by research showing that air passengers who were able to touch an airplane safety card 'valued it more and perceived it as more important and serious' compared to those who received their air safety instructions via a digital screen.¹⁵

¹¹ Claudia Hammond (presenter), 'The Touch Test: The Results', BBC Radio 4 (6 October 2020). The survey ran from 21 January to 30 March 2020 and gathered responses from 40,000 people based in 112 countries.

¹² Mark Hom, *Why Humans Prefer Print Books* (SciTech Connect, Elsevier, 2016), <http://scitechconnect.elsevier.com/why-humans-prefer-print-books/>.

¹³ *Using Neuroscience to Understand the Role of Direct Mail*, Marketing Research Case Study (Millward Brown, 2009).

¹⁴ N. B. Jostmann, D. Lakens, and T. W. Schubert 'Weight as an Embodiment of Importance' (2009) 20(9) *Psychological Science*, 1169–1174.

¹⁵ C. Gerst, 'Touch Matters: Improving Risk Communications by Inducing Congruence among Physical and Linguistic Weight' (master's thesis, University of Twente, 2015).

We need the primal sense of taking hold and of making contact, which more than any other sense is essential to feeling connected to the world. The very word ‘feel’, which is used to describe the sense of touch upon skin, and usually in reference to touching by hand, is also our word for expressing connection in an emotional sense. An emotionally expressive person is ‘touchy-feely’; an emotionally secure person is ‘in touch with their feelings’. When we talk ‘feeling’, we talk ‘touch’. Conversely, we do not talk of feeling tastes or sights or sounds or scents. A key question is whether our deep need for touch and contact with people and stuff might open us up to being seduced by touchy-feely performances, including performances by politicians. This danger might be especially acute in a modern world dazzled by the spectacle of mediated images, for the performances of ‘mainstream’ and social media purport to bring the world closer to the viewer while in fact positioning themselves as a mediating barrier between the spectator and the physical reality of the spectacle. Machiavelli warned long ago that spectacle displaces manual contact and with it the hand’s capacity to grasp and to judge by feel. He wrote that people ‘in general judge more by their eyes than their hands . . . Everyone sees what you seem to be, few touch upon what you are . . . ordinary people are always taken in by appearances.’¹⁶

‘You Can Make It If You Try’

In a world that is increasingly alienated from touch, and one in which politicians are often criticized for being ‘out of touch’, public figures frequently employ touch-based (‘haptic’) performances to demonstrate that they have the ‘common touch’. In doing so, they are exploiting the fact that the sensory stimulation of seeing and hearing others at work produces a sympathetic response in us, whereby we imaginatively experience the sensation of our own hands engaging with stuff.¹⁷ When a politician’s touching performance is associated with making, we feel not only that we are in contact with a source of social power and influence, but also that we ourselves are in a vicarious sense being productive – making a contribution and making a difference. Citizens can be captivated – etymologically ‘taken in hand’ – because they want to participate in the means of production and to ‘make it’. It was this desire that was appealed to in one of President Obama’s favourite slogans: ‘You can make it if you try’ (a maxim delivered in more than 140 speeches during his presidency). Michael Sandel questions the sort of ‘make it’ that is implied here. In his deep critique of meritocracy, he argues that it is more important to make a social contribution than personally to make it big. With words that uncannily anticipate the era of Covid-19, in which our social

¹⁶ Niccolò Machiavelli, ‘How a Prince Should Keep His Word’, in *The Prince* (1532), Peter Bondanella (trans.) (Oxford: Oxford University Press, 2005) 62.

¹⁷ A phenomenon discussed in [Chapter 8](#).

superheroes include low-paid nurses, care workers, teachers, and delivery drivers, Sandel writes that '[l]earning to become a plumber or electrician or dental hygienist should be respected as a valuable contribution to the common good, not regarded as a consolation prize for those who lack the SAT scores or financial means to make it to the Ivy League'.¹⁸

The Rhetorical Art of Making It Up

We all want to make our way in the world and to make sense of the world, but few of us stop to think what 'making' means. To that end, this book is designed to demonstrate the Making Sense in all its varieties, including the methods by which media, the law, and politics make the world go round and make it up as they go along. If that sounds like a cynical manifesto, it is not intended to be so. The argument of this book is not that we should mistrust the work of other hands, but rather that we should notice when other hands are at work on us and should know better to whom and to what we are entrusting our sympathies. If we are not familiar with the arts and crafts by which the world is made and maintained, there is a danger that mischievously artful and crafty people will make our minds up for us. Perhaps we think that we can confidently discern fact from fiction. If so, it probably never occurred to us that fact, no less than fiction, is a thing made up. That 'fiction' has always meant 'making' will not surprise us. It derives from the same Proto-Indo-European root word (**dheigh-*) that gives us the making words 'configure', 'dough', 'effigy', and 'figment', the Latin verb *fingere*, 'to form', and the Greek word *teikhos* meaning 'wall'. More surprising, perhaps, is that the word 'fact' also has its root in a sense of 'making'. Deriving from the Latin *facere*, meaning 'to make or do', a fact (*factus*) is not a discovered thing but a made thing; a manu-*fact*-ured thing. This observation is much more than an etymological quibble. We should take seriously the possibility that everything we call a fact was produced by some artificial process, and that ultimately some person or human system produced it. Wisdom lies in attending to the process by which the fact was made and to the motives and credentials of the maker.

Joe Biden delivered a wonderfully crafted speech on the acceptance of his nomination to be the Democratic Party's candidate in the 2020 US presidential election, but when politicians craft speeches they sometimes include a line or two to deny that any craft is at work. To convey a lack of art implies a lack of artifice and helps to produce an impression of sincerity. Biden prefaced his long, thoroughly crafted, and intensely rhetorical speech with the disclaimer '[n]o rhetoric is needed'. This was followed immediately by the highly rhetorical line: 'Just judge this president on the facts', in which we have the alliteration of '[j]ust judge' and the rhetorical, anonymized allusion to

¹⁸ Michael J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (New York: Farrar, Straus and Giroux, 2020), chapter 6, section heading 'The Hierarchy of Esteem'.

Trump as ‘this president’. It follows that Biden’s statement, ‘[n]o rhetoric needed’, was an exemplary instance of rhetorical irony, for he pretended to eschew rhetoric in the very act of performing rhetorically. Biden’s talk of judging Trump on ‘the facts’, which followed an earlier reference to ‘facts over fiction’, is also a rhetorical cliché. Facts in politics, especially statistical facts, are always fictions made to serve a particular political purpose. Politicians’ facts may be ‘a truth’, but they will rarely be the whole truth and nothing but the truth when they have passed through the manufactory processes by which a political speech is made.

Again, this is at risk of sounding cynical, and yet the hope is that the present project will counter the trite species of cynicism that assumes that a thing ‘made up’ or ‘fabricated’ is necessarily false. Rather than dismiss the fabricated as false, we might come to the opposite view – that the thing we call ‘the true’ in human social relations is always a thing made up by human processes. Sounding a similar note, Michael Taussig writes of ‘the political art and social power of make-believe, the reality of the really made-up’;¹⁹ and, Maurya Wickstrom, referring to Taussig in her study of consumers’ performance of brand fictions, adds:

It seems that moving on a spectrum between the made up and the real is an important source of pleasure in postmodern culture. Our consumption practices are shaped by our theatrical ability to hold the real and the not real as a simultaneous instance of embodied experience, an ability to live *the truth of the make-believe*.²⁰

This book offers a positive appreciation of rhetorical performance in law, politics, media, and society at large which will enable us to appreciate the arts of making minds up – the arts of make-believe. This approach contrasts with the lazy habit of rejecting rhetorical performance as being inherently deceitful and rejecting fiction as being necessarily inferior to fact.

Biden and his fellow politicians are not the only professional rhetoricians who use the denial of rhetoric as a rhetorical strategy. Lawyers and academics are also in the habit of bolstering their own credibility by strategically professing to critique rhetoric from the outside as if they were objective bystanders, whereas in fact they are rhetorical practitioners of the first order with a vested interest in persuading others to their points of view. A search of a leading database of academic legal scholarship reveals that in UK journals around one in three article titles containing the word ‘rhetoric’ also contains the word ‘reality’.²¹ The pairing of rhetoric and reality in those titles is nearly always in order to contrast them – as in the phrases ‘rhetoric or reality?’, ‘rhetoric vs.

¹⁹ Michael Taussig, *Mimesis and Alterity: A Particular History of the Senses* (Routledge: Abingdon, 1993) ix.

²⁰ Maurya Wickstrom, *Performing Consumers: Global Capital and Its Theatrical Seductions* (Routledge: Abingdon, 2006) 2, emphasis added.

²¹ Westlaw UK 73 of 210 articles, February 2020.

reality’, ‘from rhetoric to reality’ – and yet the use of alliteration and of antithesis (the juxtaposition of opposing ideas) in each of those phrases is itself intensely rhetorical. American legal scholar Gerald B. Wetlaufer astutely perceived that ‘law is rhetoric but the particular rhetoric embraced by the law operates through the systematic *denial* that it is rhetoric’.²² Despite jurists’ disavowal of their craft, the law is a product of rhetorical art every bit as much as a poem is. Elaine Scarry has even argued that law is more artistic than a professed work of art (e.g. a work expressly acknowledged to be ‘a poem’) because the law uses an extra layer of art to disguise its craft.²³ Rather than deny that rhetoric is at work in law, media, and politics, we might take the positive course of acknowledging the operation of rhetorical arts of statecraft and law-making with a view to refining our rhetorical performance in the hope of making the world a better place. As St Augustine said, ‘the art of rhetoric being available for the enforcing either of truth or falsehood . . . why do not good men study to engage it on the side of truth, when bad men use it to obtain the triumph of wicked and worthless causes, and to further injustice and error?’²⁴

Theatre of Make-Believe

The craft of theatrical performance and dramatic production supplies a rich analogy to manipulative arts of state-making, popularity, and persuasion. The celebrated actor Sir Laurence Olivier (later Lord Olivier) once said: ‘If someone asked me to put in one sentence what acting was, I should say that acting is the art of persuasion. The actor persuades himself, first, and through himself, the audience.’²⁵ The art of persuasion is a performative art of make-believe, and its mode of making entails a craft of construction. No wonder, then, that the leading theatre theorist and practitioner Constantin Stanislavski gave the titles *Building a Character* and *Creating a Role* to the books that completed the trilogy that began with his masterpiece *An Actor Prepares*.

The historical trajectory that took the rhetorical arts from their origins in law and government to the public playhouse is reflected in the trajectory of Prospero in Shakespeare’s *The Tempest*.²⁶ The former Duke of Milan left the world of officialdom to become the maker of his own magical world. Prospero

²² Gerald B. Wetlaufer, ‘Rhetoric and Its Denial in Legal Discourse’ (1990) 76 *Virginia Law Review* 1545–1597, 1555.

²³ Elaine Scarry, ‘The Made-Up and the Made-Real’ (1992) 5(2) *The Yale Journal of Criticism* 239–249, 242.

²⁴ St. Augustine, *On Christian Doctrine*, Book IV ‘Argument’, chapter 2.

²⁵ Toby Cole and Helen Krich Chinoy (eds), *Actors on Acting: The Theories, Techniques and Practices of the World’s Great Actors Told in Their Own Words*, new rev. ed. (New York: Crown, 1970) 410.

²⁶ On the history of rhetoric in law and theatre, see Julie Stone Peters, *Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems* (Oxford: Oxford University Press, 2022).

is a master manipulator. His ability to make and maintain his world through magical control parallels the poet's rhetorical power to make believe and the politician's power to build states and make laws through rhetorical performance. (Chapters 7 and 9 deal with these topics under the titles 'The Acting President' and 'State Building' respectively.) In the following well-known address to Ferdinand, the betrothed of his daughter Miranda, Prospero confesses his manipulative arts in theatrical terms, and in terms of the 'fabric' and 'made' quality of the make-believe:

be cheerful, sir.
Our revels now are ended. These our actors,
As I foretold you, were all spirits and
Are melted into air, into thin air:
And, like the baseless fabric of this vision,
The cloud-capp'd towers, the gorgeous palaces,
The solemn temples, the great globe itself,
Yea all which it inherit, shall dissolve
And, like this insubstantial pageant faded,
Leave not a rack behind. We are such stuff
As dreams are made on. . .

(4.1.147–157)

The 'Actor' Factor

The word 'actor' was a relative newcomer to the theatre when Shakespeare used it in the passage from *The Tempest* just quoted. It is as if the word had waited for him to arrive on the scene. First recorded as a description of a playhouse performer in 1566, when Shakespeare was two years old, it had previously been associated with that other great stage drama: the legal dispute. The first definition listed in the *Oxford English Dictionary* (OED) is an obsolete usage explaining that an 'actor' is a 'person who instigates or is involved in a legal action'. The earliest surviving record of that legal usage is a statute of 1325 written in Middle English.²⁷ The OED goes on to note that in ancient Rome the Latin word *actor* was sometimes used to refer specifically to a public prosecutor and an advocate in civil cases.

The role of actor was closely associated in Roman tradition with 'delivery', which is the performance component in rhetoric. The tradition goes back to Aristotle's *Rhetoric* and his claim that rhetorical delivery, with its blend of natural and technical proficiency, resembles theatrical performance ('*hypokrisis*') in the tragic drama.²⁸ The Roman idea of rhetorical delivery focused on two aspects: *pronuntiatio* and *actio*. Quintilian's *Institutio Oratoria*, which is 'the largest treatment of *actio* that has come down to us

²⁷ *The Statutes of the Realm*, Alexander Luders (ed.), Record Commission edition, 1810–1828, 11 vols (2011) vii. 30: 'tenaunt be actur, ant to louerd defendur'.

²⁸ *Rhetoric* 1403b22–23; 1404a12–19.

from Antiquity',²⁹ suggests that, whereas '[p]ronuntiatio is called *actio* by many people', '[i]t seems to have acquired the first name from its voice-element, the second from its element of gesture'.³⁰ *Actio* was therefore primarily a term to indicate the techniques by which gesture, usually as an accompaniment to speech, was employed as an aspect of rhetorical performance. This fits with the prehistoric origin of *actio*, which is conjectured to have been the Proto-Indo-European root word (*ag-) meaning 'to drive on'. 'Agitation', 'navigation', 'litigation', 'protagonist', 'agriculture', 'demagogue', and 'actor' all retain some of that original sense of driving forward. They are words of working and words that talk of making things happen – ploughing on to make one's food, pushing on to make one's way, driving on to make one's case, putting on a show to make an impression. It was with this sense of urgent performance that rhetorical *actio* came to refer specifically to gestures of the hand rather than to bodily communication generally.³¹

The word 'actor' naturally migrated out of rhetorical communication and persuasion in courts of law to make its lasting home in the theatre. It is reported that in Cicero's time, Aesopus, one of the greatest tragic actors, and Roscius, one of the greatest comedic actors, 'often stood in the audience' to observe the lawyer Hortensius conducting a case 'in order to bring back to the stage the gestures they had sought in the Forum'.³² With the revival of Cicero's and Quintilian's rhetoric in early modern England, the sketch *The Character of an Excellent Actor* (usually attributed to the dramatist John Webster) stresses the importance of bodily action in persuasive rhetorical performance: 'Whatsoever is commendable in the grave orator, is most exquisitely perfect in him; for by a full and significant action of body, he charms our attention.'³³ To appreciate the methods employed today by actors in law, media, politics, and every corner of the public stage, it is still necessary to pay attention to the action of the hand. Indeed, attention must be devoted to all activity that stimulates our sense of manual making, ranging from the overt gestural performances of lawyers and politicians, to the more subtle ways in which actors on the public stage appeal to our sense of touch and our sense of manual making. In this way, we will perceive

²⁹ Alberto J. Quiroga Puertas, *The Dynamics of Rhetorical Performances in Late Antiquity* (Abingdon: Routledge, 2018) 20.

³⁰ Quintilian, *The Orator's Education (Institutio Oratoria)*, Donald A. Russell (ed. and trans.), Loeb Classical Library (Cambridge, MA: Harvard University Press, 2001) 11.3.1. Quoted in *ibid* at 21. On rhetorical *actio*, see generally, María Ángeles Díez Coronado, *Retórica y representación: historia y teoría de la 'actio'* (Logroño, Gobierno de la Rioja: Instituto de Estudios Riojanos, 2003).

³¹ Michel Le Faucheur, *An Essay upon the Action of an Orator as to His Pronunciation and Gesture* (London: Nich. Cox [c. 1680]) 194.

³² Valerius Maximus, *Memorable Doings and Sayings*, D. R. Shackleton Bailey (ed. and trans.), Loeb Classical Library 492 (Cambridge, MA: Harvard University Press, 2014) Book 8, chapter 10, 'How Much Importance Lies in Elocution and Apt Bodily Movement'.

³³ John Webster (attrb.) *The Character of an Excellent Actor* in Thomas Overbury's *New and Choise Characters* etc (London, Thomas Creede, 1615).

how they handle the truth, how their *actio* acts on our affections, and how, Prospero-like, they manipulate us.

The Founding Fathers

Prospero's speech quoted earlier was his valedictory speech: his farewell to the 'great globe' he had built up by his magic. It is also taken by many commentators to be Shakespeare's personal farewell to the world of early modern theatre, *The Tempest* being his final sole-authored play (so far as the collaborative arts of theatrical drama are ever truly 'sole-authored'). As Prospero built a 'brave new world' on his island, so Shakespeare was a principal conjurer of the world of early modern theatre. His productivity as a playwright was prodigious in terms not only of quality but of quantity, and his hands-on involvement in the incipient industry even extended to participation in the project of physically erecting The Globe playhouse from the dismantled parts of a predecessor.³⁴ Prospero's 'great globe' was Shakespeare's, and it was built at the dawn of modern globalism. Miranda's famous phrase, 'brave new world', alludes to the fact that Prospero's island was Shakespeare's imaginative representation of the New World of the Americas, the play being written around 1610–1611, not long after the first English settlement was founded at Jamestown on 4 May 1607. In the centuries that followed, the fledgling United States of America had many Prosperos but the honour of *primus inter pares* must go to its first president, George Washington.

As Shakespeare gave us Prospero's memorable valediction, so Washington's farewell speech on retiring from public life on 19 September 1796 had more than a little magic to it. When he wrote 'I conjure you to believe me, fellow-citizens', he was employing 'conjure' in its original etymological sense of 'to speak an oath or word of power'. (A courtroom 'jury' is so called because it is conjured by the solemn act of being sworn in, and the name 'jurist' is related to the Latin *iurare*, which means 'to pronounce a ritual formula'.) Washington's farewell address to the nation was no mere political spiel; it was a conjuration; it was a magical spell. In John Austin's language, it was a 'speech act' or 'performative utterance'.³⁵ It did not simply report on past achievements, or merely caution against forgetfulness, but spoke words of power by which unbreakable communal bonds were forged in the hope of securing the future health of the nation. Looking to that future, one hauntingly

³⁴ James Shapiro, *1599: A Year in the Life of William Shakespeare* (London: Faber & Faber, 2005).

³⁵ J. L. Austin, 'Performative Utterances', in J. O. Urmson and G. J. Warnock (eds), *J. L. Austin: Philosophical Papers*, 3rd ed. (Oxford: Clarendon Press, 1979), 233, 236. Austin developed this idea of 'performative utterance' into his theory of the 'speech act': J. L. Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955*, J. O. Urmson (ed.) (Oxford: Clarendon Press, 1962). See, generally, Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Palo Alto, CA: Stanford University Press, 2014).

prophetic passage warns that bipartisan politics fuelled by revenge has the potential to put a despot in power. Washington warned that:

The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.³⁶

In the very first issue of *The Federalist Papers*, Alexander Hamilton (writing as 'Publius') sounded a similar warning when he observed that 'of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants'.³⁷ Washington's word 'faction' (from *facere*, 'to make' or 'to do') aptly describes a partisan political group as an entity that is made by the demagogue.

The words of George Washington and Alexander Hamilton never felt more prescient than in the extreme bipartisan atmosphere of the USA during the presidency of Donald Trump, culminating in his impeachment on charges of abuse of power and obstruction of Congress, and following the infamous storming of the Capitol Building by Trump supporters on 6 January 2021 a second impeachment charging him with incitement of insurrection. The passage just quoted from Washington's speech ends with a reference to 'ruins'. It is an apt metaphor. The United States of America did not spring up from nature fully formed; it is a grand rhetorical fabrication that was built up and must be maintained or risk falling into ruin. The founding fathers (among them Adams, Franklin, Hamilton, Jay, Jefferson, Madison, and Washington) are so called because they laid the foundations of the new nation. This they did through words of power poured into crafted speeches and texts as builders pour concrete into the foundations of a new building. Among those foundational statements are the Declaration of Independence, the US Constitution, and the speeches of George Washington. It is a fantasy to suppose that the nation was built on a natural bedrock of innate human and social values, especially when one considers that five of the seven founding fathers just listed profited from slave labour. They were frail human beings like all of us, and their personal ugliness is buried with them. The USA isn't built on them as human individuals but upon the foundational values of liberty, equality, and justice that they espoused. Such values are not found in nature, they are made;

³⁶ The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/washing.asp.

³⁷ *The Federalist Papers* No.1, 27 October 1787.

and not fully made yet but in the process of being made. They provide the blueprint by which to build a free and fair society.

To argue that democratic nation states are artificial is not to say that they are false, only that they are fragile. Things made by human minds and hands are always fallible and vulnerable to being unmade. The foundations of constitutions, laws, and states are constantly cracking under pressure and in need of continual maintenance. This is how it should be, for the alternative is the tyranny of totalitarianism. Occasionally a major fissure appears that threatens to bring the edifice down. Movements like ‘Black Lives Matter’ and #MeToo feel seismic because there is no natural bedrock at the base of democratic political systems. The only foundation is political will, and this, as with concrete in its liquid phase, is changeable and mouldable. No less than Prospero’s ‘baseless fabric’, the magic of a manufactured nation state must be conjured continually and constantly recreated if it is to be maintained.

Prospero-like, George Washington announced his 1796 retirement in theatrical terms as the step by which he would ‘quit the political scene’.³⁸ He had actually planned to retire in 1792 at the end of his first term in office, and in the speech drafted for that occasion he employed a standard theatrical metaphor to describe ‘the moment at which the curtain is to drop for ever on the public scenes of my life’, while referring to the American territory as ‘[t]he portion of the Earth allotted for the theatre of our fortunes’.³⁹ He had likewise used language of acting and drama thirteen years earlier when he resigned his military commission to Congress with the words: ‘I retire from the great theatre of Action’ (Annapolis, 23 December 1783). This can be put down to the cliché of war comprising ‘theatres’ of military action, but the thespian sense of rhetorical performance is undeniable in his letter to the states sent prior to that military resignation. In it he portrayed the citizens of the United States as ‘Actors, on a most conspicuous Theatre’.⁴⁰

Washington took many curtain calls, and on each occasion he employed the analogy of theatre to describe his participation in public life. When it fell to Martin Luther King Jr to protest the exclusion of African Americans from full and fair participation in the life of the nation, he took up the metaphor where Washington had left off. His celebrated ‘I have a Dream’ speech, delivered to participants in the ‘March on Washington for Jobs and Freedom’ on 28 August 1963, was premised on a theatrical analogy. Performing before the backdrop of the Lincoln Memorial, and with the Washington Monument before him, he told his audience, ‘we’ve come here today to dramatize a shameful condition’. Whereas Prospero’s speech had emphasized immaterial

³⁸ *Ibid.*

³⁹ James Madison, Draft of George Washington’s Farewell Address, 21 June 1792, Library of Congress: www.loc.gov/item/mjm012832/.

⁴⁰ ‘From George Washington to the States, 8 June 1783’, Founders Online, National Archives, <https://founders.archives.gov/documents/Washington/99-01-02-11404>.

illusion, a dissolving world, and the stuff of dreams, Dr King sought to build his dream on solid stuff, stuff to be touched and held on to even when it seems out of reach. He put an imagined prop into the hands of every member of his audience and thereby drew them into the drama as actors:

In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.⁴¹

This was a drama of dreams, but it was performed and built on tangible stuff. By depicting the Constitution and the Declaration of Independence as a promissory note, he put the promise of justice and prosperity in the hands of every actor. That promise has not yet been fulfilled, but the citizens have at least been given a blueprint to hold on to. Dr King understood that if you want to make history, you need to build on the materials of history. The word 'matter' in the maxim 'Black Lives Matter' is no accident but a rhetorical gesture towards real, tangible incidents of making a material difference.

The gifted wordsmith Lin-Manuel Miranda, creator of the hit musical *Hamilton*, has conjured brilliantly with the dramatic magic of speeches and statements made by America's Founding Fathers. He even incorporated excerpts from Washington's 1796 farewell speech in the song *One Last Time*. In that song, the refrain 'the nation we made' stresses that the power of the founding fathers was, as their collective name suggests, a power of making. Miranda (what a happy coincidence that he shares his name with Prospero's daughter) has understood that America wasn't found, it was founded; it wasn't discovered, it was dramatized. It was performed into being through rhetorical word and action.

Making and Motivation

Part of our concern with the Making Sense is with the appeal that making has upon our senses; not only upon the physical senses, but also upon three senses that especially dominate motivation for human action whenever we 'make' an effort. These are the sense of pleasure, the sense of purpose, and the sense of partnership. These three motivating senses frequently overlap. For example, the civic or communal sense of seeking common political welfare provides a sense of partnership, fulfils our sense of purpose, and also brings a sense of pleasure. the Making Sense emerges in sometimes surprising ways in the language by which we express each of these three motivating senses. Even when it is not clear that any material thing is being made, the Making Sense nevertheless emerges as a default expression of the things that matter most to us. We express the sense of pleasure with such phrases as 'it makes me happy',

⁴¹ Martin Luther King Jr, 'I Have a Dream' (28 August 1963).

'I'm made up', and 'it made my day'; the sense of purpose in such phrases as 'I want to make my mark', 'I want to make something of myself', 'I want to make a living', 'I want to make money', 'I want to make it big', and, less selfishly, 'I want to make a positive contribution', 'I want to make someone happy', and 'I want to make the world a better place'. Those last three examples bring in a communal or collective sense of partnership that we also hear in such making phrases as 'we were made for each other', 'let's kiss and make up', and 'let's make love'.

Of course, not all creative conjuration is for the good. There is, for example, a sense of partnership in the old idea of being a 'made man', a phrase that appears in the 1609 edition of *Faust* (Christopher Marlowe's play about a pact made with Lucifer), but which nowadays is more widely associated with the pact by which a person is admitted to full membership of the American Mafia. Sometimes a perverted sort of 'partnership' is compelled against a participant's wishes. This occurs whenever we participate in someone else's plans out of a perceived need to comply with the force of their power and influence over us. This influence that others exercise upon us through their persuasive powers is something that might win our good will, or it might be something by which our wills are overborne. Desire for partnership may be a carrot that motivates our participation in another person's plan, or participation may be compelled by a stick. Persuasive force as a mode of making is discussed further in [Chapter 2](#) under the heading 'Perforcement'. In the category of compelled participation, we find coercion of every sort, from blackmail to slavery. Our use of the language of 'making' in connection with such acts is curious. When we say, 'they made me do it' or 'you can't make me!', we can readily appreciate that the speaker is *doing*, but in what sense is the coercing party *making*? What activity of making should we impute to the person who uses their power to persuade another to act against their will or against their better judgment? This might sound like an overly sophisticated question, but the surprising use of 'making' language in a context in which no *thing* is made presents an opportunity to wonder what is going on when we think and talk in terms of 'making' generally. One answer to the question is the possibility that the speaker who says 'he made me do it' is referring to their action of participation in another person's plan. It is as if the speaker doing the 'doing' is an actor in a dramatic production of the other party's making, the latter being the director-producer of the piece. Slavery exhibits the very worst possibility brought in by the phrase 'I will make you!', which is that a person will be subjected to another's will to the point of being made into a human object.

Sensation and Pleasure

Let us return to the more pleasant thought of pleasure. If we are to appreciate law, media, and politics in terms of their pleasing and persuasive performances, we must necessarily engage with the sense of pleasure and its relation to

the physical senses.⁴² This we will do as we progress through the book, and although our attention will be focused on the famous five (the visive sense of sight, the auditory sense of hearing, the haptic sense of touch, the gustatory sense of taste, and the olfactory sense of smell), we should keep in mind such significant physical senses as the pressure sense of weight, the equilibrical sense of balance, the kinaesthetic sense of motion, the luminous sense of brilliance (this can be experienced even with the eyes closed, and even by many people who are otherwise profoundly blind), the muscular sense of action, the nociceptive sense of pain, the positional sense of posture, the thermaesthetic sense of temperature, the spatial sense of setting, the formal sense of shape, and the stereognostic sense of solidity. All these senses bear upon the pleasure that we derive from cultural performances and from engaging with artefacts of social – including legal and political – production.

Overarching and encompassing all the physical senses is the pleasure inherent in the dynamic of change. Variety is the spice of life. The essence of drama, and what makes it pleasing to us, is that drama is the discharge of the potential energy stored up in states of tension, conflict, and opposition. In a dynamo, the poles of a magnet generate electricity when they move through an electric coil. In drama, the polar opposition of protagonist and antagonist generates pleasure as we travel through the twists and turns of the plot. The delight is in the discharge, in the catharsis that ends the conflict, in the movement that courses through us as the characters move from one state to another, working through the problems and questions of the drama, and perhaps reaching a resolution. It might seem trivial to judge a play by the pleasure that it generates, but by what other test should a drama be judged? Molière put the point beautifully in his one-act prose comedy, *La Critique de l'École des femmes* ('The School of Wives Criticized'): 'If plays abiding by the rules are not pleasing, and if those which are pleasing do not abide by the rules, it must be that the rules were badly made.'⁴³ Pleasure, purpose, and partnership can motivate action independently of any sense that something is being made, as can physical sensation, but motivation will be all the greater where the ends of pleasure, purpose, and partnership are bound up with a sense of making. There is, to quote Ellen Dissanayake, an 'inherent pleasure in making', which she terms '*joie de faire*'.⁴⁴

Making an Impact

The pleasure of making is very often associated with and enhanced by the pleasure of touch – the sense of grasping something, getting to grips with

⁴² There is a long history for such an approach. See for example Mary Carruthers, *Rhetoric beyond Words: Delight and Persuasion in the Arts of the Middle Ages* (Cambridge: Cambridge University Press, 2010).

⁴³ Molière, *La Critique de l'École des femmes* (1663), Scene VI (my translation).

⁴⁴ Ellen Dissanayake, 'The Pleasure and Meaning of Making' (1995) 55(2) *American Craft* 40–45, 40.

something, getting a feel for something. This sense was evoked by the slogan ‘Take Back Control’, which was employed by campaigners for the UK to leave the European Union. The word ‘Back’, like the ‘Again’ in Trump’s slogan ‘Make America Great Again’, appeals to nostalgia. Dominic Cummings (an architect of the leave campaign) notes that the word ‘back’ engenders ‘the feeling that something has been lost and we can regain what we’ve lost’.⁴⁵ It’s a valid point, but the strongest affective appeal in the Brexiteer’s slogan ‘Take Back Control’ is more subtle. It resides beneath the black and white of the text and must be sounded out.

Saying the slogan ‘Take Back Control’ out loud produces a striking percussive sound effect. The hard ‘K’ sound in each of the three words generates an onomatopoeic sense of striking or contact. The word ‘Take’ sounds the keynote, and interestingly it rhymes with, and appears in the same prime place as, Trump’s ‘Make’. The word ‘Take’ denotes an active form of contact with someone or with stuff. It possibly originates, like the Italian *toccare* and the Spanish *tocar*, in a sense of touch derived from the Vulgar Latin *toccare*, ‘to knock, strike’. The sound of ‘Take’ evokes a striking sound of contact, the sort of striking that *makes* a noise – the sound of ‘tick-tock’ and ‘knock knock’. The name of the short-form video-sharing platform TikTok benefits from the same onomatopoeic effect. It speaks as much to making contact as to making videos against the clock. As TikTok’s name evokes taking, so the platform’s strapline, ‘Make Your Day’, emphasizes the connection between touching, making, and pleasure. The Brexiteers’ slogan, ‘Take Back Control’, delivered on its implied promise to make an impact, to make an impression, and to make a political noise by striking a blow.⁴⁶ If the ‘Take’ in the slogan was persuasive, it might have been down in large part to its percussive quality. By making a noise – and specifically the noise of making contact – the subliminal sound effect of ‘Take Back Control’ subtly appealed to the voters’ making sense in the way that Trump’s ‘Make’ appealed more overtly. Accordingly, the slogan achieved what every political slogan sets out to achieve – to make contact with people and to give them the sense that by voting a certain way they can make a difference.

Make It So

One of the key themes of this book is the nature of ‘the true’ considered as a social artefact. When the framers of the US Declaration of Independence declared ‘[w]e hold these truths to be self-evident’, they were not referring to a notion of absolute, abstract, and spiritual truth. The words ‘we’, ‘hold’, and ‘evident’ placed alongside plural ‘truths’ locates their concern firmly in the

⁴⁵ Dominic Cummings, ‘Why Leave Won the Referendum’, Ogilvy Nudgestock Conference 2017, https://youtu.be/_Tc4bllyZLw?t=427 at 7’10.

⁴⁶ On the soundscape of Brexit, see Gary Watt, ‘Sound and Fury Signifying Brexit’ (2020) 24 *Law Text Culture* 227–252.

social realm of truths sensible to, and containable within, human perception as things to be grasped and seen. The phrase ‘we hold these truths to be self-evident’ resembles the form that a judgment takes in legal practice, complete with such traditional legal terms as ‘evident’ and ‘to hold’. The founding fathers were not discovering and describing a natural, existing, and universal state of affairs, but making a new law to live by. The Declaration was a prescription for the future, not a description of the present. All people are born equal with respect to their human nature, but it would be nonsense to suggest that people are born equal in terms of talent, finance, and opportunity. The power of the Declaration is its power of conjuration – its power to make a social artefact by the name of ‘equality’ – and thereby to make a thing which would otherwise have little social reality. In other words, the Declaration does not report equality as an existing fact but *makes* the fact real through the rhetorical performance of words of power. We will see in future chapters that a parallel process of making truths through performance is always at work in judicial judgments in courtrooms. That part of our study will be of interest to lawyers, but it should also interest everyone for the light it can shed on rhetorical performance as a mode of making things of communal value.

One of the key arguments of this study is that human systems, including legal systems, do not seek to discover pre-existing, underlying truths, but seek instead to make or to perform truths. Scientific and social truths are never discovered, they are always made. It is, though, no easy task to displace the dominance of ‘discovery’ language, especially in scientific contexts. To give an example that has become topical since the outbreak of the Covid-19 pandemic, we can note that even before any vaccine had been manufactured, Google search returns for ‘finding’ a vaccine were at least as numerous as returns for ‘creating’ a vaccine.⁴⁷ This was despite the fact that non-existent vaccines were patently not out there somewhere just waiting to be discovered. Whatever materials nature supplies for fighting viruses, vaccines are always made through human craft.

It might sound cynical to argue that civil and cultural ideas of ‘the true’ – including scientific and legal ‘truths’ – are things that are ‘made up’, but the argument is intended to encourage a positive appreciation for the orthodox social processes by which proofs, facts, truths, and judgments are produced. We will, for example, better understand the law when we appreciate the creative processes by which the legislator really does *make* laws, by which the judge really does *make* decisions, and by which the advocate really does *make* their case. When we have made sense of law’s traditional activities in

⁴⁷ In September 2020, the search term ‘find a vaccine’ returned nearly eight million hits on Google, compared to a little over eight million for ‘make a vaccine’. For June 2021, the figures were 7.5 and 6.5 million respectively, which no doubt reflects the fact that people were by that date no longer concerned generally with whether a vaccine could be discovered, but with whether they could personally obtain a jab.

terms of their manufactory and performative operation as ways of constructing social consensus and making public peace, we can then apply the Making Sense to the contentious activities by which citizens confront each other and pass judgment on each other in the so-called court of popular opinion. Our exploration culminates in [Chapter 12](#) by attending to knotty contemporary issues of popular judgment, trial by Twitter, and cancel culture. In the meantime, we – as writer and readers – should not approach our subject cynically but should apprentice ourselves to the study of making things with a desire to make things better.

Invention, Creation, Production

To make sense of making, we must first make sense of the word ‘making’. To that end, this chapter defines the terms that are employed throughout the remainder of the book. No definitions are perfect, and the ones offered here do not pretend to be exclusive and comprehensive, but they will hopefully disperse the clouds of vagueness that so often obscure our talk of making.

Making – a Difference

Our starting point is to acknowledge that the word ‘making’ does too much work. We think we know what someone means when they say ‘Arthur made the dinner’, and normally in a vague sense we do; but knowing that Arthur made the dinner doesn’t tell us whether he reheated a ready-made meal and brought it to the table, or whether he had a hand in devising the recipe, preparing the ingredients, combining the ingredients, or cooking the ingredients. It is even possible that he had nothing at all to do with presenting the food but was such convivial company that he ‘made the dinner’ in the sense that he made it a social success. In this chapter, I tease apart the sense of three words that are sometimes employed interchangeably as synonyms for making. They are ‘Invention’, ‘Creation’, and ‘Production’. My definitional distinctions between Invention, Creation, and Production are based on the distinct etymologies of the words. I therefore call them, collectively, the three ‘Etymologies of Making’. Of course, etymological or ‘original’ meanings evolve over time, so my etymology-inspired definitions will inevitably differ from, and to some extent conflict with, some commonplace understandings of the words ‘invention’, ‘creation’, and ‘production’. For this reason, from hereon I have given words a capital initial when I use them as my own terms of art.

To give a brief example of the utility of the three Etymologies of Making, take the phrase ‘law-making’. We know that legislatures (parliaments) make law, but do judges? A great deal of intellectual effort has been expended over the years in disputing whether judges do or do not ‘make’ law. Some have said that when judges apply, develop, clarify, and declare the existing law, this is not the same as making law. Others have argued the exact opposite. In [Chapter 4](#), we will see that such arguments practically evaporate when one

asks, with more precise language, whether judges ‘Invent’, ‘Create’, or ‘Produce’ law. Later in this chapter, we examine the three Etymologies of Making in depth, but first, and more briefly, we will consider another trio of terms, which I call the three ‘Modalities of Making’.

Modalities of Making

The three Modalities of Making are ‘Perforcement’, ‘Artefaction’, and ‘Participation’ (which, again, I employ with a capital initial whenever these words are used as my own terms of art). Distinctions between the three Modalities do not have the dictionary precision that exists between the three Etymologies. The Modalities should therefore be treated not as definitions but as different perspectives on the various ways in which the rhetorical performance of making makes people think, feel, and act.

Perforcement

Perforcement describes the Modality of Making that operates to make minds up and to make others believe through persuasive arts of rhetorical performance. Taking the theatrical analogy, it may be compared to the dramatic urge or force that proceeds from the activity of directors and actors. No matter how gentle and subtle interpersonal persuasion may be, it has a forceful aspect to the extent that it influences another’s will. To counter this forceful idea of rhetoric as persuasion, and of persuasion as compelling others to share your point of view, Foss and Griffin proposed the idea of ‘invitational rhetoric’ as a feminist alternative to what they perceived to be patriarchal force inherent in persuasive rhetoric. In a 1995 article, they proposed a notion of ‘invitational rhetoric’, which would operate as ‘an invitation to understanding as a means to *create* a relationship’.¹ It is a brilliant notion and one that follows very closely ideas set out by James Boyd White over the preceding decade to which Foss and Griffin regrettably made no reference. In a 1985 essay, White had advocated a type of rhetoric that seeks to create community. He called it ‘constitutive rhetoric’.² The similarity of White’s idea to Foss and Griffin’s subsequent notion of ‘invitational rhetoric’ is clear from the language White uses. Explaining his idea in the context of law, he writes that:

[L]aw is most usefully seen not, as it usually seen by academics and philosophers, as a system of rules, but as a branch of rhetoric, and . . . the kind of

¹ Sonja K. Foss and Cindy L. Griffin, ‘Beyond Persuasion: A Proposal for an Invitational Rhetoric’ (1995) 62 *Communication Monographs* 2–18, 5, emphasis added.

² James Boyd White, ‘Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life’ (1985) 52(3) *The University of Chicago Law Review* 684–702, 688. See also, James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin, 1985), ix–x.

rhetoric of which law is a species is most usefully seen not, as rhetoric usually is either as failed science or as the ignoble art of persuasion, but as the central art by which community and culture are established, maintained, and transformed.³

In a 1990 restatement of this idea of legal rhetoric, White even uses the language of ‘invitation’ which, five years later, Foss and Griffin would place at the centre of their scheme. Highly significant for our purposes is the fact that White emphasizes the creative and performative qualities of law-court rhetoric, especially as demonstrated in a judicial opinion:

[J]udicial texts . . . *invite* some kinds of response and preclude others; as we deal with these *invitations*, both as individuals and as a community, we define our own characters, our own minds and values, not by abstract elaboration but in performance and action. Much of the life and meaning of an opinion . . . thus lies in the activities it *invites* or makes possible for judges, for lawyers, and for citizens; in the way it seeks to constitute the citizen, the lawyer, and the judge, and the relations among them; and in the kind of discoursing community it helps to create.⁴

Professor White’s idea of invitational rhetoric shows that the Perforcement inherent in persuasive rhetoric need not be negative. Instead of understanding rhetoric as a force that makes us do certain things, it can be understood as a cooperative activity of communication through which we invite each other to join in making something together. In short, rhetoric can be a communal force rather than a force of compulsion. Force, as any physicist (or *Star Wars* enthusiast) will confirm, is a morally neutral influence. Whether it turns to good or evil depends upon what we make of it. Instead of dismissing the influence of rhetorical force – what I call Perforcement as necessarily bad – we might come to see that when we are moved by the force of someone’s argument or by the force of a theatrical production, the force at work is frequently one that binds us together through our shared humanity and, as James Boyd White says, can constitute a community.

Artefaction

As Perforcement describes persuasive modes of making some-*one* behave in a new way, so the second Modality of Making, which I call Artefaction, concerns making some-*thing*. Artefaction is the subject of [Chapter 3](#), but it is useful to introduce it here by saying that the distinctive quality of Artefaction is that it makes a thing or artefact that has its own capacity to make things happen.

³ James Boyd White, ‘Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life’ (1985) 52(3) *The University of Chicago Law Review* 684–702, 684.

⁴ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 102, emphasis added.

Extending the theatrical analogy, Artefaction corresponds to setting a thing on the stage – not only particular physical stuff such as set, costumes, and hand props – but also the work as a whole. Theatre, architecture, law, and rhetoric are all instances of Artefaction because the human makers in each case make something that exerts a persuasive influence independently of the makers' original act of making. A theatrical show, an architectural edifice, an enacted law, a rhetorical speech – all these things are artefacts that people make, but also things that have a capacity of their own to make people behave in new ways – often long after the original maker has died. As Winston Churchill once said of architecture: 'We shape our buildings, and afterwards our buildings shape us.'⁵

In each case – theatre, architecture, law, rhetoric – the maker's original act of making is a craft requiring training, practice, and technical ability. Our word 'technical' derives from the ancient Greek *technê*, which denoted something like 'know-how' and combines the senses of our English words 'art' and 'craft' with something more besides. The 'more' is the Making Sense. Aristotle informs us that for every *technê*, there is a product or artefact:

[M]aking is different from doing . . . Nor is one of them a part of the other, for doing is not a form of making, nor making a form of doing. Now architectural skill, for instance, is an art, and it is also a rational quality concerned with making . . . an art is the same thing as a rational quality, concerned with making . . . All Art deals with bringing some thing into existence; and to pursue an art means to study how to bring into existence a thing which may either exist or not, and the efficient cause of which lies in the maker and not in the thing made. (*Ethics* 1140a)

We commonly refer to artworks as the 'baby' of the person who made them. The metaphor hints at the way in which Artefaction produces a new independent entity with a certain agency of its own. Dorothy L. Sayers used the child metaphor when describing literary authorship: 'While the parent is wholly responsible for calling the children into being, and can exercise a partial control over their minds and actions, he cannot but recognise the essential independence of the entity that he has procreated.'⁶ In the legal context, artefacts include not only such tangible things as courtroom architecture, legal costume, and legal hand props (books, briefs, and so forth), but also such intangible things as statutes, advocates' submissions, judicial opinions, judicial decrees, and judgments.

Each of these intangible things begins as an oral utterance or collection of oral utterances combined within a performed process, only later to be made tangible in the form of a physical record (UK statutes, for example, are still

⁵ Winston Churchill, 28 October 1943, House of Commons, London.

⁶ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 50.

archived on rolls of calf-skin vellum, as they have been since the fifteenth century).⁷ Legal speech artefacts that become a matter of material record illustrate well the Modality of Artefaction as I conceive it, for each is like a child which has a life independent of its human maker; a life that is lived out in its capacity to make other humans act and feel in new ways. Maksymilian Del Mar, focusing on the category of artefacts that are forms of language (including, for example, fictions and metaphors), notes likewise that they ‘call upon us to participate, ie to do things with them’.⁸

Between Perforcement and Artefaction there is sometimes only the slightest shade of emphasis. How, for instance, should we describe the process of making a speech? (We can note in parenthesis how significant it is that we talk of ‘making’ a speech rather than ‘breathing’, ‘uttering’, or ‘voicing’ a speech. Talk of ‘making a speech’, and likewise ‘delivering a speech’ or ‘giving a speech’, suggests that a speech is an artefact formed with an almost physical sense, despite its essentially intangible nature.) In the case of a rhetorical set speech, like the Gettysburg Address, we can say that Perforcement operates through Artefaction. The speech is an artefact made through rhetorical performance which has its own power, independent of its originator, to make minds up. A great speech has the capacity to make civil peace and to make a new civil society. A play-script also exemplifies Artefaction because it is a made thing that makes things happen. Indeed, every fresh production of a play is a new artefact, as is each daily performance.

Artefaction and Things

It is important to clarify that Artefaction makes artefacts as ‘things’ rather than as ‘objects’. Tim Ingold, expanding on the ideas of Martin Heidegger, explains the difference between a thing and an object by saying that an object ‘is defined by its very “over-againstness” in relation to the setting in which it is placed’, whereas with a thing ‘[w]e participate, as Heidegger rather enigmatically put it, in the thing’[s] thinging in a worlding world’.⁹ We might say that a thing brings people into the process of Production as participants in the way that a mere object does not. The oldest surviving parliament in the world is the

⁷ ‘Why Is the UK Still Printing Its Laws on Vellum?’ *BBC News*, 15 February 2016, www.bbc.co.uk/news/magazine-35569281. The BBC website carries a short video of vellum being made by the traditional method (www.bbc.co.uk/programmes/p00n3rdf).

⁸ Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Oxford: Hart, 2020) 1.

⁹ Tim Ingold, ‘Bringing Things to Life: Creative Entanglements in a World of Materials’, *Realities, Working Papers #15* (University of Aberdeen, July 2010) 4; quoting M. Heidegger, ‘The Thing’, in *Poetry, Language, Thought*, Albert Hofstadter (trans.) (New York: Harper Colophon, 1971), 165–182, 167.

Icelandic Althing (*Alþingi*), which in English might be translated as ‘general assembly’. The Icelandic word ‘thing’ denotes a gathering of people. Ingold has this in mind when he writes that:

There is of course a precedent for this view of the thing as a gathering in the ancient meaning of the word as a place where people would gather to resolve their affairs. If we think of every participant as following a particular way of life, threading a line through the world, then perhaps we could define the thing, as I have suggested elsewhere, as a ‘parliament of lines’.¹⁰

A parliament as a thing is made by people gathered together, and the thing itself then gathers individuals and forms them into a people and into new parliaments. A parliament is an intangible instance of Artefaction made tangible in the material symbols of the parliament building.

Participation

The third of the three Modalities of Making is Participation. It describes the mode by which something is made collectively and communally in a way that strengthens social fabric. Whether we are talking about the activity of a parliament or of a play, interested parties are more likely to be persuaded when they perceive themselves to be collaborators in the Production. As Perforcement describes the persuasive activity of actors, and Artefaction describes the realization and setting up of a thing that has a capacity to influence human action, so Participation is the activity of the audience that consists of appreciation, criticism, and improvement of the Perforcement and Artefaction. In ancient Greece, legal statutes were set up on standing stones (*stelai*) in the marketplace (*agora*) of the city (*polis*).¹¹ This was Perforcement through Artefaction, engendering social Participation. It contributed to building state, nation, and community. However, the Artefaction that has contributed most to building communities and states is not the stone but the thing inscribed upon it: the word.

The ‘Word’: Artefaction and Participation in Action

Owen Barfield, one of the Oxford ‘Inklings’ (alongside such luminaries as J. R. R. Tolkien and C. S. Lewis), explains how the Greek concept of *logos* – the ‘word’ – is bound up in the making of words:

¹⁰ Tim Ingold, ‘Bringing Things to Life: Creative Entanglements in a World of Materials’, *Realities: Working Papers # 15* (University of Aberdeen, July 2010), 4; referring back to Tim Ingold, *Lines: A Brief History* (London: Routledge, 2007) 5.

¹¹ Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge: Cambridge University Press, 2006) 37.

[I]t was the Stoics . . . Who gradually burdened the little Greek word 'logos' with the weight of the whole metaphysical theory of the relation between spirit and matter. 'Logos' in Greek had always meant both 'word' and the creative faculty in human beings – 'reason', as it is often translated – which expresses itself by making and using words.¹²

To put Barfield's observation in terms of Artefaction – the process by which made things make things – we can say that he has identified a circle of Artefaction in which reason makes word and word makes reason. Barfield credits the Stoics with (or blames them for) making 'logos' do so much work, but its dominance was inevitable precisely because words generate thoughts and thoughts generate words. Martin Heidegger made a similar observation when he suggested that '[m]an acts as though *he* were the shaper and master of language, while in fact *language* remains the master of man'.¹³ To his lasting shame, this insight did not prompt him to renounce his membership of the Nazi Party or to denounce its concerted promotion of hate speech.

Through a dynamic cycle of Artefaction, 'word' generates 'sentence', which generates 'language', which generates 'thought', which generates 'word'. In this way, 'word' can be seen as the ultimate dynamo or generator of human expression, whether it be in speech, writing, thought, action, or any kind of performance. This generative sense is central to the biblical idea of the Divine 'Word' as primal maker. At the very start of St John's Gospel we are told that '[i]n the beginning was the Word, and the Word was with God, and the Word was God . . . Through him all things were made; without him nothing was made that has been made' (John 1: 1–3). It is because the thing we call 'word' has a generative power of Perforcement through Artefaction and Participation that the great rhetorical speeches and statements of history have been so effective in making and maintaining civil societies. The very word 'word' contains a clue to this phenomenon, for it ultimately derives from the conjectured prehistoric (Proto-Indo-European) root **were-* which, being the root of 'rhetoric', connects 'word' to the skill of social performance, and which also, as the root of the Greek *rhetra* denoting ceremonial or authoritative utterance, connects 'word' to law-making. Our idea of 'word' is therefore the ur-expression of Artefaction – for the word is something which since prehistoric times has carried a powerful capacity to make things happen. A similar prehistoric survivor is the Proto-Indo-European root **spel*, meaning 'to say aloud, recite', which survives in our ideas of magic 'spell' and Divine 'gospel'. The spoken word, whether it be in the form of a legal declaration or a mystical incantation, has always impressed us as being a thing that makes things happen beyond the limits of physical material. The capacity of the word to regenerate in defiance of physical laws of entropy and material decay

¹² Owen Barfield, *History in English Words* (1926) (London: Faber and Faber, 1954) 113.

¹³ Martin Heidegger, 'Building Dwelling Thinking' in *Poetry, Language, Thought*, Albert Hofstadter (trans.) (New York: Harper Colophon Books, 1971) 146.

demonstrates the capacity of Artefaction to make things that not only make things happen, but make things happen that really matter and things that last.

Etymologies of Making: Invention, Creation, and Production

We now return to the three Etymologies of Making. To list them in the order Invention, Creation, and Production is to list them in a sequence that is broadly, but not strictly, chronological. Invention indicates the initiation of the making process, Creation describes the development stage, and Production describes the presentation or publication of the created thing. Of course, Creation does not indicate that all Invention has ceased, and nor does Production spell the end of the Creative process, but the concepts are distinct even when they overlap in practice. Etymology informs us that Invention means ‘to come in or come upon’, Creation means ‘to grow or increase’, and Production means ‘to lead forth’. Used casually, all three words are often confused within a unitary idea of ‘making’, but the etymology indicates that the three words once had very different meanings. In this chapter, I argue for a return to those original etymological distinctions as a way of distilling different significations from our undifferentiated talk of ‘making’. Perhaps it is not a return that I’m calling for, so much as a fresh acknowledgement of etymological distinctions that still survive just below the surface of our discourse. That survival explains why, for example, one can ‘produce’ a rabbit from a hat, but one cannot ‘invent’ a rabbit or ‘create’ a rabbit from a hat. In examples like this, we can see that our commonplace usage still recalls the etymology with some accuracy. Another example of survival appears in the language of theatre and cinema, where the label ‘producers’ is still applied with etymological accuracy to the persons who bring forth a show for public consumption. The function of a theatrical producer is conceptually distinct from that of an inventor or creator, even when in practice the discharge of those distinct roles may involve some overlap of activity and personnel.

The etymological distinctions I have drawn between Invention, Creation, and Production have frequently been drowned out by habitual usage of those words. We can observe, for example, that Invention, which etymologically indicates the initial stage of the making process, is nowadays more commonly employed as a noun (*an* invention) to indicate the item that emerges at the Production end of the making process. The etymologically accurate use of Creation to indicate the growth stage of the making process in which a thing is developed has likewise been pushed back to the Productive stage in noun form as *a* creation, or else brought forward to be associated with the Inventive stage as if one could in a God-like manner create something from nothing. When we casually describe someone as being ‘creative’, we seldom make clear whether we mean that they are Inventive or that they are adept at the Creative process of developing an idea, or both. As the celebrated jurist Roscoe Pound said, ‘[e]xcept as an act of Omnipotence, creation does not mean the making

of something out of nothing. Creative activity takes materials and gives them form so that they may be put to uses for which the materials unformed are adapted.¹⁴ When Thomas Edison said that '[g]enius is one percent inspiration and ninety-nine percent perspiration', his reference to 'inspiration' denotes Invention, and 'perspiration' refers to the effort of Creation and Production. Only God can make something from nothing through pure imagination. If we mortals have an idea appear spontaneously in our heads through genius Invention, we must sweat it out through Creation and Production. There is a passage in Act II of Anton Chekov's play *The Seagull* which demonstrates well the distinction between my three Etymologies of Making. Alluding to Invention and Creation, Nina asks, '[b]ut surely your inspiration and the creative process itself, they must give you moments of elation and pleasure?', to which the writer Trigorin replies: 'Yes. While I'm actually writing, it's enjoyable. And I like reading the proofs, but . . . the minute it's published, I can't stand it.'¹⁵ His point is that Invention (what Nina calls 'inspiration') and Creation (writing and reading the proofs) bring him pleasure, but that Production (the book leaving the press) does not.

Analogues of the Etymologies of Making: Agriculture, Horticulture, and Online Culture

As we go forward, it will be helpful to think of the three Etymologies of Making in terms of an agricultural or horticultural analogy. Invention is the stage of planting a seed. Creation entails growing the seed (the word 'creation' is a correlate of Ceres, goddess of agriculture, and of growing words like 'increase' and 'procreation'). Production is the stage of taking the crop to market. The latest social media platforms may seem far removed from agrarian life, but the same distinctions between Creation and Production are still evident in the internet context. Indeed, the defining feature of Web 2.0 is that it is 'user-generated'; in other words, it is Created and Produced by those who participate in it. The Creative and Productive aspects are both evident in those mainstays of Web 2.0 that go by the name of 'social media'. According to the OED, 'social media' are 'websites and applications which enable users to *create and share* content or to participate in social networking' (emphasis added). The word 'create' is used in this definition as shorthand for Invention and Creation. The word 'share' indicates the process I call Production.

Our nature as social beings connected together within cultures means that we usually Create in order to Produce. Web 2.0 is particularly associated with users' capacity for participation through co-Creation and co-Production, for it is 'a platform whereby content and applications are no longer created and

¹⁴ Roscoe Pound, *Interpretations of Legal History* (1923) (Cambridge, MA and London: Harvard University Press, 2013) 127.

¹⁵ Anton Chekhov, *Seagull: A Play in Four Acts* (London: Faber and Faber, 2007) 42.

published by individuals, but instead are continuously modified by all users in a participatory and collaborative fashion'.¹⁶ David Gauntlett actually employed a horticultural metaphor to describe the difference between Web 1.0 and Web 2.0 when he observed that, 'in the first decade or so of the Web's existence (from the 1990s to the early to mid-2000s), websites tended to be like separate gardens', whereas 'Web 2.0 is like a collective allotment. Instead of individuals tending their own gardens, they come together to work collaboratively in a shared space.'¹⁷ The internet has become our main social forum for the re-Creation and re-Production of ideas and experiences. Patrick Lonergan prefers the analogy of theatre: 'Every posting to a social media platform is inherently unfinished, in the sense that it is always open to being altered',¹⁸ and this, he points out, is 'analogous to the liveness of the theatrical event'.¹⁹ Social media postings can therefore be added alongside plays, parliaments, and political speeches in the list of things that we make through Artefaction and which, once made (and in the course of being made), have their own independent capacity to engender social bonds.

Threefold Authors: Gauntlett, Csikszentmihalyi, and Sayers

My elaboration of the three Etymologies of Making is a novel attempt to make sense of our talk of making, but I am not the first author to realize that making might be elucidated by distilling the activity into three distinguishable aspects. David Gauntlett's book *Making Is Connecting* focuses on the value of crafting to the building of community. He identifies three ways in which 'making is connecting':²⁰ first, connecting things to make new things (what I discuss in [Chapter 8](#) as 'confection' and 'synthesis'); second, connecting to others through making; and third, connecting to social and physical environments through sharing. The last two in Gauntlett's list I treat in overlapping ways as co-Creation, Production, co-Production, and participation.

Gauntlett cites Mihaly Csikszentmihalyi, author of *Creativity*, regarding another triad that sets out three prerequisites for a finding of creativity: '[a] culture that contains symbolic rules, a person who brings novelty into the symbolic domain, and a field of experts who recognise and validate the innovation'.²¹ Csikszentmihalyi is interested in the psychology of people

¹⁶ Andreas M. Kaplan and Michael Haenlein, 'Users of the World, Unite! The Challenges and Opportunities of Social Media' (2010) 53(1) *Business Horizons* 59–68, 61.

¹⁷ David Gauntlett, *Making Is Connecting: The Social Power of Creativity, from Craft and Knitting to Digital Everything*, 2nd ed. (Cambridge: Polity Press, 2018) 5.

¹⁸ Patrick Lonergan, *Theatre and Social Media* (London: Palgrave Macmillan, 2015) 33.

¹⁹ *Ibid.*, 34.

²⁰ David Gauntlett, *Making Is Connecting: The Social Power of Creativity, from Craft and Knitting to Digital Everything*, 2nd ed. (Cambridge: Polity Press, 2018) 10.

²¹ Mihaly Csikszentmihalyi, *Creativity: The Psychology of Discovery and Invention* (1996) (Harper Perennial Modern Classics) (New York: Harper Collins, 2013) 6.

who make a notable cultural contribution. My concern is with making more generally, so I do not stress novelty as being especially important. There is, though, some agreement between my three Etymologies of Making and Csikszentmihalyi's three prerequisites for a finding of creativity. My idea of Invention closely correlates with his requirement of a stage that 'brings . . . into' (indeed, that's pretty much the etymological meaning of the word 'invention'), and his 'field of experts who recognise and validate the innovation' is not far from my idea of Production as bringing forth to a critical audience, although I disagree that 'validation' is necessary for the Production aspect making. In my scheme, it will suffice that there is critical reception, even if there is disapproval. The presence or absence of validation goes to the popularity and perhaps to the excellence of the product but does not affect the fact that there is a product of some sort. (Csikszentmihalyi is only concerned with high-quality products.) This leaves one element of my etymological triad unaccounted for: the growth or development aspect that I associate with Creation. For Csikszentmihalyi, 'creativity' is a catch-all term encompassing all three qualities that I prefer to keep distinct under the labels Invention, Creation, and Production.

I will discuss one more triad that has been offered to make sense of making. As well as being a celebrated crime writer, Dorothy L. Sayers was a thoughtful scholar and essayist. In her book *The Mind of the Maker*, she analogized human making processes to the three persons of the Christian Holy Trinity – Father, Son, and Holy Spirit – arguing that these three Divine persons 'embody a very exact description of the human mind while engaged in an act of creative imagination'.²² She stressed that she was not seeking to advance a Christian apologetic, saying: 'Whether this goes to prove that man is made in the image of God, or merely that God has been made in the image of man is an argument that I shall not pursue.'²³ Sayers uses the process of writing a book to illustrate her trinitarian aspects of making. The first aspect is 'the Book as Thought', being 'the Idea of the book existing in the writer's mind'.²⁴ This she associates with the Father aspect in the Holy Trinity. In my scheme, it corresponds most closely to Invention, which is the planting of the seed. Her second aspect is 'the Book as Written' or worked up. This she associates with the person of the Son in the Holy Trinity – God in the physical human form of Jesus Christ – which she describes as 'the Energy or Word incarnate, the express image of the Idea'.²⁵ To the extent that incarnation implies physical development from a seed of Divine inspiration, there is some correspondence between this and my second Etymology of Making: Creation. Sayers' third aspect, 'the Book as Read – the Power of its effect upon and in the responsive mind',²⁶ is closely comparable to my third Etymology: Production. Sayers' study differs from my project in much of its detail, and

²² Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) x. ²³ *Ibid.*
²⁴ *Ibid.*, 89. ²⁵ *Ibid.*, 90. ²⁶ *Ibid.*, 91.

our respective threefold analyses are not folded in the same places, but her approach offers support in principle for the usefulness of seeking to distinguish different senses of making from one another. It also suggests that ancient human wisdom in the form of creation myths might provide fertile ground for exploring cultural notions of making. We will return to Sayers' stimulating study, but for now I enlarge a little more upon each of my three Etymologies of Making as they relate to creation myth. In doing so, I should stress that 'myth' need not imply, any more than 'made up', that one should not put faith in the story.

Invention, Creation, and the Divine

Starting with Invention, we can note that in the case of God or gods, the Divine initiative or 'spark' is sometimes called an act of creation, whereas etymologically it would be more accurate to regard it as an act of Invention. It is the first act of 'coming in' (Latin: *in-venire*). It is the seed that has not yet grown; the spark that has not yet become a fire. In the biblical account, the Divine utterance 'let there be light' is the first sound to break silence, the first light to break darkness, the first act of will to break inertia, and the first law to make order out of chaos. Etymologically speaking, Creation more properly describes the ensuing process of growth. The progressive eras or 'days' by which the biblical idea of creation and the Darwinian idea of evolution describe the development of life on earth are both properly called Creation because they involve an increase or growth from the original seed or spark.

In the biblical account, the seed of Invention is manifest in Divine intervention; in the Darwinian account it is present as genetic mutation. That the Creation stage is characterized by increase, even by horticultural growth, is emphasized in the English translation of the Old Testament account: 'This is the account of the heavens and the earth when they were created, when the Lord God made the earth and the heavens. Now no shrub had yet appeared on the earth and no plant had yet sprung up' (Genesis 2:4–5). In the beginning, the seed of Invention had not yet begun to grow. What followed was stage-by-stage growth towards a perfect garden, which is Creation properly so-called. Later in the biblical account, when the earth is renewed and reinvented by flood, the start of the post-diluvian era is also marked by a turn to Creation in the etymological sense of increase. The first Divine command to humans when they came out of Noah's ark was to '[b]ring out every kind of living creature that is with you . . . so they can multiply on the earth and be fruitful and increase in number on it' (Genesis 8:16–17). Likewise, the second Divine command post-flood called upon humans to '[b]e fruitful and increase in number and fill the earth' (Genesis 9:1). Accordingly, the first Divine command to the cosmic chaos was 'let there be light' – a command of Invention; and the first Divine command to human creatures after the flood was that they should multiply – a command of Creation. We can see, then, that since earliest

times, the human mythos of making has perceived a fundamental distinction between initiation and growth – between Invention and Creation.

Entropy and the Un-making Cosmos

While we are thinking on a cosmic scale, this is probably the place to offer a small but heavy thought that strikes me in the literally Inventive ('in-coming') way that a meteor might. The thought is that the entire dynamic of the universe is all directed, on the grandest scale, at un-making everything. Whatever is made by human hands will eventually be unmade by the hand of time. This is because in relation to any given object in any given context, natural environmental influences are more likely to produce dissolution and disorder than structure and order. The chance that heat in the Sahara will melt sand into glass and produce a mirror is not nearly so great as the chance that a human-made mirror placed in the Sahara will turn to dust. Or, to borrow a well-trodden metaphor illustrative of the same point, the chance that ocean waves will wash away a sandcastle is much greater than the chance that waves will form a sandcastle.

The fact that the direction of the universe is all one way in the direction of decay is said to be a function of the physical law of entropy, which states that energy in a closed system will always tend to equilibrium. In short, energy which goes into making a structure must eventually come out. Gravity isn't bound to travel in one direction through time – a ball thrown up will fall down, and a video of that sequence looks the same and looks sensible whether played forward or in reverse. Energy, on the other hand, is bound to travel in one direction through time – a video of a ball bouncing with ever-decreasing kinetic energy until it comes to a standstill only makes sense when played forward through time. According to the law of entropy, when other factors are equal the ball will give its energy to its environment rather than acquire energy from its environment. Even stone castles collapse over time for essentially the same reason – the energy that keeps their parts bonded into a structure eventually ebbs away. Sir Arthur Stanley Eddington, who coined the concept of 'time's arrow', explained it this way:

Let us draw an arrow arbitrarily. If as we follow the arrow we find more and more of the random element in the state of the world, then the arrow is pointing towards the future; if the random element decreases the arrow points towards the past. That is the only distinction known to physics.²⁷

Eddington observed that time's arrow is a universal progress which human beings are innately conscious of. If we saw a bouncy ball subject to no apparent external influence self-generate an increasingly expansive motion

²⁷ Sir Arthur Eddington, *The Nature of the Physical World* (1928) (Cambridge: Cambridge University Press, 1948) 35.

from a position of standstill, we would appreciate that something was fundamentally wrong. Eddington's decision to base his idea of entropy on thermodynamically closed systems (systems that exchange heat but not matter, e.g. a domestic central heating system) is not without its critics, but the general observation that structures tend to decay, and that energy tends to dissipate, holds good – and certainly accords with human perception of natural phenomena. There is a sense, then (and perhaps a subconsciously felt sense), in which a human maker is pushing against the death of the universe in every small act of making by which they put energy into making things and by which they impose structure on stuff and order on chaos. On this view, making is an act of life performed in resistance to death. The human maker is also pushing against the hand of time in every act by which they maintain the order and structure of the world through the work of their hands. It is not just a sense of nostalgia that gives meaning to every act of making and maintenance performed through a traditional craft, but the sense that in a small way our hands are holding back universal death and the tug of time. James Boyd White appreciated the same dynamic at work in the creative activity of writing when he observed that '[w]riting is a material art that creates a new and immaterial dimension of experience, a field of life, running across time and space, resisting the natural process of decay'.²⁸

The Invention of Truth

When the word 'invention' was first invented, it had a very different meaning to the one it bears today. The first entry under 'invention' in the OED is the archaic or obsolete use of the word to describe the 'action of coming upon or finding; the action of finding out; discovery'. The OED cites early examples, including Thomas Starkey writing of the 'inventyon of the truth, & equyte',²⁹ and Richard Hooker writing of the 'judicall method which serveth best for invention of truth'.³⁰ If someone spoke today about the invention of truth, we would accuse them of propagating lies, but the point is that 'invention' originally concerned the bringing in or discovery of an existing thing, rather than its modern sense of making a novel thing. A compromise between the old and new meanings is to appreciate 'invention' as the bringing in of existing ingredients to make a new thing. This is the sense of *inventio* that has been employed since the classical era to describe the bringing in of elements – topics, syllogisms, and so forth – to be used in the composition of a rhetorical

²⁸ James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006), 124.

²⁹ *A Dialogue between Pole and Lupset* (1529–1532, T. F. Mayer ed., Camden, 4th series, Vol. 37. London: Royal Historical Society, 1989) 78.

³⁰ *Of the Lawes of Ecclesiasticall Politie* (various editions, 1594 onwards) Book II, 97.

argument. The old use of invention to describe the synthetic gathering together of elements or ingredients for a particular purpose is not very different from the modern sense of bringing items together in an ‘inventory’.

As early as 1526, some authors were employing invention in the modern sense of new things made imaginatively rather than the old sense of bringing together existing things synthetically. Thus the monk William Bonde contrasted invention to synthesis when he described his *Pylgrimage of Perfection* (a collection of materials to guide the monastic life) as a book of ‘thynges, which be nat [not] of myne inuencion: but with great labour gathered’.³¹ By the late seventeenth century, which brought with it the age of Enlightenment and a new wave of suspicion of rhetorical arts, one even finds instances of invention being denounced as a fictional thing *opposed to truth*. Geologist John Woodward used the word in this sense when he contrasted ‘an appearance of Figment and Invention’ to the enlightenment values of ‘Truth and Reality’.³² This example shows that the verb invention had by then decayed entirely from the original sense of bringing in existing truths to a new sense of making falsehoods. For our purposes, ‘Invention’ describes the activity by which the seed of a made thing is first planted, come upon, or inspired.

The Science of Making Discoveries

Having said that Invention can initiate making through discovery, it is worth pausing to stress that the sometimes-supposed distinction between discovery and making is a dubious one. After all, most discoveries are ‘made’, and often by means of imaginative processes; scientific discovery being one example. The very word ‘scientific’ derives from the Latin for ‘knowledge-making’ or ‘knowledge-doing’ (combining the Latin *scientia* ‘knowledge’ with a form of *facere* ‘to make, to do’). The Greek equivalent of the Latin ‘scientific’ is *epistimonikós* (επιστημονικός), which can likewise be translated as ‘knowledge-producing’. The philosopher Gilles Deleuze deflates the fantasy that science is discovery divorced from making when he observes that scientists ‘do not discover – discovery exists but that is not how we describe scientific activity as such – they create as much as an artist. It is not complicated, a scientist is someone who invents or creates functions.’³³

³¹ *The Pylgrimage of Perfection* (London: Richard Pynson, 1526) Part I, Pref. sig. Aiiiv.

³² John Woodward, *An Essay towards a Natural History of the Earth* (1695) (London: TW for Richard Wilkin, 1702). In the passage he is discussing people’s retrospective on the biblical story of the Flood, a deluge whose ‘prime Errand’, he observes, ‘was to *re-form* and *new-mold* the Earth’ (92).

³³ Gilles Deleuze, *Two Regimes of Madness: Texts and Interviews 1975–1995*, David Lapoujade (ed.), Ames Hodges and Mike Taormina (trans.) (2001) (New York: Semiotext(e) 2007) 317–329.

Darwinism

It might be said that no scientific theory has had more influence upon the popular imagination than Darwin's theory of evolution. Its account of natural selection addresses the mystery of how life in all its varieties was made. The chief protagonist in the story is the accident of genetic mutation and the setting is the accident of environmental context. It is a tale that has grown in the telling to become an entire creation myth to rival that of any religion. The counterargument in favour of a creator God was famously expressed by Christian apologist William Paley by means of his analogy of the watchmaker. He reasoned that if a finely instrumented watch were discovered on a heath, the finder would necessarily infer the existence of a watchmaker.³⁴ The analogy asserts that it is necessary to infer the existence of a divine maker to make sense of the intricate complexity of the natural world. Richard Dawkins rejects this. In his view, the biological system of evolution through natural selection produces all the complexity of the natural world automatically without any prior image having to exist in any mind's eye. There is no image. There is no eye. There is no mind. For Dawkins, the notional watchmaker is blind, and the complexity of natural forms (and of watches, for that matter) does not necessitate the existence of a divine design, only the existence of a system of chance.³⁵ Responses to Dawkins have pointed out that his explanation for the puzzling discovery of a watch simply replaces that conundrum with the fresh challenge of understanding how his conjectured system of chance was made, or, as Physicist Stephen M. Barr puts it, of understanding the nature of the 'blind "watchmaker maker" maker'.³⁶

Writing in Oxford in 1957, around the time that elsewhere in Oxfordshire a teenage Dawkins was deciding to ditch Divinity for Darwinism, Owen Barfield criticized the Darwinian method of making sense of the world:

By a hypothesis, then, these earthly appearances must be saved; and saved they were by the hypothesis of – chance variation. Now the concept of chance is precisely what a hypothesis is devised to save us from. Chance, in fact = no hypothesis.³⁷

Dawkins may doubt that there is a divine organizing mind, but he cannot deny that Dawkins has something in mind, and that Darwin did too. Dawkins and Darwin are conscious, constructing entities, and their scientific theories of evolution and natural selection were not discovered, they were made. What we

³⁴ William Paley, *Natural Theology* (London: R. Faulder, 1802) chapter 1.

³⁵ Richard Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe without Design* (New York: Norton & Company, 1986).

³⁶ Stephen M. Barr, *Modern Physics and Ancient Faith* (Notre Dame, IN: Notre Dame University Press, 2003) 111.

³⁷ Owen Barfield, *Saving the Appearances: A Study in Idolatry* (first published Faber and Faber 1957) (Oxford: Barfield Press, 2011) 68.

call scientific ‘invention’ depends upon imaginative making by means of technical craft. It is pure pretence to say that scientific facts are discovered independent of human agency, for making a discovery is itself a mode of making that depends upon technical skills without which the discovered thing can be called neither ‘discovered’ nor ‘thing’. The role of human craft in ‘making a discovery’ is central both to science and to the fine arts, hence the statement popularly attributed to Michelangelo: ‘The sculpture is already complete within the marble block, before I start my work. It is already there, I just have to chisel away the superfluous material.’ Composer Antony Pitts says something similar about writing a new piece of music: ‘I sometimes feel sure that I’m seeing or feeling it rather than hearing it. It – whatever it is – is amodal or multimodal, an Ur-expression of some deeper confluence of ideas or tangling of neurons.’³⁸ He observes elsewhere that ‘the meta-work is already there in embryo, even before the first performance’.³⁹ In other words, artistic Invention – etymologically an ‘in-coming’ – can also be seen as an outpouring; a discovery of something within us. Composers are composing themselves.

Production

Etymologically the word ‘production’ means ‘to lead forth’ (*pro-* ‘forward’; *-duction* ‘leading’), and one of the earliest recorded uses of the word (in Latin and in medieval French) was to describe the act of bringing forward evidence in a law court. If a created thing remains the secret of its creator, there is no Production. Production describes the stage of making whereby a thing is made complete through the participation of other minds than that of the initiator or original creator of the thing. By this definition, agricultural ‘produce’ is so called not because we make it grow, but because we make it public. The word ‘try’ in the phrase ‘try my produce’ is a clue to a very important feature of Production, which is that produce is not properly so-called if it is merely shown to a passive public. Like evidence produced to a court of law, produce deserves that name only when it is brought forth in a manner that opens it up to critical scrutiny through trial. Accordingly, Production means not only ‘made public’ but also ‘public made’. A thing is made in the sense of being Produced when members of the public can engage with it, and thereby participate as co-Producers of the thing.

The idea that scrutiny and critique by a public audience might improve my product collaboratively through co-Production is a commonplace of classical wisdom across the globe. It is neatly expressed, for instance, in the classical

³⁸ Antony Pitts, ‘Towards an Outline . . .’, in Daniel Leech-Wilkinson and Helen M. Prior (eds), *Music and Shape* (Studies in Musical Performance as Creative Practice) (Oxford: Oxford University Press, 2018), chapter 30.

³⁹ Antony Pitts, correspondence with the author (September 2020).

Chinese idiom ‘the other mountain’s stone can polish jade’.⁴⁰ Dorothy L. Sayers wrote in the spirit of that idiom when she celebrated the potential for creative works to become fulfilled through their reception by others: ‘once the Idea has entered into other minds, it will tend to reincarnate itself there with ever-increasing Energy and ever-increasing Power’.⁴¹ My definition of Production as making through publication also resonates with Percy Lubbock’s opinion that ‘the art of fiction does not begin until the novelist thinks of his story as a matter to be shown’.⁴² Lubbock went too far, though, for he seems to suggest that there can be no creative writing without publication. The reality is that creative writing can be done by a writer solely as a private or personal exercise in literary expression, as Dorothy L. Sayers observes:

A writer may be heard to say: ‘My book is finished – I have only to write it’; or even, ‘My book is written – I have only to put it on paper’. The creative act, that is, does not depend for its fulfilment upon its manifestation in a material creation.⁴³

What she says here is consistent with the Etymologies of Making as I define them. Making in the sense of Creation does not require that a product be brought forth to public scrutiny but making in the sense of Production does.

Participation and Co-Production

Theatrical Production involves essentially the same elements as agricultural Production. Whereas agricultural Production entails the presentation of produce to a critical public, a theatrical Production entails putting on a show to a critical audience. The theatre theorist and practitioner Jerzy Grotowski once asserted that ‘[a]t least one spectator is needed to make a performance’,⁴⁴ and educationalist Dorothy Heathcote wrote in a similar vein that ‘the creative urge in drama cannot be completed without an audience to participate in what is at once its birth and its destruction’.⁴⁵ Csikszentmihalyi made a related point when he observed that ‘creative ideas vanish unless there is a receptive

⁴⁰ Alvin Hoi-Chun Hung, ‘“Stones from Another Mountain”: An Analysis of the Cinematic Significance of Hong Kong’s Storm Films in China’s Anticorruption Campaign’ (2021) 15:1 *Law and Humanities* 84–105.

⁴¹ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 88.

⁴² Percy Lubbock, *The Craft of Fiction* (London: Jonathan Cape, 1921) 62.

⁴³ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 31–32.

⁴⁴ Jerzy Grotowski, *Towards a Poor Theatre* (1968) (New York: Routledge, 2002) 32.

⁴⁵ ‘Drama as Challenge’, in Liz Johnson and Cecily O’Neill (eds), *Dorothy Heathcote: Collected Writings on Education and Drama* (Evanston, IL: Northwestern University Press, 1984) 81. See also, Patti Peete Gillespie, ‘The Performing Audience’ (1981) 46(2) *The Southern Journal of Communication* 124–138, arguing that ‘an audience is necessary to the art of the theatre and that the necessary audience is real rather than abstract’ because (among other factors) ‘audiences are too diverse to be usefully described by an abstraction’ (124).

audience to record and implement them'.⁴⁶ The commonplace observation that critical scrutiny can 'make or break' a theatrical production actually means to say that a positive critical reception *makes the show succeed*, whereas a negative critical reception *makes the show fail*. All criticism – positive or negative – participates in making the thing in co-Productive mode. When Elizabeth Burns attributes to the theatrical audience 'the power of making or breaking a play', her point is that the audience is 'ultimately responsible for sustaining the performance'.⁴⁷ There is more to sustaining a performance than money, but it is hard to ignore the fact that one important sense in which the public can make or break a play is the financial sense, which is why we hear economists talk of popularity 'producing' demand and of demand 'creating' a market.⁴⁸

If we want to persuade an audience to accept something, it is not ideal to present the thing as a *fait accompli*. An audience is more likely to approve something if they feel that they've had a hand in improving it through active participation; that is, if they feel that the thing is the joint product of the collaborative activity of initiator and audience. This is one reason why metaphor is such an effective rhetorical figure. Metaphor shifts some of the imaginative work onto the reader or audience in a way that engages them in judgment. An effective metaphor holds our imagination because through it the initiator presents a puzzle that must be scrutinized and judged by the receiver if it is to reveal its sense. Maksymilian Del Mar argues that linguistic artefacts, among which he includes metaphors, 'call upon us to participate . . . eg through being incomplete, under-specified, or discontinuous'.⁴⁹ He suggests that participation in this context can be considered a mode of 'playing', and even of 'making'.⁵⁰ I agree that the co-Productive activity of the receiver completes what would otherwise be incomplete. If Auden's line, 'Law say the gardeners is the sun', were empirically true, an appearance in court would be more painful than it already is, and much more brief. The reason the metaphor works is because we know that it cannot be true physically and this compels us to make figurative sense of the picture. The puzzle, or playfulness, of the image invites us to join in. Aristotle had the pleasure of audience participation in mind when he praised the operation of metaphor in his *Rhetoric*. He wrote that, by virtue of *enargeia*, metaphor has the capacity to

⁴⁶ Mihaly Csikszentmihalyi, *Creativity: The Psychology of Discovery and Invention* (1996) (Harper Perennial Modern Classics) (New York: Harper Collins, 2013) 6.

⁴⁷ Elizabeth Burns, *Theatricality: A Study in Convention in the Theatre and Social Life* (London: Longman, 1972) 185.

⁴⁸ We are told, for instance, that '[w]hen individuals seek to buy a product to satisfy a need, they create *demand*' and that '[p]roducts that are harmful to society, but are still demanded by consumers create a market characterized by unwholesome demand'. Karl Moore and Niketh Pareek, *Marketing the Basics* (Abingdon: Routledge, 2006) 11, 15.

⁴⁹ Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Oxford: Hart, 2020) 102.

⁵⁰ *Ibid.*, 120.

enliven an idea for an audience by performing or producing it as a solid image presented before their eyes (*pro ommaton poiein*).⁵¹ Richard Moran has written in relation to this passage that the aim of bringing a metaphorical image before the eyes of an audience is ‘to get one’s audience to *do* various things, to imagine in a lively fashion that involves much associating, connecting, and emotional responding’.⁵² Since the Greek verb *poiein* imports ‘making’ as well as ‘doing’, we can add that the aim is equally ‘to get one’s audience to *make* various things’ through co-Productive engagement with the originator of the metaphor. This sense emerges clearly in Moran’s further elaboration of the same passage from the *Rhetoric*:

[I]maginative activity on the part of the audience contributes directly to the rhetorician’s aim of persuasiveness . . . the audience . . . is engaged in the productive labor of constructing and exploring various useful associative connections within the image. But the crucial advantage here is not simply the surplus value obtained by having others work for you, but rather the miraculous fact that shifting the imaginative labor onto the audience makes the ideas thereby produced infinitely more valuable rhetorically than they would be as products of the explicit assertions of the speaker.⁵³

The ‘miracle’ that makes a metaphor live in a reader’s mind is of the same species as the marvel that makes a book live in the mind of a reader and makes a play live in the actors and audience. It is the miracle of co-Production. Like the wonder of human procreation, it is the miracle of making something together.

⁵¹ 1411b. See Peter A. O’Connell, ‘Enargeia, Persuasion, and the Vividness Effect in Athenian Forensic Oratory’ (2017) 20(3) *Advances in the History of Rhetoric* 225–251.

⁵² Richard Moran, ‘Artifice and Persuasion: The Work of Metaphor in the *Rhetoric*’, in Richard Moran, *The Philosophical Imagination: Selected Essays* (Oxford: Oxford University Press, 2017) 49–60, 59, emphasis in original.

⁵³ *Ibid.*

Artefaction

Making Things

The reader will recall that ‘Artefaction’ is my term for thing-making, and specifically for making things which have their own capacity to make things happen. By this definition, the products of Artefaction are not just made things but making things. Included in this class are tangible things with a capacity for rhetorical performance – for example a statue or a flag – as well as intangible things, of which the preeminent example is the word. Where words combine in sentences and in speech, they can attain monumental status and influence. In [Chapter 2](#), we considered the Gettysburg Address as an example of this phenomenon. Inspired by the work of James Boyd White, scholar Richard Dawson has devoted a whole book to the close rhetorical reading of influential statements in law, philosophy, and the arts.¹ Contemplating Edmund Burke’s *Reflections on the Revolution in France*, in which Burke argued that a word like ‘freedom’ is only as good as the use to which it is put, Dawson observes that for Burke, words are ‘evolving cultural artefacts that shape us and are shaped by us as we use them’.² This serves as an excellent definition of the Making Sense I have in mind when I use the term ‘Artefaction’, as does James Boyd White’s idea (as summarized by Dawson) that language is ‘an evolving cultural artefact for making and remaking ourselves and our world – the real world’.³

Human Nature Lying in a Bed

The words ‘Artefaction’, ‘order’, ‘harmony’, ‘art’, ‘articulation’, and ‘arrangement’ all derive from the conjectured Proto-Indo-European root word ‘ar*’, meaning ‘to join together’. An ‘artefact’ is etymologically a thing ‘put together made’ (‘arte’ – put together; ‘fact’ – made). Most anciently, the word ‘order’ might refer to the way in which threads are put together on a loom prior to the act of weaving. That metaphor opens a way to thinking of Artefaction as a process that weaves human nature into the nature of things and vice versa.

¹ Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Abingdon: Routledge, 2013).

² *Ibid.*, 48. ³ *Ibid.*, 100.

At the start of Book II of his *Physics*, Aristotle settled upon the following distinction between things produced by nature and things put together by human craft:

Animals and their organs, plants, and the elementary substances – earth, fire, air, water – these and their likes we say exist by nature. For all these seem distinguishable from those that are not constituted by nature; and the common feature that characterizes them all seems to be that they have within themselves a principle of movement (or change) and rest – in some cases local only, in others quantitative, as in growth and shrinkage, and in others again qualitative, in the way of modification. But a bedstead or a garment or the like, in the capacity which is signified by its name and in so far as it is craft-work, has within itself no such inherent trend towards change. (192 b 8–19)

And so it is with all manufactured or ‘made’ things: none of them has within itself the principle of its own making. Generally this principle resides in some external agent, as in the case of the house and its builder, and so with all hand-made things. (192b 8–29)⁴

Aristotle acknowledges that a bed has some intrinsic capacity for change – for example, it might rot away over time – but he attributes this change to the material (the wood) from which the bed is made, so that the quality of change cannot be said to reside in the bed *as bed*. Neither do beds have an inherent capacity to regenerate and reproduce themselves. Bury a bed in soil and a tree might sprout up, but a new bed never will (193a 13–14). If a tree sprouts up, this change is an incident of the material qualities of the wood rather than of the quality of the bed as a human-made artefact. A bed might be broken up and turned into a table, but such a change is attributable to the artisan who works with the wood and determines its form rather than to anything inherent in the bed as bed.

It is by attending to the influence of human external agency on made things that we can begin to appreciate the performative and persuasive capacity of artefacts, by which I mean their inherent capacity to make things happen. Let us stay with the example of the bed. We make a bed to perform a standard set of purposes, but human agency can ‘repurpose’ the thing. The bed can change in use from a place of sleeping to a place of sitting and even in these days of laptops and mobile phones to a place of working and socializing. The bed is the site, as it has been since ancient times, of recreation, of lovemaking, of procreation, of birth, of convalescence, of death. When we consider the ways in which human agencies act upon a bed, the artefact starts to acquire a ‘life’, having all of Aristotle’s hallmarks of a thing of nature – change, movement, growth, and rest. The bed as object is made once and for all when the form of the bed is complete, but the bed as artefact is made and remade through processes of recreation so long as humans are drawn to engage with the

⁴ Aristotle, *Physics*, Vol. 1, Books 1–4, P. H. Wicksteed and F. M. Cornford (trans.), Loeb Classical Library (Cambridge, MA: Harvard University Press, 1957) 107, 109.

artefact in making something new of it. Is it truly the case, then, as Aristotle contends, that there is nothing in the nature of a bed that generates new growth from within? While there is nothing closely comparable to the growth generated from within a grain when it becomes a plant or a grub when it becomes a fly, I would suggest that a bed as a made thing (as opposed to the bed as wood) does have a living nature. Its life resides in the human nature that is imparted to the bed by its maker. Elaine Scarry expressed something like this when she wrote that:

The now freestanding made object is a projection of the live body that itself reciprocates the live body . . . it will be found to contain within its interior a material record of the nature of human sentience out of which it in turn derives its power to act on sentience and recreate it.⁵

The nature inherent in a bed *as wood* is merely the nature of the wood, whereas the nature inherent in a bed *as bed* is human nature, for it is human nature to craft things by human art. As Polixenes says in Shakespeare's *The Winter's Tale*: 'over that art, / Which . . . adds to nature, is an art / That nature makes', so that 'The art itself is nature' (4.4.90–92, 97). These lines resist Aristotle's distinction between art and nature, for Polixenes is indicating here that the human art that operates over nature is itself a feature of nature because it is a feature of human nature. Humans' natural inclination to make tools and to use tools to make tools and other things (we can include language in the list of such tools) is not unknown in other animals, but its pre-eminence in humans is almost the definition of what makes humans unique and of that which distinguishes human nature from the rest of the natural world. As a statement attributed to Benjamin Franklin puts it, 'Man is a tool-making animal'.⁶ Henri Bergson developed this thought in his 1911 work *Creative Evolution*, where he writes:

[I]f, to define our species, we kept strictly to what the historic and the prehistoric periods show us to be the constant characteristic of man and of intelligence, we should say not *Homo sapiens*, but *Homo faber*. In short, *intelligence, considered in what seems to be its original feature, is the faculty of manufacturing artificial objects, especially tools to make tools, and of indefinitely varying the manufacture*.⁷

In an apparent gloss on Bergson, a cognitive psychologist has suggested more recently that '[w]e came to have a sapient mind because we are *Homo faber*'.⁸ In summary, Aristotle's distinction between made things and natural things

⁵ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford: Oxford University Press, 1985) 280.

⁶ 7 April 1778. James Boswell, *Life of Samuel Johnson* (London: Henry Baldwin for Charles Dilly, 1791).

⁷ Henri Bergson, *Creative Evolution*, Arthur Mitchell (trans.) (New York: Henry Holt and Company, 1911) 139, emphasis in original.

⁸ Lambros Malafouris, *How Things Shape the Mind: A Theory of Material Engagement* (Cambridge, MA: MIT Press, 2013) 153.

cannot be absolute so long as making is an aspect of human nature and that nature is an aspect of artefacts.

The example of the bed demonstrates Artefaction not only in the sense that it is a thing made by human art, but also in the sense that, once made (and in the course of being made), it makes humans do and feel certain things. We might say that human art works human nature into the artefact and that human nature then works its way out of the artefact over time through its ongoing effects upon humans who engage with the thing. Human nature is folded into the making of a bed as a thing and it is this nature, performing through the form of the bed, that causes the artefact, as bed, to carry meaning outwards to human agents. In short, the difference between ‘wood’ and ‘bed’ is human nature, and specifically that aspect of human nature that comprises the capacity ‘to make’ and to recognize a thing as a *made* thing. When a human agent engages in remaking a bed through their own creative agency (by making it into something new or by making it perform in new ways), they are participating in the performative work of the original maker of the bed and participating in the performative work of the bed itself as artefact. On a similar note, Fleur Johns has observed that ‘[t]he prospect of remaking an object often seems loaded with promise that the relations and routines with which it is identified might change also’,⁹ citing Bruno Latour’s hope for ‘an exchange of properties between human and non-human actants’.¹⁰ It matters not that the original maker of the bed has died, for the bed, once made, communicates its internalized human nature to all-comers. It whispers, ‘I am pieces of wood’; but it shouts, ‘I am a bed! A human made me to be a human thing for human doings’. An old riddle asks, ‘what is made only once and made every day?’ The answer is ‘a bed’. We can now add that the bed *makes* every day, because it makes humans feel and behave in a variety of ways, and this is in large part because it has been invested with the Making Sense that it was made for humans and is open to human re-Creational and co-Productive participation.

Going to the Ball

In his poem ‘Anecdote of the Jar’,¹¹ Wallace Stevens shows his appreciation for the potent way in which a commonplace human-made object, when placed in relation to human perception, can generate a strongly persuasive, even compelling, rhetorical performance.¹² The poem explains how the jar ‘took

⁹ Fleur Johns, ‘Things to Make and Do’, in Jessie Hohmann and Daniel Joyce (eds), *International Law’s Objects* (Oxford: Oxford University Press, 2018) 47–56, 53.

¹⁰ Bruno Latour, ‘On Interobjectivity’ (1996) 3(4) *Mind, Culture, and Activity* 228–245, 240.

¹¹ John N. Serio and Chris Beyers, *The Collected Poems of Wallace Stevens* (the corrected edition) (New York: Vintage Books, 2015). Originally published 1954.

¹² This section draws on my chapter ‘Reading Materials: The Stuff that Legal Dreams Are Made On’, in Julen Etxabe and Gary Watt (eds), *Living in a Law Transformed: Encounters with the Works of James Boyd White* (Ann Arbor: Maize/Michigan University Press, 2014) chapter 9.

dominion everywhere' so that the wilderness was 'no longer wild'. As with wood made into a bed, a jar placed on a hill imbues wild nature with human nature. It strikes human observers as being a thing made by human hands and as such compels the question 'what do you make of me?' In the moment of connection between the human observer and the made object, the mere object is transformed into a thing. The genius of Stevens' insight is that he perceives that a *made thing* imbued with human nature and installed by human hands acquires its own nature as a *making thing* – 'It made the slovenly wilderness / Surround that hill' (emphasis added).

Through the cycle of Artefaction – the made thing becoming maker – physical matter can persuade us and compel us. We are obedient, often blithely obedient, to the power of made stuff. In Stevens' word it takes 'dominion'. It does this because the maker who first engaged with the stuff was engaged in 'art' in its etymological sense of 'joining to', and this entails a sort of ordering (recall that 'art' and 'order' are both *ar** words) that compels the human observer to 'join' with the human nature of the made thing. Naturally occurring stuff that has not been made by human craft frequently exerts a strong effect upon us (think how our mood can change when we encounter the natural beauty of flowers, birds, butterflies, streams, shells, and stones), but the persuasive aspect of an encounter is more intensely focused where the material thing is also a human-made thing, or is a found object that strikes us as being a thing of special human interest.¹³ Many of us, upon finding a stone or some other small obstacle in our path, will kick it away rather than step over it. The stone in such a case strikes us as being an object to engage with. If the obstacle is a football – a human-made artefact imbued with a particular purpose (to be kicked) – the urge to kick is even stronger. Suppose that Jack kicks a ball. Leaving aside for one moment the distinction between a thing and an object, we tend to say that the ball in our example is an object that has been kicked by Jack, the subject. We naturally think of Jack as the subject of the story, and so he is. However, we also assume that Jack, because he is the human subject of the scene, is the active and powerful party and that the ball as object is inanimate and powerless. This is only partly true. We can regard Jack as the subject because he throws the object under his dominion ('subject' being derived from *sub-* 'under' and *jactus* 'thrown'), but it also makes sense, and arguably more sense, to say that Jack is subject to the object, because he is thrown under the power of the ball.

When Jack kicks a ball, it is because the ball struck him first. Jack acts against the ball because the ball has already been thrown against his senses and his attention. To put it another way, Jack's subconscious mind recognized the human nature and purpose in the human-made artefact and threw the object against his

¹³ On 'objets trouvés' see Joseph Vining, 'Meaning in the Natural World', in Julen Etxabe and Gary Watt (eds), *Living in a Law Transformed: Encounters with the Works of James Boyd White* (Ann Arbor: Maize/Michigan University Press, 2014) chapter 8.

conscious mind. The ball is under Jack's conscious power but at the same time Jack is subconsciously under the power of the ball and under the compelling 'ballness' that its human maker imparted to the ball's constituent materials. Aristotle said, in a similar vein, that when an animal moves towards food, the active party is the food, for 'many movements within the body are determined by changes in the environment, and some of these movements prompt conceptions or impulses which in their turn stir the whole animal'.¹⁴ If foodstuffs stir us into action, think how much more attractive and persuasive basic foodstuffs become when they are made up into a plate of fine cuisine. Cuisine compels us not only by the assurance of sustenance, but by the sense that another human is holding out the promise of pleasure through the artefact of the dish.

Owen Barfield had this to say about the life of a thing in terms of the human nature invested in it:

[W]hat is it that makes the form of a play or a poem into a real solid *thing*, something to be reckoned with, something that is able, so to say, to send a little shiver down the back? What is it that gives life to a work of art? It is, that the unity which is at the base of its form is itself a real being. At the lowest it must be a part of the author's own finite being, informed with his own life, so that if you prick it it will bleed. At the highest it will be something altogether beyond any one personality. But it will be a being, not an idea.¹⁵

The 'being' of a play does not thrive until it is looked upon. A play-script that remains hidden in a forgotten volume is powerless to perform. Despite this, it remains a living thing because it retains the capacity to perform, like a seed that is viable even as it lies dormant for centuries or frozen for millennia in permafrost. A jar on a hill in Tennessee or treasure buried underground is meaningless matter until a human encounter makes it matter again. Barfield rightly cautions that the life of a made thing should be appreciated as something larger than the residual life of its maker. What makes the thing a thing as opposed to a mere object or commodity is that the maker and the material have a relationship. The artisan works their own life into the material, but at the same time they work out the life of the material. The resulting artefact is genuinely a new thing. It is the progeny of the life of the artisan working in harmony with the life of the material. We might call this the 'Pinocchio effect', after the tale of the wooden puppet that came to life because the artisan who made it poured his art and heart into wood that already had a magical life and voice of its own. Through the relationship intrinsic to their craft, the artisan brings life to their material and brings out the life inherent in their material. The artefact then has a life capable of bringing forth life, just as Pinocchio, in one of his first frolics, ushered forth a living bird from an egg he intended to fry.

¹⁴ Aristotle, *Physics*, Vol. 2, Books 5–8, P. H. Wicksteed and F. M. Cornford (trans.), Loeb Classical Library (Cambridge, MA: Harvard University Press, 1957) 291.

¹⁵ Owen Barfield, *Romanticism Comes of Age: Essays on the Creative Imagination* (1931) (Oxford: Barfield Press, 2012) 125.

At the risk of indulging an autobiographical perspective, the story of Pinocchio supplies a surprising but lively analogy to the Artefaction of an academic opinion by a legal scholar. The analogy begins with the observation that the academic jurist works with the wood of the law. The law's wood is mostly deadwood that serves to give skeletal structure to the outer, living layer of the law. The legal scholar is, or should be, always concerned with that living layer in the hope of bringing out the life of the law with a view to influencing future growth. With this aim in mind, an academic jurist might carve out a law with human shape, but they have no power to give it life or to bring out the life that is inherent within their legal material. It falls to judges to animate the scholar's idea with the life force of the law, which has its source in the almost magical force of the judge's authority. The analogy is enhanced by the old rule of English law which states that a legal textbook could be cited to a court only after the academic author had died, for that rule in effect recognized that the academic opinion was material that could make things happen only in co-Productive partnership with the judicial power to make law. The standard justification for the old rule was that a court applying the words of a dead academic does not risk being embarrassed by that writer changing their mind.¹⁶ A similar old rule in American courts, according to Judge Cardozo's report of John Henry Wigmore's complaint, was that 'courts were unwilling . . . to refer to the masters of juristic thought unless the products of their labor were published in a volume. Anything *bound* might be cited, though wrought through no process more intellectual than the use of paste pot and scissors.'¹⁷ In other words, according to the old rule the scholar must have incontrovertibly completed the carving of their puppet idea before the judge could animate it with the living force of legal authority. The magic of legal authority simply didn't work with an academic work in progress. The old rule no longer applies with its former strictness. Exceptions were discussed in the American context in the second impeachment proceedings brought against Donald Trump, where one of the US House of Representatives managers bringing the prosecution cited the academic opinion of one professor, despite noting he 'changed his long-held views on the subject less than a month ago'.¹⁸ Increasing academic participation in the co-Production of the artefact of law can be appreciated as a rarefied instance of the same social movement towards devolved social authority that we see at work in the user-generated artefacts of Web 2.0 – Wikipedia, the comments sections on online news articles, etc. – and in the 'your opinion matters to us' culture of consumer feedback and review.

¹⁶ Alexandra Braun, 'Burying the Living? The Citation of Legal Writings in English Courts' (2010) 58(1) *The American Journal of Comparative Law* 27–52, 44.

¹⁷ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 13–14.

¹⁸ *Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump* (2-2-2021) 49.

In Praise of Underwater Basket Weaving

Two world wars and the rise of the automotive industry have brought about an irresistible and seemingly irreversible movement towards mass production. Morris & Co – a paragon of the Arts and Crafts movement – was killed off early in World War II, its handsome doors closing for ever in 1940. Manual crafts were thereafter diverted from the serious world of useful and productive industry into the world of the luxury boutique and the sleepy backwaters of recreational pastime. Craft even became a joke, as exemplified in the phrase ‘underwater basket weaving’, which since the mid-twentieth century has been a pejorative catch-all term for any utterly pointless subject studied at university. At a time when engineering was aspiring to supersonic and extraterrestrial travel, the indigenous craft of basket weaving was an easy target. The fact that it really does involve soaking reeds under water suggested, perhaps, that it was the antithesis of contemporary endeavours to rise above the constraints of the earth’s gravity and atmosphere. The ease with which the ‘basket weaving’ insult took hold on the popular imagination, and its endurance ever since, is revealing of the inexorable rise of machine technology and the corresponding decline, both in practice and respect, of older forms of manual *technè*. Today’s university-attending masses are adept in computer technology, but one suspects that few have any notion of how to execute the techniques of a traditional handicraft. The school registers of the Anglophone world might still contain such familial names as Cooper, Glover, Smith, Tanner, Wright, and Webster, but precious few, if any, will still be in the business of making barrels, gloves, nails, leather, wheels, and textiles. The same is doubtless true across the technologically developed world.

Technological development is progress that brings a great many gains, but it is accompanied by a costly regression in human connection to the material world and the dignity of working by making. That so many surnames were once indicative of medieval manual crafts indicates how closely making stuff was once tied to making social identity. We welcome the freedom that has allowed us to break the bonds which used to tie whole families to the fates of guilds and particular trades from generation to generation, but we have found nothing to replace the positive aspects of social place and productivity that such bonds supplied. Nowadays, we rarely encounter the artisan on the modern high street. Instead, outlets are devoted to the retail of mass-produced goods. It is encouraging to see artisans presenting their wares online through sales platforms like Etsy, but such online communities are a poor substitute for the full sensory experience of seeing a maker in their physical workshop. Today we see the shop but not the work. Tourist hot-spots like Florence have been able to sustain the old tradition of presenting specialist artisans at work in boutique studios, where all manner of things – paper, etchings, bindings, stucco, jewellery, handbags, shoes, perfumes – are expertly made by hand, but elsewhere the tradition of artisans and their apprentices is largely dead.

If the Industrial Revolution commenced the decline of artisan life in the so-called developed world, World War I confirmed it. For a poignant study of a craftsman who commenced his working life around the end World War I and whose profession eventually succumbed to the general decline in handicraft, the reader might consult the 1978 documentary *Albert's Last Skep*.¹⁹ It records the complex sequential processes by which seventy-three-year-old Albert Gaff, who had by then worked for sixty years in the Bradford textile industry, hand manufactures a large skep (a type of basket) from woven wands of white and buff willow wood. The purpose of the finished article was to carry bobbins of thread and other accoutrements of the textile trade; a function that is now performed by cardboard boxes and plastic bags. The documentary is riveting, right up to the last step in the structural build – which is the actual riveting of metal bolts to hold two wooden planks or ‘shoes’ to the base of the skep. The first stage in the process is the selection of slender willow rods that are left to soak overnight (making this is a species of ‘underwater basket weaving’). There follows a hypnotic manual dance of strenuous but graceful pulling, pushing, twisting, cutting, stabbing, threading, wrapping, tapping, turning, measuring, spinning, and boring. There is even, at one stage, a mouthing to moisten cut ends. Tools are used, including a bodkin, a knife, an axe, and a device called the ‘director’ which sets the wands right. Mostly, though, Albert uses his bare hands. He even uses the chopping edge of his palm to tamp down gaps in the weave, as if wielding the blunt back of an axe head. His manual craft is one that few other hands could manage, and Albert didn’t learn it from any manual. As filmmaker and narrator Eric Hall says at one point, ‘I doubt if Albert has ever seen any printed instructions on skep making, yet it is quite obvious, when finished, this skep will be perfect in size, shape, and workmanship’ (17’48). The skep is indeed a thing almost as beautiful as it is useful, and its beauty resides as much in the making process and in the relationship between artisan and artefact as in the thing as final product. The product is comfortably large enough and strong enough to carry and enclose its maker within the matrix of its woven walls, and robust enough to have a working life almost as long as Albert’s own. No cardboard box or plastic bag has such beauty or useful longevity. If he were still working today, his craft might almost be considered a form of environmental activism akin to the ‘craftivism’ by which feminist protestors have employed knitting and crochet to perform resistance to perceived patriarchal power.²⁰

Considering the undoubted gains that accompany machine technology and mass production, it can seem Luddite to allude to accompanying losses. The

¹⁹ *Albert's Last Skep* (dir. Eric Hall, 1978). At the time of going to print the film is available free online through the Yorkshire Film Archive and the British Film Institute.

²⁰ See, for example, Helen Warner and Sanna Inthorn, ‘Activism to Make and Do: The (Quiet) Politics of Textile Community Groups’ (2022) 25(1) *International Journal of Cultural Studies* 86–101.

main loss, which goes hand in hand with technological progress, is the loss of immediacy between hand and thing. Where once we manipulated stuff with our hands or by means of handheld tools, our engagement with the world is now increasingly mediated by tools that give us no sense of the satisfying strain of working with stuff. In the twenty-first century, our engagement with technology has even evolved in some respects to become utterly hands-free. With such innovations as voice activation, retinal-recognition, and blink-controlled or brainwave-controlled environments, we have taken our first steps into a post-manual world. This is entirely to be welcomed on behalf of users who lack standard physical capacities, but for the majority there is surely a danger that something valuable in the working connection between hand and mind will be lost. If and when that loss becomes total, we may wonder how sapient *Homo sapiens* can claim to be if, having the skill to put a man on the Moon or a woman on Mars, the species were to let slip from its hands the humble crafts that put a hand-made basket on a hand-made table.

Already the communal memory of many manual crafts is for the most part lost in so-called hi-tech societies and would have to be learned afresh – not, one would imagine, from a paper manual or through long apprenticeship to an expert, but from online instructional videos on YouTube. Video tutorials are actually a hopeful development in all this, for they show that the appetite for handiwork has not left us as a species but has simply been sublimated to electronic substitutes. In our technological world, manual skills of making have not become extinct, but have evolved into new forms, in something like the way that certain dinosaurs survived the demise of the great lizards to live on as birds. Our manual skills and our mental schemes for processing manual making have simply undergone ‘a sea-change / Into something rich and strange’ (*The Tempest* 1.2.401–402). Where we used to work on nets, we now network; where we used to process textiles, we now use word processors and send texts; where once we were ‘websters’ (those who weave), today we have woven a World Wide Web to live and work within. The cultural anthropologist Tim Ingold notes, citing the work of Henry Hodges, that skills of weaving cloth might have originated in weaving baskets, which in turn might have been derived from net-making.²¹ If that is the case, it would be naive to suppose that after millennia of handiwork our brains have ceased to make connections and to handle matters the old-fashioned way. Even our new ways of social networking on the internet might owe more than we think to older forms of net-making. After all, we must still make fine assessments of appropriate spacing, tolerances in the threads by which we are connected, and

²¹ Tim Ingold, ‘Making Culture and Weaving the World’, in Paul Graves-Brown (ed.), *Matter, Materiality and Modern Culture* (Abingdon: Routledge, 2000) 50–71, 63; citing Henry W. M. Hodges, *Artefacts: An Introduction to Early Materials and Technology* (London: John Baker, 1964) 147.

tightness in the knots that bind us together. Online networking still needs to be handled with careful skill.

Weaving Cultural Fabric

It is frequently objected that we are nowadays too ready to judge by feelings rather than logic, but it would be foolish and futile to exclude sensory considerations from our assessment of whether something *feels* right or wrong. Our innate sense of feel is located not only in the limbic zone of our brain (the so-called lizard brain) but in the region where our greatest artefact – the linguistic word – resides. If we were to try to give a rational account of why we ought to exclude feelings from our judgment of the world, we would inevitably find that every good sentence and fine phrase in our account would be formed through sensitivity to shape, form, weight, and balance. The collection of the British Museum contains the teardrop-shaped blade of a 5,000-year-old jade hand axe, roughly equivalent in size to a modern tablet mobile phone. It was the cutting-edge technology of its day. Commenting on this exhibit, Neil MacGregor, a former director of the British Museum, notes that modern brain-scan technology has revealed that when humans hone a stone into a blade, the part of the brain that is stimulated is the part concerned with language and speech.²² Does this mean that honing a stone is like honing a sentence? Yes, but equally that the process of forming a sentence resembles the process of forming a tangible tool. If a sentence has a sound shape and is fit for purpose, we should credit its pleasing form to the same fundamental qualities that make for a pleasing material object. There may be something in the sense that a statement is finely formed, well-balanced, and weighty that still owes a great deal to our primal appreciation of handheld stuff.²³ In short, our ability to make a speech may be indebted to our ability to make a physical artefact.

Owen Barfield notes that ‘all our words for mental processes – “grasp,” “conceive,” “understand,” etc. can be traced back historically to an earlier stage when they also signified a material process’.²⁴ We can therefore expect that the ancient manual work of networking and weaving is even today inextricably linked to the way our brains think about the world. The predominance of textile imagery in our language suggests as much. Take, for example, the following words of American Judge Benjamin Cardozo in his 1924 book *The Growth of the Law*:

²² Neil MacGregor, *A History of the World in 100 Objects* (London: Penguin, Allen Lane, 2010) 17.

²³ Or mouth-held stuff: ‘Early humans may have evolved the ability to speak after using their mouths as a “fifth limb” to hold food and manoeuvre tools in trees’ (Sarah Knapton, ‘Secret of how humans gained the ability to speak’, *The Telegraph*, 20 Dec 2022).

²⁴ Owen Barfield, *Speaker’s Meaning* (1967) (Oxford: Barfield Press, 2011) 32.

We must know what law is, or at any rate what we mean by it, before we can know how it develops. Isolate or try to isolate this little patch upon the web of human thought, and you will be given some hint of the unifying threads that are shot through the fabric of our knowledge.²⁵

Weaving is so fundamental to our deepest notions of working in the world that Tim Ingold suggests we should regard making as a way of weaving rather than regard weaving as a way of making. For Ingold, weaving is the larger concept because:

[‘Making’] defines an activity purely in terms of its capacity to yield a certain object, whereas weaving focuses on the character of the process by which that object comes into existence. [. . .] Where making (like building) comes to an end with the completion of a work in its final form, weaving (like dwelling) continues for as long as life goes on – punctuated but not terminated by the appearance of the pieces that it successively brings into being.²⁶

It will be clear from my own project to revitalize distinct Etymologies and Modalities of making that I concur with Ingold’s opinion that the word ‘making’ isn’t up to the job, but my solution is to enlarge the concept rather than to relegate it. Ingold’s concern that making is limited to outcomes evaporates when illuminated by the light of the distinct Etymologies of Making, for they reveal that Production is only one aspect of making; and that Production is certainly not limited to yielding objects, still less marketable commodities. Neither does Production stop at any fixed moment of output. Products are continually remade through cultural practices of co-Production, re-Production, and re-Creation. The horticultural analogy extends beyond the Production of a crop to the planting of seeds from that crop. The theatrical analogy extends beyond the first Production of a play to every new Production arising from the original text.

Still, Ingold’s emphasis on process over output is an important one. On this point he has an ally in the educationalist Dorothy Heathcote who, before she became a drama teacher and authority on drama education, had followed her mother into the trade of weaving. She pursued that craft in a West Yorkshire woollen mill throughout her formative years from age fourteen to nineteen.²⁷ Heathcote was deeply impressed by the need for education to give children a part in the making process. As a child born in 1926, she belonged, as she put it, ‘to the last generation of those who saw people “forming” or “making” in the streets on my way to school – engaged in shoeing horses, herding beasts to the butchers, baking bread, making useful wooden objects,

²⁵ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 27–28.

²⁶ Tim Ingold, ‘Making Culture and Weaving the World’, in Paul Graves-Brown (ed.), *Matter, Materiality and Modern Culture* (Abingdon: Routledge, 2000) 68.

²⁷ Cecily O’Neill (ed.), *Dorothy Heathcote on Education and Drama: Essential Writings* (Abingdon: Routledge, 2014) 150.

blowing glass'.²⁸ She lamented that '[s]o much is hidden now behind factory doors and technology',²⁹ and especially that children have been made 'toys of society when small' and 'exploited . . . shamelessly as consumers when large', while denying them the power to 'produce' or 'assist in the fabric of culture-making'.³⁰ There is no reticence here about the desirability of Production, but she does stress that the product should not be allowed to obscure the making processes that bring it about:

[I]f our purpose is to release the energy then we cannot afford to work only to the finished product. Certainly we must make opportunity for the product to be concluded, probably with an audience, however small, but we must not overlook the fact that it is the making of the drama which is going to contribute most to the growth of the child. Therefore, we are concerned not with rehearsal for the event, but with 'living through'.³¹

Heathcote's related idea of 'productive tension' works by agreeing an outcome in advance and thereby dispensing with the need to press on impatiently towards a final output. The problem is that when 'everyone is trying to reach resolution, they rush towards resolving the dilemma', whereas by 'knowing the outcome they all create the dilemma at a pace they find reasonable'.³² She gives the example of a group of nine-year-olds in Birmingham who play-acted locals seeking a child abducted from a supermarket. By agreeing in advance that the child was still alive, the drama produced tension when the search party discovered where the abductors were holding the missing child. Another example of an outcome revealed in advance with the aim of increasing dramatic tension is the use of plot spoilers early in a film or play. A classic instance is Shakespeare's *Romeo and Juliet*, where the prologue reveals within the first few lines that the title characters will both die by suicide: 'A pair of star-crossed lovers take their life' (line 6). (We can note in passing that part of the dramatic power of that prologue resides in the sense of making and manual touching that is conjured poetically by the triplicate assonance of three verbs all in a row – 'break', 'makes', 'take' – in conjunction with the concluding word of the prologue, which is the making verb 'mend'.) The word 'Tragedie' in the play's title as originally published was itself a spoiler regarding the fates of the title characters, and that's the point of genre and title – it gives the game away, but in doing so allows the audience to join in the game more fully from the start.

²⁸ *Ibid.*, 152. ²⁹ *Ibid.*

³⁰ Dorothy Heathcote, 'The Authentic Teacher and the Future', in Cecily O'Neill (ed.), *Dorothy Heathcote on Education and Drama: Essential Writings* (Abingdon: Routledge, 2014) 94–107, 105.

³¹ Dorothy Heathcote, 'Drama as Challenge', in Cecily O'Neill (ed.), *Dorothy Heathcote on Education and Drama: Essential Writings* (Abingdon: Routledge, 2014) 80–89, 81.

³² Dorothy Heathcote, 'Productive Tensions', in Cecily O'Neill (ed.), *Dorothy Heathcote on Education and Drama: Essential Writings* (Abingdon: Routledge, 2014) 55–61, 61.

Heathcote had a weaver's appreciation for the material crafts of dramatic making. She appreciated the metaphysical possibilities that always live alongside processes of making:

To dramatize is instinctive. It belongs not to the artificiality of the first night theatrical production, to the so-called 'practices of the night' in a school production, to the painted books on the stage flats and the wine-gum jewels on the ladies costumes; it lies in the nature of a man to at once escape from his own existence and to learn from the events he sees, reads and hears about by sharing the emotions conjured by the author. We are thereby given fresh acquaintance with mankind.³³

Abstract Things

Made things can exist inchoately in pure abstraction. This is so even in the hard-nosed business of the law. In *The Case of Sutton's Hospital* (1612), which helped establish the modern concept of the legal corporation, it was held that a corporation (the hospital) warranted the name of corporation even though it had not yet been built. It was reasoned that a legal corporation never has physical existence at all and therefore exists as much in abstract intendment as it ever does in concrete matter. The hospital was a corporation 'created and instituted by the King's Charter' so that any person might make a grant to its human representatives 'before any foundation laid'.³⁴

Unlike a book, which must appear in physical form if it is to be read, a legal corporation can do a great deal of work as an intangible abstraction. A hospital corporation might be represented in a hospital building or it might not. The physical representation affects the performative capacity of the corporation, but it has no effect upon the essential existence of the corporation one way nor another. Sir Edmund Coke, the judge in *The Case of Sutton's Hospital*, put it this way:

[A]n Hospital in expectancy or intendment, or nomination, shall be sufficient to support the name of an Incorporation, when the Corporation itself is onely *in abstracto*, and resteth onely in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law.³⁵

The point is that a great deal of the performance of which a legal corporation is capable is performance of an intangible sort. Indeed, a corporation can perform nothing tangibly in the physical world except through the agency of human actors. The same possibility of non-physical corporate

³³ Dorothy Heathcote, 'Drama as Challenge', in Cecily O'Neill (ed.), *Dorothy Heathcote on Education and Drama: Essential Writings* (Abingdon: Routledge, 2014) 80–89, 81.

³⁴ (1612) 10 Co Rep 23a. ³⁵ *Ibid.*

existence explains why, when an incumbent king or queen dies, the monarch does not.³⁶

Making Money

The phenomenon of things being made and existing in abstraction is especially acute in the economic context, for this is a context in which the language of Creation (e.g. ‘wealth creation’ and ‘economic growth’) has been used to describe the increase of a thing – money – that has no physical capacity to grow and which exists almost entirely in the absence of physical expression. Most monetary transactions entail the mere passing of electrons from one interface to another. If I ask you in that famous movie line to ‘show me the money’, you simply can’t. You can show me a note, or a coin, or the physical ledger or statement of a bank account, but these are just representations. The money itself is something else – at base nothing more than a notion of credit and confidence. If you doubt it, let me show you a discontinued hundred-year-old banknote and then tell me with a straight face that it is ‘money’. You can’t, because it isn’t. The notes and coins are still there, but the currency has all run out. Money, which has always been a metaphysical mystery, has latterly evolved into a new phase of existence in the form of cryptocurrency. Somewhat counter-intuitively, money has not grown more mysterious through this latest iteration but less so. The express acknowledgement of the cryptic nature of currency has actually made its metaphysical reality more apparent than it ever was in the form of a metal coin. Cryptocurrency is an expression of pure market value in the way that a metal coin – as a sort of alchemical substitute for value – is not.

The unnatural breeding of money from money has been cautioned against since ancient times and is one basis of medieval and renaissance opposition to usury.³⁷ Aristotle expressed his objection in the *Politics* as follows:

The most hated sort [of wealth getting], and with the greatest reason, is usury, which makes a gain out of money itself and not from the natural object of it. For money was intended to be used in exchange but not to increase at interest. And this term interest [*τόκος*], which means the birth of money from money is applied to the breeding of money because the offspring resembles the parent. Wherefore of all modes of getting wealth, this is the most unnatural.³⁸

This quotation takes us full circle to the start of this chapter where we noted that the capacity for self-generation is central to Aristotle’s definition of

³⁶ The crown or monarch is a ‘corporation sole’ – the corporate person being vested at any given time in a single natural being – whereas the hospital corporation is, as Coke says in *The Case of Sutton’s Hospital*, a ‘corporation aggregate’.

³⁷ Gary Watt, ‘Breed of Metal and Pound of Flesh: Faith and Risk in Metaphors of Usury’ (2007) 2 *Pólemos* 95–116.

³⁸ Aristotle, *Politics Book One 1258b*, Benjamin Jowett (trans.) (Oxford: Clarendon Press, 1885).

‘natural’ things, hence Aristotle was opposed to usury of any kind on the ground that money is sterile and cannot naturally breed. And yet, Aristotle’s objection to unnatural breeding sits uneasily with the fact that humans make many things which have no existence at all in a state of nature, and humans cause many things to breed which if they have a natural state at all is a sterile one. We might think of robots that make robots, and of laws that make laws.

The Law unto Itself

Law is made through human Artefaction and the artefact of law, once made, engenders new law. The very nature of law, as a thing made by human craft, is to breed. It breeds spontaneously. It is *autopoietic*, which is to say that it is self-making.³⁹ It proliferates from within on account of the inherent nature of rules, for as soon as a rule is stated it breeds an exception, a subclause, or a qualification. The example of the Old Testament shows how a single law – ‘of the tree of the knowledge of good and evil thou shalt not eat’ (Genesis 2:17) – becomes, when broken, *Ten Commandments*, and how those commandments become, through human interpretation and qualification, a hundred and a thousand laws. In his monograph *The Growth of Law*, Judge Benjamin Cardozo quipped that ‘[t]he fecundity of our case law would make Malthus stand aghast’.⁴⁰ (Thomas Robert Malthus was the economist and demographer who first demonstrated the problem of population growth as a demand on the earth’s limited resources.) I will not indulge the stereotypical complaint that lawyers deliberately exploit the growth and complexity of laws to increase demand for their services, but there is some truth in Tim Murphy’s observation that ‘law makes the law. Decisions create the possibility for further decisions but do not make anything happen in the world.’⁴¹

It is a conundrum to know whether it is more accurate to say that human societies are subject to laws or that laws are subject to human societies. Like the question of the chicken and the egg, the answer is to be found not by asking the question in the abstract but by asking it of a particular moment in time. There is a lag between law-making and law-abiding which means that today’s society is bound to abide by laws made by yesterday’s law-makers. This is precisely what we would expect from the craft of law, for, as Brett G. Scharffs observes in his article ‘Law as Craft’, ‘crafts are defined by their past’.⁴² When Owen Barfield wrestled with the conundrum of law’s relationship to society

³⁹ Discussed in [Chapter 4](#).

⁴⁰ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 4.

⁴¹ Tim Murphy, ‘Legal Fabrications and the Case of “Cultural Property”’, in A. Pottage & M. Mundy (eds), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2004) 115–141, 124.

⁴² Brett G. Scharffs, ‘Law as Craft’ (2001) 54 *Vanderbilt Law Review* 2243–2347, 2243 (abstract).

and time, he also found the solution in the craft of fiction, which he parallels to law's function of making society:

Life varies, law is of its nature unvarying. Yet at the same time it is the function of law to serve, to express, and indeed partly to *make* the social life of the community. That is the paradox, the diurnal solution of which constitutes the process called society. One solution is legislation, the other is fiction. Legislation is drastic, *a priori*, and necessary. Fiction is flexible, empirical, and also necessary.⁴³

Artefaction requires us to acknowledge the dimension of time, and attending to Artefaction can therefore assist us with the puzzle of law's present existence as a thing of the past. Artefaction encompasses the process by which humans made the artefact as well as the process by which the artefact – at the time of being made and also subsequently – makes humans behave in certain ways. Artefaction therefore embraces us in an endless cycle of making and re-making and this is why the law – a supreme example of Artefaction – maintains a perennial hold upon societies. As Cardozo wrote, '[e]xisting rules and principles can give us our present location, our bearings, our latitude and longitude', but '[t]he inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow.'⁴⁴

⁴³ Owen Barfield, 'Poetic Diction and Legal Fiction' (1947), republished in *The Rediscovery of Meaning and other Essays* (Oxford: Barfield Press, 2013) 63–93, 86.

⁴⁴ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 19–20.

Part II

The Truth Factory

The Truth Factory

Crafting Fact and Law

[G]reat legislation to protect civil rights and economic security and lead the world was debated and crafted under this dome.

Senator Amy Klobuchar, introducing President Joe Biden's Inaugural Address
(The Capitol Building, 20 January 2021)

[W]e must reject a culture in which facts themselves are manipulated and even manufactured.

President Joe Biden, Inaugural Address (The Capitol Building, 20 January 2021)

These two statements – one declaring pride in ‘crafted’ laws and the other expressing suspicion of ‘manufactured facts’ – elide an important detail: that every law *is* a social fact. Every time a new law is crafted, a new fact is manufactured. A. V. Dicey observed that legislative opinion is the result of facts more than philosophy, and ‘no facts play a more important part in the creation of opinion than laws themselves’.¹ The consideration that reconciles the statements made by Biden and Klobuchar is concern for how facts are made and by whom. Facts (including laws) which are established through reliable and rigorous processes conducted by accountable and capable people are unobjectionable. This, after all, is the very reason why we tend to trust facts established by scientific experts. It all comes down to the quality of the factory in which the fact is made, and this, to put it another way, is a question of whether the author has authority, for ‘[t]o understand why anyone is taken to be an epistemic authority – an authority on truth – it is vital to understand what authorises them’.² In the quotation at the top of this chapter, Senator Amy Klobuchar was referring to law-making as a craft carried out by the legislature. This is in a long tradition going back to Plato’s *Laws*, where he ‘compares the lawgiver to the shipwright who constructs a sturdy sea vessel’.³

¹ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905; 2nd ed. 1914), Richard Van de Wetering (ed.) (Carmel, IN: Liberty Fund, 2007), 350.

² Julian Baggini, *A Short History of Truth: Consolations for a Post-truth World* (London: Quercus Publishing, 2017) 22.

³ Plato, *Laws* (7.803b), cited in Leslie Paul Thiele, *The Art and Craft of Political Theory* (London: Taylor & Francis Group, 2018) 176.

The ship of state appears in another form as a significant expression of the constitution of First Nations people in Canada where, by valuing the process of making a cedar wood canoe, the canoe itself is credited with shaping the values that make the community that crafted it.⁴ We will touch again upon law-making in the legislative context, but most of our attention will be focused upon what I call the ‘Truth Factory’ of the legal trial. It is in that context that the skill of law-making is most like a craft, because it is here that the judge as artisan encounters and grapples with the social materials that are the practical contingencies of people’s lives.

Truth Factory is a convenient label to describe the fabricating activities of all systematic contexts in which truths are constructed, but when a legal trial works well it is actually more akin to a workshop in which expert artisans conduct their craft through bespoke processes of Artefaction. We will see later in this chapter that judicial law-making has frequently been likened to arts and crafts of various sorts, from minting coins to writing novels. Significant as this is for demonstrating the reality of the law’s fabricating processes, the aim of this chapter is to go deeper than drawing analogies between judicial art and handicrafts. The deeper aim is to challenge the assumption that the facts and truths established in law courts are ‘found’ and ‘discovered’. It is only by acknowledging that legal facts and legal truths are made by judicial crafts that we will come to appreciate the merits of those crafts and to discern the attributes of truth-making in courts that set the standard by which to judge the quality of truth claims in other contexts.

Post-truth

It is sometimes said that we live in a ‘post-truth’ world in which opinions based on personal emotions are preferred to the opinions of professional experts. The election of Donald Trump as US president in 2016 was identified as being caused by, as well as being a cause of, this truth-casual trend in modern politics. In that year, the same trend was also observable in the debate surrounding the UK referendum to leave the EU, although in relation to ‘Brexit’ the resort to emotion over cold reason was strong on both sides of the debate. It is primarily because of the prominence of truth-casual talk in US and UK politics around the events of 2016 that ‘post-truth’ was chosen as the ‘word of the year’ by the OED in 2016. The word may be new, or newly popularized, but the root of the idea is very old and ‘post-truth’ is not its first modern iteration. The American Dialect Society and the Merriam-Webster dictionary were ahead of the curve in calling out the rhetorical manipulation of truth claims when in 2005 and 2006 respectively they named ‘truthiness’ their word of the year. That word has a longstanding pedigree,

⁴ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

but its twenty-first-century deployment as a description of false truth claims began when Stephen Colbert coined it on 17 October 2005 in the pilot episode of his satirical news television programme *The Colbert Report*. In that episode, with tongue firmly-in-cheek, he said

I'm no fan of dictionaries or reference books. They're elitist! Constantly telling us what is or isn't true, or what did or didn't happen. Who's *Britannica* to tell me the Panama Canal was finished in 1914? If I want to say it happened in 1941, that's my right! I don't trust books – they're all fact, no heart! . . . The truthiness is anyone can read the news to you. I promise to feel the news *at you*.⁵

This expresses comedically the problem that would later come to be known as 'post-truth' thinking, for at the heart of the phenomenon is the rejection of facts in preference for feelings and the prioritization of my right to judge ahead of the judgments of experts. In the years since that pilot episode of *The Colbert Report*, social media have established their place at the core of the post-truth phenomenon. The online court of popular opinion operates as a Truth Factory in which truth statements are generated out of the raw materials of participants' personal points of view and emotional passions. This is the species of fact manufacture to which President Biden was objecting in his inaugural speech, as quoted at the top of this chapter. It was, of course, a thinly veiled rebuke to his predecessor, President Trump.

Legal Trial as Truth Factory

Social media have constituted the so-called court of popular opinion as a new Truth Factory, but the original Truth Factory is the legal trial. The law has traditionally claimed to be in the business of revealing hidden truth through its evidentiary processes – a claim that is clear in the legal vernacular of 'disclosure', 'discovery', 'finding of fact', and so forth – but it is more accurate to describe the legal trial as a process by which truth is made rather than discovered; fabricated rather than found. Law's pretence of being in the business of revealing and discovering truth was illustrated in antiquity by the story of the trial of the courtesan Phryne. Accused of impiety, she was defended by Hypereides, who is numbered alongside such luminaries as Demosthenes, Isocrates, and Lycurgus as one of the great Attic orators (and might also have been numbered among Phryne's lovers). According to one popular retelling, Hypereides' defence of Phryne culminated with him stripping off her clothes in court to reveal her naked breasts as a demonstration of the naked truth of her innocence. This striking and strange performative mode of legal argument was designed to prove that this was a woman with nothing to hide. A more accurate performance of law's processes would have had

⁵ *The Colbert Report*, Comedy Central, 17 October 2005 (clip available in some regions at www.cc.com/video/u39l6v/the-colbert-report-intro-10-18-05).

Hypereides gesturing to the law's civilizing ambitions by covering Phryne's naked nature with cloth. In the words of Thomas Carlyle, 'the Pomp and Authority of Law . . . are properly a Vesture and Raiment',⁶ or to quote my own previous reflections on Carlyle: 'law is dress and dress is law'.⁷ The legal system doesn't discover truths but seeks rather to cover civil disputes with the dignity of a well-crafted decision.

An enduring legal method for establishing reliable facts is the traditional oath 'to tell the truth, the whole truth, and nothing but the truth', which is believed to have its origins in thirteenth-century Old English. Ben Jonson quotes it in his 1625 play *The Staple of News* (Act V Scene II), and it is still a staple of legal performance across the Anglophone world today. The element 'nothing but the truth' purports to strip away artificial coverings from the natural, naked truth and is therefore in the tradition of Hypereides stripping Phryne before the court. The three-part oath is in the form of a rhetorically elegant tricolon with a rising ladder-like quality of *gradatio* or climax. This suggests that it might have endured due to its inherent elegance quite apart from any substantive appeal. It is a highly effective method for constraining witness testimony not only because the formulation practically excludes the witnesses' opportunity to put forward a falsehood but also because a witness who breaks the oath commits perjury and may be punished with imprisonment. Effective though it is, it would be optimistic to suppose that the traditional tripartite oath can produce the actual truth of an event before the court.

Let us suppose that all the witnesses on every side were to present 'the truth, the whole truth, and nothing but the truth' to the best of their knowledge and belief. It is still inevitable that the factual matrix produced by the witnesses will contain inconsistencies caused by variations in point of view, psychological prejudice, and variations in the clarity of witnesses' recollection and expression. Eyewitness accounts are notoriously unreliable despite the great extent to which courts rely upon them.⁸ The court will never receive absolute truth from witnesses. At best it can hope to follow the thread of each witness's account. The task of the court faced with a tangle of these threads is not to pull them out to reveal an underlying naked truth but rather to weave the threads into a plausible account of what *probably* occurred. In most common law courts, probability is established in civil cases between citizens whenever an account of events is more likely true than not, which amounts to proof established on the basis of a higher than 50 per cent chance. This is proof 'on the balance of probabilities'. Clearly, this 'probable account' is a very different creature to the

⁶ Thomas Carlyle, *Sartor Resartus* (*Fraser's Magazine*, 1833–1834) Ralph Waldo Emerson (ed.) (Boston: James Munroe & Co, 1836), Book 3, chapter 9.

⁷ Gary Watt, *Dress, Law, and Naked Truth: A Cultural Study of Fashion and Form* (London: Bloomsbury Academic, 2013) xv.

⁸ Amina Memon et al., 'Münsterberg's Legacy: What Does Eyewitness Research Tell Us about the Reliability of Eyewitness Testimony?' (2008) 22 *Applied Cognitive Psychology* 841–851.

‘absolute truth’ of the event. In criminal cases brought by the state against a citizen the standard of proof is higher. In the United States, facts establishing criminal guilt must be proved ‘beyond a reasonable doubt’, which is based on the traditional requirement in England and Wales that guilt be proved ‘beyond all reasonable doubt’ (although judges in England and Wales now direct juries more prosaically that they ‘must be sure that the defendant is guilty’),⁹ but the law never demands perfect insight of any jury because the law knows that the absolute truth of an event can never be known.

The process of establishing proof through probability is not a process of stripping away, but the quite opposite process of weaving a mesh of evidence (evidence, as the name suggests, being a visible or apparent thing) that will cover the circumstances so completely that one cannot prove it (that is ‘probe’ it) to be false. The court’s process is not to throw off the witnesses’ competing stories, but to weave the text of a new story that is proof against critical probation. The court, in short, establishes proof by weaving its account of what occurred so tightly that it will satisfactorily deflect doubts just as surely as waterproof clothing deflects water and bulletproof armour deflects bullets.¹⁰ The court’s verdict or decision cannot claim to narrate the truth, the whole truth, and nothing but the truth. It can only claim to be the most authoritative account among a range of alternative possibilities. The judge’s authority turns greater than 50 per cent probability into practical reality for legal purposes. Authority – not empirical veracity – is the ultimate assay of the truth of a judicial statement. Suppose that a judge is called upon to determine the colour of a car which the eyewitnesses agree was uniform monochrome, but which one witness swears was black and the other swears was white. The judge in such a case is permitted to find as a matter of fact that the car was grey. This is in effect to say that the judge does not know what colour the car was but will apply the law ‘as if’ the car was grey. For purposes of the legal trial, an authoritative judicial statement of probability has the effect of producing what amounts to a wholly new and freshly forged fact – a fact which in our example of the grey car, as in the example of very many real-life cases, may be strictly speaking inconsistent with all the evidence expressly offered by eyewitnesses. Indeed, judicial findings (makings) at trial are further removed from the past ‘reality’ of events by the fact that findings are influenced not only by the full range of evidence but also by what Robert P. Burns calls ‘normative and political ideals and determinations’, from which he concludes that ‘[t]he trial does not create a single most factually probable screenplay for a past event. It focuses instead on the past for moral-political reasons.’¹¹ The same is true of juries. Burns again:

⁹ *R v Majid* [2009] EWCA Crim 2563.

¹⁰ Gary Watt, *Dress, Law, and Naked Truth: A Cultural Study of Fashion and Form* (London: Bloomsbury Academic, 2013) 51–77, 55, 72–73.

¹¹ Robert P. Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 2001) 199.

[J]uries find a story acceptable – find it true – based on its consistency with its perception of what ought to be done in response to what is most important about the meaningful situation in which it is engrossed, the trial itself.¹²

Judge Benjamin Cardozo has called the deeming process of fact-finding a process of ‘make-believe’,¹³ but this needn’t imply that the facts found are fanciful or false. The judicial function of applying law to facts requires that facts – however empirically indeterminate they may be – must be finalized for the practical purposes of a trial. The law cannot be applied to the facts in the case until those facts have been fixed beyond dispute. Judges concerned to protect the supposed scientific dignity of the law have occasionally pretended that the law is not about make-believe at all. In this vein, one of the UK’s most senior judges once complained that ‘[t]here is something wrong with a state of the law which makes it necessary to create fairy tales’.¹⁴ His lordship protests too much. This is clear from the opening line of the same speech where he observed that ‘140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams’. This might not be the standard opening line to a fairy-tale, but it certainly combines narrative and imagistic techniques. It sounds like the opening to *some* sort of tale. His lordship denied that the law spins a yarn as fairy tales do, but his choice of metaphor undoubtedly assumed that judges are in the synthetic business of tailoring, stitching up, patching, and trying to make the law into an integrated whole. Equally revealing of the fabricating nature of judicial craft is the observation made by another Justice of the Supreme Court of the United Kingdom, who noted in one case that ‘a number of first-instance judges were persuaded that three separate strands of legal doctrine, all largely associated with practice in the Chancery Division, should be spun or plaited together so as to produce a new rule’.¹⁵

Legal judgments are all about making. Facts are *made* to enable law to be applied. This is done in order that decisions may be *made*, and this is done in order to *make* civil peace. Crucial to the ultimate aim of making peace is the need to persuade all immediate participants and the more remote public (or publics plural) of the authoritative and binding nature of judicial pronouncements. In other words, it all comes down to another type of making – what Cardozo called ‘make-believe’. Indeed, we can say that the legal trial is a process of make-believe from top to bottom, for as the overarching aim is to persuade the participants and the public and therefore ‘to make-believe’ in

¹² *Ibid.*, 203.

¹³ Benjamin Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928) 33–34.

¹⁴ *AIB Group (UK) plc v Mark Redler and Co Solicitors* [2014] UKSC 58, per Lord Toulson at para. [69].

¹⁵ *Futter v HMRC Commissioners; Pitt v HMRC Commissioners* [2013] UKSC 26, per Lord Walker at para. [9].

that sense, so also the lowest or foundational activity of determining facts ('the car was grey') depends upon a form of make-believe. Judges are said to be in the business of fact 'finding', but the reality is that legal facts are not found, they are fabricated. John Dewey alerts us to the lawyers' craft of constructing the materials of a case to persuasive effect:

No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts.¹⁶

The lawyer on this view is something like the supplier of building materials, with the craft of constructing the facts and making a judgment falling to the judge and jury. We tend to overlook the materiality of legal language by which tangible ideas are held in our minds, but it is present in such commonplace notions as the judge 'finding' X as a '*matter* of fact', and 'holding' Y as a '*matter* of law', before 'handing down' judgment. The Latin prefix '*In re*' that precedes the official name of many legal cases in common law jurisdictions reminds us that we are always dealing 'in matter'.¹⁷ The word 'law' itself, which is a cousin to 'lag', indicates a thing 'laid down'. Taking law in that sense we find a new significance in one of the central technical tasks of all jurists – judge, lawyer, and scholar alike – which is the skill of 'applying' the law to the circumstances of the case. Considered in this way, this key juristic technique is not far removed from the textile craft of appliqué, by which patches of cloth are stitched onto a field of fabric. Although he didn't say so, this is precisely the species of craft that Cardozo evoked when he wrote of an isolated part of the law being like a 'little patch upon the web of human thought'.¹⁸

It must be emphasized again that fabrication needn't imply falsehood. Even by the light of empirical science, the judge's finding in our example of the car is justifiable on grounds not only of legal but also of psychological probability. Visual perception is such that a grey car on a dark background can appear white, and a grey car on a light background can appear black. That said, a fact established by a duly authorized judge according to the due process of a properly constituted legal trial does not require the authority of science because it has the authority of its own process backed up by the authority of the state. It demonstrates the self-sufficient status of a legally forged fact to note that the judge's (or jury's) decision on a matter of fact cannot be appealed to a higher court, still less appealed to any court of empirical science. As one Court of Appeal judge put it in the jurisdiction of England and Wales:

¹⁶ John Dewey, 'Logical Method and Law' (1924) 10(1) *Cornell Law Review* 17–27, 23.

¹⁷ See, generally, Gary Watt 'Reading Materials: The Stuff that Legal Dreams Are Made on', in Julen Etxabe and Gary Watt (eds) *Living in a Law Transformed* (Ann Arbor: Maize/Michigan UP, 2014) 155–172.

¹⁸ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 27.

'The trial is not a dress rehearsal. It is the first and last night of the show.'¹⁹
(A metaphor that helpfully confirms that trial entails crafts of covering up.)

Judge-Made Truth

In her 2008 PhD thesis, *Trials, Truth-Telling and the Performing Body*, Kate Leader emphasizes an anthropological view of the legal trial as a process concerned with the 'production of juridical truth',²⁰ a process that 'does not "reflect" or reveal authority or "Truth", but rather helps *manufacture* it'.²¹ She cites Pierre Bourdieu for the opinion that '[t]he trial as a live performance must be continually enacted; played out over and over and over again' and that '[t]his repetition manufactures, almost as a by-product, the power of "The Law"'.²² When she identifies 'juridical truth' as 'a field-specific construction',²³ she is saying that the theatre of law is its own domain with its own means of Production.

Leader's idea of 'juridical truth' as 'field-specific' suggests that judges are a truth-making community of the sort envisaged by the Neapolitan rhetorician-jurist-philosopher, Giambattista Vico. As a way into Vico's work, I am indebted to John D. Schaeffer's gloss of Vico's *On the Study Methods of our Time*.²⁴ According to Schaeffer, Vico regarded the *sensus communis* ('a community's common sense') 'to be a synthetic faculty that both creates and judges. It focuses experience and knowledge on a case at hand, resulting in either arguments or figures of speech.'²⁵ That statement can be carried over to describe well the practical craft undertaken within the community of common law judges. Schaeffer notes further that Vico's 1710 work, *On the Most Ancient Wisdom of the Italians*, went on to explain the guiding philosophy for this synthetic doctrine in terms of a sophisticated relation between making, knowing, and truth.²⁶ Vico called this the 'verum-factum' principle, by which he argued that the truth of a thing can only be known if one has made or can make the thing. Schaeffer elaborates:

¹⁹ *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, per Lewison LJ at para. 114(ii).

²⁰ Kate Leader, *Trials, Truth-Telling and the Performing Body* (PhD thesis, University of Sydney 2008) 214, 215, 230.

²¹ *Ibid.*, 82.

²² *Ibid.*, 104. See P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38(5) *Hastings Law Journal* 814–853, 840.

²³ Kate Leader, *Trials, Truth-Telling and the Performing Body* (PhD thesis, University of Sydney 2008) 180.

²⁴ Giambattista Vico, *On the Study Methods of our Time* (1708–1709), E. Gianturco (trans.) (Ithaca, NY: Cornell University Press, 1990).

²⁵ John D. Schaeffer, 'Commonplaces: Sensus Communis', in Walter Jost and Wendy Olmsted (eds), *A Companion to Rhetoric and Rhetorical Criticism* (Oxford: Blackwell Publishing Ltd, 2004) 278–293, 284.

²⁶ Giambattista Vico, *On the Most Ancient Wisdom of the Italians* (1710), Jason Taylor (trans.) (New Haven, CT: Yale University Press, 2010) chapter 7, 103.

Hence humans can know mathematical truth because they make mathematics, but since humans did not make the physical world they cannot know the truth about it; only God, who made the world, can know physics as true.²⁷

Applying Vico's ideas to the common law trial leads to the conclusion that because law is made in a trial by lawyers, judges, and juries, humans are competent to know the 'true' in that context. Or, to put it metaphorically, we can say that because law is made in the Truth Factory of a trial, the people working in the factory are competent (on Vico's view) to confirm the trial product as 'a truth'. Robert P. Burns (adopting James Boyd White's language of constitutive rhetoric) also emphasizes the contextual nature of communal truth construction in a legal trial. He writes that:

[A] trial's linguistic practices, its constitutive rhetoric, are consciously structured to create an almost unbearable tension of opposites that shows forth the practical truth of a human situation. It is the burden of the trial to accomplish a practical resolution of those tensions in a highly contextual and specific way, one that actualizes the practical wisdom implicit in the common sense of the community.²⁸

The Show of Truth

There is a long pedigree to the idea that truth – or at least the best approximation of truth made to serve human purposes – might reside in the manufactured cover, decoration, or show rather than in the discovery of an underlying absolute or natural ideal of truth. The idea of the 'made' truth was established long before Nietzsche answered Pilate's question, 'What is truth?' (John 18:37), by analogizing truth to the adorned surface of a manufactured coin. Nietzsche called truth:

A mobile army of metaphors, metonyms, and anthropomorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid canonical, and binding to a nation. Truths are illusions about which it has been forgotten that they are illusions, worn-out metaphors without sensory impact, coins which have lost their image and now can be used only as metal, and no longer as coins.²⁹

Cardozo employed a similar metaphor in the legal context when he observed that judges work in the 'judicial mint' to stamp 'forms of conduct' into

²⁷ *Ibid.*

²⁸ Robert P. Burns, 'Rhetoric in the Law', in Walter Jost and Wendy Olmsted (eds), *A Companion to Rhetoric and Rhetorical Criticism* (Oxford: Blackwell Publishing Ltd, 2004) 442–456, 442.

²⁹ Friedrich Nietzsche, 'Über Wahrheit und Lüge im außermoralischen Sinne' (1873) ('On truth and lying in an extra-moral sense', in S. L. Gilman, C. Blair, and D. J. Parent (eds), *Friedrich Nietzsche on Rhetoric and Language* (Oxford: Oxford University Press, 1989) 246–257, 250.

'coinage of the realm'.³⁰ If the coinage is creditworthy it doesn't matter for practical purposes that it differs in quality from the gold standard of absolute justice. It is said that justice must be done and must be seen to be done, but in practice it is inefficient and unnecessary to do justice if the appearance of justice is satisfactory.

The idea that a crafted representation might communicate the best practical version of truth was endemic in the thoroughly performative milieu of early modern England.³¹ One of the classical sources for the early modern idea of the true picture or natural art is Horace's line '*ficta voluptatis causa sint proxima veris*'³² ('fictions meant to please should approximate the truth'). Ben Jonson quotes this in his 1631 play *The Staple of News*³³ and as an epigraph to his 1616 play *The Divell is an Asse*. Another precedent for the idea that art might reveal the truth of nature is Petrarch's notion that the office of the poet (*officium poetae*) is 'to demonstrate and glorify the truth of things woven into the decorous cloud of fiction (*veritatem rerum decora velut figmentorum nube contextam*)'.³⁴ Ben Jonson explores the idea of the art of truth in his commonplace book *Timber; or, Discoveries Made upon Men and Matter*.³⁵ (Commonplace books were handheld data-storage devices in which their owners set down thoughts, snippets of conversation, quotations, and images – in some respects an early modern equivalent to the modern mobile phone.) Jonson's epigraph to that work talks of woods (*sylva*) as things of nature, while the *Timber* of the book's title is his term for stuff made from nature by human hands. The theme of 'made nature' is one he returns to throughout the collection. For example, in his entry 'On picture' (*De pictura*), Jonson expresses the notion that artifice has the potential to present the true, acknowledging that representative art is fabricated ('being done by an excellent artificer'), but that despite this '[w]hosoever loves not *Picture*, is injurious to *Truth*: and all the wisdom of *Poetry*'.³⁶ Jonson reconciles the idea of true art with natural truth when he adds that 'Picture is the invention of Heaven:

³⁰ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 32.

³¹ See generally, Garry Wills, *Making Make-Believe Real: Politics as Theater in Shakespeare's Time* (New Haven, CT: Yale University Press, 2015).

³² Horace, *Ars Poetica*, §338, H. Rushton Fairclough (trans.) *Satires. Epistles. The Art of Poetry*, Loeb Classical Library 194 (Cambridge, MA: Harvard University Press, 1926) 478.

³³ Thomas L. Berger and Sonia Massai (eds), *Paratexts in English Printed Drama to 1642* (Cambridge: Cambridge University Press 2014) 570–571, 565.

³⁴ Quoted in Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957) (Princeton: Princeton University Press, 2016) 307; citing Attilio Hortis, *Scritti inediti di Francesco Petrarca* (Trieste, 1874) 33, n.i. In fact, the pertinent quotation from the text of Petrarch's diploma on gaining the laureate of Padua 8 April 1341 is '*poetae officium . . . in hoc esse, ut veritatem rerum sub amoenis coloribus*' ('The poet's job is to ensure the truth of things under pleasant colours').

³⁵ Ben Jonson, *Timber* (1641), Felix E. Schelling (ed.) (Boston: Ginn & Company Head, 1892).

³⁶ Ben Jonson, *Timber or Discoveries*, in C. H. Herford et al. (eds) *Ben Jonson*, Vol. 8, *The Poems; The Prose Works* (Oxford: Oxford University Press, 1947) 1522–1523.

the most ancient, and most a kinne to Nature'.³⁷ In a later section of notes on 'the difference of wits' (*Ingeniorum discrimina*), he writes that the 'true Artificer will not run away from nature, as hee were afraid of her; or depart from life, and the likenesse of Truth'.³⁸

In an entry on poetry and picture immediately preceding *De pictura*, Jonson says that they are both 'borne Artificers, not made. Nature is more powerfull in them then study',³⁹ which is to say that the human nature of making is inherent in human arts of making. The same point (as we noted in Chapter 3) was made by Shakespeare's Polixenes in *The Winter's Tale* when he observed that 'over that art, / Which . . . adds to nature, is an art / That nature makes', so that 'The art itself is nature' (4.4.90–92, 97). Shakespeare, like so many of his contemporary poets and playwrights, frequently expressed (even as he so excellently demonstrated) the possibility of presenting natural truths through performative arts. Hence Hamlet's famous advice to the players who visited Elsinore: 'suit the action to the word, the word to the action; with this special observance, that you o'erstep not the modesty of nature' (*Hamlet* 3.2.17–19). For Hamlet, and we might cautiously surmise for Shakespeare himself, 'the purpose of playing . . . is, to hold, as 'twere, the mirror up to nature' (3.2.24). So ubiquitous was the conceit of natural-seeming (or nature-demonstrating) art that in *Timon of Athens* Shakespeare sends it up in an exchange between a couple of cynical opportunists, a painter and poet, who are seeking Timon's patronage:

PAINTER: It is a pretty mocking of the life.
Here is a touch; is't good?
POET: I will say of it,
It tutors nature: artificial strife
Lives in these touches, livelier than life. (1.1.44–48)

Is Law Declared or Made?

The early modern belief that art reveals nature goes some way to explaining why common law judges in that period could sincerely claim that their function was to declare law rather than to make law. Francis Bacon expresses the so-called declaratory theory of law in the following terms at the start of his essay *Of Judicature*: 'Judges ought to remember, that their Office is *Jus dicere*, and not *Jus dare*; *To Interpret Law*, and not to *Make Law*, or *Give Law*'.⁴⁰ To modern minds, early modern judges' disavowal of law-making can seem disingenuous, but they genuinely believed that their creative arts served to reveal a natural truth; that truth being, in the judicial context, the truth of an extant natural or common law. Allan Beaver observes that judges were

³⁷ *Ibid.*, 1523–1524. ³⁸ *Ibid.*, 772–774. ³⁹ *Ibid.*, 1520–1521.

⁴⁰ Michael Kiernan (ed.), *Francis Bacon, The essays or counsels, civill and morall* (Oxford: Clarendon Press, 2000) 165.

perfectly happy to recreate the law and call it declaration because they understood their role to be one of altering human-made ‘positive law in order to fulfil that law’s purpose, *viz* to realize the natural law’.⁴¹ Opposing that early modern line of thought, Jeremy Bentham epitomizes the turn to modernity and the intellectual enlightenment’s impatience with the playfulness of early modern equivocation. Bentham was bitterly opposed to fictions and utterly rejected their capacity to reveal natural truth. He complained in forthright terms that when judges purport to declare law, they are making new law:

The rule in question, was it then ever declared before? – If not, then in truth and effect, though not in words, the Judge, by whom this rule is declared to be a rule of law, does, in so declaring it, and acting upon it, take upon himself to make a law.⁴²

Whereas the early moderns would happily admit that they were artificially declaring the truth of the natural law, Jeremy Bentham called it a fiction to claim that judges *do not* make law, and vehemently asserted that judges *ought not* to make law. Rules, he said, must have been made by somebody, ‘for laws do not make themselves, any more than *snares or scourges*’.⁴³ Bentham was correct to conceive of judicial arts as something akin to artisanal crafts, but his unimaginative rejection of the possibility that those crafts might express truth ushered in the erroneous belief that enlightened thinkers would henceforth have to choose the reality that judges make law over the lie that judges merely declare law. That stark choice would never have occurred to early modern thinkers because they regarded their skill in declaring law as an art performed in pursuit of truth. Bentham is partly responsible, therefore, for relegating the declaratory theory to the realm of religious mysticism and for laying the historical ground on which Lord Denning would later stand when he said: ‘Judges do every day make law, though it is almost heresy to say so.’⁴⁴

‘Law Made, If Not Also Made Known, Is No Law’

The problem with the stark statements, ‘judges make law’ and ‘judges do not make law’, is that they do not take us very far unless we say what we mean by ‘make’. Accordingly, the next challenge is to decide how to characterize juridical fact-making and law-making in terms of the three Etymologies of

⁴¹ Allan Beever, ‘The Declaratory Theory of Law’ (2013) 33(3) *Oxford Journal of Legal Studies* 421–444, 425.

⁴² Philip Schofield and Jonathan Harris (eds), *Legislator of the World: Writings on Codification, Law and Education (The Collected Works of Jeremy Bentham)* (Oxford: Clarendon Press, 1998) 126.

⁴³ *Ibid.*

⁴⁴ Lord Justice Denning, ‘Reform of Equity’, in Charles J. Hamson et al. (eds), *Law Reform and Law Making: A Reprint of a Series of Broadcast Talks* (Cambridge: Heffer, 1953) 31.

Making – Invention, Creation, and Production – that were elucidated in [Chapter 2](#).

We can immediately dismiss Invention as the proper label for the judicial process of finding facts. Invention (from *in venire*, meaning 'in-coming' or 'coming upon') would suggest that facts are naturally occurring things that are found fully formed, so that all that is required is for the judge to recognize them. The contested nature of the trial process and the need for the judge to decide between opposing points of view shows clearly that the judge does not come upon facts in this way. Neither are facts invented in the modern sense that their existence can be attributed to any originating process of discovery or genius inspiration. The judge who says that the car was grey has not imagined that fact out of nothing. The car is grey because one witness says it is black and the other says it is white. 'Grey' is the judge's best practical attempt to reconcile those conflicting accounts.

Judicial fact-making is more properly described in terms not of 'Invention' but of 'Creation' and 'Production'. Juridical facts are Created things because they are made through processes of growth, development, or increase. In our example, the statement 'the car was grey' can be said to have grown in a Creative sense out of the witnesses' conflicting black and white grounds of contention. The American scholar who wrote that 'laws are made in the clash and struggle of litigation' cannot have been thinking of laws 'made' by Invention but must have had in mind making through Creation,⁴⁵ whereby a new thing grows from the former thing. One can see a legal trial as a sort of drama in which protagonist and antagonist together generate something new from their opposing performances, hence Sir Edward Parry's suggestion that trials supply 'the raw material of drama'.⁴⁶ Or, taking the analogy of weaving, we can say that in the judicial loom of the Truth Factory the threads of witness testimonies and opposing counsels' arguments are woven against each other – lengthwise warp against crosswise weft – and thereby turned by the judge into new facts and new legal material. Without constructive opposition there would be no constructive Creation. It is also accurate to describe the making of a juridical fact as making by Production, insofar as the fact is brought forth to the public in the moment that the judge utters it. In any properly constituted trial, even one conducted behind closed doors, there is always a critical audience of sorts. The audience's critical scrutiny may lack power to influence the Production when a judge (or jury) brings forth a finding of fact, but it is still broadly accurate to say that the fact has been made through Production, for had it not been brought forth to critical scrutiny it would not exist as a fact at all. Expressed in terms of a jury's finding of fact arising from the evidence of witnesses, we can say furthermore that the Production of a 'witness fact'

⁴⁵ Joseph C. Hutcheson Jr, 'We Be of One Blood, You and I, of One Law, One Faith, One Baptism' (1949) 20(3) *Mississippi Law Journal* 284–295, 290.

⁴⁶ Sir Edward Parry, *The Drama of the Law* (London: Ernest Benn Ltd, 1924) 18.

becomes a factor in the Creation of a 'jury fact'. As Robert P. Burns has observed:

The appearance and performance of a witness, whether or not a party, profoundly affects the significance of one or the other of the competing narratives in ways that have little to do with the specific 'content'.⁴⁷

What is true of making fact is also true of making law. Only by exploring different Etymological senses of 'making' can we hope to understand the ways in which judges are and are not makers of law. In his book *Law in the Making*, C. K. Allen, warned that when asking the 'question, how far the Judge can and does legitimately "make" law', '[w]e must use this word "make" with caution'.⁴⁸ Few jurists have heeded Allen's advice and sought to understand the different senses in which 'make' is employed. Allen adds that when the word 'make' is employed with more precision, 'I think we shall find that, in one sense of it at least, Judges are not merely resorting to what Austin called "a childish fiction" when they disclaim the capacity to create new law'.⁴⁹ The crucial words are 'in one sense'. Distinguishing different senses of the word 'making' can resolve the age-old controversy between the two opposing views of the function of judges in common law courts: on the one side, the traditional claim that judges do not make law but merely declare it; and on the other side, the claim that common law judges are law-makers. The Etymology-based distinctions between Invention, Creation, and Production advanced in this study bring in nuanced senses of making that open a new way to closing this old controversy. Indeed, the controversy between the idea of judges as 'makers' and 'speakers' of law practically disappears when we enlarge our language to express 'making' in different senses of the word, for by the light of the Etymologies, Bacon's claim to be in the business of declaring the law rather than making it can be appreciated as the acceptance of one type of law-making (Production) and rejection of another (Invention). Declaration of law by delivering a judgment is law-making in the Productive sense because it *makes* the law public.

Judges are correct to disclaim any capacity to Invent new law in the sense of instigating new law to meet a political need, for judges are not elected legislators. A judge might expressly identify the need for a new law in the same way that law reform commissioners do, but they must leave the implementation of policy to the elected legislature. What judges cannot deny is that they make law by interpreting, supplementing, and developing law in the Creative sense of making it grow; neither can they deny that they make law in the Productive sense by the very act of publishing their judgment in a particular case. Production by publication is not the same as Invention by instigation, but

⁴⁷ Robert P. Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 2001) 194.

⁴⁸ Carleton K. Allen, *Law in the Making* (Oxford: Oxford University Press, 1927) 170.

⁴⁹ *Ibid.*

neither is it a passive process of simply advertising law that would in any event exist. As Hobbes wrote, '[t]o rule by Words, requires that such Words be manifestly made known; for else they are no Lawes'.⁵⁰ Hobbes made that comment in relation to legislation, but the point applies as well to judge-made law. Indeed, a great deal of judge-made law comprises interpretation and implementation of legislation, from which it follows that a judicial decision on a statute can be said to operate by way of co-Production with Parliament. The judge participates in Parliament's Production of the statute by fulfilling, and filling gaps in, the wording of statutory law. An American court expressed this point vividly in the 1917 case *Pacific v Jensen*: 'Judges do and must legislate, but they can do so only interstitially. They are confined from Molar to molecular motions.'⁵¹ To use a different metaphor, we can say that Parliament is the playwright, but that it falls to judges to read between the lines and to interpret and perform the script in each case as actors do in each show. Later in this chapter we consider two other analogies to the judge's craft: the judge as novelist and the judge as manual worker with material stuff. The latter, with its connotations of manipulation, will bring us in due course to lessons that can be carried from the legal craft of judging to popular cultures of passing judgment in society at large.

Mass Production

When performance scholar Richard Schechner argued that theatrical play should be kept separate from production, he was cautioning against the contamination of theatrical craft by commercial and commodifying tendencies. Legal scholar Milner S. Ball once expressed a similar reservation that at first glance troubles my decision to describe the legal trial as a 'Truth Factory'. He complained that '[w]hen courts are converted from theaters to factories, from places of play to places of fabrication . . . poor people find themselves dispensed "assembly-line justice," which can scarcely be called justice at all'.⁵² In defence of the metaphor of the Truth Factory, we can note that Professor Ball's criticism is directed at the type of factory that employs mass production methods and production-line efficiencies. Such an operation inevitably loses sight of the artisans who work in it and loses sight of the arts and crafts by which they work, and furthermore loses sight of the people and materials – the basic social 'stuff' of legal matter – with which they work. Applying a theatrical analogy to the trial process, Professor Ball writes:

⁵⁰ Thomas Hobbes, *Leviathan* (London: Andrew Crooke, 1651) (reprint Oxford: Clarendon press, 1909) chapter 31, §187.

⁵¹ *Pacific v Jensen* 244 U.S. 205 (1917), Holmes, J., dissenting.

⁵² Milner S. Ball, 'The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater' 28 (1975) *Stanford Law Review* 81–115, 115.

The production of plays unlike the production of goods cannot be streamlined . . . Productivity gains are precluded in live performance because what the performer does is an end in itself and not the means to production of some other good.⁵³

His point is that in the context of plays, as with the conduct of a trial, the process is the 'product'. As he says later in the same article:

Pressure for greater output promotes development of tools like plea-bargaining which bypass trials and appear primarily productive in meeting quotas. Such pressure fails to understand that live performances are as much the end of courts as is the disposition of cases.⁵⁴

What a profound observation this is. Ball makes clear that he does not object to productivity if it is the sort of productivity that values the human actors and human matters implicated in the process. Mass production is bad; bespoke production is good. The contrast he draws between theatrical play and factory fabrication does not diminish the present argument that law courts are involved in a respectable fabricating and productive species of theatrical play, because the fabrication that takes place in courtrooms is decidedly of a made-to-measure variety and ideally is fully bespoke. What it ought not to be, and this is Ball's point, is a one-size-fits-all conveyer-belt mode of fabrication. William West expressed well the ideal of bespoke judgment when he described the equity branch of the law (that which is especially concerned to fit justice to the particular case) as 'a Shoemakers shop that is well furnished with all sorts and manner of lasts for men's feet, where each man may be sure to find one last or other that shall fit him, be he great or small'.⁵⁵ If we doubt that this ideal can be attained given the demands that are made on the legal system and the limits of the judicial economy, it is comforting to think that even in the automobile industry – the very industry which first perfected production-line methods of mass manufacture – there are still examples of successful companies that eschew mass production and prefer to make their products in ways that value quality, craft, and tradition over efficiencies of scale. For example, the website of the Morgan Motor Company advertises that:

All Morgan cars are expertly crafted using three core elements: ash, aluminium and leather and are designed to work in harmony with the materials used to construct them . . . each Morgan car celebrates traditional manufacture while embracing modern design.

Add to this the fact that the specifications of Morgan cars are frequently tailored to the specific requests of individual purchasers, and one has a hopeful

⁵³ *Ibid.*, 81. ⁵⁴ *Ibid.*, 115.

⁵⁵ William West, *The Second Part of Symboleography* (London: Totthill, 1593) 75, §11. On equity and the image of the bespoke shoe, see Gary Watt, "Where the Shoe Pinches": True Equity in Trollope's *The Warden* (2016) 10(2) *Pólemos* 293–309.

model of the quality and care that might be achieved in the Truth Factory of law. Unfortunately, the analogy is all too exact when it comes to delay and cost. The typical waiting time for a new Morgan car is between six and twelve months, and in England and Wales a civil claim above the small claims threshold will typically take more than a year to come to trial even by the streamlined multitrack and fast-track routes.⁵⁶ As for cost, a new Morgan car isn't cheap and a legal trial can be ruinously expensive even for the 'winning' party, who is unlikely to recover their entire legal costs from the losing party. The quality of bespoke craft doesn't come quick, and it doesn't come cheap.

Poiësis and Autopoiesis

Jeanne Gaakeer, an appellate judge and legal scholar, reminds us that *poiësis* was the ancient Greek term for 'handcraft . . . the creation and artistic bringing into appearance, a "making"'.⁵⁷ *Poiësis* as craft lies at the heart of the judge's art every bit as much as it lies at the heart of the poet's craft. Yet there is a sense in which law is not only made by the deliberate craft of individual judges but also arises as an inherent feature of the legal system. After all, the individual judge is working within an established tradition. The law as an institution is to some extent self-generating. As Dickens' narrator says in *Bleak House*: 'The one great principle of the English law is to make business for itself' (chapter 39).⁵⁸ Chilean biologists Humberto Maturana and Francisco Varela employed the term 'autopoiesis' (coined out of the Greek *auto* 'self'; *poiësis* 'making') to define the self-maintaining chemistry of living cells,⁵⁹ and the term was taken up as a description of self-perpetuating social systems by sociologist Niklas Luhmann.⁶⁰ Günther Teubner joined Luhmann in taking the theory into the terrain of law as a social system.⁶¹ The sociological theory of autopoiesis downplays jurists' capacity to rise above the constraints of their context. It is as likely to say that the law makes the judge as that the judge makes the law. As such, the theory may be quite accurate as a description of judicial law-making in codified systems of civil law such as those of Germany, Italy, and France, but perhaps less so as an account of the largely unpredictable creative initiatives undertaken by common law judges from case to case.

⁵⁶ Pre-pandemic statistics for the first quarter of 2019 put the delay at 58.5 weeks (*Civil Justice Statistics Quarterly*, January–March 2019, Ministry of Justice, 6 June 2019).

⁵⁷ Jeanne Gaakeer, *Judging from Experience: Law, Praxis, Humanities* (Edinburgh: Edinburgh University Press, 2019) 147n.

⁵⁸ Charles Dickens, *Bleak House* (1852–1853), Norman Page (ed.) (London: Penguin Books, 1971).

⁵⁹ Humberto Maturana and Francisco Varela, *Autopoiesis and Cognition: The Realization of the Living* (1973) (Dordrecht: D. Reidel Publishing Co, 1980).

⁶⁰ Niklas Luhmann, 'The World Society as a Social System' (1982) 8(3) *International Journal of General Systems* 131–138.

⁶¹ Günther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1988).

To appreciate the nature of judicial law-making in common law systems, the natural (that is socially natural) autopoiesis of the judicial function supplies a useful starting point, but we will progress even further when we stress the agency of the individual judge by resort to the analogy of the judge as artisan or author. By the same token, attending to sociological context will only take us so far in our appreciation of the craft of such preeminent artists as William Shakespeare and Ben Jonson. Historical context and cultural milieu were immensely important to their achievement, but at some point we have to credit each individual's arts with the deliberation of craft. So far as common law jurists are concerned, various arts and crafts – among them novel writing, metal work, and weaving – have supplied informative analogies to help in the task of appreciating the ways in which judges practice the *poiësis* of making judgments.

Judicial Craft: Handling the Truth

At the start of his first and foundational text, *The Legal Imagination*, James Boyd White states that 'the lawyer must know rules, and the other materials of the law, as the sculptor must know clay and the painter paint and canvas'.⁶² In *Acts of Hope: Creating Authority in Literature, Law, and Politics*, he expands on the idea of respecting law's materials through the analogy of art and artisan craft:

It is after all the nature of cultural processes, including law, to transform the material with which they work. A block becomes a statue, a palette of colors a painting, and, in the law, the trial of a bootlegger the occasion for a great constitutional case.⁶³

This idea of judge as artisan echoes Judge Learned Hand's opinion that 'the work of a judge is an art . . . It is what a poet does, it is what a sculptor does.'⁶⁴ Brett G. Scharffs has written specifically of the judge as artisan. In his article 'Law as Craft', he writes that:

The creative tension experienced by the craftsperson, from the possibilities and constraints inherited from her forebearers, the opportunities and contingencies imposed by the present, and the prospects and perils of the future – this is the very tension that is experienced by a judge.⁶⁵

⁶² James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown and Company, 1973) xxxv.

⁶³ James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago, The University of Chicago Press, 1994) 180–181.

⁶⁴ Hershel Shanks (ed.), *The Art and Craft of Judging: The Decisions of Judge Learned Hand* (New York: Macmillan, 1968) xiii.

⁶⁵ Brett G. Scharffs, 'Law as Craft' (2001) 54 *Vanderbilt Law Review* 2243, 2250.

Scharffs' analysis, based on the Aristotelian idea of practical wisdom (*phronesis*), draws an analogy between law and craft based on points of similarity between them. He summarizes the analogy in his abstract as follows:

First, crafts are made by hand – one at a time – and require not only talent and skill, but also experience and what Karl Llewellyn called 'situation sense.' Second, crafts are medium specific and are always identified with a material and the technologies invented to manipulate that material. Third, crafts are characterized by the use and usefulness of craft objects. Fourth, crafts are defined by their past.

The philosopher Hans-Georg Gadamer would agree with much of this. He acknowledges that '[a] person who knows how to make something . . . takes the right material and chooses the right means to do the work. Thus he must know how to apply what has been learned in a general way to the concrete situation.'⁶⁶ He nevertheless identifies one important respect in which '[t]he situation of the craftsman is quite different' to that of a judge.⁶⁷ He argues that whereas artisan and judge must both adapt their plans and their materials to the contingencies of context and circumstance, in the judge's case 'it is not because he has no alternative, but because to do otherwise would not be right'.⁶⁸ That word 'right' is key to understanding the difference between artisan and judge as Gadamer explains it. His point being that whereas the artisan exhibits technical skill (*technê*) in discharge of a good job, the finding that the job is a good one says nothing of its moral quality. To put it another way, the judge in the discharge of their office is bound to consider contextual factors that include political, social, and moral factors, whereas the artisan can discharge the office of artisan without regard to such contextual factors – their task being limited only by such spatial, temporal, and material contingencies as make their task practical or impractical to perform. We can illustrate the point by saying that the artisan who expertly manufactures a precision firearm has done a (technically) 'good' job but might not be doing the (morally, politically, socially) 'right' job. Gadamer attributes to Aristotle this difference between practical know-how with a moral dimension (*phronesis*) and mere technical aptitude (*technê*), observing 'that man is not at his own disposal in the same way that the craftsman's material is at his disposal. Clearly, he cannot make himself in the same way that he can make something else.'⁶⁹ This is not to say that a good artisan should not aim to be a morally right human being, but only that the nature of 'being artisan' does not compel such an ambition in the way that 'being judge' does. The factor of moral virtue aside, Gadamer would accept, as Aristotle would accept, that the practical method of the judge is closely akin to that of the artisan. Gadamer emphasizes the comparison with

⁶⁶ Hans-Georg Gadamer, *Truth and Method*, 2nd ed., Joel Weinsheimer and Donald G. Marshall (trans.) (1960) (New York: Continuum, 1989) 314.

⁶⁷ *Ibid.*, 315. ⁶⁸ *Ibid.* ⁶⁹ *Ibid.*, 314.

reference to Aristotle's idea of the correction of strict law (and strict insistence on law) by the virtue of *epieikeia* – a word we generally translate 'equity', but which might also be translated 'forbearance' or 'the quality of yielding'.⁷⁰ Aristotle's preferred metaphor to describe the craft of *epieikeia* (equitable judgment) was the metaphor of a measuring rule made of lead that he borrowed directly from the craft of constructing buildings;⁷¹ the idea being that a rigid rule of metal or law is ill-suited to fit to life's curved contours, whereas a rule of lead has all the qualities that one wants from metal but with the advantage of flexible adaptation to the contours of life's contingencies and (important for the judge) potential to adapt to the contours of the social and cultural context in which law is applied.

What is true both of judge and of artisan is that they don't really know what they want in a practical sense until concrete contingencies present themselves. As Richard Sennett argued persuasively in his book *The Craftsman*, the process of making cannot be separated from the process of thinking.⁷² Artisans think practically rather than theoretically and will therefore anticipate and expect contingencies to be inevitable from the outset. The whole craft of an artisan may be summed up as the craft of adaptation to circumstances, including the circumstance of the physical type and tolerance of the materials to hand. It is the same in the practical craft of theatre, for, as Dorothy L. Sayers writes, any playwright who resents 'the intrusion of earthly and commonplace actors' upon their 'spiritual fancies' has 'no business on the working side of the pass-door'.⁷³

With the caveat that a judge must attend to wider moral, social, cultural, and political contextual considerations, the same practical craft of adaptation is also observable in the law. The materials may be less tangible, but the craft is still the artisan's craft of flexible adaptation or translation. Professor White writes in *Living Speech: Resisting the Empire of Force* that '[t]he lawyer or judge is perpetually refashioning the material of the law'.⁷⁴ Roscoe Pound also likens a judge to a craftsperson when he writes that:

The instinct of the experienced workman operates with assurance. Innumerable details and minute discriminations have entered into it, and it has been gained by long experience which has made the proper inclusions and exclusions by trial and error until the effective line of action has become a habit.⁷⁵

⁷⁰ *Ibid.*, 316. See, generally, Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009).

⁷¹ Aristotle, *Nicomachean Ethics*, Book V, chapter 10.

⁷² Richard Sennett, *The Craftsman* (New Haven, CT: Yale University Press, 2008).

⁷³ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 137.

⁷⁴ James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton, Princeton University Press, 2006) 125.

⁷⁵ Quoted in Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 92–93.

Bernard J. Hibberts makes the pithy observation that ‘law is made in performance’, adding that without performances ‘writings have no legal value’, and a ‘rule which is not performed is arguably no law. Performance, conversely, can effectively make law even where there is no written rule’.⁷⁶ The reason he is right to say this about law is because law is a rhetorical craft of performance that works through action. The perfection of the art or craft of rhetoric is to perform language in such a way that the audience grasps the argument, feels the passion almost tangibly, and ultimately has the sense that they are engaged in the co-Productive work of moulding the matter in hand. The central argument of Richard Sennett’s book *The Craftsman* is that making and thinking are inseparable when a person is engaged in craftwork. The ideal end of rhetoric is to engender in the mind of the audience an experience of making-as-thinking and thinking-as-making, even when their hands are not physically engaged in crafting anything. The early modern rhetorician Thomas Wilson hits upon this essential point when, at the start of his book *The Arte of Rhetorique*, he says that rhetoric is ‘an Arte to set foorth by vtterance of words, matter at large, or (as Cicero doth say) it is a learned, or rather an artificiall declaration of the mynd, in the handling of any cause, called in contention, that may through reason largely be discussed’.⁷⁷ Taken together, the phrases ‘utterance of words’, ‘matter at large’, ‘artificial declaration’, and ‘handling of any cause’ confirm rhetoric as an art of manual fabrication. To utter is to bring the matter forth to an audience; it is Production. In classical rhetoric, authoritative utterance was commonly referred to as *pronunciatio* (a word still echoed in the language by which we talk of a judge ‘pronouncing’ a sentence against the convict in a criminal trial).⁷⁸

An artisan may be compelled to depart from an ideal plan or code, but this is not a departure from ideal craft, for ideal craft *is* adaptation. Again, the three Etymologies of Making elucidate the point, for even if the artisan’s craft starts with an ideal Invention, it will inevitably adapt the original as it is developed through Creation and realized through Production. The artisan’s craft of making is not a conceptual and idealistic pursuit but a procedural process that begins with Invention of the idea and passes through stages of development (Creation) and public engagement (Production) before the making can be called complete. The making process therefore entails compromise between the craftsperson and such contingencies as starting materials, spatial and

⁷⁶ Bernard J. Hibberts, *De-scribing Law: Performance in the Constitution of Legality* (paper delivered at the Performance Studies Conference, Northwestern University, Evanston, IL, March 1996), www.law.pitt.edu/archive/hibbitts/describ.htm.

⁷⁷ Thomas Wilson, *The Arte of Rhetorique* (1553), 1560 edition, G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) 1.

⁷⁸ On Shakespeare’s use of the verb ‘to pronounce’ in this rhetorical sense, see Iolanda Plescia, ‘“In Caesar’s Name Pronounce I”: Language and Power in Shakespeare’s Roman Plays’, in Maria Del Sapio Garbero (ed.), *Rome in Shakespeare’s World* (Rome: Edizioni di Storia e Letteratura, 2018) 107–126.

temporal context, and the nature of the artisan's community. This compromise entails participation between persons of the sort that we see in collaboration between writer and reader, and actor and audience, and also extends to participation between the initiator and the inanimate elements of material stuff, space, and time with which, and within which, they work.

Material Differences

Different materials do not have identical characteristics and are not all equally suitable to any given process of making. When Scharffs said that 'crafts are medium specific',⁷⁹ he was reiterating the wisdom of the old saying, 'one cannot make a silk purse out of a sow's ear'. Rhetorical performers, including lawyers, politicians, and the press, are artisans of sorts and must therefore be attentive to differences between the materials they handle. It is a basic mistake to suppose that audiences can all be worked the same way, or to suppose that such matters as time and place do not call for fundamental variations in the mode of making called for. Rhetorical practitioners would do well to attend to Dr Stockbauer's learning on the connection between the crafting of a speech and the crafting of physical materials:

Every language has its own laws, according to which it frames its sentences, and cannot without falling into disorder, adhere to those of another. So also every material has its own peculiar laws for its development, which must be respected and observed, else disorder will accrue. Forms peculiar to wood should not be reproduced in cast iron; stone should not be treated in the same way as wood or metal; iron garden chairs and benches should not have the same shape as those of cane and wood; wood-work should not have the appearance of leather.⁸⁰

White talks about 'respect' for the materials of law; Stockbauer talks of 'respect' for the laws of material. Stockbauer's formal strictness ('iron garden chairs and benches should not have the same shape as those of cane and wood') might be pressing the point too far. The arts and crafts of illusion, such as those by which stage sets and props are made, often require that wood be made to look like metal and metal to look like wood. Stockbauer's analogy between crafting linguistic sentences and crafting physical materials is, though, an important one. For one thing, it accords with Professor White's connection between linguistic translation and material crafting. For another, it accords with an idea put forward by the novelist Dorothy L. Sayers. She contrasts the 'human maker' who 'tortures his material' so that 'the stone looks unhappy when he has wrought it into a pattern alien to its own nature' and whose 'writing is an abuse of language', to the maker who 'respects and interprets the integrity of his material' and who 'works with plants, with

⁷⁹ Brett G. Scharffs, 'Law as Craft' (2001) 54 *Vanderbilt Law Review* 2243–2347, 2243 (abstract).

⁸⁰ Jacob Stockbauer, 'On Style in Ornamentation' (1874) 7(5) *The Workshop* 65–69, 66.

animals or with men' so that 'the co-operative will of the material takes part in the work'.⁸¹ Sayers prefers the latter type of maker, but acknowledges that the ideal is ultimately unattainable, because the human artist is 'part of his own material'.⁸² Sayers' idea that the material might have a cooperative will and that it 'takes part in the work' agrees with my argument that co-Productive participation occurs not only when humans participate in each other's acts of making, but also when a human maker works *with*, rather than against, the nature and grain of their materials. A wooden box crafted and painted to look like a leather case is unlikely to perform as well as a genuine leather case, and when a judge handles the materials of human lives and cares, the distinctiveness of the case and the human lives affected by it must be respected. Neither will it suffice to handle such personal matters as if they were impersonal abstractions, or to say that a decision is well made if it is functionally effective but performed without humane respect for the sensitive nature of the material at hand.

Judge as Writer and Reader

[T]he law is not an instrument to find out truth. It is there to create a fiction that will help us.

Hilary Mantel, *The Mirror and the Light*⁸³

Which craft is most akin to that of a judge? There are several plausible candidates, but we will start with Ronald Dworkin's suggestion that judges are working together as a sequence of writers might when creating a chain novel, each handing the work on to the next to be developed in accordance with the guiding spirit and principles of the work.⁸⁴ Dorothy L. Sayers has described the book-writing process in terms that would fit well with this sense that judges accommodate new cases into an imagined integrated system of law:

[E]very choice of an episode, or a phrase, or a word is made to conform to a pattern of the entire book, which is revealed by that choice as already existing. This truth, which is difficult to convey in explanation, is quite clear and obvious in experience. It manifests itself plainly enough when the writer says or thinks: 'That is, or is not, the right phrase' – meaning that it is a phrase which does or does not correspond to the reality of the Idea.⁸⁵

Dworkin's chain novel analogy is a good one, but it might be even more helpful to think of judges as authors of a non-fiction book (like this one) who, by stitching together selected sources with the threads of their own ideas, can be said to synthesize existing materials into something new.

⁸¹ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 114–115.

⁸² *Ibid.*, 115. ⁸³ Hilary Mantel, *The Mirror and the Light* (London: Fourth Estate, 2020) 846.

⁸⁴ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) 245.

⁸⁵ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 29.

The word ‘author’ to describe our chain-writing judge needs explanation. Authorship implies Production. If I write a book in secret that never leaves my study and perhaps never leaves my laptop, I might call myself the writer of that book, but I cannot call myself its ‘author’. What makes a writer an author is not the Invention of having an idea (everyone, it is said, has the idea of a novel in them), nor even the Creation of the idea by working it up into a full-length text. An author only deserves that name when their writing is made public by Production (always assuming that the nature of the Production is sufficient to expose the work to the participation of creative and critical readers). Production by making public makes the writer an author, and if the book is well received, the public’s co-Production can constitute the artefact as not merely authored but also authoritative. So it is with judges (except in their case, respect does not depend upon popularity). Judges are not law-makers in Inventive mode. Judges Create and Produce law, and it is the latter aspect, entailing publication, that elevates a judgment to the status of authority.

Judges are, of course, subject to sovereign political will expressed through a duly elected parliament, so it might be argued that in a matter covered by statute the judge is not so much a maker of the law as an interpreter of the law – a reader rather than a writer of the law. This, though, is to fail to attend to the different etymological senses of ‘making’. If Parliament is regarded as the originator of law in Inventive mode, it nevertheless falls to judges to develop the law through the Creative activity of interpretation and to publish the law through the Productive activity of delivering their judgments. A judge can therefore be said to join with Parliament as co-maker of the law. In describing this cooperative activity, the use of the categories ‘writer’ and ‘reader’ as if they were mutually exclusive is too simplistic. The better approach, as elaborated in [Chapter 10](#), is to bring in Emerson’s category of the ‘creative reader’ and to regard the judge as a reader who helps make the thing through critical engagement. Dicey acknowledged that the judicial application of statutes is not mere passive interpretation of a finally created thing but rather a mode of interpretation that helps make the thing:

Judge-made law is real law, though made under the form of, and often described, by judges no less than by jurists, as the mere interpretation of law

... judges who interpret statutes and whose interpretation become precedents in reality legislate. To say that all interpretation is legislation is, no doubt, to maintain a paradox. But this paradox comes nearer the truth than the contention that judicial law-making is always in reality interpretation.⁸⁶

Dicey perceives a paradox because he assumes that making must mean Invention, which would seem to require judges to usurp the role of

⁸⁶ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905; 2nd ed. 1914), Richard Van de Wetering (ed.) (Carmel, IN: Liberty Fund, 2007), 350.

Parliament. The paradox evaporates when we regard the judge as law-maker to be acting not as Inventor of the law but as the co-Creator and co-Producer of law Invented (and to some extent Created and Produced) by Parliament.

At least Dicey was prepared to accept that judicial interpretation is *some* kind of law-making. Professor Allen preferred to reserve the label 'law-making' for cases not clearly covered by existing statutes or judicial decisions. He argues in *Law in the Making* that 'in that overwhelming majority of cases where precedent is cited and relied upon, [the "whole effort" of the Judge] is to find the law, not to manufacture it'.⁸⁷ Allen refers approvingly to Lord Esher M.R., who once opined that:

There is in fact no such thing as judge-made law, for the Judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.⁸⁸

This is another instance where objections to the idea of judicial law-making disappear if we broaden our understanding of what 'making' means. Attending to the Etymologies of Making reveals that 'to apply existing law to circumstances' always implies making in Creative mode, for it entails the process of developing or growing law to cover the circumstances of a novel case. The error of supposing a necessary distinction between the application of law and making law is compounded by Professor Allen's and Lord Esher's assumption that law can be applied to circumstances as if 'the law' and 'the circumstances' were prefabricated, off-the-shelf entities. They are not. Judicial decisions are essential to identifying relevant factual circumstances, to identifying the proper law applicable to the facts, and to knowing how best to apply law to facts. In every aspect of the craft of selecting materials (fact and law) and of joining materials (applying law to fact), judges are expert artisans making choices while making a new thing. The best-fitting among the law's off-the-shelf clothes can only be identified by skilful cutting out of the alternatives, and that cutting entails a craft of tailoring every bit as technically demanding as the craft of cutting whole cloth to make clothes from scratch.

Manipulating the Matter

If anybody deserves the accolade 'England's most creative judge of the last one hundred years', it is probably Lord Denning. The son of a draper, he knew something about weaving, synthetics, and handling the materials of law. He wrote in his biography, *The Family Story*, that 'judges should so handle precedent . . . as to do justice – in a way fitted to the needs of the times in

⁸⁷ Carleton K. Allen, *Law in the Making* (Oxford: Oxford University Press, 1927) 173.

⁸⁸ *Willis v Baddeley* [1892] 2 Q.B. 324, 326.

which we live'.⁸⁹ To talk of fitting materials is to talk of tailoring. Lord Denning's word 'handle' recurs in the thought of the most creative judges. In the USA, Lord Denning had a kindred spirit in Judge Benjamin Cardozo, who wrote in *The Growth of Law* that '[t]he handling of examples, of concrete instances, will develop the skill proper to the art'.⁹⁰ In one of Hollywood's most memorable movie trial scenes, the military lawyer played by Tom Cruise in *A Few Good Men* (dir. Rob Reiner, 1992) demands to hear the 'truth', only to receive from the defendant (played by Jack Nicholson) the famous reply: 'you can't handle the truth!' In the Truth Factory of the legal trial, 'truth', it turns out, is a thing that cannot be passively received but must be actively handled.

Professor Allen acknowledges that '[i]f we examine the great legal tendencies of the nineteenth century . . . we shall find the hand of the Judge . . . active in moulding the doctrines of the law'.⁹¹ Exactly so. As Cardozo said, 'the law as already developed by the wisdom of the past . . . is the raw material which we are to mould'.⁹² Cardozo's express reference to development is important because it emphasizes that judicial law-making is not Inventive but Creative. He confirms this later in the same study where he writes of 'the force of the analogy between the creative process . . . and the process at work in the development of law'.⁹³ M. R. Cohen also points to judicial law-making in common law systems as a creative process of employing existing legal materials:

In thus showing that judges do and must make law, I do not, of course, wish to maintain that they are in no wise bound and can make any law they please. Every one who is engaged in making or creating something is limited by the rules of the process and the nature of the material.⁹⁴

If found law needs to be moulded to fit new circumstances, the end product is inevitably, to a greater or lesser degree, different to the law as it was found. The degree of fettling and variation may be minor in any given case, but where the process is repeated over time something new will be manufactured incrementally. Cardozo again (this time quoting Cohen): 'the changing combinations of events will beat upon the walls of ancient categories. "Life has relations not capable of division into inflexible compartments. The moulds expand and shrink"'.⁹⁵

⁸⁹ Alfred Denning, *The Family Story* (London: Butterworths, 1981) 177.

⁹⁰ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 92.

⁹¹ Carleton K. Allen, *Law in the Making* (Oxford: Oxford University Press, 1927) 170.

⁹² Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 60.

⁹³ *Ibid.*, 91.

⁹⁴ Morris R. Cohen, *Law and the Social Order* (1933) (New Brunswick: Transaction Books, 1982) 146.

⁹⁵ Benjamin Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924) 19.

The Court of Popular Opinion: Another Truth Factory

The final chapter of this book is concerned with so-called cancel culture and the passing of judgments in the ‘court of popular opinion’, especially as it occurs in the context of social media. In advance of that treatment, it is worth pausing here to summarize some qualities of judicial law-making that go to its credit and that are usually absent or of lesser quality in a so-called trial by Twitter. The first is that professional judges may be likened to expert artisans who handle their materials with respect for the inherent tolerances of those materials. The second is that the judicial role can be regarded as a modest and restrained one because it does not extend to the legislative invention of law but is limited to the creation and production of laws initiated by Parliament. The third is that professional judges do not produce judgments off-the-shelf in a clichéd manner but craft their judgments to meet the particular situation of the instant case and with respect to the cloth as previous judges have woven and cut it. Fourth, an official trial process comes at considerable cost in terms of time and money – the judicial economy is limited, its resources are valuable, and the production of legal judgments is never easy, quick, or cheap. Fifth, judges do not ‘find’ facts but rather fabricate them expertly by weaving a mesh from crossing threads of the parties’ evidence.

It might seem that I am bringing the judicial function into disrepute when I argue that judges are essentially making it up as they go along. I would contend, however, that to acknowledge judicial activity as law-crafting has the potential to enhance rather than detract from public respect for the work that judges do. It is only when we openly acknowledge that judges make law that we can appreciate deeply the excellence with which they make it and appreciate the contingencies of the materials with which, and context and in which, they make it. Respect for the excellence of judicial craft is necessary for at least two reasons bearing on the so-called court of popular opinion. The first is to temper populist criticism of judicial activity. The second is to provide a model for making judgments in social media and other public contexts. The second aspect is the subject of [Chapter 12](#). As to the first, I have in mind a particular instance of popular outrage concerning the activity of senior judges in the jurisdiction of England and Wales.

When the High Court of England and Wales held that the UK’s 2016 referendum vote to leave the European Union (the Brexit vote) could not be enacted without parliamentary approval,⁹⁶ the three judges who sat in the case were accused by Brexiteers of usurping the sovereign will of the people. The *Daily Telegraph* reported the decision as ‘The Judges versus the People’ (3 November 2016) and the *Daily Mail* labelled the three judges ‘Enemies of the People’ (4 November 2016). We don’t know how the three embattled High

⁹⁶ *R (On the Application of) Miller & Anor v The Secretary of State for Exiting the European Union (Rev 1)* [2016] EWHC 2768 (Admin) (3 November 2016).

Court judges voted in the 2016 referendum, but the *Daily Mail* drew its own conclusions from the fact that the senior judge of the three was a founding member of the European Law Institute and of the European Network of Councils for the Judiciary. The author of the *Daily Mail*'s 'Enemies of the People' article was the paper's political editor, James Slack. Given the inflammatory nature of his article's assault on judicial integrity, it might come as a surprise to learn that a few months after its publication, Slack was appointed to act as the official spokesman to the prime minister before going on to serve as Downing Street's director of communications. Or perhaps it doesn't surprise us at all. Parliament, press, politics, and the popular will are connected places in the world of rhetorical performance. It is a world of make-believe, and our responsibility as members of the public, since we cannot unmake that world, or remove the makers from it, is to make our choice of whom among the makers we will believe. In making that choice we should be guided by concern for how laws, headlines, and policies are made. We should attend to the Invention that originated the thing, the Creation that developed it, and perhaps more than anything we should attend to the manner of its Production before the public eye – for, in the words of the Sermon on the Mount, 'every good tree bringeth forth good fruit; but a corrupt tree bringeth forth evil fruit' (Matthew 7:17).

The appropriate reaction to accusations of judicial bias is not to pretend that judges are scientifically bound to reach the decisions they do, but to admit that judges make facts, make decisions, and make laws, and that they do so with technical skill exercised according to a set of ethical constraints. Their skill and care are of the same order as those we expect of a surgeon or any technically adept expert who holds the lives and livelihoods of others in their hands. To talk of 'skill and care' is to bring in more than mere technical skill. We should recall Gadamer's distinction between *technê* and *phronesis*, as outlined earlier in this chapter, and acknowledge that the judge is bound to practice their craft with sensitivity to their political and cultural context. This adds the quality of being ethically good to the quality of being technically good. A surgeon with a good bedside manner and genuine concern for the holistic well-being of their patients also exercises *phronesis* in this sense, perhaps even in those moments when their practical wisdom leads them to decline to practise their surgical skill at all; as when they say, 'I do not think it will be in your best interests for me to operate'. The decision of the High Court in the 2016 Brexit case was upheld on appeal by a majority of the Supreme Court, and their lordships on that occasion, perhaps to address popular criticism of suspected judicial activism, took the practically wise step of acknowledging that judges do perform the Creative role of developing law, albeit within the limits of their authority. To acknowledge the popular context and to acknowledge judicial Creativity was to practise with the practical wisdom that Aristotle termed *phronesis*. It is notable, however, that their lordships were still reluctant to acknowledge in express terms that when

judges operate Creatively by applying or developing law this is indeed a mode of 'making' law. Their lordships restricted the language of 'making' law to parliamentary activity:

The law is made in or under statutes, but there are areas where the law has long been laid down and developed by judges themselves: that is the common law. However, it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, ie by Acts of Parliament.⁹⁷

The myth that judges are mere interpreters seems still to have a hold on judicial thought. Without expressly admitting the point, their lordships' references to the development and application of law confirm clearly that judges make law in Creative mode, even as making law by Invention is left to Parliament. Parliament, in turn, is made by the people through the ballot box. Attempts to short-cut the electoral process through popular protest and news media have their place – social media and mainstream media are Truth Factories of sorts – but it is an error to suppose that all Truth Factories have equal status or that the truths they produce are all equally deserving of respect.

⁹⁷ *R (On the Application Of) Miller & Anor v The Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017) para. [42].

Making Sex Change

Legal Engendering of Trans People

[We] by our dearth of youths are forced t'employ
 One of our women to present a boy.
 And that's a transformation, you will say,
 Exceeding all the magic in the play

John Dryden¹

The activity of professional agencies, especially those within the legal system, as they participate in the co-Creation and co-Production of a trans individual's new legal persona is the main focus of this chapter. This legal process of engendering is, to use Freddie Mercury's term (and to echo the quotation from Dryden), 'a kind of magic'. Medicine drove out magic long ago, but the law still depends upon a kind of magic to produce legal personhood out of the law's invisible materials.² Yet for all the talk of change and transition associated with transgender identity, the more common account given by transgender people themselves is one of coming to live as the person they have always been. This process of 'coming to live as' is in part transformative, but it is also in part confirmatory. This is the case for every human as they come to inhabit, express, and perform their social persona, but as a matter of degree is often more apparent and radical in the case of trans people. The confirmatory character of the trans person's process of transition can be regarded as being in two key senses a process of making a new social persona. The first sense is making in terms of personal development or growth. According to the definitions set out in earlier chapters, this is making in the sense of Creation. The second sense is making in terms of presenting or performing the new persona in society before the scrutiny of a public audience. This is making in the sense of Production. What 'coming to live as' does not encompass is the original instigation of transgender identity, which is making in the sense of Invention. Consideration of the originating factors that cause a person to identify as transgender in the first place – in other words, asking as a matter of genesis 'what *makes* someone transgender?' (as also the question, 'what makes a

¹ John Dryden and William D'Avenant, *The Tempest, or The Enchanted Island* (1667) Prologue.

² Gary Watt, 'Passing Resemblance: The Burden of the Mask in Legal and Theatrical Tradition' (2021) 25 *Law Text Culture* 22–52.

cisgender person identify with their chromosomal or birth-assigned sex?') – lies beyond the ambit of this chapter.

There are at least two reasons why I begin this chapter by stating that the public artefact of transgender personhood is a *made* thing. The first is to restate through this example my ongoing resistance to the negative associations that frequently encumber language of being 'made up', 'fabricated', and 'performed'. Previous chapters have endeavoured to state the neutral status, and even to explore the positive potential, of such words as 'fiction' and 'invention', which in many contexts are celebrated as the pinnacle of human artistic and scientific achievement, but in other contexts have been skewed to imply dishonesty and deceit. Considered as a crafted social artefact, transgender personhood might be approached positively as a work of art rather than negatively as a work of artifice. To borrow from Alex Sharpe's celebration of David Bowie's truthful inauthenticity: 'an explicit strategy of fabrication' enables us to appreciate 'the seams of fabricated things'.³ Transgender biographies can be extremely powerful when they draw us into the Creative and Productive making process of 'coming to live as'. An example is the BBC documentary *Lily: A Transgender Story*, in which Lily narrates the processes – personal, social, medical – of becoming who she is.⁴ The Production aspect of a transition to transgender personhood necessarily entails, as all Production entails, the presentation to a critical public of the artefact that is being made. Whether the audience approves of it or not is irrelevant to the status and validity of the artefact as a made thing. That said, the more favourable the public reception the more likely it is that the product will contribute to making social peace. In that sense, the Production of transgender personhood through self-identification will be more secure the more that others assent to that identification. Identification is, after all, a verb ordinarily used to describe the ways we recognize persons other than ourselves. This consideration brings in the second reason for stressing the made nature of transgender personhood, which is to emphasize that the law effects formalized ways of expressing public recognition (i.e. of identifying) transgender personhood, and this amounts to saying that the law performs as co-Creator and co-Producer of transgender personhood whenever it recognizes transgender identity.

'Is' Not 'Ought'

It is wise to approach the politically and personally fraught issue of transgender politics with a degree of caution. The issue is so polarizing – perhaps

³ Alex Sharpe, *David Bowie Outlaw: Essays on Difference, Authenticity, Ethics, Art and Love* (London: Routledge, 2022) 30. The insights of my university colleague Alex Sharpe have been invaluable in informing and improving this chapter.

⁴ *Lily: A Transgender Story* (dir. Molly-Anna Woods; Telescop Production Company, for BBC Three, 2020).

especially in the setting of university campuses – that it is necessary to preface this chapter with a disclaimer. The disclaimer is this: I am not seeking to enter the fray on the question of how the law *should* recognize the rights of the trans person but will endeavour instead to limit my arguments to analysing what it is the law *does* when it recognizes the rights of the trans person. In other words, this chapter is concerned with the ‘is’ rather than the ‘ought’. This is not to downplay the importance of the ‘ought’ question, but only to say that it is not my focus here. The distinction between ‘is’ and ‘ought’ must to be stressed because it is a nuance easily missed in the quarrel of hotly contested questions of culture and identity. I experienced this first-hand when, having written a book arguing that ‘dress is law, and law is dress’ (a quotation from the book),⁵ an officer of the UK’s Naturist Action Group (NAG) mistakenly assumed that I was arguing that ‘dress *ought to be* law, and law *ought to be* dress’ and sent me an angry missive of complaint.

With that caveat in place, let me begin by suggesting that the law’s activity of recognizing transgender persons is not passive; it is an active process of making in co-Creative and co-Productive mode, hence my use of the term ‘engendering’ to describe it. I also use the term ‘engendering’ as an attempt to elide the semantic but complex question of whether we should be talking about transgender transition as ‘change of gender’ or ‘change of sex’. The default view of the English common law according to the precedent of the 1970 decision of the High Court in *Corbett v Corbett* is still that a person’s sex is immutable from that ascribed at birth.⁶ A superior court could change that general view, but in 2021 the Employment Appeal Tribunal in the *Forstater* case (discussed later in this chapter) held that such a reform is properly a matter for Parliament. What Parliament has already done through the Gender Recognition Act s.9(1) is to say that, subject to specified exceptions:

Where a full gender recognition certificate is issued to a person, the person’s gender becomes *for all purposes* the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman). (Emphasis added)

The Employment Appeal Tribunal in *Forstater* infers from recent decisions of the House of Lords and the Court of Appeal that ‘for all purposes’ in subsection 9(1) means ‘for all *legal* purposes’ (para. [97]). On this view, the statute makes a person’s sex change for all purposes of legal recognition, subject to expressed exceptions, including, for example, a right of conscience for Church of England clergy to refuse to marry a trans person possessing a Gender Recognition Certificate. The law isn’t concerned with whether the transgender individual *desires* an official, legal certification of ‘rebirth’. Many transgender

⁵ Gary Watt, *Dress, Law, and Naked Truth: A Cultural Study of Fashion and Form* (London: Bloomsbury Academic, 2013) xv.

⁶ *Corbett v Corbett* [1970] 2 All E.R. 33.

people might prefer social recognition without legal intervention (the current regime of certificated gender recognition in UK law has so far proven unattractive, not least because of the expense and inconvenience of the application and the medicalization of the process) – but the law insists that official certification is necessary if full legal recognition and its attendant legal rights and protections are to follow.

Legal Engendering

According to the OED, the archaic or literary verb ‘to engender’ means ‘[t]o bring (a child) into existence by the process of reproduction; to produce (offspring), to have (children)’. By this definition, and leaving to one side the minority of age that we normally associate with ‘child’, the activity by which law recognizes transgender personhood can be regarded as a process of engendering in so far as it entails a sort of legal rebirth. In claiming to offer an account of what the law is doing when it recognizes a new legal person, I am claiming to be revealing an active process of making which the law generally downplays. The law’s habitual disavowal of active intervention is, I suggest, part of the law’s scientific pretension to be in the business of presenting its findings as naturally occurring social truths. The law typically refuses to acknowledge that it is performing imaginatively and creatively when it establishes facts and creates a person’s legal status. Hence Edward Mussawir and Connal Parsley’s observation that the law ‘tends to naturalize the person’⁷ in a way that marginalizes ‘consciousness of jurisprudence as a craft, art or technique’.⁸ For support on this point, they quote Alain Pottage when he argues:

[T]he peculiar technical and institutional artefact that is the *legal* person is clothed with attributes that are manufactured by other forms of knowledge and which obscure precisely those characteristics which define law as a specific kind of narrative technique.⁹

In other words, the law tends to be coy about its crafted coverings, preferring instead to pretend to be in the business of scientific *dis*-covery. Such reticence regarding the law’s active fabricating processes is unnecessary. The status of the law would not be diminished if it were to acknowledge that its processes entail the careful crafting of legal artefacts and do not entail processes of scientific or empirical disclosure of natural truths. As Douglas Lind writes: ‘claims of legal truth are inextricably craft-bound to the practices of lawmaking, especially judicial decision-making, and . . . conflicts between legal meaning and extralegal meaning do not render true legal propositions

⁷ Edward Mussawir and Connal Parsley, ‘The Law of Persons Today: At the Margins of Jurisprudence’ (2017) 11(1) *Law and Humanities* 44–63, 56.

⁸ *Ibid.*, 45.

⁹ Alain Pottage, ‘Unitas Personae: On Legal and Biological Self-narration’ (2002) 14(2) *Law and Literature* 275–308, 289–290, 285–286.

false'.¹⁰ Curiously, then, while for most of us 'making' is a fulfilling and defining attribute of human expression and well-being, the law is often secretive about its 'making' to the point of denying that it does any such thing. Mussawir and Parsley identify gender as a field in which the law has trespassed into the territory of truth when it ought to have limited itself to the terrain of jurisprudential craft. They complain of the recent trend in the law of persons, by which '[g]ender is treated as though it cannot be the effect of a legal classification but only a "truth" or "nature" received independently of any legal function and taken as inseparable from one's natural person'.¹¹ To illustrate the excesses of this trend, they rely especially on Alex Sharpe's reading of the English criminal law case *R v McNally*.¹² Justine McNally, a person designated female at birth, presented as a man and engaged in sexual activity with a teenage cisgender girl and was charged with sexual assault on the ground that McNally's failure to disclose their gender history amounted to deception. McNally was given a custodial sentence because the other party 'chose to have sexual encounters with a boy and her preference (her freedom to choose whether to have a sexual encounter with a girl) was removed by the appellant's deception'.¹³ Mussawir and Parsley point out that the court therefore treated the case as comparable to one in which someone 'deceitfully sidles into bed with the woman who he knows was expecting her partner',¹⁴ which begs the question whether a different gender is really enough to produce a totally different person for the purposes of sexual consent. Alex Sharpe questions the safety and fairness of labelling as 'deceptive' a self-representation that is faithful to and consistent with a particular gender.¹⁵ Her point can be applied not only to transgender people but also by extension to cisgender people. After all, it is common enough for people to pass the judgment on cisgender men that they are acting 'laddish' or upon cisgender women that they are acting 'girly' without bringing the honesty, truth, or integrity of their performance into question. The crucial point as a matter of consent is that the sexual partners of such people accept their present performance whether or not it differs from the performer's sexual or gender history

¹⁰ Douglas Lind, 'The Pragmatic Value of Legal Fictions', in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 99.

¹¹ (2013) EWCA Crim 1051, Court of Appeal (Criminal Division).

¹² Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380–391.

¹³ *R v McNally* [2013] EWCA Crim 1051, per Lord Justice Leveson at para. [26].

¹⁴ Edward Mussawir and Connal Parsley, 'The Law of Persons Today: At the Margins of Jurisprudence' (2017) 11(1) *Law and Humanities* 44–63, 59.

¹⁵ Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380–391, 387.

An Advantageous Art

The law's process of engendering legal persons has traditionally been exemplified in relation to corporate persons such as governmental, charitable, and commercial entities; the last of these commonly known as 'companies'. Sir William Blackstone made clear the Creative – we might say the procreative – nature of the law's person-making activity in that context:

[I]t has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

THESE artificial persons are called bodies politic, bodies corporate, (corpora corporata) or corporations.¹⁶

To make a legal person in this way is, as Blackstone says, 'artificial', which is to say that the law operates by means of technical arts and that the law's mode of Production is not natural in the way that human sexual reproduction is natural. Crucially, though, there is no suggestion in Blackstone's formulation that legal person-making is in any way tainted on account of its being artificial as opposed to being biologically natural. On the contrary, Blackstone explains that the law's process of making a person is 'necessary' and 'for the advantage of the public'. The same may be said of instances where the law confers legal personhood, or significant aspects of legal personhood, through such processes as adoption, the conferral of state citizenship, and the recognition of transgender personhood.

Another, and very different, instance of the law 'giving birth' to a new legal person complete with new gender identity is the launching of a ship. 'A ship', as Oliver Wendell Holmes observed, 'is the most living of inanimate things . . . every one gives a gender to vessels'.¹⁷ This surprising example has been examined with sophistication by Douglas Lind.¹⁸ The following account is taken from the 1902 decision of the United States Supreme Court in *Tucker v Alexandroff*:¹⁹

[T]he *Variag* was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a ship in the ordinary sense of the term, but shortly thereafter . . . she was launched, and thereby became a ship in

¹⁶ William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–1769), Book I, chapter 18, 'Of Corporations'.

¹⁷ Oliver Wendell Holmes, *The Common Law* (Cambridge, MA: Harvard University Press, 2009) 26.

¹⁸ Douglas Lind, 'The Pragmatic Value of Legal Fictions', in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 96–97; Douglas Lind, 'Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship' (2010) 22 *University of San Francisco Maritime Law Journal* 39–121.

¹⁹ United States Supreme Court in *Tucker v Alexandroff* (1902) 183 U.S. 424.

its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron – an ordinary piece of personal property – as distinctly a land structure as a house . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.²⁰

For our purposes, the most important words in this quotation are ‘became a ship in its legal sense’. Now, there are obviously stark differences between a human individual and a ship, but legal recognition of the trans person has the capacity to make a woman or a man ‘in its legal sense’ just as surely as the law has the capacity to make a new legal person in the shape of a corporation or a new female person in the form of a ship. *The Case of Sutton’s Hospital* indicates that a corporation can exist in law *in abstracto* from the moment of conception, whereas *Tucker v Alexandroff* indicates that a ship does not exist as such until it is born through launch, which is a sort of performed parturition. Is it truly the case that the ship known as the *Variag* was not a ship before launch, when it was ‘still upon the stocks’? It was then in all apparent respects ship-*shape*, and after launch it might one day return to the stocks to be repaired in dry dock, whereupon it does not then cease to be a ship. Pre-launch, we may legitimately debate the ‘shipness’ of the *Variag* one way or another according to a variety of perspectives, but what matters in law is that the launch, like human adoption or birth, is regarded as the essential moment of legal person-making regardless of whatever, from any other perspective, precedes or follows it.

Whatever the nature of a trans individual’s journey of ‘coming to live as’ a new legal person, the ambition of the law’s activity of making sex change is (however much it is thwarted in practice) to bring about finality with a view to making social peace. As the Latin maxim puts it, *interest rei publicae ut sit finis litium* – ‘it is in the public interest to end disputes’. The problem is that we do not take seriously enough the fictionalizing power of the legal conception of the person, hence Mussawir and Parsley’s complaint against the ‘marginalization of a certain consciousness of jurisprudence as a craft, art or technique’ by which the legal person is made ‘within the contemporary law relating to questions of gender and the division of the sexes’:²¹

The marginalization of the law of persons here tends to have the consequence of flattening sex onto the person almost to the point of taking its place entirely. Gender is treated as though it cannot be the effect of a legal classification but

²⁰ *Ibid.*, 437–438.

²¹ Edward Mussawir and Connal Parsley, ‘The Law of Persons Today: At the Margins of Jurisprudence’ (2017) 11(1) *Law and Humanities* 44–63, 45.

only a 'truth' or 'nature' received independently of any legal function and taken as inseparable from one's natural person.²²

The last words of that quotation – 'one's natural person' – probably need to be contained within quotation marks to emphasize that, to whatever extent the law works on the assumption that an individual has a 'natural person' or that 'one' identifies with a 'natural' sense of self, this is a legal construct every bit as much as legal gender is.

Debates about the legal recognition of transgender personhood will be conducted more constructively if we appropriately qualify what we mean by such terms as 'artificial', 'natural', 'fact', and 'truth'. As to the term 'artificial', the crucial point is that it is not a pejorative term in the context of legal recognition but merely the proper term to describe a persona produced by the technical art – the *technê* – of law. The term 'natural', if it is referring to biological nature, is equally bland in this context. Just as 'artificial' is no mark of shame, so 'natural' in the biological sense is no badge of honour. It simply means to say that apart from rare individuals who are born intersex, people have a biological sex ascribed at birth based on the evidence of their genitals (few people are tested as to their chromosomal nature). The fact that some transgender people sooner or later feel that some anatomical body parts do not feel natural to them indicates that there are other notions of nature at play, including individual human nature and social human nature. It is on account of such extra-biological notions of nature that the vast majority of people wear clothes in public rather than go *au naturel*. Tension between two ideas of nature in the context of dress – the biologically native on the one side and the sociologically natural on the other – might be helpful as a way of appreciating the tension between biological and social nature in the context of discourse about transgender identity.

What Is Truth?

As for the use of the terms 'truth' and 'fact' in this context, they are all too often employed in discourse around transgender issues as if they were incontestable and unchanging axioms, when it is more accurate to talk of truths and facts according to the contexts in which they are produced. There are, for instance, differences between legal and scientific truths, given the very different processes by which they are each established. This was the subject of [Chapter 4](#), where we considered the legal trial as a sort of Truth Factory. To illustrate the error and confusion that can be generated by inappropriate resort to 'truth', we will start with the example of a modern case in which the issue has arisen. The dispute in *Maya Forstater v CGD Europe*²³ originated with a

²² *Ibid.*, 56.

²³ *Maya Forstater v CGD Europe* (2019) Employment Tribunal (Case Number: 2200909/2019).

letter written by Maya Forstater to her Member of Parliament, Anne Main MP, on 30 September 2018. The letter was an objection to certain proposals for reform of the Gender Recognition Act 2004. In the letter, Ms Forstater made the following request:

Please can you not support the proposed new GRA, and instead make space for a broader national conversation about how to reconcile the welfare of people who seek treatment for gender dysphoria and the basic human rights of women and girls.

Please stand up for the truth that it is not possible for someone who is male to become female. Transwomen are men, and should be respected and protected as men.²⁴

When Ms Forstater published her letter on social media, she received a range of responses ranging from the strongly supportive to the strongly critical. This was to be expected. In the polarizing context of social media, issues of sex and gender identity, which are frequently framed in rigidly binary terms, tend to be contested in a largely divisive and bifurcating mode. On 2 October 2018, Ms Forstater replied to the social media response with a further post in which she wrote:

I have been told that it is offensive to say ‘transwomen are men’ or that woman means ‘adult human female’. However since these statements are true I will continue to say them . . . Policy debates where facts are viewed as offensive are dangerous.

It is striking that in both these social media posts, Maya Forstater puts claims about the ‘truth’ and the ‘true’ at the forefront of her argument, alongside a related claim to be speaking on the basis of ‘facts’. Ms Forstater’s contract with the political think tank the Centre for Global Development was not renewed, and when she sought redress from an employment tribunal, the judge stated that Forstater’s gender-critical opinions, and the way she expressed them, were indefensible. Judge James Tayler said, ‘I consider that the Claimant’s view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others’.²⁵ That decision was subsequently overturned by an employment appeal tribunal which set the bar at an extremely low level by holding that the only beliefs not capable of being worthy of respect in a democratic society are those ‘that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms . . . Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection.’²⁶

²⁴ *Ibid.*, para. [28]. ²⁵ *Ibid.*, para. [84].

²⁶ *Maya Forstater v CGD Europe* (2021) Employment Appeal Tribunal (Appeal No. UKEAT/0105/20/JOJ) para. [79].

By that test, Maya Forstater was held to be free to voice her gender-critical views. When her claim for unfair dismissal was subsequently heard on its merits before the London Central Employment Tribunal, the tribunal upheld her complaint that she had suffered direct discrimination on account of her gender-critical beliefs when her employer decided not to offer her a new employment contract and decided not to renew her visiting fellowship. She also succeeded in her complaint of victimization relating to the removal of her profile from the employer's website.²⁷ The point I want to focus on here is one that was not considered by any of the tribunals in this case. It is that Ms Forstater's resort to claims expressed in terms of 'truth' and 'fact' ignores the law's capacity to *make* social truths and social facts. Biological definitions of sex establish truth and fact in the Truth Factory of science, but the law makes truth and facts of its own which sometimes deliberately conflict with scientific truths and facts; as, for example, in the case of legal adoption, where the law says (contrary to biological scientific definitions) that a certain infant is the child of a certain adult.

The legal process of gender recognition under the Gender Recognition Act 2004 is committed to very different notions of truth and fact to those advanced by Maya Forstater. Whereas she sought to advance certain biological definitions of sex in support of exclusive binary norms of male and female, the law is committed by the Gender Recognition Act 2004 s.9(1) (set out earlier in this chapter) to treat a transgender person in possession of a Gender Recognition Certificate as a person of the acquired gender for 'all purposes' (or all *legal* purposes); and, subject to certain exceptions, in all contexts.

What's in a Name?

The effect of a Gender Recognition Certificate is to recognize an acquired gender and, more than that, actually to change the holder's sex for legal purposes. Now it would clearly be impossible for any legal document to change the holder's biological make-up, but it can change the holder's sex as a legal matter of fact. Transgender people generally regard their sex as described in their original birth certificate as being officially assigned rather than innate, thus Bex Stinson, head of Trans Inclusion at Stonewall, responded to radio interviewer John Humphrys' question 'you were born a man?' by saying 'yes, I was assigned male on my birth certificate, and I've transitioned to live as myself, which is a woman'.²⁸ That transition brings with it the social and cultural disadvantages of being a woman just as surely as it brings social and cultural advantages, for to bear the label 'woman' is to bear the consequences of a political category regardless of biology (as numerous feminist

²⁷ *Maya Forstater v CGD Europe* London Central Employment Tribunal (case number 2200909/2019), 6 July 2022.

²⁸ *Today* (BBC Radio 4), 18 October 2017.

scholars acknowledge).²⁹ In the UK, the law's power to make sex change extends to changing a birth certificate registered in England and Wales or Scotland to show the trans individual's identified sex and new name in place of the original ascription. The effect, for legal purposes, is the rebirth or relaunch of the legal person. This radical instance of legally recreated sex supports Judith Butler's claim that sexual identity is not an innate status to which cultural considerations are added through gender language, but something that is itself culturally engendered. As she puts it:

Gender ought not to be conceived merely as the cultural inscription of meaning on a pre-given sex (a juridical conception); gender must also designate the very apparatus of production whereby the sexes themselves are established. As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced.³⁰

When reading the words 'nature' and 'natural' in the final line of that quotation, it is helpful to recall that biological and chromosomal nature are not the only candidates. Nature comes in many forms, including those we might broadly call 'legal nature' and 'social nature'. It should also be borne in mind that there is evolution in legal nature and social nature just as there is in biological nature. Owen Barfield's wise words in that connection seem to fit our present topic well when he said that 'a deeper, more sympathetic understanding of the long, slow movement of the human mind from the feudal, or genealogical, way of regarding human relationships towards what I have called the "personal" way would do no harm'.³¹

The most basic statements of legal fact regarding our identities as individuals are always to be found in official formal documents. When the law re-creates or re-produces a legal persona, the formal founding documents of the legal person are altered accordingly. In the UK, when a court makes an adoption order, a copy is sent to the General Register Office, where a new birth certificate is produced in the child's adoptive name that replaces the original birth certificate for all legal purposes. The only (inconclusive) clue to the fact of adoption on the face of the new short-form certificate is that the place of birth is listed as Southport, Merseyside, which is the location of the General Register Office.

²⁹ See, for example, Lorna Finlayson, Katharine Jenkins, and Rosie Worsdale, "I'm Not Transphobic, but . . .": A Feminist Case Against the Feminist Case Against Trans Inclusivity', *Verso* (17 October 2018). See, further, Lorna Finlayson, *An Introduction to Feminism* (Cambridge Introductions to Philosophy) (Cambridge: Cambridge University Press, 2016); Katharine Jenkins, 'Amelioration and Inclusion: Gender Identity and the Concept of Woman' (2016) 126 *Ethics* 394–421.

³⁰ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990) 7.

³¹ Owen Barfield, 'Poetic Diction and Legal Fiction' (1947) in *The Rediscovery of Meaning and other Essays* (Oxford: Barfield Press, 2013) 63–93, 70.

My passport has entries under 'name', 'date of birth', 'place of birth', 'nationality', and 'sex'. The details under those headings are entered in part by way of legal record, but also in part by way of legal Creation and Production. The first performance of a person's gender identity normally falls to medics who declare 'it's a boy' and to parents who declare 'his name is John'. Such statements make our social sex and gender in the originating way we call Invention, a word that can be used to describe an original finding based on apparent evidence (as in 'it's a boy') and also to describe an original founding *ex cosmos* – that is, out of a world of possibilities (as in 'his name is John'). Subsequent legal formal declarations of name and sex confirm those statements, but they also make sex in the sense of Creation by developing an informal declaration into a formal one, and they make sex in the sense of Production by making public the child's ascribed sexual identity. There is, accordingly, a legal re-Creation and re-Production when a person chooses to change their legal name for any reason. In the UK, all that is required to change a name as a matter of law is for the named person to execute before two witnesses a one-party deed known as a 'deed poll', with the following wording:

'I [old name] of [address] have given up my name [old name] and have adopted for all purposes the name [new name].

'Signed as a deed on [date] as [old name] and [new name] in the presence of [witness 1 name] of [witness 1 address], and [witness 2 name] of [witness 2 address].

'[new signature], [old signature]

'[witness 1 signature], [witness 2 signature]'

There is legal poetry in the elegant efficiency by which, in a single line containing old and new signatures, the individual expresses the very essence of their legal transformation at the liminal threshold between the old and the new. For a small fee, the deed poll can be made a matter of public record by enrolling it with the court. The whole process might appear to be one of recording (as opposed to making) a new name, but to talk in terms of recording assumes that the new name had some prior existence. It need not. If the new name did have some prior existence as a social or cultural fact, the legal deed poll would nevertheless make something more than a mere matter of record, for by processes of Creation (re-Creation) and Production it would for the first time make the new name as a legal fact. The Production aspect of legal name-making is effected by bringing the new name to public recognition; by putting it on the social stage for purposes of public recognition. So it is with a legal change of sex.

Numbers, such as date of birth, are usually uncontroversial where they appear in legal formal documentation, but more nuanced matters of personal identity are likely to be controversial when they are set out in the blunt and brief language of legal formality. Take 'name' for example, which for a great many people appears as one thing in official documentation and a very

different thing in everyday usage. Assumed names and nicknames are frequently more or less at variance with our officially 'proper' name. In answer to the question 'which name is true?', it would surely stretch the language of 'truth' too far to say that the official legal name by which I am known by nobody is my 'true' name. If we cannot expect a passport entry under 'name' to be socially and practically 'true', how much less should we expect social truth to be expressed accurately in relation to the complex question of sex identity when the category admits of only two possible answers – 'male' or 'female' – each of which is in formal documentary terms exclusive of the other.

For most people, the binary question 'male or female' is straightforward enough to answer on the evidence of bodily form, but a passport isn't a scientific certificate of bodily form, still less of genetics. It is a legal document produced for legal purposes. That being so, many of us might wish to cast doubt on the law's binary understanding of 'male' and 'female'. We might demand of the law: 'when you use the labels male and female, do you mean to refer to chromosomal genetic nature? If so, why . . . since few, if any, passport inspectors have the means to test that?' We might equally ask, 'do you mean naked bodily appearance? If so, why . . . since the law has no interest in my naked form?'; or ask, 'do you mean that the holder dresses and otherwise presents in ways stereotypically normal for someone of that sex? If so, why . . . since the law has no interest in how a person performs gender norms by means of their dress?' (Perhaps the law would reply 'for reasons of border security', but to label someone as 'male' or 'female' will actually provide a false sense of security in the case of travellers who are read as the other gender.) Or we might ask, 'do you mean that the passport holder thinks of themselves in ways stereotypically normal for someone of that sex? If so, why . . . since the law has no business and no capacity to scrutinize a human's inner thoughts and ideas of self?' If the simple question 'male' or 'female' can reasonably prompt this wide range of objections from people who might on balance identify with the sex ascribed to them at birth, consider how strong and several will be the objections of someone who does not identify with the sex originally assigned to them.

Many countries across the world have introduced gender-neutral passports (the USA issued its first on 21 October 2021), but at the time of writing the UK is not one of them. In March 2020, the Court of Appeal of England and Wales handed down a judgment in a case brought by campaigner Christie Elan-Cane in which it acknowledged that a person's gender identity (or right to be identified as non-gendered) is protected as a central aspect of their private (or family) life under Article 8 of the European Convention on Human Rights.³² Despite this, the court confirmed that subscribing nation states have

³² *R (Christie Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, per Lady Justice King at para. [47] (on appeal from: [2018] EWHC 1530 (Admin)). Her ladyship cited *Van Kück v Germany* (App No 35968/97) (2003) 37 EHRR 973 ('Van Kück') which referred to gender as 'the most intimate aspect of one's identity'.

no positive obligation to offer gender-neutral passports. One of the main reasons given was that the government has the right to postpone the making of documentary changes in the case of passports until such time as it can bring in a coherent policy covering all official documentation (birth certificates and so forth). In short, the court held that it is better for an individual to suffer formal incoherence in the matter of gender-stating documentation than that the entire state bureaucracy should.³³ The clash here is between the individual's self-identification and the linkage between identity and documentation that states rely upon in the formulation of passports and other ID cards. When Elan-Cane appealed to the Supreme Court, the appeal was dismissed on the further ground that there was not an 'obvious discrepancy between the appellant's physical appearance and the "F" marker in the appellant's passport'³⁴ – a decision that threatens to introduce invidious inquiries into the degree to which a passport holder's appearance conforms to stereotypes of gender presentation. Where the formality of a passport does not correspond to physical appearance, the threat can be existential – as reported of transgender refugees prevented on that account from leaving Ukraine to escape the dangers of Vladimir Putin's invasion. Perhaps the most fundamental factor underlying their lordships' rejection of the gender-neutral passport is that a 'binary approach to gender . . . forms the basis of the provision of a wide variety of public services', including schools, hospitals, and prisons.³⁵

The law's craft of person-making can cope with the transformation of male to female and female to male, but the legal magic apparently struggles to transform female or male to no gender at all. The law prefers to function by means of defined categories, so that at the time of writing the UK's legal legerdemain allows the elusive object of gender to be held in the left hand or right hand but does not allow it to hover in the air. Despite this, the example of other nations shows that the legal magic of making gender-neutral passports can be summoned where there is the requisite legislative will to do so. To that end, a private members' bill entitled the Non-gender-specific Passports Bill was introduced into the UK Parliament, but in the event it failed for lack of timely progress. For the time being, then, when a non-gendered person like Christie Elan-Cane fills in the passport application or renewal form they will have to make a binary choice between M or F and will reluctantly have to participate as co-Creator and co-Producer in the state's performance of their gender identity.

³³ *R (Christie Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, per Lady Justice King at paras [69–70].

³⁴ *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, per Lord Reed (with whom the other Justices unanimously concurred) at para. [41].

³⁵ *Ibid.* at para. [53].

No Virtue in Nature

The language of biological and scientific ‘truth’ is of little use when discussing the quite incommensurate question of legally sanctioned reality. Since ancient times, legal processes of person-making in civil society have always sought to Create, re-Create, and Produce civil identity and human relations that are to a greater or lesser extent non-natural from a purely biological point of view. Adoption in Roman law stands out as a positive example, and on the negative side the Roman law of slavery exemplifies the law’s ability to strip the biological human of almost all the incidents of legal personhood. The law has never been limited by the norms of human biological nature. Indeed, legal sanctions – from rules sanctioning crimes to remedies for breach of contract – are frequently designed to oppose and correct the undesirable instincts and habits of human biological nature. Consider how biologically natural are the many vices of violence, prejudice, and expropriation which thrive throughout the animal kingdom. There is no virtue in nature. Hobbes regarded the ‘Leviathan’ of law and government as something necessary precisely because the natural state of human society is a fearful state of war in which the life of an individual is ‘solitary, poor, nasty, brutish and short’.³⁶ He was writing at the time of the English Civil War, but the point applies equally in times of relative civil peace. In some contexts – adoption is one of them, transgender recognition is another – the very purpose of the law’s performance is to present an idea of fact and truth which is at odds with notions that come naturally in a purely native, biological sense.

In Praise of Fiction

Having considered the use and abuse of the words ‘artificial’, ‘natural’, and ‘true’ in the context of discourse about transgender rights, we now turn to two other words that have been too casually employed in relation to the law concerning transgender recognition. Those words are ‘fact’ and ‘fiction’. Let us start with ‘fiction’ and the observation made by the chair of the employment tribunal at first instance in the *Forstater* case that he did ‘not accept the Claimant’s contention that the Gender Recognition Act produces a mere legal fiction’.³⁷ The word ‘mere’ is unhelpful here, for it leaves us unsure whether the judge would have approved some other (more than ‘mere’) idea of ‘legal fiction’ as a description of the legal personhood of a transgender individual. If we assume that the judge objected *tout court* to the use of the term ‘legal fiction’ to describe transgender personhood as protected by the Gender Recognition Act, the question arises: why? The obvious answer is the

³⁶ Thomas Hobbes, *Leviathan* (London: for Andrew Crooke, 1651) chapter 13.

³⁷ *Maya Forstater v CGD Europe* (2019) Employment Tribunal (Case Number: 2200909/2019) para. [84].

pejorative associations that frequently accompany the word ‘fiction’ and, more particularly, the term ‘legal fiction’. Those pejorative associations, which stem in large part from the assumption that fiction is false on account of being ‘made up’, are unfortunate and unnecessary. Douglas Lind observes that typically ‘fictions are treated in legal theory as consciously false assumptions’, adding that ‘[t]his is regrettable’.³⁸ I echo that regret. On my analysis, all law is fiction of one sort or another, and the truly fanciful creatures that have historically been labelled ‘legal fictions’ (e.g. naming the non-existent ‘John Doe’ as a supporter of one’s claim to avoid the accusation that the claim was groundless) are simply instances of fictional law-making that especially stand out because they are so easily falsifiable. Indeed, it may be that judicial use of such glaring sorts of legal fiction has assisted judges in their traditional effort to deny that they make law, as focusing attention on absurd cases conveniently diverts scrutiny away from the fundamentally fictional nature of *all* judicial fact-making and decision-making. Elaine Scarry alluded to this species of diversionary tactic when she posited the possibility that the law, and other such crafts in which art is deliberately hidden, sometimes takes a bow in one case in order to deflect attention from the fabricating nature of the vast majority of its business:

If it is central to her project precisely that she remain disguised, if the benefits of her work are ordinarily greatly amplified by not being assignable to her, then by having a piece of ground where she is immediately recognizable, proudly self-announcing, she will obscure her activity on all other ground, deflect attention from her responsibility for the ‘real world’s’ realness . . . Her aspiration is to be omnipresent and unrecognized – to be not the legislator of the world but, as Shelley saw, the *unacknowledged* legislator of the world.³⁹

Lind sees no reason to reject even the more obvious and extreme types of fiction. He argues that legal fictions are true insofar as they are consistent with the law’s pragmatic project. He writes:

I suggest . . . that legal fictions be understood as true legal propositions asserted with conscious recognition that they are inconsistent in meaning or otherwise in semantic conflict with true propositions asserted within some other linguistic system (or elsewhere within law). Understood this way, fictions need not present legal theory with an intractable enigma. For the legal fiction is simply a form of creative lawmaking, a phenomenon of legal (primarily judicial) technique employed to resolve trouble in the legal environment.⁴⁰

³⁸ Douglas Lind, ‘The Pragmatic Value of Legal Fictions’, in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 84.

³⁹ Elaine Scarry, ‘The Made-Up and the Made-Real’ (1992) 5(2) *The Yale Journal of Criticism* 239–249, 244.

⁴⁰ Douglas Lind, ‘The Pragmatic Value of Legal Fictions’, in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 84.

... utterances in the form of legal fictions are not, generally speaking, false within law – e.g. corporations are jural persons. That is a true proposition of law.⁴¹

I agree, and I would add that, within the law, corporations are more true than any human can be because the corporation has no excess existence outside of its legal personality. The law can provide a complete account of a corporate person, but its attempts to give a complete account of a human person are always thwarted by the fact that human beings have an existence outside of the law. Applying Lind's analysis to the legal idea of the trans person allows us to describe the legal trans person as a fiction without the description being in any way pejorative. By using the label 'legal fiction' we would actually be saying, to paraphrase Lind, that the legal trans person is a true legal person asserted with conscious recognition that their legal personhood is inconsistent in meaning or otherwise in semantic conflict with true propositions asserted within some other linguistic system (such as the language of biological science). Furthermore, whether they are true or false, legal fictions are practically necessary. This is the point made by Blackstone in the quotation cited earlier in this chapter, and Lind makes the same point in his pragmatic analysis of legal fictions when he approves Pierre de Tourtoulon's suggestion that 'if one would try to strip the Law of every fiction of the past as well as of the present, not much would be left'.⁴²

A Truth, but Not the Truth

Where I depart from Lind is in his reliance on a pragmatic philosophy that 'disavows belief in absolute truths'.⁴³ A truly pragmatic philosophy is competent to doubt that humans can ascertain and express absolute truth, but it oversteps its mark when it purports to comment one way or another on the existence of absolute truth. It is helpful here to recall Giambattista Vico's observation that the reason we demonstrate '[t]ruths in arithmetic, geometry, and their offspring, mechanics' is 'that we make it', whereas '[t]ruths in physics ... belong in God, in whom alone it is a true faculty'.⁴⁴ Law is more on the side of geometry than physics. Note that Vico refers to 'a truth' rather than 'the truth'. Vico likewise favoured a notion of 'the true' (rather than 'the truth') as an adjectival description of artefacts made in particular contexts. The mask of legal personality would be one such artefact. To say that such a thing

⁴¹ *Ibid.*, 87.

⁴² Pierre de Tourtoulon, *Philosophy in the Development of Law*, Martha Read (trans.) (New York: Macmillan, 1922) 388; quoted in Douglas Lind, 'The Pragmatic Value of Legal Fictions', in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 85.

⁴³ *Ibid.*, 88.

⁴⁴ Giambattista Vico, *On the Most Ancient Wisdom of the Italians* (1710), Jason Taylor (trans.) (New Haven, CT: Yale University Press, 2010), chapter 7, 103.

is made and can be called ‘the true’ or ‘a truth’ says nothing at all about ‘the truth’ in an absolute, context-transcending sense. Vico wrote that for the Latins, *verum* (the true) and *factum* (what is made) are interchangeable.⁴⁵ James C. Morrison stresses that ‘Vico speaks only of *verum*, an adjective, and not *veritas*, an abstract noun. *Verum* is used by him not only adjectivally but also substantively; it means true, a truth, and what is true, depending on the context. Thus, *verum* is *factum* is not a doctrine about the nature of truth but about the true.’⁴⁶ So, contrary to Lind, I argue that there can be no objection to non-rational faith in an unprovable and undisprovable absolute truth. What I do agree with is Lind’s suggestion that ‘reality, as we conceive it, is largely a product of our own creation’.⁴⁷ The crucial words here are ‘as we conceive it’, for it appropriately implies that absolute truth may exist beyond our cognitive and conceptual capacities to comprehend or express it. Even when transcendental truth is understood to be Divinely revealed, as in the Judeo-Christian account, the human recipient is said to see truth not directly but as if reflected in a mirror.⁴⁸ A broadly similar idea has been with us since the dawn of Western philosophy and Plato’s allegory of the cave, by which he analogized unenlightened human perception of reality to the interpretation of shadows cast by an unseen fire.⁴⁹ What pragmatic philosophers add to this picture is the sense – the Making Sense – that our conception of reality is something that we fabricate. Thus, Lind quotes Quine for the view that our conception of reality is a ‘man-made fabric’,⁵⁰ and the pragmatic philosopher William James for the view that the thing we call reality is ‘flagrantly man-made’.⁵¹ Referring again to James, Lind emphasizes the way in which truth is continually re-created:

We delude ourselves to think we have attained truth absolute – fixed, static, and certain for all time. For reality is continually under construction. ‘What really exists,’ James wrote, ‘is not things made but things in the making’ . . . The new idea becomes true, ‘makes itself true,’ James insisted, ‘by the way it works; grafting itself then upon the ancient body of truth, which thus grows’.⁵²

⁴⁵ *Ibid.*, chapter 1.

⁴⁶ James C. Morrison, ‘Vico’s Principle of *Verum Is Factum* and the Problem of Historicism’ (1978) 39(4) *Journal of the History of Ideas* 579–595, 582.

⁴⁷ Douglas Lind, ‘The Pragmatic Value of Legal Fictions’, in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 5.

⁴⁸ 1 Corinthians 13:12. ⁴⁹ Plato, *Republic* (514a–520a).

⁵⁰ Willard Van Orman Quine, *From a Logical Point of View* (Cambridge, MA: Harvard University Press, 1953) 42.

⁵¹ William James, *Pragmatism* (1907) (Cambridge, MA: Harvard University Press, 1975) 119.

⁵² Douglas Lind, ‘The Pragmatic Value of Legal Fictions’, in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, Vol. 110 (Dordrecht: Springer, 2015), 83–109, 90–91. Citing William James, *Pragmatism* (1907) (Cambridge, MA: Harvard University Press, 1975) 36 and William James, *A Pluralistic Universe* (1909) (Lincoln: University of Nebraska Press, 1996) 263.

Nowhere is this process of re-Created truth more apparent, I would suggest, than in the law's making or remaking of the transgender person. If we cannot shake off the regrettable association between falsehood and the term 'legal fiction', let us say instead, with no loss of accuracy, that in recognizing the new legal personality of a transgender person, the law is making transgender legal personhood as a matter of 'legal fact'. Or, in Vico's term, that in the legal context, transgender personhood is 'a truth' or 'the true'. What nobody can say of any sort of legal personhood is that it is transcendently 'the truth'. Absolute justice and absolute truth are a fire burning out of sight. When it comes to human-made laws, we are simply Making Sense of shadows on a wall.

Making Faces, Performing Persons

Wooring poor craftsmen with the craft of smiles.

William Shakespeare, *Richard II* (1.4.28)

Smiles were in short supply in the darkest days of the Covid-19 pandemic, in large part because so many were concealed beneath masks. In societies that have no modern tradition of wearing masks or veils, the unfamiliar sight of concealed faces can be disconcerting. This is not because we are unable to see the flesh of the face – a lifeless face can be quite as disconcerting as any mask – but rather because artificial face coverings conceal our arts of face-making. The face is, after all, the only part of the body that we commonly talk of in terms of ‘making’ and of being ‘made up’. The very word ‘face’ derives from the Latin *facere* – to make or to do. In this chapter, we examine the psychological power of face-making and the exploitation of that power in political performance. We also consider how physical face-making parallels the rhetorical crafting of persona in politics, law, and society at large.

We have a psychological need and desire to see faces being made. A great many of the five billion videos that are watched on YouTube every day demonstrate processes of making, including cooking, gardening, and crafting of every sort. Of these, one of the most popular genres is ‘makeup tutorials uploaded by beauty creators’.¹ In 2018, these accounted for around a million views each day.² Jiyoung Chae notes that ‘[f]amous beauty creators have millions of subscribers. For example, Yuya, a Mexican beauty creator, has 21 million subscribers, and UK-based Zoella has 12 million.’³ Yuya’s sensory arts and commercial skills extend to scent, which she markets as a perfume called #True. The name tellingly pretends to the very attribute that cosmetic arts, and all other rhetorical and performative arts, aspire to present. Scent should not be underestimated. For example, in one study it was ranked ahead

¹ Jiyoung Chae, ‘YouTube Makeup Tutorials Reinforce Postfeminist Beliefs through Social Comparison’ (2021) 24(2) *Media Psychology* 167–189, 167.

² Lora Jones and Hannah Gelbart, ‘Make-up: Have YouTube Stars Boosted Beauty Sales?’, *BBC News*, 7 June 2018.

³ Jiyoung Chae, ‘YouTube Makeup Tutorials Reinforce Postfeminist Beliefs through Social Comparison’ (2021) 24(2) *Media Psychology* 167–189, 167.

of any single aspect of facial make-up when it comes to making fourteen- to eighteen-year-old girls attractive to their peers. Perfume was followed by mascara, eyeshadow, eyeliner, nail varnish, and lipstick.⁴ That said, the combined effect of facial cosmetics outperforms scent and every other cosmetic attribute in terms of producing attractiveness; all the more so if the look of hair and teeth and the presence or absence of spectacles is taken into account. Incidentally, psychologists sometimes classify spectacles and jewellery as ‘artifactual clues’ to the wearer’s communication, a term that confirms the role played by made things in a person’s performative make-up. Anybody who is adept at meeting our psychological need to see faces being made has the potential to exert significant social influence. This is true of social media ‘influencers’ but also, as we will see later, of actors on the highest political stages. When John Gauden called the female face ‘the chief Theatre, Throne and Centre of Beauty’, ‘the Queen and sovereign of humane and visible Beauty’, and ‘the Regent and directrix of the whole bodies culture, motion, and welfare’, his language is a clue to the fact that the face also stands centre stage in the theatrical performance of law and government.⁵

The Psychology of Making Faces

The face is a fashioned thing, and yet for all its potential for artifice, the face is also the thing to which we are most naturally, in the sense of innately, attuned. Scientists have suggested that the face may be ‘the seat of the greatest amount of information that is conveyed nonverbally. That’s why we have “face-to-face” interactions. Sometimes we need to get “in people’s faces.” When we have meetings with others this is “face time,” and sometimes we need to “face off”’.⁶ Psychologists confirm our common sense that ‘[f]aces are among the most important visual stimuli we perceive, informing us not only about a person’s identity, but also about their mood, sex, age and direction of gaze’.⁷ Those authors add that:

[F]ace perception ... is implemented in its own specialized cortical network that is not shared with many if any other cognitive functions [and that] Considerable evidence from behavioural, neuropsychological and

⁴ J. A. Graham and A. F. Furnham, ‘Sexual Differences in Attractiveness Ratings of Day/Night Cosmetic Use’ (1981) 3 *Cosmetic Technology* 36–42.

⁵ John Gauden, *A discourse of artificial beauty, in point of conscience between two ladies with some satyirical censures on the vulgar errors of these times* (1656) (London: Printed for R. Royston at the Angel in Ivy-lane, 1662) 31.

⁶ David Matsumoto and Hyi Sung Hwang, ‘Facial Expressions’, in David Matsumoto et al. (eds) *Nonverbal Communication: Science and Applications* (Thousand Oaks, CA: Sage, 2012) 15–52, 15.

⁷ Nancy Kanwisher and Galit Yovel, ‘The Fusiform Face Area: A Cortical Region Specialized for the Perception of Faces’ (2006) 361 *Philosophical Transactions of the Royal Society of London* (Series B, Biological Sciences) 2109–2128, 2109.

neurophysiological investigations supports the hypothesis that humans have specialized cognitive and neural mechanisms dedicated to the perception of faces (the face-specificity hypothesis).⁸

The theory that there is a part of the brain dedicated to face recognition has been established experimentally in people who, having suffered localized brain damage, have lost the ability to recognize faces but retained the ability to recognize other things. Brain imaging shows that even people born profoundly blind who have never received visual stimuli still process the sounds of face-situated activity (such as laughing, kissing, and lip smacking) in the ‘face’ subregion of the visual region of the brain (the ventral-temporal cortex) just as fully sighted people do when they see those activities performed.⁹ Experiments have also shown that faces are hardwired holistically as whole things – as the entire face form – rather than as separate facial features. There is a face-recognizing part of the brain, but no region with equivalent predisposition to recognize discrete facial elements such as eyes, ears, lips, and nose.¹⁰

The predisposition to recognize faces is hardwired in our brain and this can sometimes prejudice us to see faces in surprising places. We might look at the front of a house with its windows and door, or a car with headlamps and radiator grille, and see something face-like in the lay-out of its ‘eyes’ and ‘mouth’. A famous photoblog is dedicated to these ‘faces in places’.¹¹ The ‘man in the moon’ – a myth based on the face-like arrangement of crater shadows on the lunar surface – is surely the oldest shared human experience of the phenomenon. Faces are seen subliminally in a passing glance out of the corner of an eye. We might fancy that we have seen face-like patterns in a pile of clothes, or (with apologies to Giuseppe Arcimboldo) in a bowl of fruit.¹² As the general category ‘face’ is hardwired in the brain, so too particular faces of individual people become deeply imprinted in our brains with surprising speed and permanence. The boast ‘I never forget a face’ is not as impressive as it sounds. Few of us forget faces once they have made an impression. According to one small-scale study, we are all on a spectrum of aptitude in face recognition, ranging from those who severely struggle to recognize faces at all and are said to suffer ‘face blindness’ (prosopagnosia) to so-called super-recognizers who struggle to forget even the most irrelevant passing sighting

⁸ *Ibid.*, 2110, 2112.

⁹ Job van den Hurk et al., ‘Development of Visual Category Selectivity in Ventral Visual Cortex Does Not Require Visual Experience’ (2017) *Proceedings of the National Academy of Sciences* (open access, <https://doi.org/10.1073/pnas.1612862114>).

¹⁰ James W. Tanaka and Iris Gordon, ‘Features, Configuration, and Holistic Face Processing’, in A. J. Calder et al. (eds) *Oxford Handbook of Face Perception* (Oxford: Oxford University Press) 77–91.

¹¹ <http://facesinplaces.blogspot.com>.

¹² Rick Peters, ‘The Face of Food’, *The Guardian*, ‘Word of Mouth’ feature, 14 September 2009.

from the sometimes distant past.¹³ The fact that most of us are rather good at remembering faces is presumably an evolutionary incident of the advantage of being able to recognize family, friends, and foes.

The well-known phenomenon of seeing the stereotypical face of Jesus or the Virgin Mary in markings on a piece of toast or in the random vapours of a cloud is not a spiritual revelation but a resolutely psychological one. The name given to the psychological phenomenon of seeing meaningful shapes in nebulous forms is ‘pareidolia’, and within this phenomenon the tendency to see faces is stronger than any other and is presumed to be seated in an evolutionarily primitive part of the brain.¹⁴ It might be said that our eyes are deceiving us, but in psychological terms we see a face because a face really is there to be seen. It does not diminish the reality of the face that it appeared on the surface of a piece of toast, or in the form of a cloud, or (to cite one celebrated photograph) in the foam of waves crashing against the shore.¹⁵ As the title of one scientific paper tells us, ‘The Potato Chip Really Does Look like Elvis!’¹⁶ Whether a face happens to be situated on a human head or not, it is a face properly so-called if it accords with the psychological archetype of ‘face’ hardwired in our brains. Since a face is a thing we make – a finding that we impose upon the matrix of our visual stimuli – a face on the surface of a house or a car is no less a face than a human face.

There is only fine shading between face and fake. Both words describe things made up, and both words derive from the Latin verb *facere*, ‘to make’. We make faces in general, and we also make faces in particular, and this is all before we even think about what it means to make our own face. How often have we glanced fleetingly at a crowd and somehow isolated the familiar face of a friend or a famous person? With the merest glimpse we instinctively know ‘I’ve seen that face somewhere’. This phenomenon of attributing individual identity to a particular face is also expressed using the language of making. We will be familiar with movies about incognito characters such as undercover detectives, spies, and people in witness protection, who say ‘I’ve been made’ when what they mean is that someone has recognized them. The language is revealing, because it gets straight to the reality of the psychological dynamic at work when our brains see a strange face in a pile of clothes or a familiar face in a crowd. We don’t just make our own faces; we make every face that we recognize as a face. When another person’s face is familiar to us, the making of their face is a type of Artefaction in which their face, as a thing made by us,

¹³ Richard Russell, Brad Duchaine, and Ken Nakayama, ‘Super-recognizers: People with Extraordinary Face Recognition Ability’ (2009) 16(2) *Psychonomic Bulletin & Review* 252–257.

¹⁴ Nouchine Hadjikhani et al., ‘Early (M170) Activation of Face-Specific Cortex by Face-Like Objects’ (2009) 20(4) *NeuroReport* 403–407.

¹⁵ *BBC News*, 8 July 2021, www.bbc.co.uk/news/uk-england-sussex-57770547.

¹⁶ Joel Voss, Kara Federmeier, and Ken Paller, ‘The Potato Chip Really Does Look Like Elvis! Neural Hallmarks of Conceptual Processing Associated with Finding Novel Shapes Subjectively Meaningful’ (2012) 22(10) *Cerebral Cortex* 2354–2364.

makes us respond in certain ways. The ability to recognize particular faces is no doubt useful in identifying undercover cops, but more importantly it is crucial to forming our most significant social bonds. Aesthetics is closely bound up in this, for just as beauty is in the eye of the beholder, so the quality of the face resides not in the fleshy form itself but in the mind of the one regarding it. It is because the face is a thing made by human perception that the art of facial cosmetics is such a fundamental feature of human social performance and has been since prehistoric times. When we make up our faces it is in part to present our faces as an artefact to meet the gaze of others, but there is also a sense in which making our face is bound up in making us recognizable to ourselves. By simply regarding our image in a mirror, we make our face before even a single stroke of make-up has been applied. We make it in the sense that we recognize the image as 'face', and we make it in the sense that we recognize it as our own face and not someone else's.

Face as Theatrical Stage

Faces can be considered the stage spaces of our social performances. Like a theatrical stage, the face is at once instantly recognized as a place where we expect a performance to occur and the place where the social performer displays the finest attributes of their performative art. The face is the site where the strongest natural compulsions of our cognition meet the most powerful artificial performances of our persona. That word 'persona' provides a clue to the role of the face in social performance, for what began as the Latin word for an actor's mask migrated to become one of the principal terms by which we describe the Production of an individual's social character. When we say that someone has a pleasant personality, we are referring to their persona – their social performance or 'front' (to use Goffman's term)¹⁷ – as if it were a thing representative of, or true to, their character.

We consider, next, two senses in which we make our own social face. The first is through facial expression, the second is through cosmetics. However, before we turn from considering the ways in which we make the faces of others to the ways we make our own faces, it is useful to remind ourselves that these two sides of our subject are to a large degree co-dependent. What we make of another's face will depend to a great extent upon what they have made of their own face, and what we make of our own face will depend to a great extent upon what others make of it. When considering this co-Productive aspect of making faces, the theatrical analogy is again useful, especially insofar as theatre scholarship has stressed the importance of stage actors and audience members being able to see each other's faces. Penelope Woods echoes Erving Goffman's idea that an individual's public persona is the 'stage front' of their

¹⁷ Erving Goffman, *The Presentation of Self in Everyday Life* (London: Penguin Books, 1959).

social performance when she writes of ‘the social and performative function of the early modern face . . . as a kind of *frons scenae* of the soul’.¹⁸ Emphasizing the audience’s role in the co-Productive activity of making the performer’s face, Woods argues that the early modern theatrical scene was to some extent made up of the faces of playgoers as seen from the stage, and that the audience ceased to play its collaborative part when artificial stage lighting in the early nineteenth century highlighted the on-stage performers and plunged the auditorium into darkness, thereby effacing the audience.¹⁹ Woods alerts us to the possibility that our very notions of ‘self and subjectivity’ might be ‘produced by the reaction and response of surrounding people’ so that ‘face exchange is on some level constitutive of character and of selves in the theatre’.²⁰ Thus, Woods’ idea of social face-making in theatre can be read as the complimentary counterpart to Erving Goffman’s idea that everyone performs theatrical face-making in society.²¹ Susan Bennett, in her book *Theatre Audiences*, places the start of the ‘separation of fictional stage world and audience’ at an even earlier date than Woods, with the seventeenth century move to indoor private theatres.²² To counter this separation, Jerzy Grotowski’s experiments in ‘Poor Theatre’ involved stripping away spectator-secluding lighting effects. He observed that ‘once a spectator is placed in an illuminated zone, or in other words becomes visible, he too begins to play a part in the performance’.²³

Of Countenance and Coins

Conscious performance is one thing, but can we be said to make a face when our facial expressions are involuntary? Some facial expressions are hard to replicate through deliberate art. Examples include a blush, the dilation of the pupils of the eyes, and a sincere full smile. It is nevertheless the case that most expressions that occur involuntarily can be replicated or restrained voluntarily. The restraint dimension, which is sometimes expressed as our ability to ‘contain’ ourselves, is the etymological source of the word ‘countenance’ as a description of facial appearance. To *con-ten* is to withhold or to get a grip on. We are all social actors with varying degrees of control over our facial display of emotions. While the best professional actors – theatrical, legal,

¹⁸ Penelope Woods, ‘The Play of Looks: Audience and the Force of the Early Modern Face’, in James A. Knapp (ed.) *Shakespeare and the Power of the Face* (Abingdon: Ashgate, 2015), 127–150, 129.

¹⁹ *Ibid.*, 131. ²⁰ *Ibid.*, 146.

²¹ Erving Goffman, *The Presentation of Self in Everyday Life* (London: Penguin Books, 1959).

²² Susan Bennett, *Theatre Audiences: A Theory of Production and Reception*, 2nd ed. (London: Routledge, 1997) 3.

²³ Jerzy Grotowski, *Towards a Poor Theatre* (1968) (New York: Routledge, 2002) 20. For an application Grotowski’s theory to law and justice, see Marret Leiboff, *Towards a Theatrical Jurisprudence* (Abingdon: Routledge, 2020).

political – are especially adept in the skill of replication and restraining emotional expression, excellence in the art of facial expression is not the exclusive preserve of professionals.

Neither do professionals always have the knack of interpreting faces even when their professional role would seem to depend upon it. One American trial judge, who scrutinizes a great many different faces every week in the course of his judicial work, laments that ‘[u]nfortunately, we judges are as accurate at reading the emotions on the face of another as we are at predicting a coin toss’.²⁴ That judge was speaking of his inability to establish the faces of others, but the flip side of the coin is a judicial inability to maintain the respectable face of the law. This anxiety was once voiced by the senior English judge, Lord Neuberger of Abbotsbury, who – also using the metaphor of coinage – cautioned against the judiciary’s growing habit of giving interviews outside of court when he said, ‘I wonder whether we are not devaluing the coinage, or letting the judicial mask slip’.²⁵ Lord Neuberger served as president of the Supreme Court of the United Kingdom, and two of the worst offenders against his lordship’s cautionary note have been his immediate predecessor Lord Phillips and his immediate successor Lady Hale. In an effort to make the highest court less daunting and more popular, Lord Phillips once stripped down to his swimming shorts for a television documentary on the Supreme Court.²⁶ While Lady Hale enjoys the celebrity status of being the first female member of the UK’s Supreme Court and of leading the Supreme Court when it intervened in Brexit politics by annulling the government’s attempt to prorogue (suspend) Parliament from 9 September until 14 October 2019. The year after retiring as a judge, Lady Hale was a guest on the BBC’s popular *Desert Island Discs* programme where her excellent musical choices were a good deal less controversial than her Brexit intervention.²⁷ Was Francis Bacon right when he protested in the early seventeenth century that ‘[a] popular judge is a deformed thing; and *plaudites* are fitter for players than for magistrates’,²⁸ or does a modern celebrity-obsessed culture demand that our judges should perform their public-facing role to a wide public audience and not just for those few who attend, or tune into, live court proceedings? On that question, the jury is out.

²⁴ Scott Brownell (Judge of the 12th Judicial Circuit, State of Florida), in ‘Nonverbal Behavior in the Courtroom’, in David Matsumoto, Mark G. Frank, and Hyi Sung Hwang (eds), *Nonverbal Communication: Science and Applications* (Thousand Oaks, CA: Sage, 2013) 183–190, 183.

²⁵ Lord Neuberger of Abbotsbury MR, ‘Where Angels Fear to Tread’, Holdsworth Club, 2012 Presidential Address (2 March 2012) para. [53].

²⁶ *True Stories: Britain’s Supreme Court* (Karen Hamilton for More4), 8 February 2011.

²⁷ *Desert Island Discs* (BBC Radio 4), 24 September 2021.

²⁸ Sir Francis Bacon, ‘*The Duties of Judges of Assize*’, in Henry Craik (ed.), *English Prose: Sixteenth Century to the Restoration*, Vol. 2 (London: Macmillan and Co, 1894) 30.

Of Construction and Clowns

The American trial judge mentioned earlier is not alone in lamenting the inscrutability of facial expression. Recall Duncan in Shakespeare's *Macbeth*, who said, 'There's no art / To find the mind's construction in the face' (1.4.12–13). Inscrutability may be down to the fact that the viewer's art of making out the meaning of another's face will frequently be inadequate to overcome the other's art of making up their face to disguise their intentions. This is a context in which scientific experiment might have an advantage over common sense and experience. Psychology researchers, working with the benefit of modern photographic and video technology, have to some extent achieved what Duncan's art could not. One nineteenth-century scientific pioneer was Guillaume Duchenne, who established experimentally that an insincere smile employs the voluntary muscles of the mouth but not the involuntary muscles of the eyes.²⁹ A genuinely joyful smile is called a Duchenne smile in his honour. In the twentieth century, the work of Paul Ekman and Wallace Friesen led to the discovery of facial 'microexpressions' and 'leakage' that betray a liar's dishonesty in such clues as discrepancy between emotions expressed facially and words expressed vocally.³⁰ Very few of us are as expert as Ekman, who has been called the 'Human Lie Detector', and in most of our daily face-to-face encounters Duncan's lament still rings true.

It is also true, as Duncan (and by implication Shakespeare) said, that the face is a site of 'construction'. The craft of making faces permeates a great many of our social encounters, not least when deception is involved.³¹ Psychologists David Matsumoto and Hyi Sung Hwang list an impressively wide range of types of facial gesture.³² These include speech illustrators (e.g. lowering eyebrows when lowering tone of voice); emblematic gestures (e.g. raising one eyebrow to express scepticism); cues to regulate turn-taking in conversation (e.g. eye gaze indicating intention to take, hold, or yield a turn to speak);³³ clues to physical exertion (e.g. frowning brows when concentrating);

²⁹ Guillaume Duchenne, *The Mechanism of Human Facial Expression* (1862) (New York: Cambridge University Press, 1990).

³⁰ Paul Ekman and Wallace Friesen, 'Nonverbal Leakage and Clues to Deception' (1969) 32 *Psychiatry* 88–106; Paul Ekman and Wallace Friesen, *The Facial Action Coding System* (Palo Alto, CA: Consulting Psychologists Press, 1978); Paul Ekman, *Telling Lies* (New York: Norton, 1985).

³¹ See Carolyn M. Hurley and Mark G. Frank, 'Executing Facial Control during Deception Situations' (2011) 35 *Journal of Nonverbal Behavior* 119–131; Mark G. Frank, 'Smiles, Lies, and Emotion', in Millicent H. Abel (ed.), *An Empirical Reflection on the Smile* (New York: The Edwin Mellen Press, 2003) 15–43.

³² David Matsumoto and Hyi Sung Hwang, 'Facial Expressions', in David Matsumoto et al. (eds) *Nonverbal Communication: Science and Applications* (Thousand Oaks, CA: Sage, 2012) 15–52, 39.

³³ See further Kristiina Jokinen et al., 'On Eye-Gaze and Turn-Taking', *Proceedings of the International Conference on Intelligent User Interfaces* (New York: Association for Computing Machinery, 2010) 118–123.

and clues to cognitive activity (e.g. puffing cheeks to show physical exertion).³⁴ One of the insults that has frequently been levelled at Donald Trump is that he is a ‘clown’. That is an inadequate and dangerous dismissal because it fails to appreciate the primal appeal of the art of clowning. Trump makes faces and he makes them well. His masks are often grotesque, but so too have been the masks of professional actors and clowns down through history and across the globe. In an engaging newspaper article, the psychologist Peter Collett has described ‘The Seven Faces of Donald Trump’. The article begins with the following observation:

A great deal of Donald Trump’s political success can be put down to his body language and the unusual ways he uses his face. The first thing we notice about Trump’s facial expressions is the sheer variety. The second is their dramatic, often over-stated character.³⁵

Shakespeare’s King Richard II might have been speaking for modern-day Trump-watchers when, commenting on public performances by his rival Henry Bolingbroke, the king:

Observed his courtship to the common people;
How he did seem to dive into their hearts
With humble and familiar courtesy,
What reverence he did throw away on slaves,
 Wooing poor craftsmen with the craft of smiles
(*Richard II* 1.4.24–28)

The seven faces of Trump that Peter Collett identifies include ‘the Big Smile’. This is used relatively infrequently and tends to be reserved for ‘when he doesn’t feel the need to look like a leader, or when he is with people whose company he enjoys’.³⁶ When performing publicly, he tends to adopt the ‘Alpha Face’, which eschews smiling,³⁷ or even the ‘Angry Face’ and the ‘Chin-jut’, all of which are straight out of the alpha male playbook that applies to humans and chimpanzees alike. To look dominant, you should look as if you are preparing for a fight. Jutting the chin gives the impression that you have a strong jaw and ‘strong jaws may indicate a heavily built skeleton, and therefore superior physical strength’.³⁸ Trump’s distinctive wide mouth, lips closed ‘Zipped Smile’ might serve the same purpose, for as Collett notes:

³⁴ See further Mark L. Knapp and Judith A. Hall, *Nonverbal Communication in Human Interaction*, 6th ed. (New York: Harcourt Brace, 2006); Peter A. Andersen, *Nonverbal Communication: Forms and Functions* (Mountain View, CA: Mayfield, 1999).

³⁵ Peter Collett, ‘The Seven Faces of Donald Trump: A Psychologist’s View’, *The Guardian*, 15 January 2017.

³⁶ *Ibid.*

³⁷ Jessica Tracy and Alec Beall, ‘Happy Guys Finish Last: The Impact of Emotion Expressions on Sexual Attraction’ (2011) 11(6) *Emotion* 1379–1387.

³⁸ Ulrich Mueller and Allan Mazur, ‘Facial Dominance of West Point Cadets as a Predictor of Later Military Rank’ 74(3) *Social Forces* 823–850, 843.

There is evidence, both from animals and humans, that mouth width is linked to readiness to engage in physical combat, and it has also been found that men with wider mouths are more likely to attain leadership positions.³⁹

Trump's 'Puckered Chin' might be a defensive gesture indicating, in its evolutionary antecedents, a readiness to take a punch to the face. Most telling of all, and most alike to the painted mask of a clown, is the seventh of Trump's faces which Collett calls the 'Exaggerated Mouth'. On this he writes:

You can't help notice the way Trump protrudes and contorts his mouth. In fact, his lips appear to have an almost prehensile quality, as if they were an extra pair of hands, reaching out from his face to manipulate the world around him.⁴⁰

A clown with such craft is one to be reckoned with. Like so many highly demonstrative demagogues, Trump makes faces that make things happen.

Cosmetics

To achieve striking facial effects, it is common for people, including professional clowns, to enlist the assistance of cosmetics. In 1656, John Gauden wrote *A Discourse of Artificial Beauty*.⁴¹ It was quite a departure for the royalist cleric who is reputed to have written *Eikon Basilike*,⁴² an important royalist tract published just a few days before the execution of King Charles I and attributed to the authorship of the king himself. Gauden's *Discourse* depicts cosmetic art as a God-given skill to enhance God-given natural beauty. Gauden writes, for example, that the addition of a little whitening tincture or rouge 'makes no more a new face or person, (so as to run any hazard of confusion or mistake) then usually befalls women in their sicknesses and ordinary distempers . . . so that this artificial change is but a fixation of natures inconstancy'.⁴³

Art and Nature

Gauden objected to the fact that 'some men seek to confine all women to their pure and simple naturals: as if Art and Nature were not sisters, but jealous

³⁹ See, for example, Daniel E. Re and Nicholas Rule, 'Distinctive Facial Cues Predict Leadership Rank and Selection' (2017) 43(9) *Personality and Social Psychology Bulletin* 1311–1322.

⁴⁰ Peter Collett, 'The Seven Faces of Donald Trump: A Psychologist's View', *The Guardian*, 15 January 2017.

⁴¹ John Gauden, *A discourse of artificial beauty, in point of conscience between two ladies with some satyricall censures on the vulgar errors of these times* (1656) (London: Printed for R. Royston at the Angel in Ivy-lane, 1662).

⁴² [John Gauden?], *Eikon Basilike, The Pourtraicture of his sacred Majestie in his Solitudes and Sufferings* (9 February 1649, New Style).

⁴³ John Gauden, *A discourse of artificial beauty, in point of conscience between two ladies with some satyricall censures on the vulgar errors of these times* (1656) (London: Printed for R. Royston at the Angel in Ivy-lane, 1662) 57.

rivals'.⁴⁴ Gauden's argument is that the natural canvas of the face is a product of Divine art so there is no offence when a human artist reveals or stabilizes human beauty by means of cosmetic craft. A similar attitude runs deep in the thinking of early modern poets and artists for whom the co-Productive activity of art and nature was the renaissance of a classical theme. One classical precedent for the theme is Cicero's essay *de Oratore*, which 'constructs ideal *eloquentia* as a hybrid of *ars* and *natura*'.⁴⁵ The argument that art and nature are a hybrid (or to use Gauden's term, 'sisters') defended early modern artists against the Puritans' assertion that beautifying arts are sinful modes of artifice. Jonson developed this defence in his essay 'On Picture' (*De pictura*), which we considered in Chapter 4.⁴⁶ The defensive tone is also apparent in Sir Philip Sidney's *The Defence of Poesie*, where he writes:

The Greeks called him a 'poet', which name hath, as the most excellent, gone through other languages. It cometh of this word ποιεῖν [poiein], which is, to make: wherein, I know not whether by luck or wisdom, we Englishmen have met with the Greeks in calling him a maker . . . There is no art delivered to mankind that hath not the works of nature for his principal object, without which they could not consist, and on which they so depend, as they become actors and players, as it were, of what nature will have set forth.⁴⁷

In his satirical poem 'Of a Painted Lady', Sir John Harrington notes how near to nature a painting can come:

I Saw dame Leda's picture lately drawne,
With haire about her eares, transparent Lawne,
Her Ivory paps, and every other part,
So limd unto the life by Painters Art,
That I that had been long with her acquainted,
Did think that both were quick, or both were painted⁴⁸

Shakespeare explores the same early modern theme of the confusion of natural life with art in the final scene of *The Winter's Tale* in which the 'statue' of Hermione comes to life.

Her husband, Leontes, admires the exemplary sculptural work, noting that 'The fixture of her eye has motion in't, / As we are mock'd with art' (5.3.79–80). When Leontes asks, 'What was he that did make it?', the answer is clear. The artisan behind the work is God, for, though Leontes does not see

⁴⁴ *Ibid.*, 89.

⁴⁵ Joy Connolly, *The State of Speech: Rhetoric and Political Thought in Ancient Rome* (Princeton: Princeton University Press, 2007) 19.

⁴⁶ Ben Jonson, *Timber or Discoveries*, in C. H. Herford et al. (eds) *Ben Jonson*, Vol. 8, *The Poems; The Prose Works* (Oxford: Oxford University Press, 1947) 1522–1523.

⁴⁷ Sir Philip Sidney, *The Defence of Poesie*, in Katherine Duncan-Jones and Jan van Dorsten (eds), *Miscellaneous Prose of Sir Philip Sidney* (Oxford: Oxford University Press, 1973) 59–121, 77–78.

⁴⁸ John Harrington, *Epigrams*, Book IV, epigram 58. Discussed in Farah Karim-Cooper, *Cosmetics in Shakespearean and Renaissance Drama* (Edinburgh: Edinburgh University Press, 2006) 94.

it yet, this is not a statue of Hermione but she herself – a work not of art but of nature, or rather of nature enhanced by human cosmetic art.

Shakespeare's contemporary, the French philosopher Michel de Montaigne (1533–1592), acknowledged that science, and even law, makes up its ideas of truth cosmetically using the legitimate falsehood of poetic fiction:

Just as women use ivory teeth where their own are lacking, and, instead of their true complexion, create one from some foreign matter; . . . and in plain sight of everyone embellish themselves with a false and borrowed beauty: so does science (and even our law, they say, has legitimate fictions on which it founds the truth of its justice).⁴⁹

This brings us to the issue of performed truth in the art of rhetoric and the place of the face in political and legal performance.

Prosopopoeia: The Rhetorical Art of Face-Making

Making up the human face by means of cosmetics parallels the making of the social persona by means of rhetorical arts. As noted earlier, the Latin word 'persona', from which our idea of social personality derives, was originally a term denoting an actor's mask. The Greek equivalent, also denoting both face and mask, was *prósopon*. That word describes something that is 'towards the eye' (*pro-ops*). The same visive sense of the face as a seen thing survives strongly in the modern French and German words for face – *visage* and *Angesicht*, respectively. The language stresses how central to the idea of 'making my face' is the co-Productive Participation of 'your point of view'. My face is a social construct that you and I make together.

The rhetorical device of prosopopoeia (*προσωποποιία*) indicates the making of a face or mask (from the Greek *prósopon* 'face, mask', and *poiéin* 'to make, to do'). In rhetorical theory it is understood to encompass two distinct techniques: 'impersonation' and 'personification'. The first technique, 'impersonation', is a species of prosopopoeia by which a performer imitates or assumes a different persona. A classical example is Cicero's device in his oration *Pro Caelio* of speaking as Appius Claudius Caecus, the great statesman of Republican Rome who was patron of the road and aqueduct (named *Via Appia* and *Aqua Appia* in his honour) that were the archetypes of Roman engineering excellence.⁵⁰ Personification of this sort is quintessentially theatrical.⁵¹ As Eric Bentley writes in his book *The Life of the Drama*: '[t]he theatrical situation, reduced to a minimum, is that A impersonates B while

⁴⁹ Michel De Montaigne, *Apology for Raymond Sebond* (1576), Roger Ariew and Marjorie Grene (eds) (Indianapolis: Hackett Publishing Company, 2003) 98.

⁵⁰ Cicero, *Pro Caelio*, 33–35, R. Gardner (ed. and trans.), *Cicero*, Vol. 13, Loeb Classical Library 447 (Cambridge, MA: Harvard University Press, 2001) 447–450.

⁵¹ James Paxson notes that rhetorical 'prosopopeia as a method of character invention has an allied source in Greek drama and the philosophical dialogue': *The Poetics of Personification* (Cambridge: Cambridge University Press, 1994) 13.

C looks on'.⁵² Gavin Alexander acknowledges similarly that 'the power to conjure up human presences and endow them with speaking voices is not just a momentary trick of the orator but is the basis of the making of fictions'.⁵³ The second technique, 'personification', is a species of prosopopoeia by which a performer attributes a human persona to a non-human entity. A classical instance is Quintilian's assertion that oratory can 'give voices to cities and states'.⁵⁴ Examples of personification in Shakespeare's works are too many to list. One example which illustrates Quintilian's claim is Shakespeare's description of the nation state of England as a pale-faced maid or woman. This example is particularly striking because it not only attributes human character to England, which is a standard mode of personification, but does so through the specific device of attributing a human face to the abstract idea of nation. Thus, in *Richard II*, the King fears the effect of bloodshed on 'the flower of England's face' and 'the complexion of her maid-pale peace' (3.3.97–98).⁵⁵ In Shakespeare's *King John*, England is again personified as a pale-faced female when he describes the nation's coastal front as 'that pale, that white-faced shore, / Whose foot spurns back the ocean's roaring tides / And coops from other lands her islanders?' (2.1.23–25).⁵⁶ As with so much of Shakespeare's imagery, these references are multivalent. They can be read as being simultaneously a literal description of a nation whose people are pallid with fear in time of war, a geophysical reference to the chalk cliff facade of the English south coast, and an oblique allusion to the cosmetically whitened face of England's chief 'maid' – Elizabeth I, the 'Virgin Queen'. Furthermore, the use of 'pale' in the *King John* quotation is a pun referring both to pallid skin and to a defensive bulwark (from *palus*, the Latin word for fence post).

Shakespeare's contemporary, Abraham Fraunce, described the impersonation species of prosopopoeia as 'a fayning of any person, when in our speech we represent the person of anie, and make it speake as though he were there present'.⁵⁷ Having quoted Fraunce, Walter Jost and Wendy Olmsted, writing on 'Rhetorical *Technē* and Poetics', note the theatrical nature (specifically, the imaginative acting) inherent in the rhetorical practice of prosopopoeia. Referring to the *Suasoriae* of Seneca the Elder,⁵⁸ they write:

⁵² Eric Bentley, *The Life of the Drama* (New York: Atheneum, 1964) 150.

⁵³ Gavin Alexander, 'Prosopopoeia: The Speaking Figure', in S. Adamson et al. (eds), *Renaissance Figures of Speech* (Cambridge: Cambridge University Press, 2007) 97–112, 108.

⁵⁴ Quintilian, *The Orator's Education (Institutio Oratoria)*, Donald A. Russell (ed. and trans.), Loeb Classical Library 124 (Cambridge, MA: Harvard University Press, 2001) 9.2.31.

⁵⁵ *Richard II* supplies another example when it refers to England's 'pale-faced villages' (2.3.94).

⁵⁶ Caroline Spurgeon notes Shakespeare's fondness for personification as a poetic device and its remarkable prevalence in *King John*. Caroline Spurgeon, *Shakespeare's Imagery* (Cambridge: Cambridge University Press, 1966) chart VI.

⁵⁷ Abraham Fraunce, *The Arcadian Rhetorike* (London: Printed by Thomas Orwin, 1588) cap. 31.

⁵⁸ Seneca the Elder, *Suasoriae*, Michael Winterbottom (ed. and trans.), Loeb Classical Library 464 (Cambridge, MA: Harvard UP, 1974) Book 1.

Alexander debates whether to sail the ocean and the speaker must imagine himself one of the sailors, or else imagine himself Alexander wishing to go on the voyage, or else imagine himself Alexander's mother wishing to prevent his departure.⁵⁹

This example shows that one way to make a persuasive argument is to make a face. By masking oneself as another it is possible to animate a different point of view. At the very least, this should make the oration livelier, which is one of Thomas Wilson's main reasons for recommending personification in his treatise *The Arte of Rhetoric*: 'Such varietie doth much good to avoyde tediousnesse, for he that speaketh all in one sort, though he speake thinges never so wittely, shall sone wearie his hearers.'⁶⁰

Rhetorical and poetic prosopopoeia is frequently as much concerned with making a sound or producing a voice as with purely visible aspects of making a face. Indeed, one speculative etymology for the Latin 'persona' suggests that it is derived from the sonic attributes of the classical actor's mask – the idea being that the wide mouth aperture amplified the voice as the sound passed through (*per-sona*). Appealing as that etymology is, a more plausible or immediate account links the word *persona* to the language of the people who occupied the Latin lands before the Romans. The Etruscan word for mask, or a masked role, was *phersu*.⁶¹

Sound is undoubtedly significant in those modes of impersonation that closely resemble theatrical acting. In the example of Cicero impersonating Appius we can see the potential for an impersonator to assume not only the facial and manual gestures, posture, gait, and other visible mannerisms of the impersonated individual but also their voice. Expert mimics, whom we still call 'impersonators', are generally adept at performing all these aspects of the individual impersonated, and very often cap off their performance by adopting the dress and props of their target. It is easy enough to impersonate the distinctive look of Charlie Chaplin's Tramp character without making a sound, or to impersonate President John F. Kennedy through the sound of his voice alone, but a character who combines a distinctive look with a distinctive voice is an impersonator's dream. Winston Churchill is one such. No doubt it was the strikingly distinctive performance of Churchill's public persona in all its aspects that enabled him to make such an impression on people during World War II. As Churchill made an impression on the wartime public, so his distinctiveness enables modern actors to perform

⁵⁹ Walter Jost and Wendy Olmsted (eds), *A Companion to Rhetoric and Rhetorical Criticism* (Oxford: Blackwell, 2004) 91.

⁶⁰ Thomas Wilson, *The Arte of Rhetorique* (1553), 1560 edition, G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) 182.

⁶¹ Robert K. Barnhart, *Barnhart Dictionary of Etymology* (New York: H.W. Wilson Co., 1988); Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language* (Amsterdam: Elsevier Scientific Publishing Co., 1971).

persuasive impressions of him now. Churchill's signature hand gesture (the V-sign), his distinctive voice, his classic English bowler hat, his squat and portly physique, and his bulldog jowls all combine to make a vivid impression. In cinematic renditions, Churchill's physical and gestural performance has convincingly concealed actors who in the absence of make-up, prosthetics, and vocal mimicry are as physically and sonically different as John Lithgow and Gary Oldman. The impersonation is especially helped by Churchill's association with a distinctive prop. The cigar was to Churchill what the walking stick was to Chaplin's Tramp. Some British prime ministers since Churchill have also come to be associated with the attribute of personal props, most notably Harold Wilson and his pipe and Margaret Thatcher and her handbag.⁶²

Making a Fool of Oneself

Since classical times, the connection between oratory and acting has been exploited by practitioners of both those arts, albeit the classical rhetoricians pretended to decry the thespian arts and to claim a higher dignity for their own profession.⁶³ The challenge for the rhetorical performer is always to judge how far to go in adopting an artificial persona and to know which types of persona it is safe to adopt. One argument in favour of adopting a new voice, facial expression, gestural manner, posture, and gait is that it will make the mask more completely artificial and distinct from the orator's own character – shielding the performer even as it enables them more blatantly to 'show off'. A counterargument, standing against the use of thespian techniques, is that the audience might attribute undesirable aspects of the performed persona to the private character of the orator. Morwenna Ludlow observes that 'the technique of *prosōpopoeia* is inherently risky speech: on the one hand, it heightens emotion and strengthens the speaker's or author's appeal to his audience; on the other hand, the impersonation of another speaker carries with it the risk of undermining the speaker's own authority.'⁶⁴ To make a face through impersonation is to risk making a fool of oneself. It is perhaps for this reason that Henry Peacham, author of the sixteenth-century rhetorical treatise *The Garden of Eloquence*, cautioned that '[i]t is not convenient that the Orator should use the helpe of fained persons without some urgent cause compelling

⁶² See the 2016 BBC Radio 4 series *Prime Ministers' Props*, www.bbc.co.uk/programmes/b0bdnp19/episodes/player.

⁶³ See the chapter 'Theatre, Theatocracy, and the Politics of Pathos in the Athenian Lawcourt', in Julie Stone Peters, *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe* (Oxford: Oxford University Press, 2022).

⁶⁴ Morwenna Ludlow, 'Role-Playing: Prosopopoeia and Embodied Performance', in Morwenna Ludlow, *Art, Craft, and Theology in Fourth-Century Christian Authors* (Oxford: Oxford University Press, 2020) 119–143, 119–120.

him thereunto'.⁶⁵ A sensible way to manage the risk that prosopopoeia might backfire is to commit to thespian representation only where the individual impersonated is one with whom the orator would wish to be associated (Cicero's impersonation of the respected statesman Appius Claudius Caecus was of that sort), and to avoid adopting the voice and manners of a rogue or a fool. There is otherwise the risk that a vivid image of the rhetorician impersonating a villain may remain in the memory of the audience even when they have forgotten that it was only an act.

One technique that is useful in distinguishing the orator's own character from the character personated is, in the words of Thomas Wilson, to 'frame the oration'.⁶⁶ This can be done by means of a clear introduction and conclusion. Hence the advice of Abraham Fraunce, that the speaker should 'make a fit and orderly accesse too, and regresse from the same *Prosopopoeia*'.⁶⁷ Theatrical actors performing on stage have some very specific techniques for framing their performances, and, in particular, a standard way of emerging from their persona at the point that Fraunce calls the 'egress'. Chief of these is the 'curtain call' at the end of the show. One actor explains that when he performs a comedy, he marks the end of the theatrical ritual by removing his adopted persona while still on stage: 'once I reach the center stage and take my bow, I shed my character and become myself. Generally, audiences appreciate getting a glimpse of the artist behind the character.'⁶⁸ Framing of this sort, which shows the maker behind the make-believe, doesn't kill off the illusion so much as seal it to live on forever within the confines of the fictional domain of the show.

Show of Truth

Impersonation raises concerns of sincerity and truth. Recall psychologist Paul Ekman's observations, alluded to earlier, regarding the ability and inability of the face to hide emotions. He writes that:

The face appears to be the most skilled nonverbal communicator and perhaps for that reason the best 'nonverbal liar,' capable not only of withholding information but of simulating the facial behavior associated with a feeling which the person is in no way experiencing.⁶⁹

⁶⁵ Henry Peacham, *The Garden of Eloquence* (1577) (1593 edition facsimile) (Delmar, NY: Scholars' Facsimiles, 1977). Peacham lists prosopopoeia as an example of rhetorical amplification within the third order of his 'Schemates Rhetorical'.

⁶⁶ Thomas Wilson, *The Arte of Rhetorique* (1553), 1560 edition, G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) 179.

⁶⁷ Abraham Fraunce, *The Arcadian Rhetorike* (London: Printed by Thomas Orwin, 1588) cap. 31.

⁶⁸ Wade Bradford, 'Curtain Call: Dos and Don'ts', Liveabout.com, 30 April 2017, www.liveabout.com/curtain-call-dos-and-donts-2713056.

⁶⁹ Paul Ekman et al., *Emotion in the Human Face* (New York: Pergamon Press, 1972) 23.

Citing that quotation, performance scholar Richard Schechner connects the dissembling capacity of the face to that of the thespian arts when he writes in his book *Performance Theory* that 'lying, as much as truth-telling, is the stock in trade of theatre',⁷⁰ adding:

Here the Ekman of 1972 does not yet know what the Ekman of 1983 found out: that the 'mechanical' construction of a face in the configuration of a 'target emotion' elicits an ANS [autonomic nervous system] response, i.e. an 'experience.' Thus lying is a very complicated business in which the skilled liar – a person who can make a convincing face – *knows* he is lying but *feels* he is telling the truth (see Ekman 1985).^[71]

... the doing of the action of a feeling is enough to arouse the feeling both in the doer and in the receiver. The so-called surface of emotion – the look on the face, the tone of the skin, the tilt of the body, the placement and moves of muscles – is also the emotion's 'depth.'⁷²

In 2016, US presidential candidate Hillary Clinton gave an interview for the photoblog *Humans of New York* in which she offered a fascinating insight into the hard work that goes into making a public persona seem natural. What she had to say about the orator's art of performing a natural persona corresponds to John Gauden's idea that facial cosmetics present nature at its best:

I'm not Barack Obama. I'm not Bill Clinton. Both of them carry themselves with a naturalness that is very appealing to audiences. But I'm married to one and I've worked for the other, so I know how hard they work at being natural. It's not something they just dial in. They work and they practice what they're going to say. It's not that they're trying to be somebody else. But it's hard work to present yourself in the best possible way.⁷³

Split Personality

The tension that exists between a persona that is professionally crafted for public consumption and the 'natural' character of the individual performing that persona is one that has erupted in fascinating ways in relation to celebrity 'personalities' in the world of television and politics. Someone who fits into both those categories is Donald Trump. On one infamous occasion he exploited the tension between his private character and his public persona as a cover for insulting a political rival's facial appearance. His target, Carly Fiorina, is a successful business executive who as CEO of Hewlett-Packard became the first woman to lead a Fortune Top-20 company. When she ran against Trump for the Republican nomination in the 2016 presidential election, he was determined that her substance should not distract voters from

⁷⁰ Richard Schechner, *Performance Theory*, revised ed. (1977) (New York: Routledge, 2003) 315.

⁷¹ *Ibid.*, 316. Referring to Paul Ekman, *Telling Lies* (New York: Norton, 1985).

⁷² Richard Schechner, *Performance Theory*, revised ed. (1977) (New York: Routledge, 2003) 322.

⁷³ Hillary Clinton, interview, *Humansofnewyork.com*, 8 September 2016.

surface considerations. As a showbiz celebrity, his strategy was to make a strong surface impression and to encourage superficial scrutiny of the candidates. Accordingly, he gave an interview in which, referring to Fiorina, he said: 'Look at that face! Would anyone vote for that?'⁷⁴ When subsequently taken to task for what was apparently intended to be an insult to Fiorina's facial attractiveness, Trump said: 'some comments are made as an entertainer. And, as everybody said, as an entertainer [it] is a much different ballgame.'⁷⁵

Trump claimed that he wasn't talking about Fiorina's physical face at all, but 'talking about her persona . . . She failed miserably at Hewlett-Packard and ran for the Senate and lost in a landslide and now running for president. I'm talking about her persona.'⁷⁶ We might dismiss that excuse as a brazen evasion, but in the showbiz world of Donald Trump it's quite easy to believe that a disparaging comment on someone's facial attractiveness is genuinely inseparable in his mind from his attitude to their attractiveness as a public figure. He wasn't lying when he said that he was talking about Fiorina's persona, it's just that his own critical gaze does not pierce deeper than the superifice of someone's public performance. For Trump, physical face *is* persona. Face is everything. If Ms Fiorina were minded to take the insult personally, it might be some comfort to know that the standards by which Trump judged her to be unattractive are the same by which he judges himself to be beautiful.

We consider, next, two examples from the UK in which the tension between a celebrity's private character and public persona has erupted to the extent of litigation. In the first case, a popular daytime television presenter successfully claimed a tax exemption for expenses incurred during the theatrical performance of her public persona. In the second case, the then UK prime minister, Boris Johnson, brought a successful action for judicial review against a magistrates' court which had issued a criminal summons against him in a private prosecution alleging that he had committed the common law offence of misconduct in public office.

The first case concerned daytime television presenter Lorraine Kelly. The Inland Revenue tax authorities had claimed that Ms Kelly appeared as herself when presenting television programmes and therefore should not receive tax exemptions available to a performer. The authorities' assumption that *any* of us appear as ourselves in public is an extremely questionable one. It seems to assume, first, that there is an essential 'self' of such stability that it can be identified; second, that there is an element of 'our' by which we identify (in the sense of feel at one with) that stable sense of self; and third, that when we appear in public, we not only choose to represent our stable self in our social performance, but that we do so accurately. If such doubtful assumptions arise

⁷⁴ Paul Solotaroff, 'Trump Seriously: On the Trail with the GOP's Tough Guy', *Rolling Stone*, 9 September 2015.

⁷⁵ 'Trump on Fiorina Flap', *Fox News*, 10 September 2015. ⁷⁶ *Ibid.*

in the case of everyone who presents themselves to public perusal, how much more problematic are the issues arising in the case of a person who is a professional presenter?

Rejecting the Inland Revenue's claim, the tax tribunal found in favour of Ms Kelly:

We did not accept that Ms Kelly simply appeared as herself; we were satisfied that Ms Kelly presents a persona of herself; she presents herself as a brand . . . All parts of the show are a performance, the act being to perform the role of a friendly, chatty and fun personality . . . for the time Ms Kelly is contracted to perform live on air she is public 'Lorraine Kelly'; she may not like the guest she interviews, she may not like the food she eats, she may not like the film she viewed but that is where the performance lies.⁷⁷

Those last three words – 'the performance lies' – produce a telling pun. If the performance of the public personality 'Lorraine Kelly' is not a sincere representation of the private person, can the performance be regarded as true? The answer to that question depends upon the purpose of public performance in the context of daytime television. It is certainly arguable that the purpose is not to lay bare the private character of Lorraine Kelly, but to produce a persona that will please the public. Far from being called upon to present Ms Kelly's quotidian private life, the programmes in which she appears are designed to distract the public from everyday mundanity. Ms Kelly is true to that purpose when she presents a pleasing and diverting persona. Seen in this way, the performance of a popular show business personality resembles the way in which law courts, instead of simply presenting the unedited, messy, and contested circumstances of human lives, seek to present instead a polished matter that will satisfy the public.

Every actor in her litigation – Ms Kelly, the tax authorities, and even the court – was in a different way performing a role which did not depend upon substantial integrity between private performer and public persona. The private Ms Kelly might have an individual character at odds with her television persona, and the tax officials and their legal advisors bringing the action against her might not, in private, have believed in the merits of their case. A seventeenth-century preacher once complained that lawyers 'put the *fairest faces* on the *foulest actions*',⁷⁸ but often this is precisely what professional performance – from that of soldiers to social workers – demands from a role. Even the judge applying the law in Ms Kelly's case might not, as a private person, have believed in the correctness of the law. Jacques' sketch of a judge ('the justice') in his famous 'All the World's a Stage' speech in Shakespeare's *As You Like It* concludes with the words 'he plays his part' (2.7.157). It is the

⁷⁷ *Albatel Ltd v HMRC* [2019] UKFTT 195 (TC) [First-Tier Tribunal (Tax Chamber)] (16 March 2019), para. [193].

⁷⁸ John Rogers, *Sagrir, or, Doomes-Day Drawing Nigh, with Thunder and Lightning to Lawyers etc.* (published posthumously) (London: Printed for Tho. Hucklescot, 1654) 24.

conclusion we might reach when considering all sorts of professional performance in which the actor is duty bound to represent others and their interests rather than present their own private character and their own private interests.

In the second case, the then UK prime minister, Boris Johnson, brought a successful action against a magistrates' court that had issued a summons against him in a private prosecution alleging the common law offence of misconduct in public office. The summons was chiefly based on statements made by Johnson while campaigning for Brexit when he was Mayor of London and a Member of Parliament, including 'we send the EU £350 million a week, let's fund our NHS instead'. The High Court quashed the decision of the magistrates' court because there was no evidence of the offence, and because the judge in the magistrates' court had without good reason dismissed the possibility that the action had been brought against the prime minister for political and vexatious motives.⁷⁹ The substantial question in this case came down to a similar issue to that which arose in the case of television personality Lorraine Kelly. The question was whether the disputed statements made by Boris Johnson in relation to the Brexit campaign were made by him 'in his public role' or 'in a different role'. In the technical language of the Johnson case, those issues were distilled down to this question: was Boris Johnson, who was then a public officer, 'acting as such' when he made the statements he made in relation to Brexit? The common law offence of misconduct in public office has four elements: (1) that it concerns a public officer acting as such; who (2) wilfully neglects to perform his duty and/or wilfully misconducts himself; (3) to such a degree as to amount to an abuse of the public's trust in the office holder; (4) without reasonable excuse or justification.⁸⁰ The Law Commission Report on the topic explains that the 'acting as such' ingredient was 'designed to distinguish between circumstances where the public office holder is misconducting themselves while performing their function or role, and where they are misconducting themselves in non-public contexts. This includes, but is not necessarily limited to, conduct in their personal life.'⁸¹ The High Court held in the Johnson case that holding an influential public role is not enough for liability. There must also be a causal connection between the role and statements made, such that in making the statements Boris Johnson could be said to have been performing his public role. 'If, as here, he simply held the office and whilst holding it expressed a view contentious and widely challenged, the ingredient of 'acting as such' is not made out.'⁸² In politics, it apparently helps to be two-faced in the sense of having more than one mask to wear. In Donald Trump's case, he attempted to deflect criticism directed at him personally by claiming that he was acting as an entertainer. In Boris

⁷⁹ *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin); [2019] 1 WLR 6238.

⁸⁰ *Attorney General's Reference (No 3 of 2003)* [2005] QB 73, the Court of Appeal.

⁸¹ *Misconduct in Public Office*, Law Commission Report LC 397 (4 December 2020) para. [2.51].

⁸² *Johnson v Westminster Magistrates' Court*, para. [29].

Johnson's case, he successfully deflected criticism directed at him as a public official by claiming that he was acting in a non-official capacity. The challenge, as in the case of Lorraine Kelly, is to know 'where the performance lies'.

Facebook and Social Media Persona

Nowadays, social interaction through online media is an important context in which we make our public face and in which members of the public confirm our face through what they make of it. No major online social media platform has had the longevity of Facebook. The platform's name, which was originally an allusion to the use of a profile image to display the user's face, is now a fitting label for the platform's role in producing a user's social persona. In addition to the user's own design in presenting a version of their self through the platform, interactions such as 'tagging', 'liking', 'sharing', and 'commenting' enable a 'friend' of the page owner to participate in the co-Productive activity of making up the page owner's social face even as the friend simultaneously performs their own public persona. Another leading platform, just two years younger than Facebook, is Twitter. Whereas Facebook users have 'friends', Twitter users have 'followers'. That fact illustrates a distinction of tone between the two platforms. Facebook is more private and personal; Twitter more public and impersonal. It might for this reason be somewhat easier on Twitter than on Facebook to fake a persona that will fool the public. An instance that attracted press coverage is the case of British teenager Sam Gardiner who passed himself off as older men by means of pseudonyms. His aim was to gain respect for his opinions on football (the soccer variety), and it worked. He attracted more than 20,000 followers. The face was fake, and the pseudonyms were a fabrication; but the question still presents itself – was his performance fundamentally false? This wasn't criminal identity theft; it was identity *Production*. He was publishing and performing the substantial truth of his soccer expertise by means of fictional personas. Commenting on this case, Patrick Lonergan observes that '[t]he construction of his online persona was an act of creativity, but it was also an act of self-expression, a revelation of something authentic about the real person'.⁸³ This is reminiscent of Esther Newton's 1972 study of gender performance by drag artists ('female impersonators' as Newton's title styles them),⁸⁴ and specifically of Judith Butler's reflections on that study which conclude that drag performances, like other gender performances, 'are *fabrications* manufactured and sustained through corporeal signs and other discursive means'⁸⁵ and that 'gender attributes . . .

⁸³ Patrick Lonergan, *Theatre and Social Media* (London: Palgrave Macmillan, 2015) 2.

⁸⁴ Esther Newton, *Mother Camp: Female Impersonators in America* (Englewood Cliffs, NJ: Prentice-Hall, 1972).

⁸⁵ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed. (1990) (New York: Routledge, 2006) 185 (emphasis in original).

effectively constitute the identity they are said to express or reveal'.⁸⁶ In other words, that a male impersonating a 'female' is constructing the reality of the 'female' gender, because 'female' is itself a social construction and 'the inner truth of gender is a fabrication'.⁸⁷ The initiator of a five-day course on drag art as part of a summer school for Scottish teenagers seems to have Butler's theory in mind when she asserts confidently that 'gender is a performance'. According to a report in *The Guardian*, the course includes a session on 'creating a persona'.⁸⁸

Lonergan's small but significant book is called *Theatre and Social Media*. In it he argues that the space produced by '[s]ocial media is not just a performance space, it is also a *theatrical* space';⁸⁹ and that social media and traditional theatre both provide 'a space in which fictions can reveal truths, a space in which individuals can find their 'real self' by pretending to be someone they're not'.⁹⁰ 'Pretending' is the right word, for although we often associate the word with deceit, its etymological meaning carries a morally neutral sense of putting something forward. Thus 'pretenders' to the royal crown were so called because they put forward a claim, not because their claim was necessarily false. When Richard Schechner writes that a 'great difference between human and non-human performance is the ability of humans to lie and pretend', and that people can choose 'to wear masks, or to go bare-faced', the running together of pretending and lying is unfortunate.⁹¹ In our social interactions, as in theatrical action, pretending is the action of putting the mask forward for the audience to see. In doing so, the 'pretender' might be saying sincerely that the projected mask or performance presents the *real* me.

Bram Stoker – most famous as the author of *Dracula* – noticed something like this process at work in the thespian craft of Henry Irving, the celebrated nineteenth-century actor for whom Stoker worked as manager. Irving's process of refining a stage role was summarized by Stoker as one that involved 'passing a character through one's own mind' so as to produce a new theatrical artefact:

When it has gone through this process it takes a place as an actual thing – a sort of clothing of the player's own identity with the attributes of another . . . The individuality within, being of plastic nature, adapts itself by degrees to its surroundings.⁹²

⁸⁶ *Ibid.*, 192. ⁸⁷ *Ibid.*, 186.

⁸⁸ Libby Brooks, "'Gender Is a Performance": Scotland's First "Drag School" Sells Out', *The Guardian*, 16 July 2021.

⁸⁹ Patrick Lonergan, *Theatre and Social Media* (London: Palgrave Macmillan, 2015) 16.

⁹⁰ *Ibid.*, 4.

⁹¹ Richard Schechner, *Performance Theory*, revised ed. (1977) (New York: Routledge, 2003) 257.

⁹² Bram Stoker, *Personal Reminiscences of Henry Irving*, Vol. 2 (1906) (Cambridge: Cambridge University Press, 2013) 9–10.

We are all of us forever refining and reworking our public persona by 'passing a character through one's own mind', and the plastic self 'within' becomes in time of one substance with the mask we make to fit our social space.

Of 'Blackface' and 'Black Fishing'

The tension between nature and art produces fascinating and difficult questions in the contemporary realm of identity politics. One of the most interesting and controversial contexts is the phenomenon by which people represent themselves with the physical face or social persona of a racial ethnicity with which they have no background connection in terms either of biology or upbringing. Theatrical and recreational use of 'blackface' (whereby a non-Black person blacks up their face with make-up) was once quite commonplace, but nowadays elicits a strongly negative social response. The strength of modern reactions to this cosmetic activity is a testament to the preeminent place of the face in social life. Blackface is akin to stealing another person's social persona. It steals the show in a fundamental sense because the face is the stage front of an individual's social performance, and the face, as we have seen, has great depth despite its seeming superficiality. As with the mask that represents a deeper truth, skin colour as the superifice of race is never superficial. Skin is deep.

The theatrical or costumed performance of blackface is usually crudely obvious. A more subtle and insidious iteration of the phenomenon of cultural appropriation occurs when non-Black individuals pretend to be Black. An opinion piece in the *Los Angeles Times* discusses the phenomenon under the headline 'What's Going on with All the White Scholars Who Try to Pass as Black?'.⁹³ The phenomenon isn't restricted to scholars, but the university setting is a uniquely intense cauldron of identity politics in which, in the USA especially, some employment opportunities are strongly correlated to race. It is also the case that many university scholars have a set of skills ideally suited to crafting and performing a new social mask, while also having the power to influence the shape of the academic culture that determines the terms on which such masks are read and received. Erin Aubry Kaplan, the author of the *Los Angeles Times* opinion piece, calls the phenomenon 'passe noir' (others have called it 'blackfishing').⁹⁴ She cites a number of instances, including the case of Jessica Krug, a white woman from suburban Kansas City, who was appointed to a tenured post in Black studies at George Washington University under an assumed Black identity, and Rachel Dolezal, a white woman who passed herself off as Black and taught for a number of years in

⁹³ Erin Aubry Kaplan, 'Opinion: What's Going on with All the White Scholars Who Try to Pass as Black?', *Los Angeles Times*, 8 October 2020.

⁹⁴ Kameron Virk and Nesta McGregor, 'Blackfishing: the Women Accused of Pretending to Be Black' *BBC News*, 5 December 2018, www.bbc.co.uk/news/newsbeat-46427180.

the Africana Education programme at Eastern Washington University. Dolezal was also for a brief period the president of a local chapter of the National Association for the Advancement of Colored People.

Dolezal and Krug, like many of the most infamous pretenders, held posts which would otherwise almost certainly have gone to a person of colour. That factor makes their behaviour deeply hypocritical and unfair. In cases lacking such factors, the tangible harm caused to others might not be so great, but there would still be at least two problems. The first is the pretender's lack of candour. Dolezal and Krug were decades into their deception before their cover was blown; neither was upfront about being a white person identifying as Black. The second is the problem of cultural appropriation. The first factor feeds into the second, for without candour, appropriation cannot be licenced by the group whose identity is being appropriated; and dishonest, unlicensed appropriation is akin to theft. Kaplan summarizes these concerns by means of a theatrical analogy:

The most charitable reading of their *passe noir* is still a troubling irony: sincerely intentioned, empathetic white people felt they could only serve Black consciousness by going undercover, slipping on a Black identity like a costume rather than treating it like a set of distinct, and distinctly American, life experiences that need to be probed, not performed.⁹⁵

If we were to extend the charitable reading further, we might perhaps acknowledge that pretenders of this sort may be trapped in their own make-believe like undercover cops or method actors who can no longer discern where their 'true' character ends and their performed persona begins. (The quotation marks indicate that we cannot talk of 'true' character as a concept unaffected by social influence.) Whether the psychological effect of being trapped in their own performance was present in the cases of Dolezal and Krug and, if it was, whether it ought to mitigate their offences, I cannot say. Using language that expressly acknowledged the fabricating nature of impersonation, Krug issued an online confessional in which she presented herself as someone whose 'false identity was crafted entirely from the fabric of Black lives'.⁹⁶ She attributed this behaviour to a longstanding psychological habit of seeking security in new identities, saying that '[w]hen I was a teenager fleeing trauma, I could just run away to a new place and become a new person', but that she now finds 'I have no identity outside of this. I have never developed one . . . I have built only this life.'⁹⁷

The cautionary tale here is that our crafted mask can become a true performance of who we are, but that social spectators – who are indispensable

⁹⁵ Erin Aubry Kaplan, 'Opinion: What's Going on with All the White Scholars Who Try to Pass as Black?', *Los Angeles Times*, 8 October 2020.

⁹⁶ Jessica Krug, 'The Truth, and the Anti-Black Violence of My Lies', Medium.com, 3 September 2020, <https://medium.com/@jessakrug/the-truth-and-the-anti-black-violence-of-my-lies-9a9621401f85>.

⁹⁷ *Ibid.*

co-Producers of any mask deserving the description 'social' – are entitled to reject the product if they were never in on the act. Related to this is another note of caution, which is that we can slip over from the willing performance of a social mask into a situation in which our agency is overborne to such an extent that the mask performs us. This is another example of the phenomenon of Artefaction – the made thing as making thing – as explained in [Part I](#). The 'mask that becomes fixed' is a long-running cautionary tale in cultures the world over, including cinematic depictions from Japanese horror (*Onibaba*, dir. Kaneto Shindō, 1964) to the Hollywood comic book genre (*The Mask*, dir. Charles Russell, 1994). A recent film in the latter category is Todd Phillips' *Joker* (2019). Following the success of that film, and adopting one of its taglines, a 2020 documentary focusing on the eponymous comic book anti-hero was fittingly titled *Joker: Put on a Happy Face*. The main cinematic trailer for the 2019 film presented a short study of several modes of face-making, including the application of a clown's 'greasepaint' and wearing a plastic clown mask. There is even a brief scene in which the protagonist performs a face-changing mime to amuse a child. This may have been a nod to 'The Mask Maker' sequence by celebrated mime artist Marcel Marceau in which he repeatedly removes his hands from in front of his face to reveal a series of contrasting facial contortions. Marceau's masker makes masks to please and amuse his social audience until, ultimately, he is left with a fixed mask that he can no longer alter or remove. The lesson is clear – through social processes of mask-making we make up our faces to make friends, but, as Dolezal and Krug found to their cost, it is sometimes when we make it that we lose sight of who we should be.

Part III

The Acting President

The Acting President

Trump is a hyper-narcissist performance artist charismatic rough beast. As for Bannon, he is Trump's Barnum.

Richard Schechner¹

He offers a barking carnival act that can be best described as Trumpism.

Rick Perry²

YouGov, the online pollsters of public opinion, conducted a survey in the UK in 2012 to see *What Voters Really Think of Parliament and Our Politicians*. That was the survey's subtitle. Its main title was *Democracy on Trial*.³ Judging from its reported findings, democracy was found guilty on all charges. The main indictment was against the trustworthiness of politicians. The report tells us that two-thirds of respondents believed that 'however they start out, most MPs "end up becoming remote from the everyday lives and concerns of the people they represent"'.⁴ Shockingly, almost the same proportion agreed that 'politicians tell lies all the time – you can't believe a word they say'.⁵ The section containing those two findings opened with a gloss by YouGov journalist Peter Kellner, author of the report, where he opined: 'If Parliament is the principal stage on which democracy is displayed, MPs are the principal actors.'⁶ He was making the point that politicians are judged by the appeal and persuasiveness of their rhetorical performance. This is made express in the title to a prize-winning article by scholar Alan Finlayson: 'Proving, Pleasing and Persuading? Rhetoric in Contemporary British Politics'.⁷ Finlayson cites research conducted by the Fabian Society which found that if non-voters and

¹ Richard Schechner, 'Donald John Trump, President?' (2017) 61(2) *The Drama Review* 7–10, 9

² Zeke J. Miller, 'Rick Perry Calls Donald Trump a Cancer and Carnival Act', *Time*, 22 July 2015, <https://time.com/3968398/donald-trump-rick-perry-cancer/>. Rick Perry was a rival to Trump for the Republican nomination for president and subsequently secretary of energy in the Trump administration.

³ Peter Kellner, *Democracy on Trial: What Voters Really Think of Parliament and Our Politicians* (YouGov; The Reuters Institute for the Study of Journalism, March 2012).

⁴ *Ibid.*, 6, table 4. ⁵ *Ibid.*, 6. ⁶ *Ibid.*, 6.

⁷ Alan Finlayson, 'Proving, Pleasing and Persuading? Rhetoric in Contemporary British Politics' (2014) 85(4) *The Political Quarterly* 428–436.

swing voters could change one thing about British politics it would be ‘politicians themselves: who they are, *the way that they talk and act*’.⁸

If voters are as much persuaded by the charisma of a politician’s personal performance as by their policies, it should not surprise us that actors have sometimes successfully made the move from showbiz to the business of government. President Reagan and Governor Schwarzenegger are well-known examples. Sometimes the substance exceeds the show, as it does in the case of the actor Volodymyr Zelensky, who at the time of writing stands centre stage of global politics as the feted wartime president of Ukraine. With other performers, a spectacular show might make up for lesser substance. What John L. Styan observed in relation to theatrical acting is equally true of political performance: ‘[a] profound idea only partly communicated is as nothing against a shallow one wholly communicated: content, form and medium cannot be judged apart’.⁹ Early modern rhetorician Thomas Wilson made much the same point when he observed that ‘an eloquent man being smally learned’ can be much more persuasive than ‘a great learned clarke . . . wanting words to set forth his meaning’.¹⁰ Donald Trump has been a major beneficiary of voters’ susceptibility to persuasive political performance, and his performative prowess might be said to have overcome what Wilson calls small learning and Styan calls ideas of a shallow sort. His supporters will like the substance of what he says every bit as much as they like his style, but in relation to a strongly partisan section of the electorate the opinions of card-carrying supporters have little bearing on effective persuasion. In the 2016 presidential election campaign, neither Trump nor Clinton had to do much, if anything, to persuade their dedicated followers. It is in relation to the minority of undecided voters – the floating or swing voters – that the persuasiveness of rhetorical performance comes most strongly into play.¹¹

What Donald Trump lacks in political education he has made up for through practical experience in the entertainment industry, and especially through his role as host of the popular programme *The Apprentice*. The format of that show – in which business hopefuls compete for the chance of employment in Trump’s business empire – is one that encourages conflict, egocentricity, autocracy, and snap judgments of a career-defining sort. It was ideal preparation for the president he became. If, as commentators have observed, US presidential rhetoric has evolved from addressing the US

⁸ *Ibid.*, 428, emphasis in original, citing Ed Wallis and Ania Skrzypek-Claassens (eds), *Back to Earth: Reconnecting People and Politics* (London: The Fabian Society, 2014) 9–10, <https://fabians.org.uk/publication/back-to-earth/>.

⁹ John L. Styan, *Drama, Stage and Audience* (Cambridge: Cambridge University Press, 1975) 239.
¹⁰ Thomas Wilson, *The Arte of Rhetorique* (London: Richard Grafton, 1553) (1560), G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) 161.

¹¹ David B. Holian and Charles Prysby, ‘Polls and Elections: Did Character Count? Candidate Traits and the 2016 Presidential Vote’ (2020) 50(3) *Presidential Studies Quarterly* 666–689, 684.

Congress to addressing the public directly,¹² then Trump's televisual and Twitter presidency can be regarded as the culmination of the process – at once its zenith and its nadir.¹³ The argument that Trump brought the values and practices of popular entertainment to presidential politics is the governing theme of the 2020 BBC documentary *The Trump Show*.¹⁴ Originally a three-part series, a fourth part, 'Downfall', was added in 2021 to document the last days of Trump's presidency culminating in the infamous incursion into the Capitol Building by a mob of his supporters on 6 January 2021. The title *The Trump Show* may be an allusion to the 1998 movie *The Truman Show*, in which Truman Burbank (played by Jim Carrey) is a normal Joe who doesn't realize that everything in his life has been staged to deliver a reality TV show in which he is the star. The argument of *The Trump Show* is that the reality TV star turned president, turned the presidency into a reality TV show. Even Trump's critics acknowledge his knack for producing an entertaining performance. Jonathan Karl, chief White House correspondent for *ABC News* during the Trump presidency, was especially struck by Trump's remarkable stage-managed meeting with North Korean leader Kim Jong-un. *The Trump Show* shows him smiling broadly at the sheer chutzpah of it all: 'It was mind-blowing. I mean, it was showmanship of the highest order' (ep. 1, 57'20). Tim Alberta, chief political correspondent for *Politico Magazine*, echoes the sentiment:

Donald Trump, who has an insatiable thirst for reality television style drama saw an opportunity to be the star of the biggest show in global politics. (ep. 1, 57'40)

This is Donald Trump sending a message to the political establishment at home and internationally, that there's a new sheriff in town and the presidency was going to be show business. (ep. 1, 58'10)

Near the start of the 'Downfall' episode, British politician and Trump confidante Nigel Farage called Trump's performance in the 2020 presidential campaign rallies 'a level of political showmanship the world has never seen before, and I'm going to predict now will never see again' (ep. 4, 1'37). Where Truman Burbank was the only person in his world not 'in the know', the documentary makes clear that Trump is well aware of the production values in the performance of his political brand. A suitable subtitle for the BBC documentary, and the title I have chosen for this chapter, would be 'The Acting President', for Trump is an actor through and through – even in the sense of being adept in the art of *actio*, which is the classical rhetorical term for the use

¹² See, for example, Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987).

¹³ See, generally, Michele Lockhart (ed.) *President Donald Trump and His Political Discourse: Ramifications of Rhetoric via Twitter* (Abingdon, Routledge, 2019).

¹⁴ BBC and 72 Films, *The Trump Show* (dir. Rob Coldstream, 2020).

of hand gestures. We will return to his hands later. What *The Trump Show* demonstrates, and what is in any case clear to a casual observer, is that Trump was somehow able to dominate the political scene through his natural mastery of performative techniques. Why devote a chapter to the performative rhetoric of this one former president? The simple and sobering answer is that he came to power in one of the world's most free and open democracies and his show turned out (through unprecedented insurrection and impeachment) to be as shallow as it had been seductive. If '[e]lections are a mix of reality TV, drama, and soap opera',¹⁵ the case of Trump the reality TV president supplies an exemplary instance of a performative demagogue and a warning for all time.

The 'reality' in 'reality television' seems an odd descriptor for a genre of entertainment which is highly hyperbolic, exaggerated, and frankly unrealistic. The truth, though, is that such shows can perform and become a sort of reality for participants and viewers alike. Their reality is the heightened reality of the theatrical stage. The celebrated actor Sir Ian McKellen once said something that is relevant in this regard and also highly pertinent to this book's general concern with the fashioning of the world. He was speaking many years ago as a talk-show interviewee in the context of a discussion on the nature of realistic theatrical acting through the centuries since Shakespeare's day. He made the point that the acting style of the Victorian actor Henry Irving in the play *The Bells* would seem melodramatic to us today but would have seemed perfectly realistic to the tastes of audiences at the time. Sir Ian's pithy summary was this: 'fashions of reality change'.¹⁶ The new reality of our time is the reality of the unreal – the reality of virtual reality and of the reality 'show'. Trump, as showman, has an innate feel for what plays well in these times. He has a performer's instinct for forming a public persona and a maker's instinct for moulding and mobilizing the mass of voters. In the hands of such a player, realities can be refashioned. In *The Trump Show*, Jon Sopel, the North America editor for the BBC, issues a warning: 'I think people underestimate him at their peril. He understands theatre. Understands entertainment. Understands politics as entertainment' (ep. 1, 25'30).

To know for sure that Donald Trump conceived his presidency as a continuation of his reality television performance, we needn't rely solely upon the testimony of his supporting cast. Near the beginning of the second episode of *The Trump Show*, the man himself gives the game away when an archive clip shows him at the start of the first cabinet meeting of 2018 saying: 'Welcome back to the studio!' (ep. 2, 2'5). Sara Brady writes in a personal communication with performance scholar Richard Schechner that Trump's performance is 'not acting/theatre and it's not performance/art. It's a category

¹⁵ Phil Mercer, 'Australia TV Networks Jostle for Viewership in Election Coverage', *BBC News Sydney*, 21 May 2022.

¹⁶ *The Dick Cavett Show* (11 November 1981).

of reality TV, of “theatre of the real” . . . It’s not about authentic, or true, or false, or fake. Simply: it’s “good television”.¹⁷

One of the talking heads on *The Trump Show* is Omarosa Manigault Newman. She was the director of African American outreach for Donald Trump’s 2016 presidential campaign and joined his White House team as an assistant to the president and director of communications for the Office of Public Liaison. She first met Trump when she appeared as a contestant on *The Apprentice*. Jonathan Capehart, a Pulitzer Prize-winning journalist from the *Washington Post*, interviewed Newman in August 2015. His reflections on that interview are extremely informative:

The thing she said was, Jonathan, reality television has taken over America. Donald Trump is the reality television king. He is now bringing that to Presidential politics and you are making a mistake if you try to view him through a Presidential prism. You need to view him through this pop culture reality television prism. And I was having a hard time with that. Three years later I have no hard time at all. I completely see it. Everything I know about Donald Trump and learned about Donald Trump I learned from Omarosa.¹⁸

Ms Newman picks up her theme again on *The Trump Show* when, around halfway through the first episode, she says that people were selected for Trump’s White House team ‘based on their look. A lot of the briefing materials would have a photo clipped on it . . . it was almost like a casting call.’

A Skirmisher Enters the Fray

The award for most entertaining cameo played out in Trump’s inner circle goes to financier Anthony Scaramucci. He acted (in every sense of the word) as Trump’s White House director of communications for a period of just eleven days. A confident and brash New Yorker, he blazed into his post and then blazed out of it post-haste when Trump fired him for an indiscrete interview with a reporter for the *New Yorker*. That was the official reason. *The Trump Show* proposes that Scaramucci had to go because he stole Trump’s spotlight. It quotes an *ABC News* reporter who says that:

Scaramucci came in – bigger than President Trump in his own ways and received an even bigger spotlight than the boss himself and as all of us who cover this administration know that is the one way to get out of this White House. (ep. 1, 43’10)

In Trump’s reality television White House, it was not so much that life imitated art, but that art and life were indistinguishable. Scaramucci epitomizes the phenomenon, for his very name evokes the stock character of the

¹⁷ Sara Brady correspondence with Richard Schechner (31 January 2017). Cited in Richard Schechner, ‘Donald John Trump, President?’ (2017) 61(2) *The Drama Review* 7–10, 9.

¹⁸ Jonathan Capehart, *The Beat with Ari Melber*, MSNBC (transcript, 13 August 2018).

commedia dell'arte known as Scaramouche, a name that rock music fans will recognize from the lyrics of rock band Queen's 'Bohemian Rhapsody'. Scaramouche derives from the Italian *scaramuccia*, meaning skirmish, and the English word skirmish is itself derived from *scaramuccia* via the French *escarmouche*. Scaramouche is an aggressive figure and a dramatically compelling one. He 'can be clever or stupid – as the actor sees fit to portray him'.¹⁹ It's almost as if the young Anthony studied the role and made it his mission to give it life. Before his interview on *The Trump Show*, Scaramucci said to his interviewer, 'you don't want a boring show . . . all that spin cycle bullshit that all these political clowns give you' (ep. 1, 1'36). The irony is that Scaramucci in his *commedia* role is the purest, classic incarnation of a clown, right down to the fact that Tiberio Fiorilli (1608–1694), the actor who established the role of Scaramouche, abandoned the traditional *commedia* mask for the white facial cosmetics that we associate with the modern circus clown.²⁰ There have been many incarnations of Scaramouche down the years. One website devoted to *commedia dell'arte* even suggests that the character traits of Scaramouche were reborn in the brash *Looney Tunes* cartoon character Daffy Duck.²¹ I would add, not just his character but also his clothes – since Daffy's colouring resembles Scaramouche's all-black costume with white ruff. Scholars have argued that 'the success of Trump's candidacy in the 2016 Republican primary was in part due to its value as comedic entertainment'.²² For the offence of encroaching on Trump's comedic prerogative, Anthony Scaramucci simply had to go.

Off the Cuff or with a Script Up His Sleeve?

It is difficult to discern in Trump's performance when and to what extent it is scripted and stage-managed and to what extent it is off the cuff. As regards the lowest point of his performance in office, which was surely his refusal to acknowledge the legitimacy of the 2020 election results and his conspiratorial allegations of election fraud, there is good reason to believe that there was nothing ad-lib about it. Trump had prepared that script many years previously. This is a point convincingly made in episode four of *The Trump Show*, 'Downfall'.

Tim O'Brien recounts an airplane flight with Trump when he was conducting research for his 2005 biography *TrumpNation: The Art of Being the Donald*.²³ On the flight, Trump watched the 1941 cinematic masterpiece

¹⁹ <https://en.wikipedia.org/wiki/Scaramouche> (1 February 2023).

²⁰ John Rudlin, *Commedia Dell'Arte: An Actor's Handbook* (London: Routledge, 1994) 152.

²¹ <https://sites.google.com/site/italiancommedia/the-characters> (1 February 2023).

²² Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, 'The Hands of Donald Trump: Entertainment, Gesture, Spectacle' (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 71.

²³ Tim O'Brien, *TrumpNation: The Art of Being the Donald* (New York: Warner Books, 2005).

Citizen Kane, acted and directed by Orson Welles. Trump is said to have paused the film at one point and said to O'Brien, 'this is an amazing scene'. The scene is the one in which a newspaper owned by Charles Foster Kane runs the headline 'Fraud at the polls' after Kane loses a political election. It seems that Trump kept the script to that scene filed away for many years and might have pulled it out for the 2016 election had he lost it. We can deduce this from his third televised presidential debate with Hillary Clinton (20 October 2016), in which the convenor asked Trump if he was prepared to commit to the principle of peacefully conceding to Clinton in the event of losing the election. Trump replied, 'I will tell you at the time. I'll keep you in suspense, okay?' The fact that he won in 2016 meant that the *Citizen Kane* script could be kept under wraps on that occasion, but when he lost the 2020 election it was duly dusted off. Kane's 'Fraud at the polls' became Trump's 'Stop the Steal', a slogan coined by right-wing political agitator Roger Stone in 2016.²⁴ Regardless of the shortcomings of its ideology, the slogan 'Stop the Steal' is a brilliant example of rhetorically effective drafting. It is in form a simple tricolon of monosyllabic words with a powerful alliterative repetition of the 'st' sound. No sound is rhetorically more potent than 'st', for it is the sound of stasis. It is the sound of a static obstacle or state which an active political movement will instinctively desire to shift and overcome. The effect of the 'st' sound has been deeply embedded in human psychology since prehistoric times. It is a potent example of sound symbolism, for the 'st' sound – which supplies our language of stasis, stopping, and standstill – is itself made when the mouth brings the movement of air to an abrupt stop.²⁵ Probably unintentionally, Trump used the 'st ... the st ...' slogan as a way to depict the Democrat's election victory as a stubborn obstacle to be overcome.

Trump's Two Tongues

Several commentators have remarked upon Trump's use of simple speech. An article titled 'Trump's cleverest trick is sounding stupid' notes that the Flesch-Kincaid readability test assesses Trump's language to be pitched at the level of nine- and ten-year-olds, Hillary Clinton's at thirteen- and fourteen-year-olds, and George Washington's 1796 farewell address at university degree level.²⁶ Others have noted that Trump's language is a highly polarized mix of phrases, some of which appeal more to men and others more to women.²⁷ What has not been closely analysed is the way in which Trump frequently combines a highbrow, presidential style alongside a low-brow, populist style within a

²⁴ Rob Kuznia, Curt Devine, Nelli Black, and Drew Griffin, 'Stop the Steal's Massive Disinformation Campaign Connected to Roger Stone', CNN, 14 November 2020.

²⁵ Gary Watt, *Shakespeare's Acts of Will: Law, Testament and Properties of Performance*, The Arden Shakespeare (London: Bloomsbury, 2016) 137.

²⁶ Ben MacIntyre, 'Trump's Cleverest Trick Is Sounding Stupid' *The Times*, 13 May 2016.

²⁷ Claire Cain Miller, 'Measuring Trump's Language' *New York Times*, 14 March 2016.

single passage of speech. This enables him to speak to two audiences at once. Instances of Trump's double-speak are too numerous to list, but there are several examples in Trump's first official press conference as president held on 16 February 2017 in which Trump expressly addressed two different audiences at the same time: 'I'm making this presentation directly to the American people, with the media present.'²⁸ He was talking *at* the media, but he was talking *to* the people. The following short passage from that press conference illustrates the way that he uses pithy repetitions (underlined) and colloquial language (italicized) alongside more highbrow clauses to speak in two registers at once with the aim of satisfying the immediate audience of news reporters while appealing directly to members of the wider public audience watching from their homes:

The press has become so dishonest that if we don't talk about it, we are doing a tremendous disservice to the American people. Tremendous disservice. *We have to talk about it . . . to find out what's going on, because the press honestly is out of control.* The level of dishonesty is out of control. (4'17)

Examples of Trump's two-tongued technique can be found in every one of his campaign speeches. Listed next are just a few of the many instances that appear in a single speech delivered at a 2020 presidential election rally in Rome, Georgia.²⁹ In each case, the phrase that demonstrates his low-brow linguistic mode appears in italics to contrast it to the more sophisticated style of the text immediately preceding it. Repetition is again underlined:

With your vote, we will continue to cut your taxes, cut regulations, support our police, support our great military, protect your second amendment . . . Defend religious liberty, and ensure more products are proudly stamped with that beautiful phrase 'Made in the USA.' *That's happening.* (2'14)

Biden has vowed to abolish American oil, fracking, natural gas. *You ever see a guy fracking?* (7'31)

As long as I'm president, we will remain number one producer of oil and natural gas anywhere in the world. *We are now number one.* (9'29)

Joe Biden is a globalist who spent 47 years outsourcing your jobs, opening your borders and sacrificing American blood and treasure in endless foreign Wars. *Don't worry, they're all coming home.* (12'20)

If you want a vaccine to kill the virus, a job to support your family well, and freedom to live your life, then go cast your ballot for a man named Trump. *We're doing a job. We're doing a job together.* (25'15)

We will mass distribute the vaccine in just a few short weeks and it will quickly help us to eradicate it. *It's going to go anyway.* (21'15)

²⁸ Donald Trump, First Presidential Press Conference (16 February 2017).

²⁹ Donald Trump, Rally Speech (Rome, GA, 1 November 2020).

The last example in this list illustrates perfectly the dumbing down technique of Trump's two-tongued technique. Just in case the word 'eradicate' has too many syllables for some of his audience, he translates it immediately as 'going to go'. Journalist Ben MacIntyre observes that 'Trump's unique brand of Basic English may sound stupid to some but it is highly effective, carefully calculated, and the shape of things to come'.³⁰ How 'carefully calculated' (as opposed to instinctive) it may be doubted, but Trump's double-speak is certainly effective. Part of its appeal to his supporters may lie in its ability to mimic their own hotchpot patterns of thought. Journalist and Trump biographer Gwenda Blair notes that Trump's habit of speaking in 'incomplete thoughts and sentence fragments has an unmediated, stream-of-consciousness feel', so that for the members of his audience the way he talks amplifies 'the voice inside their own heads – a rich and sometimes dark stew of conversational snippets and memory scraps, random phrases and half-thoughts'.³¹ Incoherence also has the advantage of shifting the work of solving the puzzle onto the audience, which not only captures the listeners' attention but also leaves them with the Making Sense that they had a hand in constructing the outcome as co-Creator and co-Producer. Whatever its merits or demerits, Trump's language is undeniably a key factor in creating his distinctive brand. As linguist Jennifer Sclafani acknowledges in a video interview for the *Washington Post*: 'You can use language to construct an identity ... that works towards creating an authentic persona that people will pay attention to' (7 July 2017).

The Making Sense of Trump's Hand Gestures

We now turn to consider another symbolic register in Trump's performance repertoire – the action of his hands. The very word 'action' is a cousin to 'agriculture', the connection being the idea of driving on beasts. This early association with the manual work of driving animals was later coupled with driving on a lawsuit (hence 'legal action') and with the gestural rhetorical performance of the hand (called '*actio*') by which charismatic politicians drive their followers on in something like the way that a gesticulating shepherd drives sheep into an obedient flock. This idea of 'driving people on' is the precise etymology of the word 'demagogue', which is worth bearing in mind as we come to puzzle Donald Trump's distinctive and seemingly innate aptitude for gestural performance. As with his linguistic register, Trump's register of manual gestures employs a sort of double-speak. This could be read as a sign of weakness or confusion, but on the contrary it seems to serve him well as a way of appealing to a broad range of gestural spectators through a single performance event, just as his linguistic double-speak helps him to connect to

³⁰ Ben MacIntyre, 'Trump's Cleverest Trick Is Sounding Stupid' *The Times*, 13 May 2016.

³¹ Gwenda Blair, 'Inside the Mind of Donald Trump', *The Guardian*, 12 November 2016.

socially higher and lower sections of his audience through a blend of higher and lower modes of speech. The authors of the article ‘The Hands of Donald Trump’ advance the theory that Donald Trump is popular because he is a comedic performer. They make the point that comedy is a language that works on more than one level and therefore transcends differences in social status and taste:

[S]treet performers, clowns, criminals, or jokers may become popular – and valuable – precisely because of their skill at entertaining. In the liminal space of comedic entertainment, distinct identities of ‘high’ and ‘low’ culture may remain in the interpretation of verbal and gestural form, but viewers laugh, even if not for the same reason.³²

Trump’s mixed gestural language, particularly his favoured technique of blending expansive gestures with pinpointing gestures, allows him to convey the sense that he knows how to use the broad brush as well as the fine needle. A great deal has been written about Trump’s idiosyncratic gestural idiom. My aim in this section is not to duplicate the vast volume of observations and analysis that has been offered up by psychologists, rhetoricians, and experts in performance and communication, but to select and synthesize some of their insights to propose and support a new theory about Trump’s gestural symbols. The theory is that Trump’s gestures start to make integrated sense when we see them as gestures of making. This is in addition to, and without prejudice to, the suggestion that Trump’s gestures can be read as elements in a comedic routine. After all, comedy can itself be considered a mode of making, one which makes communities by making people laugh at the folly that makes us who we are.

Trump is a maker. As a businessman he makes deals and makes money. As a celebrity he makes television. In the 2016 presidential election he made ‘making’ the central message of his campaign, promising to ‘Make America Great Again’ and to ‘Build a Wall’. Since effective performance in rhetoric and theatre demands that the action should suit the word, and the word suit the action (a paraphrase of Shakespeare’s Prince Hamlet), it should follow that ‘making’ will be as central to Trump’s gestures as to his speech. This is indeed what we find, for his gestural repertoire can be read as mimes in which he performs fabricating manipulations of invisible stuff. The abstract to the article ‘The Hands of Donald Trump’ hints at this reading when it observes that ‘Trump crafts with his hands to . . . accrue visual capital in a mediatized twenty-first-century politics that is celebrity driven’.³³ At another point in their account the same authors even compare one of Trump’s signature moves

³² Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, ‘The Hands of Donald Trump: Entertainment, Gesture, Spectacle’ (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 73.

³³ *Ibid.*, 71.

to a mode of culinary craft. We will come to that and to other specific examples of Trump's 'making' mimes shortly. The broader point is that Trump's gestural activity is rhetorically persuasive not only because it entices the spectator to enjoy the comedic exaggeration of his gestural performance, but also because it draws the observer into a sense of participation in Trump's projects of making. Television audiences are especially seduced by programmes – including gardening shows, DIY shows, and cooking shows – that offer the vicarious experience of manual making. It is not insignificant, therefore, that Trump's former television show, *The Apprentice*, challenged competing teams to make a success of a weekly task which very often involved manual making. Examples included the restoration or renovation of real estate locations, the devising of new ice-cream flavours, designing a new pizza, and making chocolate bars, cupcakes, and pies. The very first episode of the very first series set a task that is the American cultural archetype of making stuff in order to make money – selling home-made lemonade from a street stall. Before we turn to some specific examples of the making mode in Trump's manual performance, it is useful to make one or two general points about his gestural idiom.

The first point is that Trump's gestures are extremely dynamic. Trump's involvement in high-paced business is expressed through the frenetic busyness of his hands. He is active – always doing, doing, doing. His hyperactive hands mirror this not only through their perpetual motion but also through the remarkable way they leap from one type of motion to another. He takes his hands, or his hands take him, on an ever-circling tour of his favourite gestural topics – moving from his expansive, double-handed, symmetrical, open-palm-facing-forward, outward-circling, 'window-cleaner' action (which I call his 'large circle') to his precise one-handed pinched circlet of thumb and finger (which I call his 'small circlet'). The latter is Trump's signature gesture. When Michelle Obama gave a celebrated speech denouncing 'hateful language . . . from public figures on TV' and someone who is 'cruel or acts like a bully', she did not refer to Trump by name, but by using his signature 'small circlet' gesture we were left in no doubt that he was the target of her denunciation.³⁴ Trump tours through his repertoire of stock gestures like a businessman doing his rounds – checking off his stocks, looking in on his projects one by one. We will shortly see that his two gestural poles – the large circle and small circlet – are especially useful for illustrating the way in which Trump's gestural language conveys the Making Sense.

A second general and foundational feature of Trump's hand gestures is that taken together they are expansive – ambitious in a spatial sense. This sprawling attribute is entirely to be expected from a man who is personally ambitious and larger than life, who is physically tall and corpulent and

³⁴ Michelle Obama, Democratic National Convention (Wells Fargo Center, Philadelphia, PA, 25 July 2016).

extremely proud of his big hair. Trump's costume is also larger than life. His unusually long ties and excessively baggy suits are clown-like. Writing in *Vanity Fair*, Kenzie Bryant conjectures that Trump's ever-widening trouser legs might be down to the fact that he is shrinking with age or that he is wearing the cut of trouser favoured by Juggalos – the hardcore fans of hip hop duo Insane Clown Posse who are frequently to be seen sporting clown wigs and make-up.³⁵ Sometime British Prime Minister Boris Johnson is another political leader who favours the clown cut of baggy clothing and a 'cut' of hair that is even more clownish than Trump's.³⁶ Boris Johnson's nickname 'BoJo' is quite at home in the pantheon of famous clowns alongside Bozo, Coco, Vercoe, and Blinko. The Italian press, attuned to their native tradition of *commedia dell'arte*, seized upon Johnson's clown-like persona in the aftermath of his resignation on 7 July 2022. *Corriere della sera* presented a photo gallery with the title 'Bojo the Clown Surrenders'.³⁷ In England, *The Economist* covered the resignation with the pithy front-page headline 'Clownfall' (9 July 2022). The ancient Greek comic actors preferred to wear tights, but in two respects their costume has come down to Trump, for they wore heavy padding and exhibited a large phallus.³⁸ In Trump's case the padding is his own actual flesh, and the phallus is his long dangling tie.³⁹ The long tie survives to this day as a staple of the costume of circus clowns. As to the colour, Trump's preference for a red tie on a white shirt is no doubt a nod to the red of the Republican Party, but it inadvertently serves a deeper semiotic purpose, for red against white is one of the most ancient and innate signs of dramatic, ritual performance.⁴⁰ Red on white, whether in the form of a red wax seal on white parchment, or blood on white skin, is the primal and archetypal sign – indeed, the word 'seal' is itself derived from the Latin for 'small sign'.

The expansiveness of Trump's tie, baggy trousers, big hair, and bulging body extends even to a tendency to splay his fingers apart. Swell sells, and Trump wants us to know that he's Mr Big and a swell guy. It is no surprise therefore that Trump bristles at any suggestion that his hands might in fact be on the small side. He was acutely defensive in response to a political rival's mischievous implication that Trump's manual shortcomings might be

³⁵ Kenzie Bryant, 'What Is Going on with Trump's Pant Legs? One Humble Theory', *Vanity Fair*, 5 April 2018.

³⁶ Edward Docx, 'The Clown King: How Boris Johnson Made It by Playing the Fool', *The Guardian*, 18 March 2021. Mr Docx reprised his theme after Johnson's resignation: 'The Death of "Boris" the Clown', *The New Statesman*, 13 July 2022.

³⁷ 'Bojo the Clown si è Arreso', *Corriere della sera*, 8 July 2022.

³⁸ Allardyce Nicoll, *Masks, Mimes and Miracles: Studies in the Popular Theatre* (1931) (New York: Cooper Square Publishers, 1963) 62.

³⁹ Claire Robinson, 'The Phallic Necktie Is an Outdated Symbol of White Male Rule in New Zealand's Parliament', *The Guardian*, 8 February 2021.

⁴⁰ Gary Watt, 'Black and White and Red All over: Bloody Performance in Theatre and Law' (2017) 28(2) *Anglistik* 23–33.

mirrored in the scale of another anatomical extremity.⁴¹ Trump countered in a televised *Fox News* debate by proudly splaying his hands and, dismissing the implied slight of his manhood, assured his audience, ‘I guarantee you there’s no problem’.⁴² As he uttered that guarantee his left hand delicately alighted on the mic stand in a manner that might have been a Freudian slip. Trump’s standard gesture of splayed fingers may be an instance of the sort of dominance displays – especially those that give the impression of superior size – that are exhibited by mammalian males across a wide range of species. In addition to the size aspect, there is also a vigour, performative energy, and dynamism in the splayed fingers. That dynamism is lacking in the stock gestures so often favoured by other politicians, such as the chopping axe-hand (favoured by Hillary Clinton) and Barack Obama’s clenched ‘signature precision-grip gesture’ (discussed later).⁴³ It is almost as if Trump’s hands have internalized the secrets of dynamic dance. The famous ‘jazz hands’ dance move, for example, is performed with elbows in at the waist and arms out to the side with fingers splayed. One online tutor advises the dancer to ‘think of energy shooting out from each fingertip’.⁴⁴

The authors of ‘The Hands of Donald Trump’ repeat a question that has been asked frequently by bemused political commentators: ‘How does a businessman situated in the uppermost tier of American wealth capture the allegiance of the working classes?’⁴⁵ The authors of the article put it down to his class-transcending comedic appeal, but concealed in their question and buried in their own analytical response another answer presents itself – it is that Trump appeals to manual workers because his hands are always manually at work, and specifically at work in gestured processes of manufacture. Unlike members of the orthodox political cadre, Trump has seldom been accused of craftiness, artfulness, and subtle manipulation. This may be because the brute openness of his gestures combined with other aspects of his performance suggests a lack of guile. His hand actions are those of a down-to-earth crafter, an artisan – a manipulator only in the sense that he constantly mimes manual making.

Kneading Bread, Pulling Thread

We now consider two of Trump’s gestures in detail to demonstrate how they mirror manual activities of making. There are, of course, a great many more

⁴¹ Fox News Debate (3 March 2016).

⁴² Rebecca Kaplan, ‘Marco Rubio Goes after Donald Trump’s “Small Hands”’, *CBS News*, 29 February 2016.

⁴³ Jennifer Sclafani, *Talking Donald Trump: A Sociolinguistic Study of Style, Metadiscourse, and Political Identity* (Abingdon: Routledge, 2018) 62.

⁴⁴ ‘How to Do Jazz Hands – Beginning Jazz Steps’, YouDance.com (YouTube channel).

⁴⁵ Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, ‘The Hands of Donald Trump: Entertainment, Gesture, Spectacle’ (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 71.

gestures in Trump's range, but these two – the 'large circle' and the 'small circlet' – are a good starting point because they lie at polar extremes as being respectively one of the most expansive and one of the most tightly focused actions in his repertoire.

We will commence with Trump's 'large-circle' gesture – his double-handed, symmetrical, open-handed, palms facing the viewer, window-cleaning action. Jennifer Sclafani observes that this tends to move 'either in the vertical (downward-moving) or horizontal (outward-moving) direction', which she likens to two different modes of manual craft – kneading-dough and combing out tangled threads – saying that:

[T]he openhanded configuration of his hands [gives] the impression not that he is trying to pinpoint an idea but is instead trying to 'flatten' (in the case of vertical downward movement) or 'spread' (in the case of horizontal-outward movement) an idea. Together these movements recall the action of kneading and stretching pizza dough – taking something amorphous and putting some shape to it. Finally, the spreading of the fingers give the impression that he is combing his way through a large snarl . . . Trump's indexical gestures . . . construct Trump as the big, strong, forceful Washington outsider who will comb through the current political mess the country is in and will restore order to American life.⁴⁶

In the early days of the 2020 US presidential campaign, *Sky News Australia* interviewed Louise Mahler, billed as 'Australia's leading body language expert', who gushed that 'Donald Trump is the master of body language'.⁴⁷ She might not like him or his politics, but as a professional gesture analyst, she was impressed by his performative prowess. (Another body language expert, Mary Civiello, acknowledges likewise that 'he's entertaining, even if you don't buy a thing he's saying'.)⁴⁸ Louise Mahler singled out his large-circle gesture as the 'key tool' by which he is able to 'work with people, so that they come with him'. As she demonstrated the gesture, she emphasized that it operates by bringing his supporters in. As if working a ball of dough, Trump constantly massages his audience, presses them, and pulls them, until they are worked into his project and manipulated into the form of a mass. He kneads his support base as if it were a pizza base.

The authors of 'The Hands of Donald Trump' mention in passing that Trump 'used his craft as an entertainer to forge a new hybrid of politics and comedy',⁴⁹ but it could also be his craft as a manual maker, a manipulator of

⁴⁶ Jennifer Sclafani, *Talking Donald Trump: A Sociolinguistic Study of Style, Metadiscourse, and Political Identity* (Abingdon: Routledge, 2018) 62.

⁴⁷ 'Trump Is the "Master of Body Language"', *Sky News Australia*, 7 March 2020.

⁴⁸ 'What Donald Trump's Hand Gestures Say about Him', *BBC News*, 17 August 2016.

⁴⁹ Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, 'The Hands of Donald Trump: Entertainment, Gesture, Spectacle' (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 75.

stuff – an actual ‘forger’ – that assists him to make contact with his support base of manual workers. This is borne out by the second of the two gestures that we focus on here: the ‘small circling’ made by pinching the thumb and index finger together while splaying the non-pinching digits outwards and upwards. The small circling is a species of ‘precision grip’, which, as Michael Lempert explains, ‘refers to a family of gestures . . . named for the prehensile motion in which something small appears to be grasped’.⁵⁰ A simple way to replicate Trump’s small circling is to imagine that you are holding a sewing needle between thumb and index finger. Pretend to push the needle through cloth and then pull it up with the other fingers splayed upwards, as if drawing the thread through the fabric. Not only will this put your hand in the classic Trump small circling position, but it will force your hand to follow a typical Trump trajectory – from midriff or chest level upwards to somewhere near shoulder height. Trump’s first solo press conference after his inauguration is infamous for his lengthy (seventy-seven minute), impassioned tirade against ‘mainstream media’, and it is also notable for his heightened gestural activity, including repeated use of the small circling gesture.⁵¹ The first time that he holds that gesture, rather than simply flashing it, he very clearly demonstrates the entire upwards trajectory of the needle-pulling-thread action (5’35). It’s not just a stitch. It’s a stitch up. It can be read as a sign that Trump is fabricating, or to talk in terms of another threading process – spinning a yarn. Ironically, and revealingly, he makes the fabricating gesture at precisely the moment that he says, ‘to be honest’. He then holds it until the next emphatic statement, ‘I inherited a mess’. The needle-and-thread action therefore demonstrates Trump’s resolution to get a grip on, and perhaps even to patch up, the political problems he had inherited. The next time he holds the gesture (11’29) it accompanies the claim that his own administration is running like a ‘fine-tuned machine’, thereby demonstrating the gesture’s ‘precision-grip’ credentials.

Adam Kendon makes the point that precision-grip gestures go beyond mere preciseness of grip to imply preciseness of process, and specifically a process of making: ‘the semantic theme that they share is related to ideas of exactness, making something precise, or making prominent some specific fact or idea’.⁵² On the word ‘mess’, Trump moved from his small circling to a new gesture by flicking up his index finger to make an upwards pointing pistol pose with the thumb tucked against the forward-facing palm and behind the middle finger. A variation of this is to flick out the thumb at the same time as flicking up the index finger in order to make an upwards pointing L-shape pistol hand. Mary

⁵⁰ Michael Lempert, ‘Barack Obama, Being Sharp: Indexical Order in the Pragmatics of Precision-Grip Gesture’ (2011) 11(3) *Gesture* 241–270, 246.

⁵¹ Donald Trump, First Presidential Press Conference (16 February 2017).

⁵² Adam Kendon, *Gesture: Visible Action as Utterance* (Cambridge: Cambridge University Press, 2004) 240.

Civiello notices that Trump often emphasizes the precision of the point he is making by moving immediately from the small cirlet to the L-shape pistol.⁵³ In Trump's gestural performance, the right to bear arms carries a new meaning.

Barack Obama's favoured precision gesture is a compound of Trump's small cirlet and Trump's upwards pointing pistol finger. Obama makes an index-finger-touching-thumb ring as in Trump's small cirlet, albeit somewhat more pinched,⁵⁴ but in Obama's case the other digits are flexed inwards to touch the palm. Whereas Trump, with fingers splayed, appears to be gripping a needle, Obama appears to be gripping a pen. Trump has a great many go-to gestures, including an index finger pointed directly towards his audience (this is a version of the 'pistol hand' that he used in *The Apprentice* when firing competitors), but the small cirlet is his signature manual action. The challenge is to discern its meaning. It is plausible, as I've just argued, to regard it as a stitching gesture, but of course I am biased by my project to make sense of it through the Making Sense. That's the thing about gestures: they are extremely susceptible to the interpretations we bring to them. The co-productive participation of the viewer or reader of a gesture is fundamental to making it mean something. One of the merits of reading the small cirlet as emblematic of the making process of sewing is that it is a natural extension of the basic gestural sign of getting a precise grip, and specifically of getting a grip for a productive purpose. Trump's two key gestures – the needle-holding, thread-pulling, 'small cirlet', and the pizza-kneading, thread-combing, 'large circle' – together present a president who is always crafting something, always manipulating. If he isn't stitching something up, he's cooking something up.

Trump as Mime and Mimic

Mime artists have always exploited familiar everyday activities in order to produce sympathetic associations in their spectators. In *Modern Times* (dir. Chaplin, 1936), Charlie Chaplin performs a classic pantomime scene in a café involving such quotidian actions as opening a car door and engaging in romantic flirtation. In *Les Enfants du Paradis* (dir. Carné, 1945), the mime Jean-Louis Barrault in the role of Jean-Gaspard 'Baptiste' Deburau (the creator of Pierrot and father of modern French mime) rendered a sublime pickpocket scene incorporating such familiar daily acts as checking a pocket watch. The celebrated mime Marcel Marceau, who refined his craft as a member of Jean-Louis Barrault's company, made a high art of such commonplace actions as walking against the wind.

⁵³ 'What Donald Trump's Hand Gestures Say about Him', *BBC News*, 17 August 2016.

⁵⁴ Michael Lempert, 'Barack Obama, Being Sharp: Indexical Order in the Pragmatics of Precision-Grip Gesture' (2011) 11(3) *Gesture* 241–270, 247.

Trump's particular penchant is for mimicking opponents by caricaturing aspects of their character or physical attributes, which is acting in the impersonation mode discussed in [Chapter 6](#). Trump's most infamous impersonation was a mocking representation of reporter Serge Kovaleski. What made it infamous is that Trump's positioning of his hands was interpreted by many to be a deliberate parody of Mr Kovaleski's hands, which are affected by a congenital joint condition. Whatever the truth of that interpretation, there is no doubt that Trump's wild, flailing gestures on that occasion were undignified and unbecoming of a US president. He probably hasn't read Quintilian, who warned that whereas 'a somewhat more agitated style of Delivery is regarded as acceptable, and is indeed appropriate in some contexts', it 'needs to be under control, lest, in our eagerness to pursue the elegance of the performer, we lose the authority of the good and grave man'.⁵⁵ Trump was on safer ground when he employed the mime of reading a script to mock Hillary Clinton and the mime of falling asleep to lampoon Jeb Bush.⁵⁶ What's especially striking about his decision to ridicule Clinton as a script-reader is that this mocks an attribute that in a politician might be considered a reassuring sign of rigour and devotion to detail, but which in a theatrical or television performer comes across as unprofessional, unprepared, and damaging to the credibility of their performance. Trump is judging her, and encouraging his audience to judge her, by the standards of the actor's craft rather than by the standards of statecraft. Purists might say that Trump's set-piece impersonations aren't true mimes because they are accompanied by speaking, but Trump's distinctively disjointed and jumbled speech patterns become a sort of background noise that caption the mime just enough to give it context without distracting the spectator's attention from the spectacle of his gestural performance. They might be compared to the barely decipherable mumblings uttered by Rowan Atkinson's 'Mr Bean' character as he engages in his comedic gestural escapades. Indeed, this may be one of the unintended effects of Trump's rambling sentence structure – that it liberates his spectators to judge him more by his actions than by his words, and licences him to blame offensive words on innocent acting or to excuse offensive acting with innocuous words.

Late in 2016, I recommended to my students of rhetoric and advocacy that they should watch the US presidential debates with the sound turned off and assess for themselves which speaker – Donald Trump or Hillary Clinton – had the greatest gestural and performative appeal. The suggestion arose from my own accidental experience of watching a news report of the televised 'town hall'-style Second Presidential Debate (10 October 2016) with the sound

⁵⁵ Quintilian, *The Orator's Education (Institutio Oratoria)*, Donald A. Russell (ed. and trans.), Loeb Classical Library 124 (Cambridge, MA: Harvard University Press, 2001) 11.3.184.

⁵⁶ Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, 'The Hands of Donald Trump: Entertainment, Gesture, Spectacle' (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 84

turned off. As I watched, it struck me that Hillary Clinton's performance seemed rather rigid and repetitive, with lots of chopping hand gestures and a generally constricted and awkward comportment. Her use of the stage space was also static and constricted. This is ideal in a lawyer in a courtroom and perhaps commendable if one is trying to communicate political stability, but Clinton's fixed status as part of the nation's political furniture was one of Trump's main points of attack against her. His mobility across the stage signalled that he was bringing a new movement and disruption to the settled state of things. It is true that at one point in the debate he seemed to stalk Clinton as he followed her from behind, which came across as somewhat predatory behaviour (a *Saturday Night Live* parody accompanied it with the famous threat music from the movie *Jaws*), but in brute performative terms it does no harm for a populist to present himself as being at the top of the political food chain in contrast to the immobility of a career politician and member of the Washington establishment (the same *Saturday Night Live* picked up on Clinton's somewhat robotic movements and general lack of gestural ease). Trump's mobility across the stage might have made him look like a shark, but in contrast Clinton's incessant paddling on the spot made her look like a lame duck stuck in what Trump calls 'the swamp' of the political establishment. The *New York Times* published a video summary of the second debate with the title 'Trump's Looming Onstage Presence in Presidential Debate'.⁵⁷ Jim Rutenberg's commentary accompanying that video provides an excellent summary of the candidates' contrasting styles:

I think what we saw in this debate that we didn't see in the last debate was Donald Trump's comfort in front of a camera, his ability to command the stage. However, it was a looming presence: looming behind her, pacing around her . . . the huge risk is that that will be seen as not only disrespectful, but patently aggressive. His back was so up against a wall, that he went to what he knows best in sort of the reality TV showman. He did own the medium tonight, and that's not to say Hillary Clinton didn't. She was composed, she kept to her mark, as they call it, on the stage. She wandered when she had to, but it was in the practiced way a politician does it. Donald Trump's career has been lived on television. Hillary Clinton's career has been lived in the halls of Congress, in the White House, and tonight you really saw that.

Clinton's gestures were seldom smooth but tended rather to punctuate and beat out her words in the percussive manner that is known as a 'baton' gesture. Lacking gestural variety and interest, the cumulative effect can give the viewer the sense that they are being beaten down by the repeated hammering home of points. In this respect, Clinton's gestures were as aggressive as Trump's, only in a different way. Arguably, and counter-intuitively, they might even have

⁵⁷ Jim Rutenberg, 'Trump's Looming Onstage Presence in Presidential Debate', *New York Times*, 10 October 2016.

been more stereotypically masculine than his. It could be that Trump's freely flowing hands, smooth stage-gliding, and even his soft-edged hairstyle are actually more typically female in their register than Clinton's more tightly sculpted hair, erect posture, deliberate gait, and chopping hands. Linguists examining the performance of candidates in the presidential primaries concluded that the femininity of Donald Trump's voice was second only to Hillary Clinton's and that, when placed alongside such nonverbal cues as gestures and facial expressions, he was the most feminine of all the candidates.⁵⁸ Haley Freeman, a journalist for *The Guardian* newspaper, wrote a piece entitled 'Imagine if Donald Trump Were a Woman: You Simply Can't';⁵⁹ but an experiment in political performance at New York University has successfully imagined precisely that. Maria Guadalupe, an associate professor of economics and political science, worked with Joe Salvatore, an associate professor of educational theatre, to commission an actress to play Trump, 'replicating his words, gestures, body language, and tone verbatim', while a male actor did the same in the role of Clinton.⁶⁰ Guadalupe and Salvatore found in rehearsal that their own preconceptions were challenged, leading them to ask what the male Clinton (actor Jonathan Gordon) was 'smiling about all the time', and did he not 'seem a little stiff, tethered to rehearsed statements at the podium', while the female Trump (actress Brenda King) was 'plainspoken and confident' and 'freely roamed the stage?'⁶¹ In performances of their show, *Her Opponent*, audiences 'were shocked to find that they couldn't seem to find in Jonathan Gordon what they had admired in Hillary Clinton – or that Brenda King's clever tactics seemed to shine in moments where they'd remembered Donald Trump flailing or lashing out'.⁶²

The authors of 'The Hands of Donald Trump' note 'how Trump elevates his entertainment value by crafting comedic representations of his political opponents as well as himself'.⁶³ These crafted representations 'involve the dramaturgical replaying of an actual or imagined event, action, or behavior', often by impersonation ('assuming another's alleged subjectivity'). The authors add that '[t]hese representations take the form of a kind of embodied performance' which include what gesture scholars call 'bodily quoting',⁶⁴

⁵⁸ Claire Cain Miller, 'Measuring Trump's Language' *New York Times*, 14 March 2016, quoting Robin Lakoff, professor emerita of linguistics at the University of California, Berkeley.

⁵⁹ Haley Freeman, 'Imagine if Donald Trump Were a Woman: You Simply Can't', *The Guardian*, 27 September 2016.

⁶⁰ Eileen Reynolds, 'What if Donald Trump and Hillary Clinton Had Swapped Genders?', NYU website, 28 February 2017. I am grateful to Sean Mulcahy for bringing this to my attention.

⁶¹ *Ibid.* ⁶² *Ibid.*

⁶³ Kira Hall, Donna M. Goldstein, and Matthew Bruce Ingram, 'The Hands of Donald Trump: Entertainment, Gesture, Spectacle' (2016) 6(2) *Hau: Journal of Ethnographic Theory* 71–100, 73.

⁶⁴ Leelo Keevallik, 'Bodily Quoting in Dance Correction' (2010) 43(4) *Research on Language and Social Interaction* 401–426.

'transmodal stylizations',⁶⁵ 'full body enactments',⁶⁶ 'gestural reenactments',⁶⁷ and 'pantomime'.⁶⁸ The last of these – 'pantomime' – is especially pertinent to their analysis of Trump as comedic performer, because pantomime is a highly crafted and conventional art form. It is unlikely that Trump has studied the art form and consciously crafted his performances in keeping with its conventions, which compels the conclusion that he is an accidental mime. He is not obeying the tenets of comedic pantomime but has stripped it back to its ancient origins in human, even animal, gesture. There is also, though, a sense in which Trump might be said to have internalized a general appreciation for the extensive and deep-rooted culture of 'knock-about' comedy. The various tributaries of this culture – *commedia dell'arte*, 'Punch and Judy' shows, modern French mime, silent movie slapstick, and circus clowning – can be traced back to ancient sources, including the visceral and lascivious Graeco-Roman mime and the somewhat more refined arts of the *pantomimus* that was popular in Augustan Rome.

Whereas Roman mime is said to have sometimes involved actual sexual and homicidal acts, the *Encyclopaedia Britannica* describes the *pantomimus* as a 'nonspeaking dancer in the Roman theatre who performed dramatic scenes, acting all the characters in a story in succession using only masks, body movement, and rhythmic gestures'. *Commedia dell'arte* developed on the more refined side, whereas Punch and Judy puppet shows emphasize the brutal. Pulcinella, a stock character of the *commedia*, was Anglicized as Punchinello ('Punch') sometime after certain Italians, probably Neapolitans, brought him to England. Samuel Pepys' diary dates the first recorded performance in England to 9 May 1662 in London's Covent Garden, where he saw 'an Italian puppet play that is within the rayles there, which is very pretty, the best that ever I saw'. When Punch and Judy became especially popular with children on their seaside summer holidays, Punch's mistress (a vestige of the Roman penchant for sexual mime) lost her place in the puppet line-up, but even as a children's show the spectacle generally retains scenes of baby beating, wife beating, evasion of police, hanging, and even a crocodile attack that wouldn't be out of place in the Roman circus. There are echoes of the Punch and Judy show in Donald Trump's remarkable ability to evade the legal consequences of alleged sexual and financial impropriety. Even the Devil, who eventually comes for Punch, is outsmarted by the slippery protagonist.

⁶⁵ Marjorie Harness Goodwin and H. Samy Alim, "'Whatever (Neck Roll, Eye Roll, Teeth Suck)": The Situated Coproduction of Social Categories and Identities through Stancetaking and Transmodal Stylization' (2010) 20(1) *Journal of Linguistic Anthropology* 179–194.

⁶⁶ Irene Mittelberg, 'Balancing Acts: Image Schemas and Force Dynamics as Experiential Essence in Pictures by Paul Klee and Their Gestural Enactments', in B. Dancygier et al. (eds), *Language and the Creative Mind* (Chicago: University of Chicago Press, 2013).

⁶⁷ Jack Sidnell, 'Coordinating Gesture, Talk, and Gaze in Reenactments' (2006) 39(4) *Research on Language and Social Interaction* 377–409.

⁶⁸ Jürgen Streeck, 'Depicting by Gesture' (2008) 8(3) *Gesture* 285–301.

'The Donald' has his own devils, including his Democrat opponents, and although they have impeached him twice and sought to have him removed from office almost from the moment that he became president, at the time of writing they have yet to drag him down. A similar dynamic can be observed in Bill Clinton's impressive Punch-like success in slipping substantially unscathed from the noose of impeachment. James L. Mast puts this down to Clinton's theatrical appeal in contrast to that of his adversary, Newt Gingrich, noting that '[i]n drama, a villain can be the star if he is more attractive than the other characters'.⁶⁹

Trump in the Tradition of the *Commedia Dell'arte*

Trump's performance does not fit squarely with any one of the stock characters of the *commedia dell'arte*, but he displays characteristics of several of them. Being a privileged member of America's financial elite, and at the same time a populist with special appeal to grassroots labourers, from farmers to truckers, he reflects the duality of Pulcinella whom Ducharte summarizes as a conjuncture of higher and lower social status: 'The "upper" Pulcinella is intelligent, sensual, sly, keen . . . The "lower" Pulcinella is a dull and course bumpkin.'⁷⁰ Trump also displays attributes of other stock characters of the *commedia*. Like Il Capitano, Trump is a ridiculously hyperbolic braggart who shows off his virility with boasts of sexual prowess, and, like the *commedia* mask (character) called 'Il Dottore', Trump pretends to have expertise in a great many subjects of which he is in fact quite ignorant. Trump even thinks he deserves a Nobel Prize for 'a lot of things'⁷¹ – a claim made in a joint press conference with Imran Khan, prime minister of Pakistan, who on that occasion seemed to be thoroughly enjoying Trump's larger-than-life comedic turn. One of the great many reasons why 'Il Dottore' Trump didn't win the Nobel Prize in chemistry or medicine was his notorious speculation that Covid-19 might be cured by somehow injecting disinfectant into the human bloodstream. More probably, he had his sights set on the Nobel Peace Prize, to judge from the offer made (in the press conference just mentioned) to mediate between Khan and Prime Minister Modi of India if they should ever need his help. The offer was accompanied by the boast, 'I've never failed as an arbitrator'. How reminiscent this is of Ducharte's recollection that Il Dottore 'undertook one day to use his vast learning in an affair that did not concern him in the least'.⁷²

⁶⁹ James L. Mast, *The Performative Presidency: Crisis and Resurrection during the Clinton Years* (Cambridge: Cambridge University Press, 2013) 198.

⁷⁰ Pierre Louis Ducharte, *The Italian Comedy* (1929) (New York: Dover Publications 1966) 212.

⁷¹ 'Donald Trump Complains He Deserves a Nobel Prize: "They Gave One to Obama"', *Guardian News*, 24 September 2019.

⁷² Pierre Louis Ducharte, *The Italian Comedy* (1929) (New York: Dover Publications 1966) 196.

Another stock character of the *commedia* with whom Trump's performance has more than a passing resemblance is the Venetian Magnifico (high status man) 'Pantalone'. Literary scholar Allardyce Nicoll suggests that if we were to seek Pantalone's 'present-day counterpart':

[W]e should not be far wrong in thinking of a middle-aged businessman, wealthy and well esteemed, apt at times to dally with ladies of doubtful virtue, at other times apt to show himself the devoted father anxious to protect a young son or puzzled by the actions of a daughter he does not understand.⁷³

Nicoll adds that Pantalone 'can prove himself stingy, avaricious and credulous on occasion'.⁷⁴ These attributes chime with the self-styled 'billionaire' Donald Trump and his insistence that Mexico is 'going to pay for the wall', which he promised to build to keep illegal immigrants from entering the USA at its southern border.⁷⁵ Pantalone is mature of years but more virile than senile. He is energetic and athletic, with his comedy residing in large part in the fact that for a middle-aged Magnifico who ought to be a sober man of affairs, he is ridiculously lustful, passionate, and excitable. Another point of resemblance is Trump's partnership with his vice-president, Mike Pence, which parallels the classic master–servant pairing that runs through the *commedia* and is exemplified by the Venetian merchant Pantalone and his Bergamask servant Zanni. In their relatively rare joint performances, Pence is typically to be seen deferring obsequiously to his master. In one video interview on Trump's private jet, Pence simply smiled and nodded silently while his Pantalone pontificated at length.⁷⁶

Other Populist 'Presidents': Blair and Macron

Trump is not the first vainglorious and vaguely comedic politician to have played the populist card in recent years. In the UK, the first modern paradigm was Prime Minister Tony Blair (1997–2007). A wannabe rock star,⁷⁷ he never missed a chance to sprinkle himself with celebrity stardust imported from the USA. It was on Blair's watch that the UK's highest court of law – the Judicial Committee of the House of Lords – was rebranded in American style as the 'Supreme Court of the United Kingdom'. Blair's party also rebranded the

⁷³ Allardyce Nicoll, *The World of Harlequin, a Critical Study of the Commedia Dell'arte* (Cambridge: Cambridge University Press, 1963) 52.

⁷⁴ *Ibid.*, 51.

⁷⁵ 'Donald Trump and Mike Pence Sit Down with David Muir', *ABC News*, 7 September 2016; Linda Qiu, 'The Many Ways Trump Has Said Mexico Will Pay for the Wall', *New York Times*, 11 January 2019.

⁷⁶ 'Donald Trump and Mike Pence Sit Down with David Muir', *ABC News*, 7 September 2016, 5'26–6'40.

⁷⁷ See the satirical documentary *Tony Blair Rock Star* (dir. Bruce Goodison and Alison Jackson, 2006) (<https://vimeo.com/50781150>) that depicts Blair's attempts to become a rock star while at university.

Labour Party as 'New Labour' and did its best to rebrand Blair and traditional cabinet government along more presidential lines. I personally saw Blair once when he visited the University of Warwick for a summit with US President Bill Clinton. I was standing outside in a small crowd of university staff and assorted spectators as we watched Clinton's motorcade glide past. Sitting in the shade of his limousine and wearing a dark suit behind tinted windows, only Clinton's vague silhouette was visible and the white cuff of his shirt sleeve as it conferred a regal wave on the assembled onlookers. Blair put on a very different performance. He leapt out of his limo, grinning manically and waving excitedly in all directions with his waving hand held high in the air. As he waved in the direction of my section of the crowd, he seemed to be looking above our heads as if acknowledging a much larger crowd arrayed in a grandstand of well-wishers. I distinctly remember turning around and thinking 'who is he waving at?' There was nobody there. To this spectator on the ground, Blair looked both deluded and foolish in that moment, but to quote Polonius in Shakespeare's *Hamlet*, 'Though this be madness, yet there is method in't' (2.2.202–203). What I'd just witnessed was entirely for the benefit of the television audience that would later tune into news coverage of the event. They would see Tony Blair acknowledging a mass gathering. It was a Trumpian move straight from the populist propaganda playbook. (For a more recent example, witness Canadian Prime Minister Justin Trudeau waving as he stepped out of his plane on arrival at the 2021 G7 summit in the UK – were there really public crowds there to greet him in the midst of the Covid-19 pandemic?)

French President Emanuel Macron has adopted Blair's populist tactic of positioning his politics outside of traditional party lines. I have in mind Peter Mair's definition of populism as 'a means of linking an increasingly undifferentiated and depoliticized electorate with a largely neutral and non-partisan system of governance'.⁷⁸ Like Blair, Macron comes across as a vainglorious political weathervane. Not welded to established party doctrine or respect for tradition, he seems to spin for a vote whichever way the wind blows. In 2016, Macron established a new political party, or movement, with the amusingly non-committal and excitable name 'La République En Marche!' – complete with exclamation mark! It says something about the party's lack of roots and populist responsiveness that it was rebranded in May 2022 as 'Renaissance', despite being founded under its former name as recently as 2016. The highly animated, personality-driven politics of characters like Trump, Blair, and Macron can be charismatic and attractive, but loose cannons are dangerous. In the case of Trump, Blair, and Macron, their instinct to goad the popular will and lackey the populist tide has arguably cost lives, albeit indirectly. In Trump's case the movement utterly lost control when his supporters stormed

⁷⁸ Peter Mair, 'Populist Democracy vs Party Democracy', in Y. Mény and Y. Surel (eds), *Democracies and the Populist Challenge* (Basingstoke: Palgrave, 2002) 81–98, 84.

the Capitol Building on 6 January 2021, resulting in fatalities. In Blair's case, his instinct to follow like a tributary wherever the fount of US foreign policy flowed, led him on a flimsy premise to send UK forces to join the USA in the 2003 invasion of Iraq. The official inquiry into the basis for that invasion was critical of Blair's bluster, including the legalese spin that the former lawyer put on the dossier of evidence presented to the House of Commons in September 2002. Blair had incorrectly summarized it as establishing 'beyond doubt' that Saddam Hussein's regime was in possession of weapons of mass destruction. In Macron's case, he made the dangerous mistake of playing politics at a critical stage in his country's response to the Covid-19 pandemic in 2021 by groundlessly describing the UK-developed AstraZeneca vaccine as 'quasi-ineffective' in older people.⁷⁹ A staunch supporter of the EU and vociferous opponent of Brexit, Macron has also been accused of shoring up his domestic standing by pushing the EU to adopt a hard line against the UK in Brexit trade negotiations. In response, certain unnamed UK sources were reported to have labelled talks with the EU as 'performance art'.⁸⁰ Boris Johnson responded by walking away from the talks, but six days later the talks resumed. On that occasion it was reported that '[t]he theatrics of Boris Johnson's walkout lasted less than a week', and '[t]he pantomime is over and now the serious work begins in the UK–EU trade negotiations'.⁸¹ All politicians put on a show to seek popularity, but danger attends popularity that is pursued at the cost of principle. Trump, Blair, and Macron were acting presidents who were applauded into power by popular approval. (We can add Johnson and Trudeau to the list if we include leaders more firmly grounded in the traditions of an established political party.) An acting president's moment centre stage is brief. Whether the performance stands the test of time is judged ultimately not by the quality of the acting but by the fruits of their actions.

⁷⁹ Discussed in [Chapter 11](#) on the topic of fake news.

⁸⁰ Edward Malnick, 'Macron "Using Brexit Talks to Boost Standing in France"', *The Telegraph*, 17 October 2020.

⁸¹ James Crisp, 'The Week of Pantomime-Like Negotiations That Brought Britain Back to the Brexit Negotiating Table', *The Telegraph*, 24 October 2020.

Political Confection

Making a Meal of It

A confection is a thing made with other things (Latin: *con-facere*), which is to say that it is a thing made by combining physical ingredients and also (or alternatively) by combining elements within a process. Confectionary Performance is always complex in the etymological sense of plaiting or weaving elements together, but many Confectionary Performances are nevertheless mundane and easy to perform. Even the most basic method of making a cup of hot tea by using a teabag involves a combination of physical elements – at minimum these are water, heat source, teabag, and cup – as well as a combination of procedural elements, which typically include procuring the teabag and the cup, placing the teabag in the cup, boiling the water, and pouring the water into the cup. There are of course numerous background elements to confectionary processes, including environmental conditions, but such elements are properly regarded as contributions to the performance only to the extent that they have been selected or influenced for that purpose. In a Confectionary Performance, as I use that term, the maker and the spectator will both appreciate that the performance is a deliberate one of making something by combining other things. ‘Synthesis’ and ‘articulation’ would serve as satisfactory synonyms for ‘confection’, but the advantage of ‘confection’ as a description of making processes that persuade spectators is the word’s association with pleasing sweetness. The very word persuasion originates in the idea that a person is moved ‘through sweetness’ (*per-suade*). Persuasion first entered our lexicon because our ancestors understood that moving rhetorical effects are produced through sensory stimulation. Sweetness, in rhetoric or in food, can be delightful. Horace quotes the young knights who, rejecting dull poetry, said that ‘[h]e has won every vote who has blended profit and pleasure, at once delighting and instructing the reader’.¹ Cicero stated similarly that the ‘supreme orator’ is ‘one whose speech instructs, delights, and moves the minds of his audience’;² and, following Cicero in the early modern period, Thomas Wilson described the

¹ Horace, *Ars Poetica*, §§343–344, H. Rushton Fairclough (trans.), *Satires. Epistles. The Art of Poetry*, Loeb Classical Library 194 (Cambridge, MA: Harvard University Press, 1926) 478–479.

² Cicero, *De Optimo Genere Oratorum (The Best Kind of Orator)*, §1.3, H. M. Hubbell (trans.), *Cicero*, Vol. 2, Loeb Classical Library 386 (Cambridge, MA: Harvard University Press, 1949) 357.

‘ende of Rhetorique’ as being ‘To teach. To delight. And to perswade’.³ Sweetness is the spoonful of sugar that makes the medicine of a message go down. As Wilson puts it, ‘to delite is needfull, without the which weightie matters will not be heard at all, and therefore him kunne I thanke, that both can and will ever, mingle sweete among the sower’.

A Question of Discipline: Psychology and Rhetoric

Richard R. Lau, a professor of political science, contributed the chapter ‘Classic Models of Persuasion’ to *The Oxford Handbook of Electoral Persuasion*.⁴ In it he asserts that ‘[t]he scholarly discipline in which the study of persuasion fits most directly is psychology – social psychology, to be specific’.⁵ We can certainly learn a great deal from modern psychological science as we try to understand why people derive so much pleasure from observing Confectionary Performance and are so potently persuaded by it. To that end, we examine the insights of modern psychology in some detail in the next section. I would contend, however, that there is another scholarly discipline that deals equally directly with modes and means of persuasion; one with a much longer pedigree in explaining the dynamics of human behaviour and which is truly ‘classic’ (to use Lau’s word). I am referring to rhetoric. Rhetoric began in ancient times as the study of the technical arts of public speakers (in Greek ‘rhetors’; in Latin ‘orators’) of the sort that we would today call lawyers and politicians. From there it developed into an art of poetic, literary, and dramatic practice. Rhetoric, as practised through dramatic performance on the theatrical stage, on the political stage, and in the court room, can be considered a precursor (and now a partner) to social psychology practised through experiment. Hence the statement attributed to Eugene O’Neill that ‘dramatists were psychologists – and good ones at that – before psychology was thought of’.⁶ Shakespeare, who was intensely educated in rhetoric at school and became a master practitioner of the art, has been called ‘a very great psychologist’.⁷ In the introduction to his book *Theatre and Mind*, Bruce McConachie boasts of theatre’s longstanding psychological wisdom, writing ‘it’s nice to see that science has caught up with the theatre’.⁸

Psychology and rhetoric offer different perspectives on persuasive performance because the two disciplines exist for different purposes. Rhetorical study

³ Thomas Wilson, *The Arte of Rhetorique* (1553), 1560 edition, G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) xx.

⁴ Richard R. Lau, ‘Classic Models of Persuasion’, in Elizabeth Suhay et al. (eds), *The Oxford Handbook of Electoral Persuasion* (Oxford: Oxford University Press, 2020) 29–50.

⁵ *Ibid.*, 29.

⁶ Quoted in Glynne Wickham, *Drama in a World of Science* (London: Routledge and Kegan Paul, 1962) 46.

⁷ Lionel C. Knights, *Further Explorations: Essays in Criticism* (Stanford: Stanford University Press, 1965) 42.

⁸ Bruce McConachie, *Theatre and Mind* (London: Springer Nature Limited, 2013) 2.

is intensely practical. It observes that certain techniques produce certain effects, and it demonstrates the efficacy of those techniques through practical demonstration – that is, through performance. The psychological sciences are more concerned to establish why, as a matter of human cognition and behaviour, certain techniques work the way they do. In the course of its endeavour, social psychology occasionally coins new terminology for concepts that rhetoric named millennia ago. Take the idea of ‘attitude’, which Lau says has ‘proved indispensable to social psychology’.⁹ Something like it was a feature of rhetorical studies as far back as Aristotle, when it went by the name of ‘ethos’. If one wants to understand the motivations of human behaviour and the means of human persuasion, it is still highly informative to start with the rhetorical wisdom of ancient authors and to consider how that wisdom has been applied in practice over the centuries since. Consider the example of one of the psychological insights described by Lau. He observes that ‘[s]ocial judgment theory derives from a long line of research in cognitive psychology on the perception of physical stimuli’ and that the influence of individual stimuli on judgment is in part ‘a function of both the total range of stimuli to be categorized or judged and any anchor or norm that is provided’. He illustrates this idea of the ‘anchor’ by noting that ‘the first 50-degree day after a long cold winter seems delightfully warm while the first 50-degree day after a long hot summer is very cold ... Different anchors or adaptation levels lead to very different judgments’.¹⁰ As social judgment theory attributes variability of human perception to such factors as the anchor of prior experience, so we find in Shakespeare acute awareness of the fact that a taste or sound which seemed sweet at first can cease to be pleasurable in excess. The famous opening words of *Twelfth Night* provide one of several instances: ‘If music be the food of love, play on; / Give me excess of it, that, surfeiting, / The appetite may sicken, and so die’ (1.1.1–3). Where Lau discusses the psychology of differing human perceptions of a ‘50-degree day’, Shakespeare’s Bolingbroke identifies psychological limits to our capacity to relativize temperatures imaginatively:

O, who can hold a fire in his hand
 By thinking on the frosty Caucasus?
 ...
 Or wallow naked in December snow
 By thinking on fantastic summer’s heat?
 (*Richard II*, 1.3.294–299)

⁹ Richard R. Lau, ‘Classic Models of Persuasion’, in Elizabeth Suhay et al. (eds), *The Oxford Handbook of Electoral Persuasion* (Oxford: Oxford University Press, 2020) 30. (See, e.g., Anselm Strauss, ‘The Concept of Attitude in Social Psychology’ (1945) 19(2) *The Journal of Psychology* 329–339.)

¹⁰ Richard R. Lau, ‘Classic Models of Persuasion’, in Elizabeth Suhay et al. (eds), *The Oxford Handbook of Electoral Persuasion* (Oxford: Oxford University Press, 2020) 34.

As rhetoric and psychology differ in their aims, so they differ in their ethical aspect. Rhetoric, from its earliest iterations, has been concerned with the contribution of performance technique to the improvement of an individual's ethical good life and its contribution to the commonwealth of the political community. Plato rejected bastard forms of rhetoric that neglect this ethical motivation, and Aristotle (doubtless mindful of Plato's critique) subsequently promoted a species of rhetoric that has ethical considerations at its heart. In the early modern period, in which there was a renaissance of Aristotelian rhetoric as developed in the works of such Roman writers as Cicero and Quintilian, Thomas Wilson (the author of the popular early modern rhetorical manual *The Arte of Rhetorique*) described rhetoric as the ethical art of 'moving pittie, and stirring men to shewe mercie'.¹¹ Shakespeare's *Julius Caesar* (1599) can be appreciated as a study in the political chaos that ensues when rhetoric is concerned not to make political peace but only to win a political contest. The rhetoric of Mark Antony in that play is exemplary of the point.

The fact that the most excellent exponents of the art of rhetoric have been lawyers, politicians, and dramatists reveals that rhetoric has always been about something more than persuasion. It is about social construction. Good rhetoric for the lawyer, politician, and dramatist succeeds when it engages in disputes constructively, and when it aims to constitute communities through consensus. It is probably fair to say that nowadays too few lawyers and politicians appreciate that their rhetorical performance ought to be directed, not towards beating down the opposition, but towards building up society and making peace. Psychology, for all its merits as a scientific discipline, does not, cannot, and should not pursue ethical outcomes in this way. It is inherent in the nature of pure scientific endeavour that its ethical ambitions should be negatively framed in terms of avoiding unethical means rather than positively framed in terms of achieving ethical ends. The discipline of rhetorical practice is subject to no such ideological constraint.

Holding a Mirror Neuron up to Nature

Studying the rhetorical arts will assist us greatly as we consider the persuasive effects of Confectionary Performance, but the science of psychology also offers several potentially important insights. Perhaps none is more important than the psychological finding that watching others perform tasks triggers in our brains the same sense that we experience when we perform similar tasks ourselves. The phenomenon has been demonstrated using functional magnetic resonance imaging, which shows that in response to the external stimuli of performance actions, a mirror response occurs in various parts of the

¹¹ Thomas Wilson, *The Arte of Rhetorique* (1553), 1560 edition, G. H. Mair (ed.) (Oxford: Clarendon Press, 1909) 133.

observer's brain,¹² and that hand gestures, for example, trigger different mirroring pathways to facial gestures.¹³ What is less clear is the biological basis for the phenomenon. The leading theory attributes it to the presence of 'mirror neurons' in the brain. Experiments conducted in the early 1990s in the lab of Giacomo Rizzolatti, a neuroscientist at the University of Parma, showed that mirror neurons in the monkey brain fired when the animal carried out an action or saw (or heard) another animal performing the same action.¹⁴ As Rizzolatti noted at the time:

We are exquisitely social creatures. Our survival depends on understanding the actions, intentions and emotions of others. Mirror neurons allow us to grasp the minds of others not through conceptual reasoning but through direct simulation. By feeling, not by thinking.¹⁵

Any suggestion that mirror neurons are the sole psychological seat for the complexity of human emotions must be doubtful, but how significant it is in our post-truth age to appreciate that the Confectionary Performances of politicians might bypass our logical thought processes in order to influence us through our feelings.

Dr Vittorio Gallese, one of Rizzolatti's group at the University of Parma, confirms the next logical conclusion, which is that representative arts engage us because they produce effects through our neural mirror response. He cites the work of Baroque sculptor Gian Lorenzo Bernini. In Bernini's sculpture, *The Rape of Proserpina*, when we see the hand of the god Pluto grabbing Proserpina's thigh, we perceive a real hand pressing into real flesh rather than a single inanimate slab of marble carved into forms of hand and thigh.¹⁶ Italian scientists continue to be highly influential in the field. Marco Iacoboni, a Roman by birth and subsequently a professor of psychiatry and biobehavioral sciences at UCLA, has reported some of the most exciting demonstrations and made some of the largest claims for the phenomenon. It seems fitting that a scholar born in Rome should continue a tradition of behavioural observation that was in ancient times so minutely systematized by rhetorical scholars and practitioners in that city. Iacoboni and his colleagues report that when presented with the performance of the simple action of picking up a cup of tea from a table, mirror neurons automatically anticipate the actor's intention (to drink from it or to tidy it up) according to the different contexts of the

¹² Valeria Gazzola and Christian Keysers, 'The Observation and Execution of Actions Share Motor and Somatosensory Voxels in All Tested Subjects' (2009) 19 *Cerebral Cortex* 1239–1255, 1239.

¹³ Pier F. Ferrari et al., 'Two Different Mirror Neuron Networks: The Sensorimotor (Hand) and Limbic (Face) Pathways' (2017) 358 *Neuroscience* 300–315.

¹⁴ Giuseppe Di Pellegrino et al., 'Understanding Motor Events: A Neurophysiological Study' (1992) 91 *Experimental Brain Research* 176–180; Vittorio Gallese et al., 'Action Recognition in the Premotor Cortex' (1996) 119(2) *Brain* 593–609.

¹⁵ Sandra Blakeslee, 'Cells that Read Minds', *New York Times*, 10 January 2006. ¹⁶ *Ibid.*

action (being respectively a table set neatly ready for tea to be taken, and a messy table at which tea has apparently already been taken).¹⁷ This is a radical new insight, for it suggests that intentions might be inferred from witnessing an action in context, and not just inferred to others but in some way sympathetically experienced and anticipated in the brain by the observer of the action.

It has been shown that human brains evidence a mirror response not only when someone ‘kicks a ball, sees a ball being kicked, hears a ball being kicked’¹⁸ but also when someone ‘says or hears the word “kick”’.¹⁹ Our brains automatically suit the action to the word – which is precisely the pairing that Shakespeare’s Hamlet encouraged theatrical players to pursue in their performances. Thanks to modern psychological science, we now know what dramatists have suspected all along – that if actors accompany speech with unsuitable actions, the subconscious psychology of the audience will automatically detect the error. Thus, one study observes that in everyday life, ‘motor imitation can be influenced by providing verbal instructions but also disrupted by task-irrelevant single words’.²⁰ As such, an instructor who utters a random word out of place might cause a trainee to misplace a stage in a manual process. One reason why speech and gesture are still so hard to separate, even in the language-dominated world of the modern human, is that speech is thought to have developed from, or alongside, gesture. Indeed, they still share the same psychological communication system.²¹

One of Iacoboni’s largest and most significant claims is that mirror neurons are a neurological basis of human empathy:

¹⁷ Marco Iacoboni et al., ‘Grasping the Intentions of Others with One’s Own Mirror Neuron System’ (2005) 3(3) *PLOS Biology* e79.

¹⁸ Sandra Blakeslee, ‘Cells that Read Minds’, *New York Times*, 10 January 2006. See Evelyne Kohler et al., ‘Hearing Sounds, Understanding Actions: Action Representation in Mirror Neurons’ (2002) 297 *Science* 846–848; Christian Keysers et al., ‘Audiovisual Mirror Neurons and Action Recognition’ (2003) 153 *Experimental Brain Research* 628–636.

¹⁹ Sandra Blakeslee, ‘Cells that Read Minds’, *New York Times*, 10 January 2006. See, for example, Olaf Hauk et al., ‘Somatotopic Representation of Action Words in Human Motor and Premotor Cortex’ (2004) 41(2) *Neuron* 301–307 (the abstract summarises the finding that the words lick, pick, kick ‘differentially activated areas along the motor strip that either were directly adjacent to or overlapped with areas activated by actual movement of the tongue, fingers, or feet’); Giovanni Buccino, ‘Listening to Action-Related Sentences Modulates the Activity of the Motor System: A Combined TMS and Behavioral Study’ (2005) 24(3) *Brain Research: Cognitive Brain Research* 355–363.

²⁰ Haiyan Wu et al., ‘Object Words Modulate the Activity of the Mirror Neuron System during Action Imitation’ (2017) 7 *Brain and Behavior* (<https://doi.org/10.1002/brb3.840>).

²¹ Paolo Bernardis and Maurizio Gentilucci, ‘Speech and Gesture Share the Same Communication System’ (2006) 44(2) *Neuropsychologia* 178–190; Elisa De Stefani and Doriana De Marco, ‘Language, Gesture, and Emotional Communication: An Embodied View of Social Interaction’ (2019) 10 *Frontiers in Psychology* 2063; Giacomo Rizzolatti and Michael A. Arbib, ‘Language within Our Grasp’ (1998) 21 *Trends in Neurosciences* 188–194; Friedemann Pulvermüller, ‘Brain Mechanisms Linking Language and Action’ (2005) 6 *Nature Reviews Neuroscience* 576–582.

[I]f you see me choke up, in emotional distress . . . mirror neurons in your brain simulate my distress. You automatically have empathy for me. You know how I feel because you literally feel what I am feeling.²²

What Iacoboni's Roman forbears would have called pathos generated through rhetorical action, the modern psychologist calls empathy or sympathy generated through a neural response to gestural behaviour. The language has changed, but the story stays the same. One thing that has changed radically are the media through which our performances are displayed. Even before the Covid-19 pandemic forced it upon us, in-person, face-to-face performances were losing territory to performances mediated through video and film. A child cannot be taught to mimic human behaviour by a television screen so well as by a present-in-person human parent, and by the same token adults are not as susceptible to mediated gestural performances as to live ones. Iacoboni again: 'Mirror neurons work best in real life, when people are face to face. Virtual reality and videos are shadowy substitutes.'²³ That said, mediated performance is still powerful, as is evident from our emotional susceptibility to cinematic 'weepies', Netflix comedies, high-adrenaline video games, and YouTube videos of people comedically but painfully coming a cropper when attempting hare-brained stunts.

Of further relevance to our concern to understand the persuasive effect of witnessing Confectionary Performance is the finding that action imitation following the stimulus of hearing the names of manufactured objects (e.g. 'thread', 'pen', 'chopsticks', 'watch', 'cup') induces stronger brain activity in the mirror neuron system than hearing other types of word.²⁴ This might suggest innate human affinity for active engagement with things that have been made and are manipulable. Another experiment compared the effects of observing a complex task (turning a key in a lock) with a more basic manual task. It found that both observations activated the fronto-parietal mirror system, but that brain activity is higher in the observation of the complex task than in the observation of the simple task.²⁵ Psychology is therefore gradually gathering the neurological evidence to prove what rhetoricians have always assumed on the basis of anecdotal experience: that observers and audiences engage more actively with more active forms of performance, are more likely to grasp points made through performances that engage the hands in the manual manipulation of graspable objects, and are most intensely stimulated by complex sequential processes of making things – what I call 'Confectionary Performances'.

²² Sandra Blakeslee, 'Cells that Read Minds', *New York Times*, 10 January 2006. ²³ *Ibid.*

²⁴ Haiyan Wu et al., 'Object Words Modulate the Activity of the Mirror Neuron System during Action Imitation' (2017) 7 *Brain and Behavior* (<https://doi.org/10.1002/brb3.840>).

²⁵ Laura Biagi et al. 'Anterior Intraparietal Cortex Codes Complexity of Observed Hand Movements' (2010) 81 *Brain Research Bulletin* 434–440.

The Great British Bake Off

The fact that Confectionary Performance triggers the brain's mirror neuron system might explain the extraordinary popularity of cooking shows on television. In the UK, none has been so popular as *The Great British Bake Off* (GBBO), a show that features a knockout competition between amateur bakers.²⁶ The show, which was originally judged on the BBC by celebrity cook Mary Berry and celebrity baker Paul Hollywood, and which is staged in the setting of a village fête marquee, is in many ways quintessentially British. Its reassuringly typical depiction of British character might be part of its appeal in America, where it has been aired to critical acclaim,²⁷ but this hardly explains the popularity of cooking shows in general. The best, perhaps only, way to account for the intense and ostensibly unlikely appeal of watching people cook food which viewers can neither smell nor touch nor taste, is to accept that the activity of watching others make things is in itself psychologically engaging and satisfying. The pleasure comes in part from the sensory stimulation of imagined textures, scents, and tastes, but also in large part from the vicarious experience of participation in a process of Production. Nothing stimulates our Making Sense quite so effectively as witnessing a Confectionary Performance, and few modes of Confectionary Performance are quite so enticing, quite so appealing to the full range of senses, as cuisine craft. It may be that Confectionary Performance appeals to the brain so powerfully because the brain recognizes the Making Sense of the complex activity of confecting cuisine to be similar to its own activity of making integrated sense of diverse stimuli.

To recognize the popularity of GBBO and shows like it, the National Television Awards in the UK invented a new awards category for the 'Skills Challenge Show' (subsequently 'Challenge Show'). GBBO won the inaugural 'Skills Challenge Show' award in 2015 and two of the three losing nominees were other competitive cooking shows (*MasterChef* and *Come Dine with Me*). The third unsuccessful nominee was *The Apprentice*, a show most famous now because the American original was hosted for more than a decade by Donald Trump. The man who promised to 'Make America Great Again' came to popular prominence through a show grounded in the vicarious pleasure of watching others perform complex tasks and the voyeuristic pleasure of watching them fail. Many of the tasks featured on the show were Confectionary Performances, such as devising new sandwiches and designing new toys. In psychological terms the popularity of skills challenge shows, especially those that involve making, may be attributable in large degree to the ways in which Confectionary Performance triggers the mirror neuron system in the human

²⁶ Sarah Rainey, 'How the Great British Bake Off Changed Britain', *The Telegraph*, 12 October 2013.

²⁷ Vicky Baker, 'Why Americans Love the Great British Bake Off', *BBC News, Washington*, 27 January 2019.

brain. That said, there is at least one rival to cuisine craft in this regard. A study has suggested that the mirror neuron system might also explain the popularity of pornography.²⁸ Mrs Berry (not the celebrity cook, but a character in a George Meredith novel) advised, ‘don’t neglect your cookery. Kissing don’t last: cookery do!’,²⁹ but in terms of their psychological appeal the two activities might not be so very different – certainly it wouldn’t be surprising if essentially the same neurological source lies at the base of vicarious viewing pleasure in both cases. It is to generate vicarious viewing pleasure, and to foster a sense of viewer participation and co-Production – or to use a more usual term, to generate ‘engagement’ – that Confectionary Performance has become a common trope of political media. This is our next topic.

Kitchen Cabinet: When Politicians Cook

The most blatant example of politicians using Confectionary Performance to show that they have the common touch and can make complex things cooperatively must surely be the Australian Broadcasting Corporation’s television programme *Kitchen Cabinet*. The programme is as charming as its title is witty. The format is a conversational interview with an Australian politician conducted by political journalist Annabel Crabb while she and the politician prepare a meal together, usually in the politician’s home. The programme works brilliantly to make the politician appear approachable and down-to-earth. (We can note in passing that descriptions by which a person is said to be ‘down-to-earth’, ‘grounded’, prepared to ‘get stuck in’, to ‘roll their sleeves up’, and to ‘get their hands dirty’ are always taken as compliments, which is a testament to the fellow feeling generated by the observation that someone is willing to carry out basic manual work.) Guests on *Kitchen Cabinet* have included Scott Morrison, who went on to be Australia’s thirtieth prime minister.³⁰ We encounter Mr Morrison’s manual skills again in [Chapter 9](#) on ‘State Building’, where we find him putting together a cubby house with his daughter. It would be cynical to suggest that he is deliberately manipulating his media image to appeal to Australians’ characteristic affinity for informality in their politicians, but he certainly seems adept at manual craft and at putting on a performance without seeming crafty. It is a performance, though. He lets slip in his *Kitchen Cabinet* interview that as a child he witnessed his father’s work in local politics and ‘quite enjoyed the theatre of it all’.³¹

²⁸ Alison Motluk, ‘Mirror Neurons Control Erection Response to Porn’, *New Scientist*, 16 June 2008.

²⁹ George Meredith, *The Ordeal of Richard Feverel: A History of Father and Son* (London: Chapman and Hall, 1905) chapter 28.

³⁰ Scott Morrison was minister for social services (2014–2015) at the time he appeared on *Kitchen Cabinet* and treasurer of Australia (2015–2018) when his episode (season 5, ep. 1) first went to air on 28 October 2015. He became prime minister on 24 August 2018.

³¹ <https://youtu.be/8sJyb5zAOi4> (7’00).

Former UK Prime Minister Boris Johnson is certainly a man who relishes political theatre. He has gone out of his way to cultivate celebrity status throughout his political career, including through guest appearances on popular television shows such as the soap opera *Eastenders*, the ancestry show *Who Do You Think You Are?*, the automobile magazine show *Top Gear*, and, as guest host, the political quiz show *Have I Got News for You*. On his *Top Gear* appearance, his host Jeremy Clarkson said, ‘most politicians . . . are pretty incompetent and then have a veneer of competence . . . you do seem to do it the other way round’. In response to this playful taunt, Mr Johnson demonstrated his trademark self-deprecating jocularly, saying ‘you can’t rule out the possibility, that you know, beneath the elaborately constructed veneer of a, you know, a blithering idiot, there lurks . . . a blithering idiot’. Of course, Mr Johnson is no idiot, and he knows it, but a master of the ‘elaborately constructed veneer’ he certainly is.

Taking full advantage of Mr Johnson’s performing talents, the Conservative Party has occasionally produced short promotional videos featuring Confectionary Performances by their leading man. We focus here on three videos which at the time of writing can all be accessed on the party’s YouTube channel. The first was posted during the 2019 general election campaign and is tagged ‘Boris Johnson’s hilarious election advert | 12 Questions to Boris Johnson’ (12 November 2019).³² It originally went out on Twitter with the teaser: ‘We bumped into Boris on his tea break. Here’s what happened.’ The second was posted after the Conservatives and Boris Johnson won the general election and is tagged ‘Boris and Stanley Johnson made some mince pies and it was brilliant’ (24 December 2019).³³ The third, released in the context of the Covid-19 pandemic, is tagged ‘This is how we’ll BUILD BACK BETTER – watch our latest Party-Political Broadcast!’ (7 October 2020).³⁴ The mince pies video isn’t subtle. Not only does it seek to tap quite transparently into the nation’s penchant for cooking programmes, and GBBO in particular, but Boris Johnson also made a candid admission as he cooked. Giving an insight into his rhetorical method, he said: ‘the whole thing is an extended metaphor. What you have here is a series of ingredients . . . and what you need is a binding element, there . . . the egg . . . which will bring it all together.’ This binding together of ingredients is, of course, the very definition of a Confectionary Performance. He then suggested that the NHS might be the nation’s ‘binding element’. A few months later he would find himself both personally and politically in the grip of the Covid-19 pandemic and bound to the NHS more tightly than he could ever have foreseen. As Boris the baker pops his tray of mince pies in to cook, he declares them ‘oven ready’ – a favoured metaphor for

³² ‘Boris Johnson’s Hilarious Election Advert | 12 Questions to Boris Johnson’, Conservatives, 12 November 2019, <https://youtu.be/97zPDojMWiQ>.

³³ ‘Boris and Stanley Johnson Made Some Mince Pies and It Was Brilliant’, Conservatives, 24 December 2019, <https://youtu.be/OuaQDxEWRIA>.

³⁴ ‘This is How We’ll BUILD BACK BETTER – Watch Our Latest Party-Political Broadcast!’, Conservatives, 7 October 2020, <https://youtu.be/cIB2IN7n0A4>.

his government's Brexit deal with the EU.³⁵ The video titled 'This is how we'll BUILD BACK BETTER' (7 October 2020) is considered in more depth in [Chapter 9](#), where we examine 'Boris the Builder' and his fondness for Confectionary Performance in relation to construction language and projects. Suffice to say here that even the 'BUILD BACK BETTER' video has a brief moment of baking in it, when we see cupcakes being constructed in a family kitchen. The video we will spend most time with here is the one in which Johnson is interviewed 'on his tea break'. It is slightly more subtle than the other two only in this respect: that its elements of Confectionary Performance, while present, are not expressly advertised to the audience as being deliberately metaphorical and are not expressly mentioned in the title of the video. Despite this, the essential message of the tea break video can be read as one of hands-on making. It sought to impress upon voters the need to cast their vote at the 2019 general election in a way that would form a new Parliament to support the government in delivering Brexit. Through hands-on making processes and talking about hands-on making processes, the video impressed upon voters the sense that the power to make a difference lay in their hands.

What, then, are the linguistic and performative elements by which the 'tea break' video sought to conjure the Making Sense in its audience? To answer that question, there now follows a brief commentary on six elements of script and action selected from the video, followed in each case by some thoughts on their relevance to the Making Sense.

I

Script

INTERVIEWER: 'How do you typically start your day?'

JOHNSON: 'I tend to get up pretty early and then I go down and take the dog for a walk, and dog does his business and so on and so forth.'

Action

Johnson performs no accompanying actions of note, but the phrase 'get up' followed by 'go down' employs antithesis to establish a dramatic sense of theatrical space and movement.

The Making Sense

We are invited to imagine Johnson engaging in an everyday physical task, including, if our imagination runs that far, the humble (and socially responsible) task of stooping down to clean up after his dog. This might convey the sense that he is a man who is not afraid of the hands-on work of clearing up a

³⁵ It features in Boris Johnson's introduction to the Conservative Party's 2019 general election manifesto (24 November).

mess made by others. The humble nature of the task following the spoken antithetical sequence of ‘up’ and then ‘down’ produces a sense of condescension, not in the modern patronizing sense, but in the older sense of a higher-status person coming down to meet others at the level of their common humanity. Shakespeare’s Mark Antony uses this technique in his forum speech at Caesar’s funeral when, with the words ‘shall I descend? And will you give me leave?’, he asks the crowd’s permission to join them on the floor of the forum (*Julius Caesar*, 3.2.160).³⁶ All these elements taken together excite aspects of the Making Sense through making contact and evoking humble hands-on labour with the promise of making an improvement to the state of things. In short, the act of condescension from high status to low performs the hope of making a better society.

II

Script

INTERVIEWER: ‘When was the last time you cooked, and what did you make?’

JOHNSON: ‘The last time I cooked was last night and I made steak and oven chips, which were very good.’

Action

Johnson points his right index finger on ‘steak’ then gives a thumbs up (with his right hand) on ‘very good’, before turning to lead the interviewer towards the threshold of a small kitchen.

The Making Sense

Johnson’s express references to the meal he ‘cooked’ and ‘made’ continues his performance as the hands-on politician who gets things done. Cooking is employed for its direct appeal to the Making Sense. Whether intended or not, the reference to ‘steak’ produces a homophonic connection to each individual voter’s ‘stake’ in society, and the accompanying stabbing motion of the index finger can be read as a gestural illustration of the act of ‘staking out a claim’. The reference to humble ‘oven chips’ advances his performance of a rhetorical ethos of humility and confirms his ‘common touch’.

III

Script

INTERVIEWER: ‘What’s your favourite band?’

JOHNSON: ‘Look, this is either The Clash or it’s The Rolling Stones, and mainly I listen to The Rolling Stones nowadays, so you can make of that what you will.’

³⁶ See the discussion in Gary Watt, “‘Shall I Descend?’: Rhetorical Stasis and Moving Will in *Julius Caesar*”, in Gary Watt, *Shakespeare’s Acts of Will: Law, Testament and Properties of Performance*, The Arden Shakespeare (London: Bloomsbury, 2016) 109–147.

Action

Johnson walks towards the kitchen work surface and picks a solitary tea bag out of an open transparent plastic storage jar of teabags. He drops the teabag into a white mug.

The Making Sense

The words ‘make of that what you will’ are uttered exactly simultaneously with the action of removing the tea bag from the jar. This may be coincidence, but if it was calculated it was a rather brilliant combination of word and action, for the effect is to invite the viewer to make a choice while giving the viewer the impression that the performer knows how to make things simple. It is significant that Johnson never once mentions that he is making a cup of tea. He demonstrates it through action rather than words. As for his taste in rock bands, what should we make of his preference for ‘The Clash’ and ‘The Rolling Stones’? Again, it may be entirely coincidental, but the names of both bands conveniently conjure up the sense of action, movement, and breakthrough that Johnson evokes elsewhere in the video through the phrases ‘going gangbusters’ and ‘knock it through’, the latter referring to his stated aim of getting Brexit done. The fact that both bands are English combines with the tea-making to produce a performance calculated to appeal to Brexit-supporting voters.

IV**Script**

INTERVIEWER: ‘What would you say to someone who’s wondering who to vote for at this election?’

JOHNSON: ‘I would say it is a very, very simple choice.’

Action

Johnson picks up the mug containing the teabag and walks over to a tap. He pours ready-boiled water from the tap into the mug.

The Making Sense

The interviewer’s question raises the crucial issue that all previous questions and answers have been building up to. Performing the very simple action of pouring pre-boiled water into a mug demonstrates through the simplest mode of making a cup of tea that it is easy for voters to act to make a difference through their action of voting. The fact that tea-making is one of the most common Confectionary Performances in the daily lives of UK voters serves again to cultivate the sense that Johnson has the common touch and helps to relate the Making Sense of his Confectionary Performance to their own performance of making a choice at the ballot box.

V**Script**

JOHNSON: ‘A coalition of chaos with Jeremy Corbyn at the lead, at the head ...’

Action

Johnson bends down to retrieve a plastic container of milk from a small fridge, then twists off the cap.

The Making Sense

Twisting the ‘cap’ off the container is literally to twist its head off (Latin *caput* = ‘head’). Performing this action just after he talks of his rival Corbyn being the ‘head’ of a chaotic coalition of Johnson’s political opponents gestures a figurative decapitation of his rival or, less viscerally, a removal of the opposing party’s figurehead.

VI**Script**

JOHNSON: ‘... or you can go with us, get Brexit done with our deal, which is ready to go, oven-ready, slam it in the microwave, it’s there.’

Action

Still holding his mug of tea in his right hand, with his left arm (elbow raised upwards) Johnson mimes an awkward under-arm, back-handed action of slamming shut the door to an imaginary microwave oven.

The Making Sense

Following the Confectionary Performance of the elements in tea-making, Johnson makes express reference to his ‘oven-ready’ Brexit deal as he enacts an element in the Confectionary Performance of cooking. Both performances – tea-making with a tea bag in a mug and microwaving food – are the simplest modes of making tea and making a meal. He is stressing through words and performance that he trusts the voters to make a simple choice at the ballot box (to pop their vote in the box in the way he pops a teabag in a cup and a meal in a microwave), while inviting them to trust him to bring simple finality to Brexit by slamming shut the oven door.

More than a year after this video was made, Boris Johnson (by then prime minister) returned to his theme while adding a reference to the contentious issue of EU member states fishing within UK territorial waters. In his Christmas message, delivered on Christmas Eve 2020 he said: ‘That oven-ready deal was just the starter ... This is the feast – full of fish, by the way.’ Johnson even wore a tie adorned with a repeating fish pattern and showed off

a dog-eared bundle of paper – a working copy of the Brexit deal in the final form that had just been agreed. As ever with Johnson, the performance was total, right down to costume and props. Whatever else he makes, he always makes an impression.

As with all propaganda, there is of course a risk that a Confectionary Performance will backfire. To judge from comments on YouTube, Twitter, and Facebook, Johnson's tea break video played well to many viewers, but to his entrenched opponents it simply made him look more ridiculous and disingenuous. Rishi Sunak (prime minister at the time of writing) suffered a similar backlash when he sought to take a leaf out of Johnson's book. Just a week or so into his role as Chancellor of the Exchequer in Johnson's government, Sunak tweeted an image of himself in an office kitchen holding a metal teapot in one hand while his other hand plucked a teabag from a massive, catering-sized pack of Yorkshire Tea. He captioned it: 'Quick Budget prep break making tea for the team. Nothing like a good Yorkshire brew' (@RishiSunak, 21 February 2020). Sunak is the Member of Parliament for Richmond in North Yorkshire, so the choice of Yorkshire Tea was an understandable one. However, the performance rang somewhat hollow. It was not so much that Sunak, who was born and educated in Hampshire in the south of England, had no strong personal association with the county of Yorkshire, but that his immaculate dress, speech, and generally 'posh' demeanour sat awkwardly with the staged use of budget teabags and his colloquial use of 'brew' as shorthand for 'cup of tea'. It might be thought that a budget bag of teabags would communicate an attractive blend of Britishness and economic prudence, and for some viewers it probably did, but his opponents apparently struggled to see past Sunak's political party allegiance and the widely publicized fact of his own personal wealth. The social media backlash resulted in a veritable 'storm in a teacup', with some even calling for a boycott of Yorkshire Tea. Concerned for its brand image, the company responded by pointing out that the Labour Party leader Jeremy Corbyn had made a similar gesture during a visit to York in 2017, when he'd said that he'd happily discuss climate change with Donald Trump over a pot of Yorkshire Tea.³⁷

'Hot Dish Is a Great Unifier – Just Like Amy'

The United States supplies an example of cuisine-based Confectionary Performance in a political context that suggests a tantalizing connection between making food and making laws. In 2011, Al Franken (the then Democratic senator for Minnesota) inaugurated a cooking competition between the members of Minnesota's congressional delegation. The winner was fellow Minnesota senator Amy Klobuchar. She went on to make the most of her victory, for the *New York Times* reports that when Ms Klobuchar was

³⁷ 'Yorkshire Tea "Shocked" by Backlash over Rishi Sunak Photo', BBC, 24 February 2020.

running for the Democrats' nomination for president in 2020 she hosted a number of 'Hot Dish House Parties' at which she served her winning 'Minnesota hot dish'.³⁸ Invitations to the house parties advertised the metaphoric potential of the humble baked dish with the line: 'Hot dish is a great unifier – just like Amy'.

Katie Rohman, the managing editor of the *Duluth News Tribune*, was right when she called Klobuchar's 'Hot Dish House Party' a 'piece of political theatre', but only partly right when she called it 'amusing'.³⁹ It was amusing in the sense of being light-hearted and in the sense that the Confectionary Performance stimulated participants' physical senses in a manner akin to an 'amuse bouche', but there is serious political power in amusing performances of this type. Amy Klobuchar's communal gatherings around food show that she has understood that politics is itself an art of Confectionary Performance by which ingredients and people are bound together to make a whole – *e pluribus unum* ('out of many, one'), as the national motto of the USA puts it.

The connection between making food and making laws is suggested by another of Amy Klobuchar's accomplishments. According to GovTrack data for 2017, the legally trained Senator Klobuchar was the first ranked among all senators of more than a decade's standing when it came to cosponsoring bills, a rise of one position from her achievement in 2016. As the GovTrack website explains: 'Cosponsorship shows a willingness to work with others to advance policy goals.' In 2017, she was placed third for cosponsorship compared to all senators. In 2018, she maintained third spot, and in 2019 rose to second in the all-senator list of cosponsors. So we can see that Amy Klobuchar is not only a champion maker of meals, but also a champion maker of laws in cooperative mode. The fact that she particularly excels in cosponsored laws may be revealing of her aptitude for confection – the process of making something by bringing diverse elements together.

Odour Is in the Brain of the Beholder

As with all modes of rhetorical performance, Confectionary Performance depends for its success upon the co-Productive participation of an audience. In political contexts, hot dish house parties and the like can work with small-scale gatherings, but Confectionary Performance to the masses is normally remote and mediated in ways that make it impossible for the performer to influence members of their audience through direct contact with their senses of touch, taste, and smell. If such a performance is persuasive in the strict etymological sense of delighting and moving 'through sweetness', it can only be because the audience has been engaged through conscious and

³⁸ Kim Severson, 'A Classic Midwestern Dish Becomes a Talking Point in Iowa', *New York Times*, 28 January 2020.

³⁹ Quoted in *ibid.*

subconscious appeals to their imagination and through the sort of sympathetic sensory response that we now associate with the brain's motor neuron system. With this in mind, it is worth pausing to consider the part played by the audience's taste as a factor in the Making Sense as it relates to Confectionary Performance.

The sense of smell or scent is central to our perception of nuanced taste, and taste and scent are together central to our sense – and to our language – of nuanced judgment. Bad smells and tastes produce a signally strong negative reaction, which is no doubt down to their deep-seated primitive association with diseased, rotten, and otherwise unpalatable food and unhygienic environments. Hence, we still communicate the strongly negative judgment that 'something's off' or is 'rotten to the core' or is 'sickening' with such visceral sensory phrases as 'that stinks', 'something's fishy', 'it leaves a bad taste in my mouth', 'that's in poor taste', and 'you're just bitter'. One of our standard words for strongly negative judgment – 'disgust' – literally means 'contrary to taste', and psychologists have shown that the severity of our moral judgment is amplified when choices are made in the presence of disgusting smells and in disgusting environments.⁴⁰ The evolution of language confirms the evolution of biological psychology, for judgment in the sense of 'choice' is etymologically nothing other than a description of 'taste', the Proto-Indo-European root *geus- being the basis both of the English word 'choice' and Latin word 'gustum' ('taste').

When we use the word 'olfactory' to refer to making smells, the relevant 'factory' is the brain of the receiver rather than the originator of the physical stimulus. A rose does not produce a scent – the human brain does. At the very least, the receiver's olfactory sense must be regarded as a co-Producer of the aroma. The brilliant Italian jurist, rhetorician, and philosopher Giambattista Vico made precisely this point almost three centuries ago when he wrote that 'a living being makes the odor in the smelling' (*animans odorem olfactu faciat*).⁴¹ Human sensory 'faculties' are so-named, he says, because the senses *make* sensations ('faculty' being derived from the Latin verb *facere*, 'to make'). In the late nineteenth century, Dewey put the point in modern scientific language when he wrote that 'sensation is the result of the *activity* of the psycho-physical organism, and is produced, not received'.⁴² The social psychologists Waskul and Vannini observe likewise that '[t]o sense . . . is to make sense',⁴³ adding that '[t]he physiological nature of odors is, in fact, the raw

⁴⁰ Simone Schnall et al., 'Disgust as Embodied Moral Judgment' (2008) 34(8) *Personality and Social Psychology Bulletin* 1096–1109.

⁴¹ Giambattista Vico, *On the Most Ancient Wisdom of the Italians*, Book I, cap 7 (1710), Jason Taylor (trans.) (New Haven, CT: Yale University Press, 2010) 103.

⁴² Herbert W. Schneider (ed.), *John Dewey: The Early Works 1882–1898*, Vol. 2 (1887) (Carbondale: Southern Illinois University Press 1967) 43, emphasis in original.

⁴³ Dennis D. Waskul and Phillip Vannini, 'Smell, Odor, and Somatic Work: Sense-Making and Sensory Management' (2008) 71(1) *Social Psychology Quarterly* 53–71, 53.

material of which olfactory perception is fashioned – and that fashioning is quintessentially cultural and natural at the same time'.⁴⁴

We prefer our bodies, our clothes, our cars, and our homes to smell pleasant, and even in virtual or remote performance we might respond sympathetically to Confectionary Performance when it evokes some of our culture's favourite scents. The popularity of GBBO and Boris Johnson's decision to ape it in his mince pie-making video makes sense when one appreciates not only that Confectionary Performance appeals holistically to the Making Sense, including the haptic sense evoked by hands-on processes, but also because baking makes pleasant scents – not in our nose (it's a rare television that emits a perfume) but in our brain. The smell of 'freshly baked bread' ranked first in one survey of the UK's fifty favourite smells, and the smell of 'cakes baking in the oven' ranked fifth in the same survey.⁴⁵ A question put to Boris Johnson in his 'tea break video' also makes sense when scents are borne in mind. The interviewer put to him the choice 'fish and chips or a Sunday roast?' Those meals rank at positions nine and eight respectively in the nation's top-fifty scents. Boris Johnson's reply – 'fish and chips on a cold night on the beach' – brings in the 'seaside' (ranked sixth in the list of favourite smells). It might seem that Johnson missed an olfactory trick when he made tea instead of coffee (the smell of coffee comes in at number four, whereas tea didn't make the top fifty), but one can appreciate why he would prefer the traditional appeal of tea to the British psyche (even if by some measures coffee is now the most popular hot beverage in the UK). For all his olfactory prowess, as demonstrated in the tea-making video, Johnson risked undoing all his good work when he referred to the act of cleaning up after his pet dog. The performed humility and civic responsibility of the act might not be enough to compensate for the bad smell it leaves in the audience's mind.

Johnson's tea break and mince pie videos conjure up half of all scents ranked in the top ten by popularity. The five not alluded to are bacon (2), freshly cut grass (3), coffee (4), freshly washed clothes (7), and fresh flowers (10). Perhaps a future video will capitalize on the popularity of gardening television shows and bring us a politician with a flask of coffee cutting grass and flowers then popping their muddy clothes in the wash. The bacon, however, is best avoided – partly because it may be off-putting to vegetarians and observant Jewish and Muslim voters, but also because UK politicians and voters remember 'How a Bacon Sandwich Derailed Ed Miliband's UK Political Career'.⁴⁶ That's the *Huffpost* headline to an article looking back on the day in the 2014 general election campaign when former Labour Party leader Ed

⁴⁴ *Ibid.*, 69.

⁴⁵ Gemma Francis, 'Freshly Baked Bread Tops Poll of Britain's Top 50 Favourite Smells', *The Mirror*, 25 May 2015, <https://www.mirror.co.uk/news/uk-news/freshly-baked-bread-tops-poll-5761432>.

⁴⁶ 'How a Bacon Sandwich Derailed Ed Miliband's UK Political Career', *Huffpost*, 10 December 2018.

Miliband staged a photo-op of himself buying flowers for his wife (a good olfactory choice) and eating breakfast. It was the latter that proved a disaster for those who, in the words of the article, ‘had been crafting his image’.⁴⁷ He was meant to be consuming a bacon sandwich, but newspaper photographs gave the visceral impression that the sandwich was consuming him. The lesson for politicians is simple – if you want to ‘make it’, make it – but never eat it.

Political performance works best when it appeals (we might say ‘panders’) to popular taste. In the mid-seventeenth century (even before Vico), Baltasar Gracián had associated the senses with the cultivation of ‘good taste’. Patrícia Branco and Richard Mohr suggest that this may be ‘the earliest use of the term in the sense of refined judgment’,⁴⁸ adding that Gracián, like Vico, ‘identifies taste not with the tongue, but with “olfato”, the olfactory’.⁴⁹ The tongue is a rather crude touchstone of taste. It covers such basics as sour, salty, sweet, bitter, and savoury (umami), but cannot detect more nuanced flavours. Fine judgment belongs to the nose,⁵⁰ and specifically to the sense of smell.⁵¹ Branco and Mohr note that Gracián favoured the cultivation of a sort of sixth sense or common sense (*sensus communis*) to govern the five major senses.⁵² Modern psychology suggests that the brain does indeed manage sensory stimuli synaesthetically in something like the way that Gracián anticipated. The Making Sense as I describe it is likewise associated with the combined cognition and critique of sensory impulses. When we make things or see others making things, our brains employ our sympathetic sense of making to make combined sense of what would otherwise be discrete, confusing, and potentially contradictory stimuli. A good example of the brain’s capacity to impose a dominant sense upon stimuli that are quite literally contradictory is the McGurk effect, by which the brain hears the sound shaped by the movement of another person’s lips even when the audible signal received by the ear is a different sound.⁵³ To be precise, the McGurk effect stimulates the eye with the sight of a person silently and repeatedly mouthing one syllable (‘va’) while the sound of another syllable (‘ba’) is simultaneously emitted. Remarkably, the

⁴⁷ *Ibid.*

⁴⁸ Patrícia Branco and Richard Mohr, ‘Odore di Napoli: What if Jurisprudence Came to Us through Smell?’, in *Non Liqueur: The Westminster Law and Theory Lab Working Papers, Law and the Senses: Smell* (London: University of Westminster, 2015) 58–75, 60.

⁴⁹ *Ibid.*

⁵⁰ Peter Goodrich, ‘Proboscations: Excavations in Comedy and Law’ (2017) 43(2) *Critical Inquiry* 361–388.

⁵¹ Patrícia Branco and Richard Mohr, ‘Odore di Napoli: What if Jurisprudence Came to Us through Smell?’, in *Non Liqueur: The Westminster Law and Theory Lab Working Papers, Law and the Senses: Smell* (London: University of Westminster, 2015) 58–75, 60.

⁵² Baltasar Gracián, ‘El Criticón’, in Lorenzo Gracián (pseudonym), *Obras de Lorenzo Gracián* (Madrid: Pedro Marín, 1773) 148.

⁵³ Lawrence D. Rosenblum, *See What I’m Saying: The Extraordinary Powers of Our Five Senses* (New York: W. W. Norton & Company, 2010) 254–256, section headed ‘Your Brain Hears the Speech You See’.

brain hears the syllable that is silently mouthed and cannot hear the syllable that is actually being emitted. The brain decides that if the auditory signal contradicts what the eye has seen, the sense of sight should be preferred.

We conclude by returning to the observation made at the outset of this chapter that the art of rhetoric has always appreciated the psychological realities that modern science is only now beginning to confirm. When it comes to producing a persuasive rhetorical performance, the rhetoricians knew that the key is to appeal to the Making Sense by making or talking about making, and to perform in ways that delight the senses. There is, though, a danger in delight. Bertolt Brecht used the term ‘culinary theatre’ to decry drama that panders to the audience’s tastes and which only seeks to feed them through feelings rather than provoking them to think.⁵⁴ The complaint has an ancient antecedent in Aristophanes’ critical depiction of public speakers in his play *The Knights*,⁵⁵ where it is suggested that ‘a sausage seller is the ideal orator, for he will know the most delicious recipes’.⁵⁶ It is at the point of sale that our role as co-Producer comes into play and we are required to exercise ‘Receiver Responsibility’ (an attribute I discuss in more depth in [Chapter 11](#) in the context of ‘fake news’). If we develop our awareness of the power of Confectionary Performance and of its capacity to make opinions palatable and persuasive, we will be forearmed to counter and resist. Just because someone’s making it, doesn’t mean we’re swallowing it.

⁵⁴ Werner Hecht, ‘The Development of Brecht’s Theory of the Epic Theatre, 1918–1933’ (1961) 6 (1) *The Tulane Drama Review* 40–97.

⁵⁵ Aristophanes, *The Knights*, in Alan H. Sommerstein (trans. and ed.), *The Comedies of Aristophanes*, Vols. 3–5 (Warminster: Aris and Phillips, 1981) 214–216.

⁵⁶ Jennifer Wise, *Dionysus Writes: The Invention of Theatre in Ancient Greece* (Ithaca, NY: Cornell University Press, 1998) 159.

State Building

Donald Trump called ‘Make America Great Again’ his ‘whole theme’.¹ He blazoned the slogan in signal white on his red baseball cap and even trademarked it.² ‘Let’s make America great again’ had been the election slogan of Ronald Reagan’s successful 1980 presidential election campaign. Accepting the Republican Party’s nomination to run as its presidential candidate, Reagan portrayed his party as one with ‘positive programs for solving the nation’s problems, a party ready to build a new consensus with all those across the land who share a community of values embodied in these words: family, work, neighborhood, peace and freedom’. He founded these values in the compact made between the Pilgrim Fathers:

Three-hundred-and-sixty years ago, in 1620, a group of families dared to cross a mighty ocean to build a future for themselves in a new world. When they arrived at Plymouth, Massachusetts, they formed what they called a ‘compact,’ an agreement among themselves to build a community and abide by its laws.

Reagan called for a communal effort to rebuild America on those first foundations, promising to ‘those who’ve abandoned hope’ that his party would ‘welcome them into a great national crusade to make America great again’. Reagan talked of building ‘consensus’ and ‘community’, and of ‘making a commitment to care’. Absent the alliterative ‘crusade’, such language is about as close as a conservative on the political right can come to aligning with the politics of the political left as described in the following terms by one Fabian commentator:

To end citizens’ disillusionment with politics, we need to craft a different idea and practice of political power. Politicians should see themselves as creators not managers, as leaders who build and nurture institutions in which people negotiate and agree a common plan of action for mutual interest.³

¹ David Martosko, ‘Trump Trademarked Slogan “Make America Great Again” ...’, *Daily Mail*, 12 May 2015.

² *Ibid.*; and see Katherine Kerrick, *(Trade)mark America Great Again: Should Political Slogans Be Able to Receive Trademark Protection?* (2020) 18 UNH L Rev 309–342.

³ Jon Wilson, ‘The Politics of Creation’, in Ed Wallis and Ania Skrzypek-Claassens (eds), *Back to Earth: Reconnecting People and Politics* (London: The Fabian Society, 2014) 1.

Reagan put America first, but he also acknowledged that making a better America was compatible with the project to ‘make a better world for others’.

Making Enemies

There was no such note of consensus building in Donald Trump’s acceptance speech when the Republicans nominated him to run for president.⁴ On the contrary, his references to building and making were invariably framed in opposition to others, whether they be Mexican immigrants, Chinese trade rivals, or Washington political elites. The most blatant example was his notorious promise to ‘build a wall’ on the US-Mexico border: ‘We are going to build a great border wall to stop illegal immigration, to stop the gangs and the violence, and to stop the drugs from pouring into our communities.’ Whenever he talks of building his own people up, he seldom misses the chance to put others down. For example, his promise to ‘outline reforms to add millions of new jobs and trillions in new wealth that can be used to rebuild America’ was immediately followed with the assertion that ‘these reforms that I will outline tonight will be opposed by some of our nation’s most powerful special interests’; and his statement, ‘[w]e are going to start building and making things again’, follows talk of renegotiating ‘horrible trade agreements with China and many others’. Even when expressing the positive belief that his economic plan ‘will improve the quality of life for all Americans – We will build the roads, highways, bridges, tunnels, airports, and the railways of tomorrow [which] in turn, will create millions more jobs’, he posits an enemy to his plan – not a political rival or a foreign power – but hard-working teachers in struggling (and presumably inner-city) schools. That’s the implication of his very next line: ‘We will rescue kids from failing schools by helping their parents send them to a safe school of their choice.’ Likewise, when he promises that ‘[w]e will completely rebuild our depleted military’, the constructive point is immediately followed by criticism of others: ‘and the countries that we protect, at a massive loss, will be asked to pay their fair share’. It is significant that ‘Rebuilding America Now’, which has been identified as the ‘primary’ super PAC (political action committee) backing Donald Trump’s 2016 election campaign,⁵ spent \$17 million attacking Hillary Clinton and less than a quarter of that sum positively supporting Donald Trump.⁶ Even as this book goes to press in February 2023, the tagline on its website under the banner ‘Rebuilding America Now’ is ‘Vote #NeverHillary’.⁷

⁴ Donald Trump, Republican National Convention (21 July 2016).

⁵ Alexander Burns and Maggie Haberman, ‘Electoral Map Gives Donald Trump Few Places to Go’, *New York Times*, 30 July 2016.

⁶ ‘Rebuilding America Now’, *OpenSecrets.org*, Outside Spending Summary 2016.

⁷ See: www.rebuildingamericanow.com.

Trump is a property developer by background, and is fond of boasting his credentials as a ‘builder’:

[T]he bottom line is we have to rebuild our country, ’cos the infrastructure . . . and who can do better than me with that . . . the building, nobody can do building like I do building, and even the builders in New York will tell you ‘Trump builds the best’.⁸

The populist brand of building promoted by Trump and his primary supporters, including Rebuilding America Now, is not of the consensus-building sort, but of the demolish and rebuild sort. There is seldom a ‘put it up’ without a corresponding ‘put them down’. With his negative emphasis, Trump departs from standard political wisdom on the use of metaphors, which holds, as Jonathan Charteris-Black summarizes it in his index of metaphors, that ‘Good Governing Is Creating’ and ‘Bad Governing Is Destroying’.⁹ When the Rebuilding America Now website does put across its message in more positive terms, as in its one-minute campaign video ‘America Soaring’, it appeals to the Making Sense. It opens with the negative observation that ‘[s]killed craftsmen and tradespeople and factory workers have seen the jobs they love shoot thousands of miles away’, but promises that it can be turned around:

It will be American steel, just like the American steel that built the Empire State Building, that will fortify America’s crumbling bridges. It will be American steel that rebuilds our inner cities. It will be American steel that sends our skyscrapers soaring. It will be American hands, American workers that remake this country . . . we’re going to Make America Great Again for everyone. Greater than ever before.¹⁰

All this is the standard puff of presidential election campaigns. The reference to building bridges is especially potent metaphorically as a way of combining the virtues of building with the political ideal of connecting people. Hence Bill Clinton’s slogan for his successful 1996 presidential election campaign was ‘Building a Bridge to the 21st Century’. Rebuilding America Now’s reference to ‘[s]killed craftsmen and tradespeople and factory workers’ is also a cliché of campaign advertisements. Indeed, an April Fool’s Day video from 2016 entitled ‘This Is a Generic Presidential Campaign Ad’ contains the line: ‘machines spark in the foreground when I tour the few remaining places where they manufacture things’.¹¹ In the hands of property developer Donald

⁸ ‘Trump: Nobody Can Build Like I Can’, *Morning Joe*, MSNBC, 8 February 2016.

⁹ Jonathan Charteris-Black, *Politicians and Rhetoric: The Persuasive Power of Metaphor* (Basingstoke: Palgrave, 2011) 362.

¹⁰ ‘Rebuilding America Now: America Soaring’ (2 August 2016) <https://youtu.be/NMNZTcGSHlg>.

¹¹ Kendra Eash, ‘This Is a Generic Presidential Campaign Ad, by Dissolve’, Dissolve, 1 April 2016, 0’32 <https://www.youtube.com/watch?v=rouDIzhgVcY>.

Trump, the cliché of building and making had a particularly plausible appeal to his base voters.

Made in Germany

Like all performers, Trump knows his audience and how to play to them. His talk of 'building and making things again' might be especially appealing to that section of the electorate whose heritage is one of manual craft and industry, and in that respect few sections of American society are as significant as the German-Americans. Per Urlaub and David Huenlic, scholars in the Department of Germanic Studies at the University of Texas at Austin, have written an article which asks in its title: 'Why Are the German-Americans Trump's Most Loyal Supporters?'.¹² It is an important question because, as they note, '46 million Americans claim German ancestry and therefore constitute the largest national heritage group in the United States', and the counties in which they are the largest ethnic group correspond closely to counties that supported Trump in 2016.¹³ In answer to Urlaub and Huenlic's question, we can perhaps dismiss the relatively superficial fact that Trump is himself of German extraction. Some scholars have pointed to race as a significant factor in Trump's support in the northern heartland states where German-Americans are prevalent,¹⁴ but that is hard to square with support for Obama in swing 'German-American counties' in 2008 and 2012.¹⁵ The scholars who posed the question regarding German-Americans being Trump's most loyal supporters answer it by pointing not to race or to Trump's ancestry but to a more complex blend of socio-economic and cultural factors. These factors can be read together, I would argue, to suggest that the root of German-American support for Trump is his appeal to the Making Sense. When German farmers and skilled workers settled in the USA in the nineteenth century, they had a huge hand in the cultivation and industrialization of the mid-west:

¹² Per Urlaub and David Huenlic, 'Why Are the German-Americans Trump's Most Loyal Supporters?', in Darren G. Lilleker et al. (ed.), *US Election Analysis 2016: Media, Voters and the Campaign* (Poole: Centre for the Study of Journalism, Culture and Community, Bournemouth University, 2016) 65.

¹³ Compare the map in the article: 'The Silent Minority: America's Largest Ethnic Group Has Assimilated So Well that People Barely Notice It', *The Economist*, 5 February 2015, with maps of Trump support at state level in the 2016 election and (which is more indicative of his core base) the 2020 election.

¹⁴ Marc Hooghe and Ruth Dassonneville, 'Explaining the Trump Vote: The Effect of Racist Resentment and Anti-immigrant Sentiments' (2018) 51(3) *Political Science & Politics* 528–534; Ann M. Oberhauser, Daniel Krier, and Abdi M. Kusow, 'Political Moderation and Polarization in the Heartland: Economics, Rurality, and Social Identity in the 2016 U.S. Presidential Election' (2019) 60(2) *The Sociological Quarterly* 224–244.

¹⁵ Klara Dentler, Thomas Gschwend, and David Hünlich, 'A Swing Vote from the Ethnic Backstage: The German American Role in Donald Trump's 2016 Victory', Working Paper (University of Mannheim, 2020) 12.

Agriculture and entrepreneurial craftsmanship generated wealth that sustained families and communities for more than a century until globalization undermined the economic sustainability of family farms and domestic manufacturing. . . . the collapse of communal structures, and the loss of a rich cultural heritage that provided a sense of being, made people receptive for Trump's anti-establishment gestures and his xenophobic messages.¹⁶

The slogan 'Make America Great Again' is rhetorically effective because it appeals powerfully to significant topics of rhetorical persuasion. 'America' appeals to nation. 'Great' appeals to power and success. 'Again' appeals to nostalgia. 'Make', though, may be the most actively persuasive word of them all. It is in prime position at the start of the slogan and is the only verb – the only active word – of the four, but most significant is the fact that the type of action it appeals to is the action of making. Insofar as the slogan excites the Making Sense, it will have psychological appeal to voters. For some (including, one suspects, many Native Americans and African Americans) this will be offset by a lack of nostalgia for the ways in which America was made in the first place. For German-Americans, on the other hand, and for descendants of other groups for whom the ideal of America is positively inseparable from their skill in making, crafting, and cultivating with their own hands, the slogan 'Make America Great Again' must sound like an anthem to 'Make America's Makers Great Again' in the face of the twin existential threats of urbanization and globalization.

Washington: America's Chief Architect

Five years before the 'Make America Great Again' motif appeared in US politics, 'Make Britain Great Again' had been the slogan of the far-right party The National Front in their campaign for the UK to answer 'no' in the 1975 national referendum on the question 'Do you think that the United Kingdom should stay in the European Community (the Common Market)?'. The 'Make Great' slogan has a particular relevance to the UK because 'Great Britain' is the traditional label for the territorially largest – that is, the physically 'greatest' – of the British Isles, but despite the slogan's unique suitability to the UK, it is no surprise that it has migrated so effectively into US politics. The idea of building has always been at the heart of the rhetorical performance by which America has sought to form its national identity, right down to the fact that the original performers of the rhetorical texts on which the nation was built were named the 'founding fathers'.

¹⁶ Per Urlaub and David Huenlic, 'Why Are the German-Americans Trump's Most Loyal Supporters?', 65.

The nation's capital, Washington, DC, is named for the keystone of the founding fathers – George Washington. Washington the man has been transformed into Washington the national symbol. In a political system designed to operate by checks and balances, the symbolic fulcrum is the massive stone needle of the Washington Monument – the tallest monumental obelisk in the world. The main architectural sentence in the rhetorical expression of the national polity is the grand articulation of the National Mall. It stretches out, the Lincoln Memorial at one end and the Capitol Building at the other, with the Washington Monument somewhere near the mid-point. The monument is a fitting tribute to a president who was acutely attuned to the architectural construction of his personal and political image, and who – as befits a pragmatic military general and political performer – eschewed architectural theories in favour of a simple respect for structures that ‘please the eye’.¹⁷ George Washington practised as a professional surveyor from his teenage years. He was also a Master Mason – not of the artisan variety, but as a senior member of the fellowship of freemasons which he had joined as a young man. Among the founding fathers, Ben Franklin and John Hancock were also freemasons and it is believed that at least one in six of the signatories of the Declaration of Independence and at least one in three of the signatories of the Constitution of the United States were freemasons. As architects and freemasons, the founding fathers were self-consciously in the business of state building.

Freemasonry was, and largely still is, a principally male affair. The political association between building and political life is also dominated by male politicians, but there are nevertheless significant examples of female politicians leaning on building metaphors. Hillary Clinton's concession speech after the 2016 presidential election featured a call, figured as a rhetorical tricolon, ‘to build that better, stronger, fairer America we seek’ (9 November 2016). In the UK, Prime Minister Theresa May closed her first speech as prime minister with the words: ‘together we will build a better Britain’ (13 July 2016). When accepting the 2020 Democratic Party nomination to run for vice-president, Kamala Harris spoke of ‘building this country back better’ to ‘create millions of jobs . . . so the future is made in America’ and of her vision to ‘build on the Affordable Care Act’ (19 August 2020). She was here echoing a key theme of Joe Biden's presidential campaign, for when accepting the nomination to run for president, Biden said:

Together, we can, and we will, rebuild our economy. And when we do, we'll not only build it back, we'll build it back better. With modern roads, bridges, highways, broadband, ports and airports as a new foundation for economic growth. With pipes that transport clean water to every community. With

¹⁷ Joseph Manca, *George Washington's Eye: Landscape, Architecture, and Design at Mount Vernon* (Baltimore: The Johns Hopkins University Press, 2012) 43.

5 million new manufacturing and technology jobs so the future is made in America. (20 August 2020)

In his first address to the nation as president elect, Biden reasserted his building theme:

I sought this office to restore the soul of America. To rebuild the backbone of the nation – the middle class. To make America respected around the world again and to unite us here at home . . . And now the work of making this vision real is the task of our time. (7 November 2020)

In his inaugural presidential address, Biden sought to galvanize the nation to undertake the shared challenge, and to take the shared opportunity, of having ‘much to do . . . Much to repair . . . Much to restore . . . Much to heal . . . Much to build . . . And much to gain.’ Combining making and building, he went on to replace the ‘great’ of Trump’s slogan with an idea of the common ‘good’:

We can reward work, rebuild the middle class, and make health care secure for all. We can deliver racial justice. We can make America, once again, the leading force for good in the world. (20 January 2021)

Boris the Builder

Joe Biden’s 2020 alliterative tricolon ‘build it back better’ was published shortly after then UK Prime Minister Boris Johnson’s press release ‘Build, Build, Build’, in which Johnson committed his government to ‘build back better’ in response to the Covid-19 pandemic.¹⁸ Johnson’s government also used the motto as the slogan for the G7 summit hosted by the UK in 2021, where the main agenda item was global recovery from the Covid-19 pandemic. In Johnson’s case, the phrase was used not only metaphorically but also literally. The policy advertised in the press release was concerned with ‘making it easier to build better homes where people want to live’. A further policy announced in 2022, which aimed, with a typical alliterative flourish, to turn ‘benefits to bricks’, promised to help working people in receipt of housing benefits to save for their own homes. Johnson seems to enjoy playing the role of ‘Boris the Builder’. Like the animated television character ‘Bob the Builder’, he is frequently to be seen wearing a builder’s yellow hard hat and on one memorable occasion his party published a video of him driving a JCB digger emblazoned with the British flag and the slogan ‘Get Brexit Done’ through a polystyrene wall bearing the word ‘Gridlock’.¹⁹ Johnson likes a big building venture. He eagerly adopted and promoted the UK’s HS2 (High Speed Rail 2) project even though it was running massively over budget, would cause

¹⁸ ‘Build, Build, Build’, Press Release, Prime Minister’s Office (30 June 2020).

¹⁹ General election campaign visit to JCB, Uttoxeter, UK (10 December 2019).

environmental damage to the rural heartlands of Conservative Party support, and had originally been proposed by the opposition Labour Party. When he was London Mayor, Johnson put his name to the London Olympics and to the construction of London's new Crossrail development, as well as being a prime mover in a project to build a new London airport on an artificial island in the Thames, a project almost as impractical as his talk of building a bridge joining Northern Ireland to Scotland. The cynic might say that Johnson deliberately initiates or adopts huge infrastructural projects not only to grab headlines and to appear to be productive, but also to distract the public from the finer details of his political performance. He undoubtedly appreciates the rhetorically performative benefits of being seen to build. As Tom McTague summarizes: 'He loves infrastructure, mobile infrastructure especially – planes, trains, bicycles, trams, even bridges to Ireland and airports floating in the sea. And he loves photo ops.'²⁰ 'Mobile infrastructure' is an apt phrase, for it tells us that projects of this sort achieve the rhetorical ideal of performing political change in tandem with political stability.

Building up the House Down Under

The building trope is also favoured in political performance elsewhere across the globe. In Australia, male politicians in particular have been at the forefront of notable building performances. As befits the more informal tone of Antipodean politics, we more than once find prime ministers embedding their performances in the context of a casual trip to Australia's popular hardware store Bunnings (shorthand for Bunnings Warehouse). Interestingly, and perhaps to offset the traditionally macho associations of building work, female family members have on these occasions been cast in supporting roles. So we have the example of Scott Morrison, the then prime minister of Australia, who uploaded a video to his Facebook account with the following tagline:

In honour of Father's Day, I thought I'd share a quick video of one of my best dad moments from this year – building a cubby house with my daughter Lily for her school project. It's not perfect, but doing it together was. (Facebook, 6 September 2020)

Within the first ten seconds of the video, he announces: 'we've been to Bunnings'. By enlisting his daughter's help in the construction, she becomes a sort of representative figure for the viewing public – encouraging Australians to imagine themselves as co-Producers participating in the prime minister's political project.

On 1 September 2013, the then Australian prime minister, Kevin Rudd, launched his party's campaign for the Australian federal election with the

²⁰ Tom McTague, 'The Minister of Chaos: Boris Johnson Knows Exactly What He's Doing', *The Atlantic*, July–August 2021.

motto ‘building for the future’. This time his wife, businesswoman Thérèse Rein, played the supporting role, introducing him to the stage with an amusing account of when her husband visited Bunnings and came back with all manner of goods (step ladder, extension cable, etc.) but not the one thing she’d asked him to buy – a single ‘mozzie candle’. The anecdote neatly framed the ensuing speech in which the prime minister exploited the building trope to the full, saying:

We are in the business of building the house up. We have been building this vision – brick-by-brick over the last five years ... we, for all our faults, are always having a go at building a better Australia.

Chinese Walls

The popularity of building slogans with politicians is also observable in China. When Chinese artist Zhang Dali produced his photographic artwork *The Slogan Series*, which was based on political slogans placed on state-sponsored billboards across Beijing in 2007 and 2008, nearly all of the artist’s chosen slogans featured at least one theme relating to making, building, construction, or development. In Professor Maurizio Marinelli’s English translation, they were:

- ‘Effortlessly build up a saving society. Implement a sustainable development.’
- ‘Seek the truth and be pragmatic. Open up to innovation. Promote the balanced development of the three cultures.’
- ‘Study ceremony and propriety and you will make yourself more cultivated. Behave according to ceremony and propriety and you will make (your) life more beautiful.’
- ‘Enhance an advanced culture. Promote the social development.’
- ‘Take to heart the study, the implementation, and the fulfilment of the spirit of the Party’s Seventeenth Congress. Push forward the construction of the harmonious socialist society.’
- ‘Strengthen the construction of morality in the way of thinking. Elevate the cultural quality of the citizens.’²¹

The predominance of themes of cultural construction in this selected list of slogans might be down in part to the artist’s bias – he was, after all, using them in the construction of his own cultural contribution – but it is more likely attributable to the dominance of the building theme in Chinese political ideology. The state’s national goal is summed up as ‘building up a socialist political civilization’.²² The authors of an article on building metaphors in

²¹ Maurizio Marinelli, ‘Civilising the Citizens: Political Slogans and the Right to the City’ (2012) 9 (3) *PORTAL* 1–27.

²² Xia Nianxi, ‘Political Slogans and Logic’ (2009) 56(1) *Diogenes* 109–116, 115.

Taiwanese presidential speeches note how Chinese nationalist Kuomintang presidents of Taiwan have promoted the Chinese communist ideal of building through their use of building metaphors, whereas presidents opposed to Chinese rule have preferred metaphors that convey the idea that ‘Communists are Destroyers’ and ‘The Communist Takeover is Destruction’.²³ Of course, the important thing with all political propaganda is to treat with prudent suspicion any suggestion that the ideals behind the metaphor are sincerely held and sincerely pursued by the propagandist. After all, even Vladimir Putin, whose name is nowadays a byword for wanton destruction, is apparently an ardent enthusiast for metaphors of building.²⁴

The Universality of Linguistic Construction

One reason for the global appeal of the building metaphor, despite great regional differences in language, is the basic fact that the formation of linguistic sentences is itself a constructive activity. Raymond W. Gibbs, Jr. observes that ‘people automatically construct imaginative understandings of metaphors that are closely tied to their mental simulating . . . Metaphorical simulations are not abstract, or amodal, but are created in terms of “as if” bodily action.’²⁵ For example, when we talk metaphorically of ‘grasping a concept’ we really do think about the motor function of ‘grasping’, and for this reason the seemingly abstract metaphor is cognitively realized and made real. This finding flows from cognitive or conceptual metaphor theory as pioneered by such scholars as George Lakoff and Mark Johnson.²⁶ They argue that the cognitive basis for metaphor usage entails that in certain contexts, including the context of law, ‘metaphor is made real’.²⁷ Andrew Ortony acknowledges that this ‘constructivist approach . . . tends to undermine the distinction between the metaphorical and literal’, but that it establishes ‘an important role for metaphor in both language and thought.’²⁸

The rhetoricians of antiquity appreciated in their own way the essential cognitive connection between language and thought. When the Roman rhetorician Quintilian wrote that in the construction of a sentence each word ‘has

²³ Louis Wei-Lun Lu and Kathleen Ahrens, ‘Ideological Influence on BUILDING Metaphors in Taiwanese Presidential Speeches’ (2008) 19(3) *Discourse & Society* 383–408.

²⁴ Nelya Kotevko and Lara Ryazanova-Clarke, ‘The Path and Building Metaphors in the Speeches of Vladimir Putin: Back to the Future?’ (2009) 15(2) *Slavonica* 112–127.

²⁵ Raymond W. Gibbs, Jr and Teenie Matlock, ‘Metaphor, Imagination, and Simulation’, in Raymond W. Gibbs, Jr (ed.), *The Cambridge Handbook of Metaphor and Thought* (Cambridge: Cambridge University Press, 2008) 161–176, 165.

²⁶ See, for example, the section ‘An Argument Is a Building’, in George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: Chicago University Press, 1980), chapter 17.

²⁷ George Lakoff, ‘Contemporary Theory of Metaphor’, in Andrew Ortony (ed.) *Metaphor and Thought*, 2nd ed. (Cambridge: Cambridge University Press, 1993) 202–251, 243.

²⁸ Andrew Ortony (ed.) *Metaphor and Thought*, 2nd ed. (Cambridge: Cambridge University Press, 1993), 2.

to be placed in its proper position, as in a structure of unshaped stones. We cannot cut or polish words to make them fit together',²⁹ he was talking metaphorically but also in a way that expressed and revealed the cognitive reality of the art of crafting a sentence. The idea of language as practice in rhetorical craft, and specifically of the builder's or mason's craft, continued into the medieval period³⁰ and still survives today. James Boyd White pursues a similar thought in his chapter on 'Making Meaning in the Sentence', where he observes that 'in our writing and talk we do not in fact produce a series of unconnected clauses but fashion them into what we call sentences, built up by a process of subordination and coordination'.³¹ Use of the words 'produce', 'fashion', and 'built up' reveals that he has a material process in mind. More prosaically, we are accustomed to talk of a 'well-constructed' sentence. It is the feel, the shape, the sound, the solidity, and the form of the sentence that makes the matter and makes it matter. In criminal convictions we even talk of judges 'passing down' or 'handing down' sentences as if they were material things. Judicial and juristic sentences are indeed made things – whether 'made' is here understood to refer to Invention through the choice of linguistic fragments, or to Creation of a material expression out of the grain of an idea, or to the public Production of an utterance to be handled by the hearer or reader as co-Producer. To utter a sentence, says White, is to 'engage in creation'.³² Not surprisingly, it is to Ralph Waldo Emerson, who coined the idea of 'creative reading', that White turns for support.³³ Emerson brings in the audience's role as co-Producer of a sentence when he observes that:

The maker of a sentence like the other artist, launches out into the infinite and builds a road into chaos and old Night, and is followed by those who hear him with something of wild, creative delight.³⁴

As with all language, 'metaphor . . . is not a mere reflection of a pre-existing objective reality but a construction of reality',³⁵ and metaphors are especially constructive, for they present a puzzle (e.g. 'hope is a rose bud') which prompts the mind to erect a cognitive bridge between an abstract concept

²⁹ Quintilian, *The Orator's Education (Institutio Oratoria)*, Donald A. Russell (ed. and trans.), Loeb Classical Library (Cambridge, MA: Harvard University Press, 2001) 8.6.63. See Leland M. Griffin, 'The Edifice Metaphor in Rhetorical Theory' (1960) 27(5) *Communications Monographs* 279–292, 284. Griffin argues that 'rhetoric is in some sense the counterpart of architecture' (279).

³⁰ Mary Carruthers, *The Craft of Thought: Meditation, Rhetoric, and the Making of Images, 400–1200* (Cambridge: Cambridge University Press, 2000) 20–21.

³¹ James Boyd White, *The Edge of Meaning* (Chicago: University of Chicago Press, 2001) 106.

³² *Ibid.*, 129.

³³ *Ibid.* On Emerson's idea of 'creative reading', see the discussion in [Chapter 10](#) of the present study.

³⁴ Emerson, *Journals*, 19 December 1834, quoted in James Boyd White, *The Edge of Meaning* (Chicago: University of Chicago Press, 2001) 129.

³⁵ Andrew Goatly, *The Language of Metaphors*. London: Routledge. 1997) 155.

(hope) and a concrete image (rose bud).³⁶ Where metaphor – which is a constructor – uses the imagery of building, its power of construction is amplified, for in a building metaphor the builder builds. No wonder, then, that Charteris-Black's analysis of fifty years of British party-political election manifestos reveals that building imagery accounted for 'nearly a quarter of all metaphors' used;³⁷ although how many of these were 'building as completed edifice' and how many 'building as process' is not said. That distinction matters, because whereas the former speaks of stability, the latter conjures the equally significant but very different political value of change. Charteris-Black does make the important point that the popular political metaphor 'we have laid the foundations' expresses both present stability and the potential for future change.

Building, Not Building

It is important to clarify that the most effective rhetorical performances are not those that present 'building' as a noun (the product as completed construct) but those that present 'building' as a verb (the thing in the course of construction). Presenting the building process opens up the possibility, or at least the perception, of public participation in the co-Production of the national commonwealth. Building as activity encourages the Making Sense of communal building and of building community in a way that presenting 'a building' as completed edifice does not. I am drawn back to a beautiful passage in Horace's *Ars Poetica* in which he represents art's ability to build society through persuasive influence:

Amphion too, the builder of the Theban wall, was said to give the stones motion with the sound of his lyre, and to lead them whithersoever he would, by engaging persuasion.³⁸

Music is symbolic here of all the lyrical arts inspired by the muses – what the Greeks called *mousiké* – among which we can certainly include the rhetorical art of performed speech, which in ancient times was inseparable from law and statecraft.³⁹ A key feature of what makes this passage in Horace so persuasive and engaging is that it does not present a picture of the built wall but instead

³⁶ Gary Watt, *Equity Stirring: The Story of Justice beyond Law* (Oxford: Hart, 2007) 56–57.

³⁷ Jonathan Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis* (Basingstoke: Palgrave, 2004) 70.

³⁸ Horace, *Ars Poetica*, §394, C. Smart (trans.), *The Works of Horace*, Theodore Alois Buckley revised (New York: Harper & Brothers, 1863). Here I prefer Smart's choice of 'engaging persuasion' to H. Rushton Fairclough's Loeb translation 'supplicating spell' (Cambridge, MA: Harvard University Press, 1926).

³⁹ Penelope Murray and Peter Wilson (eds), *Music and the Muses: The Culture of Mousike in the Classical Athenian City* (Oxford: Oxford University Press, 2010); M. Paola Mittica, 'When the World Was *Mousiké*: On the Origins of the Relationship between Law and Music' (2015) 9(1) *Law and Humanities* 29–54.

draws the audience into the activity of building. It evokes the Making Sense. Present the public with the chance to participate in making, and you make friends. Present the public with a finished product over which they can have no creative influence, and you are likely to make enemies. Former UK Prime Minister Theresa May found this to her cost.

In the final Prime Minister's Questions in the House of Commons before the 2017 UK general election, Theresa May said 'strong' thirty-one times and 'strong and stable' ten times (26 April 2017). This was a rather clumsy attempt to lodge in the public ear the Conservative Party's election slogan 'Strong and Stable Leadership in the National Interest'. She was not presenting a building as such, but she was presenting her leadership and her government as an established and immovable object with the definite sense that it was the finished and firmly founded article – a *fait accompli*. Theresa May's offering came with no inherent sense of flexibility, growth, or capacity to change. As leader of the incumbent government, she was seeking to establish in the public imagination the statue-like stability of the state and the status quo. It seems that the possibility did not occur to her that voters would want to push against the strong and stable stone she presented to them rather than give her a mandate to build upon it. Shakespeare dramatized a historical precedent for the same sort of political blindness when his Julius Caesar boasted right before he was assassinated that he was 'constant as the northern star, / Of whose true-fixed and resting quality / There is no fellow in the firmament' (*Julius Caesar* 3.1.58–62). I have argued elsewhere that Shakespeare's *Julius Caesar* can be read as an extended rhetorical engagement with connotations of the Latin verb *stare* 'to stand' (the foundation of such words as 'state', 'status', 'statue', 'statute', 'constitution') and by the same token as an extended rhetorical study of the dramatic dynamic of overcoming political stubbornness and the stasis of the state.⁴⁰ Making a broadly similar point, the celebrated Shakespearean director Michael Bogdanov notes that Shakespeare often 'poses a status quo against which he pits a protagonist', and that the protagonist 'usually smashes him or herself to pieces against the rock of state'.⁴¹

The supposed stability of any static state, whether it be the state of the nation or the individual playgoer's state of mind, sets a challenge to the dramaturge, for the essential urge of a dramatist is always to move their audience. In the drama of the 2017 general election, Theresa May smashed herself to pieces on the rock of her own stability. Interestingly, her premiership had begun in July 2016 with an appeal to the Making Sense expressed in her hope to 'build a better Britain' and 'forge a new role for ourselves in the world' after departure from the EU. By 2017, the dynamism of that initial message

⁴⁰ Gary Watt, "'Shall I Descend?': Rhetorical Stasis and Moving Will in Julius Caesar", in Gary Watt, *Shakespeare's Acts of Will: Law, Testament and Properties of Performance* (London: Bloomsbury, 2016) 109–148.

⁴¹ Michael Bogdanov, *Shakespeare: The Director's Cut* (Edinburgh: Capercaillie Books, 2003) 23.

had become static to the point of stagnancy, having been stymied by parliamentary reluctance to deliver the Brexit outcome called for by the 2016 referendum. Whichever way individuals had voted in the 2016 referendum, few among the electorate at the 2017 general election had any appetite for the status quo, and yet this is precisely what Theresa May's 'strong and stable' mantra was offering them. In the event, the public rejected Theresa May's insistent and stagnant offer of stability. She had called the 2017 general election in the hope of improving her party's parliamentary majority in order to strengthen her government's hand in Brexit negotiations with the EU, but the election wiped out her majority. The electorate likes building but doesn't necessarily like buildings.

Law in the Making

It is in the nature of politics that a government 'must be stable and yet it cannot stand still'. These words, borrowed from American jurist Roscoe Pound, were originally applied to law. He went on to say that 'all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change'.⁴² Judge Benjamin Cardozo once observed similarly that 'the lover of stability, of things as they are [and] the zealot who pants for change. Each is a builder of the Civitas Dei; and so, let us believe in all humility, is every craftsman in this process of ours'.⁴³ To retain popular respect for its processes, the law must somehow exude a sense of reliable stability while at the same time promising responsive plasticity. How can it communicate these two conflicting qualities at one and the same time? Cardozo's words demonstrate that one of the law's successful methods for simultaneously displaying stability and change is the use of metaphors and allegories of building, and particularly those that communicate building as an ongoing process. When the law can demonstrate that it is in the course of erecting a strong edifice it is able to communicate present progress and change even as it performs its belief in permanence and stability. The performance is at its most effective when the law, by which I mean legal actors and the law's human representatives, can demonstrate that it is offering not a *fait accompli* but (in the title of Professor Allen's book) *Law in the Making*.⁴⁴ The balance between stability and change is demonstrated, for example, in an official video about the construction of the permanent premises of the International Criminal Court, for, despite the descriptor 'permanent', the video focuses on the construction stage and the narrator expressly notes that 'it is

⁴² Roscoe Pound, *Interpretations of Legal History* (1923) (Cambridge, MA and London: Harvard University Press, 2013) 1.

⁴³ Tycho Brahe (ed.), *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon Publications, 1947) 25.

⁴⁴ Carleton K. Allen, *Law in the Making* (Oxford: Oxford University Press, 1927).

important that a formal institution like the ICC does not constitute barriers for people, on the contrary, it must express the very essence of democratic architecture'.⁴⁵ These words have the effect of inviting the public into the making process and of encouraging them to participate and even (given the express aim to produce 'democratic architecture') to have a sense of co-Production in the project. When the French Ministry of Justice embarked on a revision of its courthouses in the late 1980s, it likewise sought to express 'the values of democracy' in the construction of its new court buildings.⁴⁶ Eliza Garnsey makes a similar observation on the Constitutional Court of South Africa when she writes that:

The physical existence of the court building is a realisation of South Africa's transition; this is the site of justice . . . the Court is simultaneously a utopian good place (a site constituting justice) and a utopian no place, a prospect yet to be realised (a sight of justice in the making).⁴⁷

The subtitle of Garnsey's book is *Creative State-Building in Times of Political Transition*. It hints that art – whether it be Amphion's musical art or a politician's rhetorical art – is especially well suited to performing the seemingly paradoxical task of building the state as a stable thing while responding to social movements and transitions through time. The special qualification of musical, rhetorical, and other arts in this regard resides in their dependence upon settled rules and their creative capacity to adapt those rules in new ways to new conditions. There is rhetorical and dramatic genius in any performance that can simultaneously promise stability even as it enacts change, for what most humans desire is to be exposed to conditions in which the twin goods of security and variety exist in harmonious balance.

Equitable Architecture

The word 'architect' is derived from the Greek *arkhitekton*. It means 'master builder' and, more anciently, 'chief weaver'. The word conveys the sense that an architect is a person whose superior technical skill confers superior social status; a sense that also appears from the Old English counterpart *heahcraeftiga* ('high crafter'). Many a lawyer is content to function as a mere technician,

⁴⁵ 'Video: Permanent Premises of the International Criminal Court', www.icc-cpi.int (April 2013). On similar themes, see 'Law in Concrete: Institutional Architecture in Brussels and the Hague'. On courthouse design generally, see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Abingdon: Routledge, 2010).

⁴⁶ *A nouvelle architecture judiciaire: des palais de justice modernes pour une nouvelle image de la justice*, Ministère de la Justice, France (2000). English quotation in Judith Resnik, Dennis E. Curtis, and Allison A. Tait, 'Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere', in Anne Wagner and Richard Sherwin (eds), *Law, Culture and Visual Studies* (Dordrecht: Springer, 2014) 515–545, 526.

⁴⁷ Eliza Garnsey, *The Justice of Visual Art: Creative State-Building in Times of Political Transition* (Law in Context) (Cambridge: Cambridge University Press, 2019) 124–125.

when they ought to aspire to the status of ‘high crafter’. As the lawyer Pleydell says in the novel *Guy Mannering* by Scottish author (and sometime legal advocate) Sir Walter Scott, ‘[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect’.⁴⁸ The idea of the architect first became prominent as a description of experts who oversaw the technical design and building of wooden, stone, and brick constructions, but it readily became a metaphor to describe an expert in rhetorical techniques of state building and constructing laws. It was in this metaphorical sense that Martin Luther King Jr referred to America’s founding fathers as ‘the architects of our republic’.⁴⁹

So similar are the architectural crafts of law and building that when Aristotle contemplated the seemingly intractable conflict between law’s rigidity and life’s variability, he found a solution in a building metaphor. In Greek thought, a law properly so-called was an inflexible and unchanging thing to be laid down against the shapes of life to enable a judge to determine where life had fallen short of law. It was Aristotle who identified the need for equity (he called it *epieikeia*, which means something like ‘gentleness’ or the quality of ‘yielding’) to act as ‘a rectification of law where law is defective because of its generality’.⁵⁰ The solution, he said, was not to lay down law in the form of a universal and rigid rule, but to apply discretion through judicial decree in the particular case. He likened this flexible mode of justice to ‘the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case’.⁵¹ The metaphor seems to have been inspired by a curved or leaf-like motif used in architectural decoration on the ancient Greek island of Lesbos. The lesson of the metaphor is that a builder or carpenter wishing to fit material to an irregular (non-rectilinear) support must bend their rule to fit the contours of the context, just as a judge must bend rigid legal rules to fit the organic shapes of human life in the context of a particular case. Law should bend to fit life, rather than life bend to fit law.⁵²

Another Brick in the Law

The activity of equity demonstrates that law at its most imaginative aspires to the difficult task of integrating rules to life, so that laws take on human shape. James Boyd White writes that:

⁴⁸ Sir Walter Scott, *Guy Mannering or The Astrologer* (1815) this quotation is from the Collins Classics edition (London: Collins, 1955) chapter 37, 253.

⁴⁹ Martin Luther King Jr, ‘I have a Dream’ (28 August 1963).

⁵⁰ Aristotle, *Nicomachean Ethics* 5.6, Harris Rackham (trans.), Aristotle Vol. 19, Loeb Classical Library 73 (Cambridge, MA: Harvard University Press, 1926) 317.

⁵¹ *Ibid.*, 5.7.

⁵² See, generally, Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009), 156.

The art of the lawyer, like that of the judge, is to put together the prior texts that are the material of law in new compositions, which, while respecting the nature of each item, so order them as to create a new arrangement with a meaning of its own. The art of law is the art of integration.⁵³

Law sets itself the ambition of integrating every section of law, old and new, with every other to produce a whole that is as coherent as possible. This aims to achieve consistency and predictability as necessary features of a just legal process. The American jurist Rosco Pound stresses the importance of ‘the process of adjusting the legal materials handed down from the civilization of the past to the demands of the civilization of the present and of finding or creating new materials and fitting them with the old into a more or less harmonious system’.⁵⁴ The lawyers’ art of integrating law with itself entails the craft of constructing the whole with an eye to the part and construing the part with an eye to the whole. The proper construction of a statutory section or the proper construction of a contractual clause is only achievable through the expert practice of this highly technical – indeed architectural – art. As interpretation of a document is an art of integration, so too is drafting a document so that all the clauses and subclauses fit together to form an impenetrable wall.

Judge-made law is an integrated (if not entirely coherent) whole built out of cases, and cases in turn are formed out of the skilfully assembled fragments we call facts. The basic building blocks of judicial craft are the speech units that constitute the judicial fact and the speech units that constitute the judicial statement of law. The legal maker of a well-formed juristic sentence must have an eye to the construction of the whole edifice. The jurist who does this well may be compared to the high crafter who carefully selects suitable stones to form a dry-stone wall, or else to the artisan who lays down the law brick-by-brick to build the integrated stable wall of the legal edifice.

The word ‘brick’ is a close cousin to ‘break’. A brick is always a fragment of a greater whole. A lone brick is estranged from its intended purpose, which is to be joined with other bricks to make an integrated edifice. A stone, unlike a brick, can be a freestanding thing. The earliest law codes were inscribed in the form of standing stones called steles, and famous examples survive including the Rosetta Stone in the British Museum and the basalt stele in the Musée du Louvre that bears almost the entire Code of Hammurabi. Even in modern English, derived as it is from prehistoric, Proto-Indo European roots, the stone-like stability of inscribed law is clear from the similarity of the related words ‘statue’ and ‘statute’. They are both standing things. The legal image of the brick in the wall fits with the language by which we typically describe

⁵³ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) 214.

⁵⁴ Roscoe Pound, *Interpretations of Legal History* (1923) (Cambridge, MA and London: Harvard University Press, 2013) 116.

infractions of law in the language of ‘breaking’ and ‘breach’. The notion of ‘law-breaking’ implies fragmentation of a whole, whereas ‘law-making’ can be conceived as the opposite process of building a whole out of fractions brick-by-brick. Thus law-bricking and law-breaking are processes by which the law is rendered more or less integrated. If the legal drafter leaves holes in the whole, the draft document may prove draughty. When we use the term ‘loophole’ to describe a weakness in legal drafting, we are using the imagery of medieval warfare. The loophole was the narrow slit or gap in a castle wall from which arrows were fired out, and through which a well-aimed arrow of the enemy might pierce. As always with legal loopholes, the point of vulnerability in the law’s edifice is simultaneously one side’s weakness and the other side’s opportunity. The challenge facing the legal draftsman is to build the law brick-by-brick without a loophole. One brick out of place might produce a dangerous infraction of the integrity of the whole. It is complicated enough in private drafting, but the edifice of the law is also built on a grand scale through the work of Parliament and judges. On the grand scale, the bare passage of time can produce social movements that unsettle the structure. Particular bricks are sometimes eroded by social change. If a judge thinks, for example, that a former case was decided *rebus sic stantibus* (‘as things then stood’), the judge might depart from the former decision and in effect remove the brick from the wall of the law. When breaches or loopholes appear in the wall for any reason – whether it be the passage of time, human error, or the vagueness of language⁵⁵ – the law must make good the whole by supplying a new brick to fit the need. In the common law, this work of constant repair and maintenance falls not to the architect of any grand design but to the humble work of the judge as bricklayer in the particular case. The inevitable conclusion is that there is no conclusion. The building (verb) of the legal edifice is continuous. The building (noun) of the law is never complete.

Law is engaged, then, in two simultaneous building processes: one to achieve its own integrity, the other to integrate law to life. The very word ‘order’, which has come to be associated with the force of rules and commandments, is more properly (i.e. etymologically) associated with the integration of social structures through a positive process of ‘joining together’. This should entail not only the joining of law with law to establish its own edifice for its own purposes, but also the joining of law to human social life so that the law remains a thing made by the people for the people. A positive and hopeful way to think of legal utterance – the legal sentence – is to regard it as an example of the art of building order through articulation with a view to producing something harmonious. All those key words – ‘art’, ‘order’, ‘articulation’, and ‘harmonious’ – are cognate with the conjectured Proto-Indo-European root **ar-* meaning ‘to fit together’.

⁵⁵ See Timothy A. O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000).

The question arises as to the mutual compatibility of the endeavour to join law to law and the endeavour to join law to life. There is potential tension between the need to build the integrity of the law's own edifice and the need to develop integrity between law and society as a whole. That being so, it is surely desirable that priority should be given not to establishing the impenetrability of law's design but to the more difficult craft of making the law fit flexibly with human experience so as to maintain the integrity of the entire social fabric. Milner S. Ball has more than once embarked on similar metaphorical musings. His thoughtful conclusion is that both can be achieved when law promotes the business of building peace:

If law is to be anything other than a bulwark, what transforms the fear, self-protectiveness, and love of power that the bulwark serves? . . . An alternate conceptual metaphor for law . . . depends upon its family connections for its vitality and fullness of expression . . . Within the family, its integrity is maintained. Law is a medium of solidarity where there is a community needing a medium for its mutuality.⁵⁶

Law as Cathedral

If we assume that law is building its edifice brick-by-brick and stone-by-stone, the question is whether we can tell what it is yet. Perhaps it is becoming a defensive castle, or a factory of some sort – maybe something like a cotton mill, or a place where weaving is undertaken on an industrial scale, or perhaps the craft of law is building a terrace of homes in which judges as artisan weavers work by the light of garret windows. There are doubtless as many ways of working law as there are candidate varieties of edifice. I wonder, though, if 'the cathedral' serves best as an image of the sort of structure that the law is working on. I don't mean the pagan temples of the Greeks and Romans that have inspired the neoclassical design of so many courthouses, especially in the United States of America, but the old medieval cathedrals of Europe. The courtroom designed as a neoclassical temple is a clue to the secular religion of modern law, but the classical temples of Greece and Rome were built by slaves. So too were some of the old courthouses still in use in modern America. The medieval cathedrals of Europe were quite another matter.

Richard Schechner identifies the building of the medieval cathedrals as a multi-authored work. The process of building a cathedral is, he says, an

⁵⁶ Milner S. Ball, 'Law Natural: Its Family of Metaphors and Its Theology' (1985) 3 *Journal of Law & Religion* 141–165, 161–162. See, further, Milner S. Ball, *Lying Down Together: Law, Metaphor and Theology – Rhetoric of the Human Sciences* (Madison: University of Wisconsin Press, 1985), in which he identifies the dominance of the metaphor of law as 'bulwark of freedom' (23) and offers as an alternative an idea of law as 'a medium of the human community as community' (34).

example of a production in which the process must take place in public, in something like the way that a theatrical performance must be presented before witnesses.⁵⁷ Perhaps it is the drama inherent in the public construction of these majestic places of worship that has so endeared them to authors and dramatists. Ibsen's play *The Master Builder* (*Bygmester Solness*) concerns the erection of a church spire, and its climactic scene brings the public together to witness the dramatic grand opening at which the architect Solness climbs to the top of the spire only to fall to his death. Referring to Ibsen's play, Frank Kermode observes that '[a] building comes completely into being before it is 'topped out' but architects want the ceremony', adding, '[i]t is not a fact that there are no facts, indeed it is because there are so many that we need our fictions'.⁵⁸ An example like Ibsen's, is Dorothy L. Sayers' 1937 play *The Zeal of Thy House*. Commissioned to celebrate the work of artisans connected to Canterbury Cathedral, it was based upon the real-life master builder William of Sens who died following a fall from scaffolding during a renovation of the cathedral. Sayer's study *The Mind of the Maker*, which we discussed at length in [Chapter 2](#), was developed from a passage in that play.

In the construction of a medieval cathedral, members of the public were not passive onlookers but active co-Producers. Almost the entire witnessing public would have had some hands-on part in the work, from chiselling or hoisting stones to feeding the labourers or donating to the building fund. David Turnbull has observed that:

Gothic cathedrals like Chartres were built in a discontinuous process by groups of masons using their own local knowledge, measures, and techniques. They had neither plans nor knowledge of structural mechanics. The success of the masons in building such large complex innovative structures lies in the use of templates, string, constructive geometry, and social organization to assemble a coherent whole from the messy heterogeneous practices of diverse groups of workers.⁵⁹

How close this sounds to the craft by which common law judges, proceeding without any codified plan, work together across many lifetimes to construct an edifice which, by respecting the humanity of individual lives in particular cases, comes to deserve the reciprocal respect of the public it serves. Schechner adds that in the case of works that span the lifetimes of many authors, such as the Homeric Epics, the Bible, and the medieval cathedral:

[T]he process of making the work has an extra step, that of arriving at a 'finished form' that cannot be known with certainty beforehand. This solidification may

⁵⁷ Richard Schechner, *Performance Theory*, revised ed. (1977) (New York: Routledge, 2003) 204.

⁵⁸ Frank Kermode, 'The Men on the Dump: A Response', in M. Tudeau-Clayton and M. Warner (eds), *Addressing Frank Kermode: Essays in Criticism and Interpretation* (Basingstoke: Macmillan, 1991) 89–108, 101.

⁵⁹ David Turnbull, 'The Ad Hoc Collective Work of Building Gothic Cathedrals with Templates, String, and Geometry' (1993) 18(3) *Science, Technology and Human Values* 315–340, 315 (abstract).

take many generations and be ratified historically in structures which, under different circumstances, may have turned out differently. For example, Notre Dame in Paris has only one ‘finished’ tower; but how ‘wrong’ it would be to finish the ‘incomplete’ structure. As an ideal cathedral the building lacks a tower; as Notre Dame it is complete only as it now stands.⁶⁰

It is not apparent to the casual onlooker that one of the two towers of Notre Dame de Paris is unfinished as Schechner observes, but his point about allowing the cathedral to live out its unplanned life according to its own organic nature is well made. One thing that is clear to the naked eye is that the north tower is larger than the south tower. Here, again, the discrepancy does not diminish the beauty of the whole. The narrator of Anthony Trollope’s novel *The Warden* shares this very thought when contemplating the edifice of the parish church at Plumstead Episcopi, Barchester:

[I]t is built in a faulty style: the body of the church is low – so low, that the nearly flat leaden roof would be visible from the churchyard, were it not for the carved parapet with which it is surrounded. It is cruciform, though the transepts are irregular, one being larger than the other; and the tower is much too high in proportion to the church. But the colour of the building is perfect . . . and though in gazing on such a structure one knows by rule that the old priests who built it, built it wrong, one cannot bring oneself to wish that they should have made it other than it is.

Anthony Trollope appreciated, as Aristotle appreciated, that a life built strictly to rule and to the letter of legal rights will be cold, mean, attenuated, and austere. Rules that yield a little to the contours of natural life are far more fitting to the humans who make them and the societies that are subject to them. As John Ruskin wrote in his essay ‘The Nature of Gothic’, in which he advanced the superiority of medieval artisanal building over the architectural techniques of his own time: ‘no architecture can be truly noble which is *not* imperfect’.⁶¹

Arguably, the common law method has an advantage over its civil law codified counterparts when it comes to finding the right ‘fit’, because the common law builds its edifice responsively and organically – its judges working like Trollope’s ‘old priests’ – rather than according to a preordained architectural scheme.⁶² The only question is whether the advantage of working without a master plan outweighs the disadvantage of slight wonkiness and inconsistencies in the resulting structure (these are certainly features of every

⁶⁰ Richard Schechner, *Performance Theory*, revised ed. (1977) (New York: Routledge, 2003) 204–205.

⁶¹ John Ruskin, *On the Nature of Gothic Architecture: And Herein of the True Functions of the Workman in Art* (London: Smith, Elder, & Co, 1854) 13. See also, *The Stones of Venice*, Vol. 2 (London: Smith, Elder & Co, 1853), chapter 6, ‘The Nature of Gothic’ (emphasis in original).

⁶² On the traditional priestly or sacerdotal function of common law judges, see Paul Raffield, *Shakespeare’s Imaginary Constitution: Late Elizabethan Politics and the Theatre of Law* (Oxford: Hart, 2010) 44–45.

common law, case-based system). If there is doubt as to whether the advantages are worth it, they might be offset by adjustments in the next round of building, for the common law, as stated earlier, is always building and is never finally built.

The adversarial nature of common law pleading is another feature of the common law that is illuminated by reference to the analogy of cathedral construction. Conflict in law and drama teaches us that criticism can be constructive where opponents work together to produce a mutually beneficial outcome. In law, legal advocates are professionally opposed, but they are supposed to be united in seeking to produce an outcome that is just and satisfactory not only to their client but to the cause of justice and therefore to society as a whole. Hence, it is said in the legal system of England and Wales, as elsewhere, that an advocate's first duty is not to their client but to the court. In theatrical drama, the parts of protagonist and antagonist are opposed to each other, but the actors' enterprise, like that of the law, is the shared one of working together in a production that gives scope for expression and resolution of conflicting passions and wills. What might modern politics and social debate look like if opponents were more civil in their appreciation that each side needs the other in order to produce a satisfactory and enduring civil society? One answer is that it might resemble the apparent opposition between the exterior wall of a medieval cathedral and the 'flying' buttress that pushes against it from the outside. (In England, the cathedrals of Lincoln and Winchester supply some of the most striking examples.) The formal opposition between wall and buttress is a productive partnership. The buttress supports the very thing that it pushes against. More than this, the wall and buttress are not in partnership for their own sakes, but for the common purpose of reducing the bulk of the wall and thereby to enable the inclusion of larger windows. Through this simple picture, we can see how constructive opposition in law, politics, and other social contexts can operate to let more light into the scene.⁶³

This Insubstantial Pageant

Our procession around the medieval cathedral is complete and we have come full circle. We began by noting the rhetorical power of the ostensibly positive slogan 'Make America Great Again', but also by lamenting the way in which it has not fulfilled Ronald Reagan's expressed hope that it should promote a society for the good of all citizens. It has instead become the mantra of a divisive and nihilistic brand of politics that insists on razing existing structures to the ground before a new work of building can begin. One of those structures is an actual building – the Capitol Building in Washington, DC – which is the

⁶³ On legal architecture as a reflection of values of 'openness and lightness', see David Gurnham, "'Hell Has No Flames, Only Windows that Won't Open': Justice as Escape in Law and Literature' (2019) 13(2) *Law and Humanities* 269–293.

concrete and conceptual home of the legislature of the United States of America. When Donald Trump's supporters stormed the Capitol Building on 6 January 2021, it was an assault not only against governmental institutions and a particular governmental building but against the very idea of building a civil society upon the foundations of the past. So it is with all insurrections, coups, and revolutions – buildings suffer as citizens strike a symbolic blow against the stability of the status quo. In the Russian Revolution of 1917, the Bolsheviks overran the Tsar's Winter Palace in Petrograd, an event commemorated three years later in a mass theatrical spectacle. In the French Revolution of 1789, the equivalent event was the Storming of the Bastille on 14 July.

I suggested early on in this book that the president of the 'brave new world' of the United States is a sort of Prospero figure. He (one day she) is invested with an almost mystical rhetorical power of state building, but when the magic fails the edifice cannot be sustained. In that moment we see that it was all a front – like the fascia of a Wild West saloon thrown up for a Hollywood movie. Without its sustaining mystique, it falls flat on its face. On 6 January 2021, the spell of Trump's performative presidency was broken. It is notable that when Shakespeare's Prospero called time on his own magical statecraft, he did so with the material language of building and specifically of the playhouse. His reference to the 'great globe' is presumably an allusion to the playhouse for which Shakespeare wrote after 1599, and when Prospero confesses that the performance had been all along a 'baseless fabric' and an 'insubstantial pageant', those phrases are also references to early modern theatre spaces (*The Tempest* 4.1.153–155). Today, 'fabric' is associated with woven textiles, but in Shakespeare's day 'fabric' denoted a building or other structure, and to describe it as 'baseless' was to say that the building had no foundations. The phrase 'insubstantial pageant' had practically the same meaning. A pageant was a stage structure erected for the purpose of ostentatious and theatrical public display, and to describe it as 'insubstantial' was a reference to the fact that it was usually pushed about on wheels – like a float at a modern carnival. There was literally nothing stable standing under it (nothing '*sub-sta*') to make it 'substantial'. A theatrical show is judged primarily according to appearances. If the surface pleases, we tend not to worry about the substance. So it has been from the medieval pageant to the fake store front of a Western movie lot. Ronald Reagan, an actor in those classic Westerns, was looking back to the founding fathers when he issued the invitation, 'Let's make America great again'. When Donald Trump issued his mandate, 'Make America great again' he was looking forward to the sort of state building that begins with demolition. The key to understanding what happened on 6 January 2021 is to realize that there was nothing standing under the Trump presidency.⁶⁴

⁶⁴ See in this vein, Jon Herbert, Trevor McCrisken, Andrew Wroe, *The Ordinary Presidency of Donald J. Trump* (London: Palgrave, 2019). The authors argue that Trump was an extraordinary president with an institutionally unremarkable presidency.

Part IV

Masses, Media, and Popular Judgment

Co-Production and Populism

Production fulfils the making of a thing by bringing it to public scrutiny. Production is therefore the cutting edge of rhetorical performance in law, politics, media, and all aspects of civic and social life. Its impact lies largely in the fact that the public – or ‘publics’ – are naturally most persuaded towards the positive reception of a thing where they perceive that they’ve had a hand in the co-Production of the thing. The appeal to ‘making with’ has been a technique favoured by orators throughout the history of political rhetoric. President John F. Kennedy employed it in his Inaugural Address on 20 January 1961, when he called on ‘both sides’ to ‘join in creating a new endeavor, not a new balance of power, but a new world of law, where the strong are just and the weak secure and the peace preserved’. With the very different motivation of seeking to divide one section of humanity from the rest, Donald Trump also appealed to collaborative construction when he famously said: ‘we have to build a wall, folks. We have to build a wall.’¹ Perhaps he borrowed the technique from his background in business and sales, for the appeal to ‘making with’ is also pervasive in modern marketing practices. Thus, in 2008, word-of-mouth or ‘viral’ marketing was called ‘the defining marketing trend of the decade’.² Analysing that trend, Jim Nail, chief strategy and marketing officer at media company Cymfony, emphasizes the public’s co-Productive influence on demand for the things that suppliers make: ‘To succeed in word-of-mouth marketing, you need to find that segment of real ardent fans and create special programs and tools that will empower them to share that enthusiasm.’³ The tactic of appealing to and empowering ‘that segment of real ardent fans’ sounds like something straight out of the Donald Trump playbook.

¹ Donald Trump, Presidential campaign rally (Dallas, Texas, 14 September 2015).

² Rick Ferguson, ‘Word of Mouth and Viral Marketing: Taking the Temperature of the Hottest Trends in Marketing’ (2008) 25(3) *Journal of Consumer Marketing* 179–182, 179.

³ *Ibid.*, 181.

Making, Marketing, Meaning

So-called collaborative marketing and creative consumption have been called ‘the new marketing logic’.⁴ An example of collaborative marketing is the technique of engaging savvy consumers in product design on the assumption that the habits of today’s ‘lead users’ can predict the habits of general consumers tomorrow. Eric von Hippel notes that ‘since lead users often attempt to fill the need they experience, they can provide new product concept and design data’.⁵ From the mid-2000s, consumers considered to be ‘market partners’⁶ in the ‘co-creation of value’⁷ became a ‘new paradigm’⁸ and ‘the key process in the new marketing logic’.⁹ The terminology of marketing scholarship differs somewhat from my own. For example, marketing vernacular tends to apply the label ‘co-production’ to situations in which the consumer is a passive recipient of the provider’s values and the label ‘co-creation’ to contexts in which the consumer is more active in product development.¹⁰ Although our present definitions are drawn in different places, the marketing theorist’s distinction ‘between active involvement in the creative process’ and ‘decoding or meaning-making activities’ is potentially a useful one.¹¹

Owen Barfield found the distinction between primary thing-making and secondary meaning-making to be helpful in relation to making poetry, hence his suggestion that when a person, ‘having achieved self-consciousness, returns to the making of poetry, the secondary imagination is at work on the making (or, if you like, restoration) of meaning’.¹² Meaning-making in relation to poetry may be carried out by the same person who first uttered the poetic words, or it may be made collaboratively by and with other people as

⁴ Bernard Cova and Véronique Cova, ‘Faces of the New Consumer: A Genesis of Consumer Governmentality’ (2009) 24(3) *Recherche et Applications en Marketing* 81–99, 88. See generally C. K. Prahalad and Venkat Ramaswamy, *The Future of Competition: Co-creating Unique Value with Customers* (Harvard, MA: HBS Press, 2004).

⁵ Eric von Hippel, ‘Lead Users: A Source of Novel Product Concepts’ (1986) 32(7) *Management Science* 791–805, 791.

⁶ Don Peppers and Martha Rogers, *Return on Customer: Creating Maximum Value from Your Scarcest Resource* (New York: Broadway, 2005).

⁷ C. K. Prahalad and Venkat Ramaswamy, ‘Co-creation Experiences: The Next Practice in Value Creation’ (2004) 18(3) *Journal of Interactive Marketing* 5–14.

⁸ Detlev Zwick, Samuel K. Bonsu, and Aron Darmody, ‘Putting Consumers to Work: “Co-creation” and New Marketing Governmentality’ (2008) 8(2) *Journal of Consumer Culture* 163–196.

⁹ Bernard Cova and Véronique Cova, ‘Faces of the New Consumer: A Genesis of Consumer Governmentality’ (2009) 24(3) *Recherche et Applications en Marketing* 81–99.

¹⁰ See, for example, Christian Grönroos, ‘Value Co-creation in Service Logic: A Critical Analysis’ (2011) 11(3) *Marketing Theory* 279–301; and Prakash Chathoth et al., ‘Co-production versus Co-creation: A Process Based Continuum in the Hotel Service Context’ (2013) 32 *International Journal of Hospitality Management* 11–20.

¹¹ Ben Walmsley, ‘Co-creating Art, Meaning, and Value’, in Ben Walmsley, *Audience Engagement in the Performing Arts, New Directions in Cultural Policy Research* (London: Palgrave Macmillan, 2019) 165–198, 166–167.

¹² Owen Barfield, *Poetic Diction: A Study in Meaning* (1928) (Oxford: Barfield Press, 2010) 22.

critical readers. Where I depart from Barfield is when (in his very next line) he goes on to state that, ‘as the secondary imagination makes meaning, so the primary imagination makes “things”’.¹³ It seems to me that interpretative co-Production through ‘meaning-making’ is just as much an essential part of making ‘things’ as the activity of poetic Production. Indeed, it is the engagement of a reader or audience that makes all the difference between a mere ‘object’ and a meaningful ‘thing’. Whereas an object is a matter that is in etymological terms ‘thrown against us’ (from the Latin *ob-* ‘against’ and *iacere* ‘to throw’), a thing, recalling Tim Ingold’s definition (see [Chapter 4](#)), is constituted by social connection, cooperation, and consent.

Popularity and Populism

Some will say that Trump’s rhetoric lacks elegance, nuance, and ethical virtue, but that is to judge him by the standards of traditional political oratory. Judged as a performer and businessman, it is hard to deny that he knows his audience, knows his market, and knows how to make his market and how to appeal to it. So it is with every ‘demagogue’ – a word that means people agitator or, as we usually put it, ‘rabble rouser’. There are serious consequences when the Production values of commercial marketing become the Production values of populist politics. Companies seeking to sell their goods and services become so beholden to the public that the public as co-Producer begins to market *its* demands to the supplier. When this dynamic operates in a political context it can be a force for good and a model of democratic, devolved government, or it can amplify errors by encouraging a political leader to pipe whatever tune the public pays for. In the case of Donald Trump, one senses sometimes that his more extreme and illogical utterances have less to do with his own manifesto than with maintaining the brand that his market demands. We sometimes say that Donald Trump ‘plays to his base’, which graphically expresses how demagoguery can produce a descent to the lowest common denominator. This mirrors commercial marketing practice in non-political contexts, where emphasis on manufacturer supply has shifted over time to emphasis on public demand.

What is our ideal of political behaviour in the people who seek our votes? Perhaps we imagine the ideal political candidate to be a person of principle who comes upon (Invents) a set of social concerns, then develops (Creates) a set of policies, and finally publishes (Produces) their policies in the form of a manifesto to be judged and voted upon by the electorate. If all this were done with integrity and transparency, we could find little to fault in such candidates – leaving aside disagreement with their particular choice of policies. In practice, though, our ideal politician may be unlikely to succeed if they simply

¹³ [Ibid.](#)

offer the public prefabricated policies. By adapting our image of the political candidate and political office holder to that of a person seeking to involve the public in collaborative marketing, we see that the successful politician is one who gives the public not only what the public thinks it wants, but one who also encourages members of the public to believe that they had a hand in making the policies and a hand in making the politician. This appeals to the public's proprietorial sense of ownership, but it also appeals to their Making Sense. One has to invite the voting and paying public into the entire making process, from Invention through Creation to Production, in order for them to experience the sense that their candidate and their candidate's policies were tailor-made to the voters' personal specifications.

Politics is not the only context in which performers appeal to their audience's desire to be co-Producers of the show. It is, for example, highly prominent in the arts, as the authors of *Getting in on the Act* observe in relation to the trend among arts groups towards making opportunities for public participation.¹⁴ In his book *Making Is Connecting*, David Gauntlett attributes this trend to the possibility (or 'hope', as he puts it) 'that we are seeing a shift away from a 'sit back and be told' culture towards more of a 'making and doing' culture'.¹⁵ For Gauntlett, one of the ways in which 'making is connecting' is through what I call 'co-Production'. Gauntlett explains the merits of co-Production when he writes that, 'through making things and sharing them in the world, we increase our engagement and connection with our social and physical environments'.¹⁶

What is true of commerce, politics, and cultural performance is also true of news marketing by news makers. In his book *Making the News Popular*, Anthony M. Nadler writes that:

By exploring the different strategies that news makers have pursued to popularize news, I suggest that making news popular is not only a matter of responding to an audience's preexisting interests; it is also a matter of mobilizing publics and creating new forms of feedback between news outlets and their publics.¹⁷

That passage appears under the heading 'Mobilizing Audiences', but it is just as much about making audiences as mobilizing them. What Walter Dill Scott said about the orator seeking to move the political masses applies equally to the newsmaker seeking to produce popular mass media: 'The difficult task is not to convince and sway the crowd, but to create it'.¹⁸

¹⁴ Alan S. Brown et al., *Getting in on the Act: How Arts Groups Are Creating Opportunities for Active Participation* (San Francisco: The James Irvine Foundation: 2011).

¹⁵ David Gauntlett, *Making Is Connecting: The Social Power of Creativity, from Craft and Knitting to Digital Everything*, 2nd ed. (Cambridge: Polity Press, 2018) 16.

¹⁶ *Ibid.*, 10.

¹⁷ Anthony M. Nadler, *Making the News Popular: Mobilizing U.S. News Audiences* (Champaign: University of Illinois Press, 2016) 15.

¹⁸ Walter Dill Scott, *The Psychology of Public Speaking* (Philadelphia: Pearson Bros, 1907) 179.

Popularity is, of course, a double-edged sword. The ‘public’ is never a perfectly homogenous mass, and from this it follows that any given gesture to meet a demand made by one segment of the public might prove unpopular with another segment. Take Procter & Gamble’s decision in October 2019 to repackage its Always brand sanitary products by removing the Venus symbol (♀) on the basis that ‘[a]fter hearing from many people, we recognized that not everyone who has a period and needs to use a pad, identifies as female’.¹⁹ The ‘we listened to you’ trope is now a trite gesture in co-Productive mode. In this instance, the co-Produced rebranding, which was popular with many transgender users of sanitary pads, proved to be unpopular with many other users. Unpopularity with opponents of the rebranding went to the extent of a Twitter movement to #BoycottAlways or, as one wag put it, #GirlcottAlways. This example begs the question whether Procter & Gamble’s decision to repackage Always was based on a calculation of net popularity gain, leading to the supplemental question, ‘if so, did it work?’ If it wasn’t calculated to be popular, was it simply a policy decided on as a matter of principle? If that were the case, we would have come upon a most unusual creature – a global, profit-driven company with more politically sincere motives than many actual politicians. There is another possibility, which is that the marketing changes were driven neither by the desire to make a statement of political principle or the desire to appeal to any particular segment of the populace but by a cynical desire to build brand awareness. In other words, not to make a political point, or to make friends, but simply to make an impact.

For some global companies, focused techniques of co-opting consumers in the performance of their brands have become a major part of what makes them distinctive in the marketplace. One of the best examples is the use of interaction between staff, consumers, and products in Apple Inc.’s famous retail venues: Apple Stores. It has been said of the participation of the public in such spaces that it is as if we, the public, are ‘actors in the theatre’, because ‘as consumers in branded spaces we loan the brand’s character the phenomenological resources of our bodies. We play out its fictions, making them appear in three dimensions, as if they were real.’²⁰ The Always controversy shows that the same effects can be achieved in the virtual theatre spaces of social media. Whether Procter & Gamble thought about it in these terms may be doubted, but the company effectively co-opted the collaborative, user-generated force of social media, and turned consumers into ‘improv’ actors, riffing on the provocative prop (the rebranded sanitary pad) that it had set up in physical and virtual space.

¹⁹ Dan MacGuill, ‘Did Trans Activists “Force” Procter & Gamble to Remove Female Symbol from Some Period Products?’, Snopes.com, 21 October 2019, www.snopes.com/fact-check/pg-venus-symbol-removed/.

²⁰ Maurya Wickstrom, *Performing Consumers: Global Capital and Its Theatrical Seductions* (New York: Routledge, 2006) 2.

The Always controversy was not Procter & Gamble's first brush with the double-edged blade of popularity. The year 2019 began with an advertising campaign in which its Gillette brand of shaving razors ditched its traditional slogan, 'The Best a Man Can Get', for 'The Best a Man Can Be', in a move apparently calculated to distance the brand from 'toxic masculinity' in response to the #MeToo movement. While many of Gillette's male customers appreciated the gesture towards positive aspects of male social behaviour, many others objected to what they perceived to be politically correct virtue signalling. For some objectors, the root of their complaint was not that a politically correct signal had been sent, but that the entity sending it was an impersonal, commercial, corporate conglomerate. It is one thing for a faceless institution to promote ideals of face-shaving, but to promote ideals of human social behaviour was perceived by its detractors to be bare-faced cheek. For all the controversy generated by the new slogan, the irony is that the traditional slogan, 'The Best a Man Can Get', had always equivocated between a manifesto for masculinity in grabbing mode and a manifesto in growing mode – in other words, it was never clear whether 'get' meant 'to acquire' or 'to become'. That had been the puzzle posed by the pun all along, and the puzzle had made the slogan intriguing, engaging, and memorable. Political concerns aside, the new slogan lacks the pun and lacks the puzzle and therefore lacks the impact of the original.

The two 2019 boycotts did no harm to Procter & Gamble's financial bottom line. On 28 December 2018, Procter & Gamble's share price as quoted on the New York Stock Exchange was \$91.18 and on 27 December 2019 it had risen to \$126.09, despite the two headline-grabbing Twitter boycotts, or perhaps *because* of the boycotts. Speaking about the Gillette advertisement to BBC Radio 1's *Newsbeat* in January 2019, Rob Saunders, an account manager at UK advertising company the Media Agency Group, emphasized the potential for publicity to triumph over unpopularity, noting that the Gillette commercial 'is getting them good publicity and good numbers and causing a debate – which they must have known when they put out this ad'.²¹ Procter & Gamble might have been less concerned to move consumers one way or another on the issues of the debate than to make consumers take interest in the performance of its brands. The implications for politics of this species of principle-neutral or principle-equivocal brand-building are serious. It is possible, for example, that a president might be voted into power, not on the basis of rigorous policies sincerely and consistently expressed, but on no better basis than the robust and attention-grabbing nature of their own personal brand. Donald Trump is just the latest, eye-catching example of the phenomenon.

²¹ Michael Baggs, 'Gillette Faces Backlash and Boycott over "#MeToo Advert"', *BBC Newsbeat*, 15 January 2019.

Reader-Response as Co-Production

The relevance of co-Production to making things has received some of its most serious attention in relation to novels. The very name ‘novel’ suggests something new and original, and this, combined with the fact that the novelist nearly always works alone or publishes in their sole name, can give the misleading impression that a novel is crafted in the manner of an engraved stone – to be set up as a memorial monument to one person’s genius. The reality is very different when one considers the great variety of readers who engage with a novel and the great variation in what they make of it. As you read this book, you are almost certainly reading something that I didn’t write. Text might be set in type, or even in stone, but the meaning of words can never be fixed once and for all. Words are always more or less vague, and the accuracy of the author’s expression and the reader’s interpretation will vary with mindset and physical setting – even down to such factors as the time of day and whether the text is read in a doctor’s waiting room or on a sun lounger by a swimming pool. The author’s words and expressions Produce an inchoate meaning that only approaches solidity through the confirming co-Productive activity of a critical reader. In short, this book depends for its meaning upon what you, the reader, make of it.

This idea is familiar to us nowadays as ‘reader-response theory’, which is the idea that the reader’s interpretation plays an active part in making a literary work, in something like the way that an actor or director fulfils a script, or an instrumentalist or conductor fulfils a musical score. Composer Antony Pitts concedes that ‘[t]he life of the work over which I now slave so assiduously will have a shape free from its creator’s legal reach: I cannot say how it will be interpreted and received, however hard I try’.²² Quintilian said something similar when he opined that rhetoric depends more upon the impression made on the hearer than the thought formed in the speaker.²³ It has likewise been said of painting that ‘art is not what you see, but what you make others see’.²⁴ For an example of the radical way in which an image can be made to mean something that its originator did not intend, consider the famous Vietnam War photograph of a member of the Viet Cong being executed by a policeman in broad daylight on a Saigon street. In the USA and elsewhere, the photograph became an emblem for public opposition to the Vietnam War, but the photographer Eddie Adam, who was awarded the Pulitzer Prize for that image, is said to have been dismayed by this interpretation of his work. His *New York Times* obituary reported that he had believed the policeman’s claim ‘that the

²² Antony Pitts, ‘Towards an Outline . . .’, in Daniel Leech-Wilkinson and Helen M. Prior (eds), *Music and Shape*, Studies in Musical Performance as Creative Practice (Oxford: Oxford University Press, 2017) 386–388.

²³ Quintilian, *The Orator’s Education (Institutio Oratoria)*, Donald A. Russell (ed. and trans.), Loeb Classical Library (Cambridge, MA: Harvard University Press, 2001) 11.3.2.

²⁴ Saying attributed to Edgar Degas.

man he shot had just murdered a friend of his, a South Vietnamese army colonel, as well as the colonel's wife and six children', adding that Adams had later gone on to challenge viewers by asking: 'How do you know you wouldn't have pulled the trigger yourself?'²⁵

Ralph Waldo Emerson appreciated the dynamic of 'reader-response' before that label had been devised to describe it. In his speech 'The American Scholar', he observed that '[o]ne must be an inventor to read well . . . There is then creative reading as well as creative writing'.²⁶ To say that the reader plays a part as co-Producer of the work is not to disparage the distinctiveness of the instigator's Productive activity. As Mary Louise Pratt writes: 'To say that a text can be made to mean anything by readers does not *require* one to deny the text's existence as a historically determined product.'²⁷ She approaches my sense of co-Production when she calls for the activities both of creating art and receiving art to be regarded as entailing 'production of meaning according to socially constitutive signifying practices'.²⁸ In his book *The Craft of Fiction*, Percy Lubbock expressly acknowledges Emerson's idea of 'creative reading' when he describes the task of a reader of a novel in terms of making a 'compact fabric' out of the impressions set forth by the novelist. This, he writes, 'is a task which does not achieve itself without design and deliberation on the part of the reader'.²⁹ He elaborates the following expanded version of Emerson's idea:

The reader of a novel – by which I mean the critical reader – is himself a novelist; he is the maker of a book which may or may not please his taste when it is finished, but of a book for which he must take his own share of the responsibility. The author does his part, but he cannot transfer his book like a bubble into the brain of the critic; he cannot make sure that the critic will possess his work. The reader must therefore become, for his part, a novelist, never permitting himself to suppose that the creation of the book is solely the affair of the author.³⁰

When Barthes announced the 'death of the author' with such assertions as his claim that 'a text's unity lies not in its origin but in its destination',³¹ it was to some extent a repetition of the idea propounded by Emerson as developed by Lubbock. There were, however, certain differences of emphasis. For one thing, Barthes targeted the habit of attributing textual meanings to the author's

²⁵ Andy Grundberg, 'Eddie Adams, Journalist Who Showed Violence of Vietnam, Dies at 71', *New York Times*, 20 September 2004, www.nytimes.com/2004/09/20/arts/eddie-adams-journalist-who-showed-violence-of-vietnam-dies-at-71.html.

²⁶ Address to the Phi Beta Kappa Society of Harvard College (31 August 1837).

²⁷ Mary Louise Pratt, 'Interpretive Strategies/Strategic Interpretations: On Anglo-American Reader Response Criticism' (1982) 11(1–2) *Boundary 2* 201–231, 205.

²⁸ *Ibid.*, 206. ²⁹ Percy Lubbock, *The Craft of Fiction* (London: Jonathan Cape, 1921) 17.

³⁰ *Ibid.*

³¹ Roland Barthes, 'The Death of the Author' *La mort de l'auteur* (1967), S. Heath (trans.), in Roland Barthes, *Image-Music-Text* (London: Fontana, 1977) 142–148, 148.

biographical attributes. For another, and as befits social evolution from 1920s optimism to 1960s pessimism, whereas Lubbock had talked in positive terms of the reader as a 'maker of a book', Barthes' approach can be read as a continuation or application of the Nietzschean nihilistic project of killing off the ultimate author – God. In Barthes' words, his mission is 'to refuse God and his hypostases – reason, science, law'.³² Of course, to talk of Barthes' mission is to fall headlong into his trap, for it is to talk of Barthes as if he were the ruling author of the piece. It makes sense to read Barthes' entire argument as heavily satirical (as his assault on 'reason, science, law' amply betrays).³³ We should therefore engage with Barthes as if he were our own spectre of Barthes. That accepted, we must interpret the spectre as we see it. We will then appreciate that the gap left by 'the Author-God',³⁴ has been filled by Barthes' idea of the text as 'a tissue of quotations drawn from the innumerable centres of culture'.³⁵ This expresses well the sense of societal co-Production that I propose as ideal, except the idea I propose enjoys the possibility of working with the author, albeit an idea of the author that the reader has made up as if it were the author's ghost. After all, to borrow the opening words of Charles Dickens's *A Christmas Carol*, by the time the modern reader comes to a classical text there is no need to kill the author, for the author in the literal sense 'was dead: to begin with'. From Barthes' observation that '[t]he reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost',³⁶ it follows that the space of the reader's imagination is haunted by the ghost of the author and to some degree inhabited by the resurrected author. Barthes concludes that 'the birth of the reader must be at the cost of the death of the Author', but a more hopeful vision is one in which the reader works co-Productively with the author (the idea of the author, the author's ghost) to make something new. It is precisely this respect for tradition in the course of making something novel that characterizes all great works of craft and art, including both law and literature.

Lubbock's preferred term for making is 'creation'. This was also Emerson's preferred word. A reader's contribution to a novel is Creation in my sense of that word in so far as the critical reading of the work enacts an amplification, development, or enlargement of the text. Likewise, to talk of the reader as 'Creator' accurately informs us that reading develops the 'original' book into something larger, more expansive, more full of meanings. Emerson also referred to the reader of a book as 'an inventor' of the book. That is only accurate in my etymological definition of the word Invention to the extent that the book as read can be considered a new thing from the book as written. For the sake of distinguishing different modes of making, Invention is more

³² *Ibid.*, 147.

³³ J. C. Carlier and C. T. Watts, 'Roland Barthes' Resurrection of the Author and Redemption of Biography' (2000) 29(4) *Cambridge Quarterly* 386–393.

³⁴ *Ibid.*, 146. ³⁵ *Ibid.* ³⁶ *Ibid.*, 148.

usefully limited to the origination of the idea of the book rather than its subsequent Creation and Production (always admitting that these definitions, when considered as temporal stages, are bound to overlap). The reader, correspondingly, is best thought of as making in the mode of ‘co-Production’, for this emphasizes that the original was not fully made until the thing was read in critical mode by someone other than the writer. We are permitted through our readings to make something new. Some of the most brilliant effects and interpretations of Shakespeare’s texts, for example, are ones produced by scholars, directors, and actors engaging with his works in ways which the playwright surely did not foresee.

Made in Translation

‘The Theory of Production’ set out by G. Wilson Knight, in his book *Shakespearean Production*, proposes an idea of dramatic production that resembles Emerson’s idea of creative reading and chimes with my idea of participatory co-Production. Knight argues that ‘we must not start where Shakespeare left off, but rather start with Shakespeare and go with him’.³⁷ He writes that the theatrical producer ought not to present a play to the public as if merely communicating a thing completed by Shakespeare: ‘The producer’s business is not translation, but re-creation.’³⁸ While I approve of Knight’s understanding of co-operative Production, I do not agree that ‘translation’ should be contrasted with ‘re-creation’ as if translation were not itself a process of making. Translation is actually an exemplary instance of making and specifically in the mode of co-Production. Knight’s error of contrasting making with translation in the context of making theatre has also been committed by Isaiah Berlin in the context of making laws. Berlin writes:

Legislation is not the making of laws (that would be more properly called ‘legislation’). *Legislation* is the *translation* into legal terms of something which is to be found in nature: ends, purposes.³⁹

Translation, which is etymologically a ‘carrying across’, is a highly skilful process of making through which an original is remade into something new and even into something improved. Susan Bassnett, a pioneering scholar of translation studies, laments that ‘so much time should have been spent on discussing what is lost [in translation] whilst ignoring what can also be gained, for the translator can at times enrich or clarify the [source] text as a direct

³⁷ G. Wilson Knight, *Shakespearean Production* (1964) (Abingdon: Routledge, 2002) 43.

³⁸ *Ibid.*

³⁹ Isaiah Berlin, *Freedom and Its Betrayal: Six Enemies of Human Liberty*, Henry Hardy (ed.) (London: Chatto and Windus, 2002) 15. Cited in John Snape, ‘David Hume: Philosophical Historian of Tax Law’, in Peter Harris and Dominic De Cogan (eds), *Studies in the History of Tax Law*, Vol. 7 (Oxford: Hart Publishing, 2015) 421–464, 460.

result of the translation process'.⁴⁰ Translation, on this view, is a species of Creation by which the original is enlarged, and it is a species of co-Production through which an expert, critical reader brings forward something new (and sometimes improved) out of the original published work.

For James Boyd White, participation in the Production of something new from the past, in something like the manner of Emerson's creative reader, is an art of translation. In his book *Justice as Translation*, he identifies translation as the central work of an excellent judge when called upon to respond to new cases using the precedents of the past:

Authority . . . lies in a kind of respectful interaction between mind and material, past and present, in which each has its proper contribution to make: not simply in the tradition, then, but in the tradition as it is reconstituted in the present text.⁴¹

White adds that the participatory process of translation is central to the lawyer's craft:

The art of the lawyer, like that of the judge, is to put together the prior texts that are the material of law in new compositions, which, while respecting the nature of each item, so order them as to create a new arrangement with a meaning of its own.⁴²

In the two preceding quotations, White uses the words 'respectful' and 'respecting' respectively. Respect is the key. Like any rhetorical craft, translation must respect the original materials, respect the community to whom it is communicated, and self-reflexively respect the craft of translation.

Public Participation in Judicial Production

This section brings in another important element in the judicial tradition, and one with powerful implications for the 'court of popular opinion'. It is the idea that the public good is the sovereign consideration underlying the authority of the legislature and that the commonwealth of the people is the prime purpose to which the common law ought to be directed. What Cicero made the motto of judges in Republican Rome must apply as well to judges in all civilized systems of law: *salus populi suprema lex esto* ('the safety of the people shall be their highest law').⁴³ Writing in relation to legislation, Thomas Hobbes asserts that:

⁴⁰ Susan Bassnett, *Translation Studies*, 3rd ed. (London: Taylor & Francis, 2002) 38.

⁴¹ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) 172.

⁴² *Ibid.*, 214.

⁴³ Cicero, *De Legibus*, §3.3.8, Clinton W. Keyes (trans.), *Cicero On the Republic: On the Laws*, Loeb Classical Library 213 (Cambridge, MA: Harvard University Press, 1928) 466–467.

The Legislator in all Common-wealths, is only the Sovereign, be he one Man, as in a Monarchy, or one Assembly of men, as in a Democracy or Aristocracy. For the Legislator, is he that maketh the Law.⁴⁴

He then identifies an important additional prerequisite for the legitimacy of laws – that the laws as published ought to be demonstrably derived from an authoritative source:

Nor is it enough the Law be written, and published; but also that there be manifest signs, that it proceedeth from the will of the Sovereign . . . There is therefore requisite, not only a Declaration of the Law, but also sufficient signes of the Author, and Authority.⁴⁵

Hobbes' demand for 'manifest signs' is a call for the legitimacy of law-making to be publicly performed, not only at the point of publication as if Production of law was the entire process of law-making, but also performed in such a way that the entire process of law-making will be manifest as an integrated practice progressing from Invention to Creation to Production. The sovereign will is the notional source or fountainhead of legislative law in every nation, so what Hobbes is saying here is that the integrity of law requires that the law as published must be demonstrably and directly the product of sovereign will. He was speaking to a different time and constitutional situation to ours, but the principle still holds good. To use the fluvial metaphor, we can say that when the law flows out to the wide public sea, it must be seen to derive in an unbroken stream from the sovereign source. In Rudyard Kipling's poem 'The Reeds of Runnymede' (about the signing of Magna Carta at Runnymede on the river Thames in 1215), the river Thames is his symbol of a sovereign will that is of prince and people without being tyrannical or populist:

And still when mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!

As the river runs to the sea and the sea supplies rain clouds to the river's source, so the sovereign will of the people – represented in such communal concepts as the 'commonwealth' and the 'common law' – courses through a circle of authorship and accountability in law-making. Or, to use the horticultural metaphor, we can say that the law produced to market must be grown

⁴⁴ Thomas Hobbes, *Leviathan* (London: for Andrew Crooke, 1651) (reprint, Oxford: Clarendon press, 1909), chapter 26, §1.

⁴⁵ *Ibid.*, chapter 26, §141.

untainted and unmixed from the sovereign seed. This amounts to a demand for sincerity, for the etymology of ‘sincerity’ denotes integrity between seed, growth, and crop.⁴⁶ It also amounts to a demand for a manifest process that brings with it a considered pace in making decisions. Plants do not grow instantly from seed to crop and neither do waters run in a single moment to the sea from their mountain spring.

Creativity was a large theme for German legal philosopher Josef Kohler. One of his essays, published in 1887, is entitled ‘The Creative Force of Jurisprudence’ (*Die schöpferische Kraft der Jurisprudenz*). Another is ‘On the Task of Jurisprudence in Industrial Law’ (*Über die Aufgabe der Jurisprudenz im Industrierecht*), where he writes eloquently, even poetically, about the Production of law by analogy to cycles of natural and industrial growth:

The strongest tree needs its period of growth, and industrial law also needs its time. Every right is sterile so long as it has not been absorbed by the circles of production; Law builds its place in the feeling of productive trade.⁴⁷

How perceptive it is to say that law ‘needs its time’. The same is true of justice and human judgment. Invention can occur in an instant – like a lightning flash sparked from the hand of God – but Creation takes time. Failure to appreciate the necessary factor of time is frequently a feature of popular impatience with the pace of parliamentary and judicial reaction to social change.

Nowadays we take it for granted that the public gives legitimacy to legislation, not only as co-Productive receiver of published law, but also in so far as public consent is implied at the point of the law’s origin as a condition of the social contract by which governmental authority is legitimated. In short, the people are understood to be the ultimate source of sovereignty in a democratic state. Which, of course, is the etymological meaning of the word ‘*demos*-cracy’. Josef Kohler argued that the will of the law-maker must be considered sociologically as being itself a construct of the culture in which the law-maker lives:

[R]ules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become.⁴⁸

⁴⁶ Calvert Watkins posits that ‘sincerity’ derives from the horticultural sense ‘of one growth’ from the Proto-Indo-European root **sem-* ‘one’ (as in ‘same’) and the Proto-Indo-European root **ker-* ‘to grow’ (as in the Latin *crescere* ‘to grow’). Calvert Watkins, *The American Heritage Dictionary of Indo-European Roots*, 2nd ed. (Boston: Houghton Mifflin Co., 2000).

⁴⁷ Josef Kohler, ‘Über die Aufgabe der Jurisprudenz im Industrierecht’ (1887) 71(3) *Archiv für die civilistische Praxis*, 408–413, 409. [‘Der kräftigste Baum braucht seine Periode des Wachstums . . .’, etc.].

⁴⁸ Josef Kohler, *Lehrbuch des bürgerlichen Rechts* (Berlin: Verlag, 1904) I.III, §38, 124 [‘Gesetze sind nicht auszulegen nach dem Denken und Willen’, etc.].

Even in a monarchy it is the people, not the princes, that are supposed to embody the sovereign will, and it is the implied consent or inferred well-being of the people that is understood to put the 'common' in 'commonwealth' and in 'common law' so as to turn the law from a set of rules into a legitimate scheme for the maintenance of social welfare. The monarch, as chief of the tribe, is not the whole body of national sovereignty but merely its symbolic head. The animating spirit of the whole body politic – the urge that drives the entire dramatic play of state – is the sovereign will of the people. An old maxim of English law recorded in Henry de Bracton's *De Legibus et Consuetudinibus Angliae* (c. 1235) asserts '*lex facit regem*' – 'law makes the king'.⁴⁹ The early modern legal antiquarian John Selden doubtless had the maxim in mind when he wrote that 'KING is a thing Men have made for their own Sakes'.⁵⁰ As law makes the monarch, so law is made by the people or by the interests of the people (the safety of the people being the highest law – *salus populi suprema lex esto*). There is even a sense in which the legitimacy of a new monarch depends directly upon popular consent, a fact that is recognized in the collective acclamation (the *collaudatio*) 'God save the Queen/King!' which is proclaimed three times in the coronation ceremony of the British monarch. Every time the British national anthem is sung, its first three lines ('God save our gracious King! / Long live our noble King! / God save the King!') perform an echo of the threefold *collaudatio* and serve to confirm the people's coronation consent. The monarch is of course made by birth and by blood, but this is merely to say that the monarch is made in the Inventive sense that he or she 'comes into' the crown. The monarch is not fully made until the accession and coronation ceremonials (complete with the *collaudatio* consent of the Commons and the clergy) confirm the making of the monarch in the developmental or Creative sense and the making of the monarch in the publicized or Productive sense. Blood 'Invents' the monarch, but the consent of the Commons 'Creates' and 'Produces' the monarch. The *collaudatio* is an element in the Creative process and also serves to perform the Production of the monarch to public scrutiny and approval. Thus, by the light of the three Etymologies of Making, we can elucidate the seemingly paradoxical fact that a monarch is made by inheritance but not made until coronation.

A. W. Dicey, the respected historian and theorist of UK constitutional law, once observed that '[l]aw and opinion are . . . so intermixed that it is difficult to say whether opinion has done most to produce legislation or laws to create a

⁴⁹ 'Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem', Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (c. 1235), Samuel E. Thorne (trans.), 4 vols (Cambridge, MA: Belknap Press, 1968-1977) 2:33, cited in Paul Raffield, 'Representing the Body of Law in Early Modern England', in Sidia Fiorato and John Drakakis (eds), *Performing the Renaissance Body: Essays on Drama, Law, and Representation* (Berlin and Boston: De Gruyter, 2016) 135-144, 140.

⁵⁰ John Selden, *The Table-Talk of John Selden* (1689) (Cambridge: Cambridge University Press, 2015) 97.

state of legislative opinion'.⁵¹ Dicey was talking about nineteenth-century reforming legislation on the status of married women in England. Gravitating to the same quotation from Dicey, Gary Slapper notes that '[i]n calculating why the population in the UK has become less racist and sexist since the 1960s, one factor clearly of some relevance and weight is the fact that such discrimination was declared unlawful in many circumstances by Parliament'.⁵² Slapper's theory is supported by Dicey's opinion that:

Laws foster or create law-making opinion . . . Every law or rule of conduct must, whether its author perceives the fact or not, lay down or rest upon some general principle, and must therefore, if it succeeds in attaining its end, commend this principle to public attention.⁵³

Dicey adds as an extremely important further observation that public acceptance of particular legislative provisions is not necessary for the legislature to succeed in implementing its original statutory intention. It will suffice for the success of the law-making project that the legislature generates in the public a sentiment of participation in the Production of the law. Indeed, it is surely more desirable that the legislation should be successful because the process has broad social acceptance than that it should be successful in a technical sense. In relation to this, Dicey writes expressly of the 'production' of popular affirmation:

Nor is the success of a law necessary for the production of this effect. A principle derives prestige from its mere recognition by Parliament . . . The true importance, indeed, of laws lies far less in their direct result than in their effect upon the sentiment or convictions of the public.⁵⁴

This is an admission, or acknowledgement, that Parliament is concerned with pure performance. Like the judicial law-maker, the parliamentary law-maker is not so much determined that justice should be done as concerned that justice should be seen to be done. To illustrate this phenomenon, Dicey cites the example of the Reform Act 1832 (which, while still limited to males, and to only one in five adult males, greatly expanded the range and social status of eligible voters):

[T]he transcendent importance of the Act lay in its effect upon public opinion. Reform thus regarded was revolution. It altered the way in which people

⁵¹ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905; 2nd ed. 1914), Richard Van de Wetering (ed.) (Carmel, IN: Liberty Fund, 2007), 44.

⁵² Gary Slapper, *How the Law Works*, 3rd ed. (London: Routledge, 2014) 17.

⁵³ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905; 2nd ed. 1914), Richard Van de Wetering (ed.) (Carmel, IN: Liberty Fund, 2007), 30–31.

⁵⁴ *Ibid.*, 31.

thought of the constitution, and taught Englishmen, once and for all, that venerable institutions which custom had made unchangeable could easily, and without the use of violence, be changed.⁵⁵

A more recent illustration of the phenomenon is the radical reform enacted by the New Zealand Parliament when it legislated to recognize the legal personality of the Whanganui River.⁵⁶ Just as the Reform Act 1832 struck a previously inconceivable blow for parliamentary representation of the people (and opened the way for universal suffrage), the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 struck a revolutionary blow for the parliamentary representation of First Nations people and for the natural environment as they relate to it. As with the 1832 Act, the importance of the 2017 Act arguably resides more in its performed response to public opinion and its potential to reform public opinion than in any technical effects of its provisions in practice.

In her book *The Mind of the Maker*, Dorothy L. Sayers acknowledges the people to be the ultimate source of sovereignty where she writes that ‘opinion is the authority’:

An arbitrary law unsupported by a consensus of opinion will not be properly enforced and will in the end fall into disrepute and have to be rescinded or altered. This happened to the Prohibition Laws in America.⁵⁷

America should have seen it coming. After all, the opening three words of the US Constitution are ‘We the people’, for it is expressly of the essence of a non-monarchical republic that it is *re publica* – a thing of the people.⁵⁸ In a modern constitutional monarchy the principle is the same, albeit performed through different symbols. In the USA, the chief is the president, in the UK it is the monarch. It might fairly be said that in practice the USA and many other republics founded in the eighteenth and nineteenth centuries are a good deal more monarchical than the UK, for younger republics are still at the stage in which the symbolic head wields real executive power. In the UK, the power of the monarch is the pure power of symbolic performance rather than the executive power of a democratically elected official. This is not to deny the significance of purely symbolic power. As Prince Philip said in 1977, the year

⁵⁵ *Ibid.*, 32.

⁵⁶ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Cristy Clark et al., ‘Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance’ (2018) 45 *Ecology Law Quarterly* 787–844. In 2017, the decision was approved by the High Court of Uttarakhand in an attempt to grant legal rights to the rivers Ganges and Yamuna, but that decision was overturned by the Supreme Court of India.

⁵⁷ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) 5.

⁵⁸ The will of the people was a refrain throughout Joe Biden’s inaugural speech as US president (20 January 2021), which included the richly rhetorical line: ‘The will of the people has been heard and the will of the people has been heeded.’

of Queen Elizabeth II's Silver Jubilee: 'People still respond more easily to symbolism than to reason', adding, '[t]he idea of chieftainship in its representative rather than its governing function is still just as clearly and even instinctively understood'.⁵⁹ Whereas the UK has stripped all real governmental power from its prince, modern republics elevate their presidents to princely status and endow them with all the mystique and magic of royalty, with this crucial limitation – that their power is temporary and does not descend to the incumbent's blood relations. The USA has monarchs for the day. Chapter 4 of this book began with President Joe Biden's Inaugural Address, in which he called upon the people to 'reject a culture in which facts themselves are manipulated and even manufactured'. The irony is that the first and founding fact that the people make when they make their electoral choice at the ballot box is nothing other than the artefact of their chief.

The Co-Productive Influence of the Mob: Going with the Flow

We will conclude this chapter on populism and introduce the next chapter on 'fake news' with some thoughts on mob dynamics in mass movements and their implications for mass media. The word 'mob' is an abbreviation of the Latin *mobile vulgus*, which translates as the moveable mass of common people. The authors of the chapter 'Persuasion and Ballot Propositions' have this sense of the moveable mob in mind where they write that, 'when it comes to ballot propositions, voter opinions are like balloons in the wind, easily blown about'.⁶⁰ The first appearance of the Latin phrase *mobile vulgus* in an English text was in 1602 when the recusant Roman Catholic priest William Watson, an advocate of secular priests and in that matter an opponent of the Jesuits, referred to the '*mobile vulgus in England*'.⁶¹ The fickleness of the populace and fear of the mob was a pervading theme in the period surrounding the death of Queen Elizabeth I in 1603. Indeed, the same William Watson was executed that year for plotting to kidnap the new Protestant king of England, James I. Further plots followed, culminating in the Jesuits' infamous 'Gunpowder Plot' to assassinate the king in Parliament in 1605. Around 1607, against this backdrop of priestly plotting and the ever present fear of rumour and revolt, Shakespeare expressed the fickleness of the common populace poetically in Octavius' powerful metaphor of a 'flag' (an iris or other rootless water plant) that sways and eventually decays in the motion of a river:

⁵⁹ Obituary of HRH Prince Philip, the Duke of Edinburgh, *The Telegraph* (9 April 2021).

⁶⁰ Shaun Bowler and Stephen P. Nicholson, 'Persuasion and Ballot Propositions', in Elizabeth Suhay, Bernard Grofman, and Alexander H. Trechsel (eds) *The Oxford Handbook of Electoral Persuasion* (Oxford: Oxford University Press, 2020) 885–903, 888.

⁶¹ *A Decacordon of Ten Quodlibeticall Questions Concerning Religion and State* (1602) (London: imprinted by Richard Field, 1602) 105.

... This common body,
 Like a vagabond flag upon the stream,
 Goes to and back, lackeying the varying tide,
 To rot itself with motion.

(*Antony and Cleopatra*, 1.4.44–47)

What a striking image this is for the recently coined idea of the *mobile vulgus* as a rootless, moving mass. The movement of the river sways, dislodges, sways, carries, sways, corrupts, and eventually, we can suppose, swirls the broken stems into a stagnant side-water where they spin among themselves. Movement moves the mass, but, crucially, movement also makes the mass. Anyone who has ever watched vegetation floating on a river will attest to the dynamic by which the activity of going with the flow gathers the detritus together into a new mass – Shakespeare’s ‘common body’ – matted together by the motion of the flow. The orator who wishes to manipulate the people must likewise both make and move. As Walter Dill Scott wrote in his 1907 study *The Psychology of Public Speaking*: ‘The orator who is able to weld his audience into a homogeneous crowd has already won his hardest fight. *The difficult task is not to convince and sway the crowd, but to create it*.’⁶² President Donald Trump showed himself adept at creating a crowd in the form of the ‘Make America Great Again’ movement (and through reciprocal co-Production it is also true that the crowd made him after the model of Bourdieu’s ‘group made man’),⁶³ but he learned to his shame and to the cost of civil peace that a crowd once created is easily moved but much less easily steered. On 6 January 2021, Donald Trump’s supporters violently stormed the US Capitol Building in an attempt to thwart the Senate’s confirmation of Joe Biden’s election as US president. Writing in *The Atlantic*, Joan Donovan echoed Shakespeare’s aquatic analogy for the mob, when she observed that ‘[t]he moment at which the “Make America great again” movement became completely unmoored from the democratic process arrived at around 1 p.m. on January 6’.⁶⁴

Gustave Le Bon’s 1895 treatise *Psychologie des Foules* was extremely significant in establishing crowd psychology as a subject of scholarly inquiry.⁶⁵ It has been called ‘one of the best-selling scientific books in history’,⁶⁶ and ‘[p]erhaps

⁶² Walter Dill Scott, *The Psychology of Public Speaking* (New York: Hinds, Hayden, Eldredge 1907) 179, emphasis in original.

⁶³ See Erec Smith, ‘Habitat for Inhumanity: How Trolls Set the Stage for @realDonaldTrump’, in Michele Lockhart (ed.) *President Donald Trump and His Political Discourse: Ramifications of Rhetoric via Twitter* (Abingdon: Routledge, 2019) 131–145, quoting Pierre Bourdieu, *Language and Symbolic Power* (1982) (Cambridge, MA: Harvard University Press, 1999).

⁶⁴ Joan Donovan, ‘MAGA Is an Extreme Aberration’, *The Atlantic*, 15 January 2021.

⁶⁵ First published in English as *The Crowd: A Study of the Popular Mind* (New York: The Macmillan Company, 1896).

⁶⁶ Robert A. Nye, *The Origins of Crowd Psychology: Gustave Le Bon and the Crisis of Mass Democracy in the Third Republic* (London: Sage, 1975) 3.

the most influential book ever written in social psychology'.⁶⁷ It is not without its detractors, and it has not always been an influence for the good. It is thought, for instance, that Hitler's techniques of propaganda and performance oratory were inspired in part by Le Bon's theories.⁶⁸ Le Bon's key analogy for explaining crowd psychology was his idea that an individual is mesmerized through immersion in a crowd and will go with the (magnetic) flow. He endeavoured to provide a scientific account for the observed phenomenon of the mass mind:

The most careful observations seem to prove that an individual immersed for some length of time in a crowd in action soon finds himself – either in consequence of the magnetic influence given out by the crowd, or from some other cause of which we are ignorant – in a special state, which much resembles the state of fascination in which the hypnotised individual finds himself in the hands of the hypnotiser.⁶⁹

When Adolf Hitler observed the same phenomenon of the mass mind, he resorted to spiritual and mystical explanations, including notions of 'enthusiasm' and 'magic influence' by which the crowd is 'swept away'.⁷⁰ What their preferred analogies have in common – Le Bon's scientific and Hitler's mystical (and, for that matter, Shakespeare's metaphor of the floating iris) – is the sense of going with the flow that is inherent in the idea of 'influence'. It is sobering to think that for today's social media demagogue – the online 'influencer' – the flow of the mob has become their very badge.

The ground had been laid for Le Bon's thinking by the theories of earlier political theorists, not least John Stuart Mill. Writing in the mid-nineteenth century, Mill had warned that democracy might produce a 'tyranny of the majority', observing that:

At present individuals are lost in the crowd. The only power deserving the name is that of masses, and of governments while they make themselves the organ of the tendencies and instincts of masses.⁷¹

When Le Bon observed that it is 'terrible at times to think of the power that strong conviction combined with extreme narrowness of mind gives a man possessing prestige',⁷² he doubtless had in mind the examples of tyrants,

⁶⁷ Christian Borch, *The Politics of Crowds: An Alternative History of Sociology* (Cambridge: Cambridge University Press, 2012) 34; see also, Richard Butsch, *The Citizen Audience: Crowds, Publics, and Individuals* (London: Routledge, 2008).

⁶⁸ Alfred Stein, 'Adolf Hitler und Gustave Le Bon: Meister der Massenbewegung und sein Lehrer' (1955) 6 *Geschichte in Wissenschaft und Unterricht* 362–368, 366.

⁶⁹ Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (New York: The Macmillan Company, 1896) 11.

⁷⁰ Adolf Hitler, *Mein Kampf* (1925), Ralph Mannheim (trans.) (London: Pimlico, 1992) 435.

⁷¹ John Stuart Mill, *On Liberty* (1859), Ronald B. McCallum (ed.) (Oxford: Basil Blackwell, 1948) 58.

⁷² Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (New York: The Macmillan Company, 1896) 242.

despots, and demagogues throughout history and in his own time. He also anticipated the demagogues of the twentieth and twenty-first centuries. The protagonists vary from time to time, but the story never changes.

What is the relationship between ‘fake news’ and processes of creating and moving crowds? An answer suggests itself when we take seriously the fluvial metaphor that is the root of our word ‘influence’, and which pervades our language of ‘mainstream’ media, the ‘flow’ of news, internet ‘streaming’, and even the ‘current’ in ‘current affairs’. Le Bon understood crowd mentality by means of a fluvial metaphor. When the individual’s psychology is submerged in the mass mind (as opposed to being merely one among a ‘number of individuals finding themselves accidentally side by side’), it is submerged, he says, by some ‘influence’ of ‘certain predisposing causes’. Recalling Shakespeare’s image of the flowing stream which creates, carries, and corrupts the crowd, we can conceive of the mainstream media as the current or flow of news within which the popular mass of people is congregated and carried along. Baudrillard’s view was that information streaming from the media did not inform the masses, but that it merely ‘produces even more mass’.⁷³ Putting his own spin on Marshall McLuhan’s famous assertion that ‘the medium is the message’, Baudrillard writes that ‘[t]he mass and the media are one single process. Mass(age) is the message.’⁷⁴

What was Le Bon’s wisdom on the activity of crowds, and in what ways did Hitler apply similar thinking to his own propaganda and performative oratory? Christian Borch suggests a number of possibilities.⁷⁵ One is that ‘Le Bon pinned his faith neither on education nor on enlightenment’ but advised rather that ‘one should apply seductive measures and try to appeal affectively to the crowd through rhetorical techniques’.⁷⁶ Hitler believed similarly that effective political propaganda must be emotionally affective rather than intellectual and ought to be levelled as directly as possible at the mob (‘addressed always and exclusively to the masses’, and not to the ‘scientifically trained intelligentsia’).⁷⁷ Another rhetorical technique recommended by Le Bon was the device of *repetitio*. Hitler held that ‘all effective propaganda must be limited to a very few points and must harp on these in slogans until the last member of the public understands what you want him to understand by your slogan’.⁷⁸ He advised, as

⁷³ Jean Baudrillard, *In the Shadow of the Silent Majorities; or, The End of the Social, and Other Essays*, Paul Foss et al. (eds) (New York: Semiotext(e), 1983) 25. Quoted in Christian Borch, *The Politics of Crowds: An Alternative History of Sociology* (Cambridge: Cambridge University Press, 2012) 273.

⁷⁴ *Ibid.* 44. Quoted in *ibid.*, 274.

⁷⁵ Christian Borch, ‘Crowd Theory and the Management of Crowds: A Controversial Relationship’ (2013) 61(5–6) *Current Sociology* 584–601.

⁷⁶ *Ibid.*, 587.

⁷⁷ Adolf Hitler, *Mein Kampf* (1925), Ralph Mannheim (trans.) (London: Pimlico, 1992) 163.

Quoted in Christian Borch, ‘Crowd Theory and the Management of Crowds: A Controversial Relationship’ (2013) 61(5–6) *Current Sociology* 584–601, 590.

⁷⁸ *Ibid.*, 65, and see also 168. Quoted in *ibid.*

Borch summarizes it, that one 'should make blunt, simple statements and repeat them over and over again; this would gradually mould the mind of the crowd'.⁷⁹ According to this moulding metaphor, the mind of the crowd is made up by repeated impressions, as clay is moulded through the repetitive manipulative printing and pressing of fingers. Today such repeated pressing home of a single point or short slogan is a staple of modern news reporting that goes by the name of the 'sound bite'. It is also a staple of bite-sized social media platforms, of which Twitter is exemplary. So it was that Donald Trump's election slogan 'Make America Great Again' was able, through repetition in various media, to mould a mass in its own image. When that mass moved on the Capitol Building on 6 January 2021, it may be that Trump did not foresee that this would be the outcome of his manipulations, but his was undoubtedly the influence – the flow – which made and moved the mob.

⁷⁹ Christian Borch, 'Crowd Theory and the Management of Crowds: A Controversial Relationship' (2013) 61(5–6) *Current Sociology* 584–601, 588.

Faking News

They can make anything bad, because they are the fake, fake disgusting news.
Donald Trump¹

All news is fake news. By this I mean that all reports of current events are to some extent ‘made up’ by the time they are received by a mediated consumer distanced from the original source. Recall that ‘fake’, from the Latin *facere* (to make, to do), is a member of the family of making words that includes fact, factory, fashion, artificial, and face. Also in that family is the name of one of the main players in the realm of fake news: Facebook. One study found that in the final three months of the 2016 US presidential campaign, ‘the top-performing fake election news stories on Facebook generated more engagement than the top stories from major news outlets’.² With all these *facere* words in mind, it is ironic that the standard test for whether news is ‘fake’ is to subject it to ‘fact-checking’. Facts themselves are things – artefacts – that we make through artificial processes of Creation and Production. Any ‘fact’ deserving of the name is something established by some process involving human skill and judgment. What matters is not whether news or facts are made up – they always are – but how they are made up and what relation there is between the thing at source and the thing as made up for public reception. Public reception also plays its part in the broadcast of fake news. Whereas an electronic radio receiver is passive, the human receiver of a message ‘is an active *producer* of meanings’.³ We therefore need to think in terms of what I call ‘Receiver Responsibility’, from the case of the journalist who receives the factual grain of a promising story, to the editor who publishes journalists’ copy, to the online user who retweets a tweet.

The UK’s Digital, Culture, Media and Sport Committee concluded that the term ‘fake news’ is ‘bandied around with no clear idea of what it means’ and that it ‘has taken on a variety of meanings, including a description of any

¹ Trump rally, Wilkes-Barre, PA (2 August 2018).

² Craig Silverman, ‘This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook’, *BuzzFeed*, 16 November 2016.

³ Carl Gardner (ed.), *Media, Politics, and Culture: A Socialist View* (New York: Macmillan, 1979) 5, emphasis in original.

statement that is not liked or agreed with by the reader'.⁴ The committee recommended that the government should reject the phrase and instead adopt a 'definition of the words "misinformation" and "disinformation"'.⁵ The government agreed, and reported in its response that its latest practice is to define disinformation as 'the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain' and to define 'misinformation' as 'inadvertent sharing of false information'.⁶ This definitional distinction between the deliberate and the accidental might produce an improvement in discourse in relation to misleading news, but the word 'fake' – derived as it is from *facere* 'to make' – does at least have the merit of bringing to the fore the Making Sense that human agency is at work at every stage in which headlines are made. I have therefore chosen to retain the contentious term 'fake news' as a catch-all for processes of making news.⁷

Objections to the use of the phrase 'fake news' are also mindful of the fact that the phrase itself has been used as a method of faking. When 'fake news' was chosen as the 'word of the year' by the *Macquarie Dictionary* in 2016 and by both the *Collins English Dictionary* and the American Dialect Society in 2017, it was largely down to Donald Trump's use of the phrase to accuse the mainstream or established professional media of publishing falsehoods. The quotation from Donald Trump at the top of this chapter shows that the accusation 'fake news' can itself be 'fake news'. When Donald Trump objects to fake news, we often find that the news in question isn't objectively falsifiable but is simply news that he dislikes. Trump's technique is an example of a rhetorical strategy by which a person implies their own creditworthiness by calling out the falsehood of others. A similar phenomenon has been observed when politicians disparage rhetoric, even as they use it. Former BBC Director General Mark Thompson has cautioned that we should not 'make the mistake of confusing anti-rhetorical "truth-telling" with actually telling the truth':

One of the advantages of noisily rejecting any notion of rhetoric is that, once listeners are convinced you're not trying to deceive them in the manner of regular politicians, they may switch off the critical faculties they usually apply to political speech and forgive you any amount of exaggeration, contradiction or offensiveness.⁸

⁴ House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News'*, Interim Report: Fifth Report of Session 2017–2019 (HC 363) (24 July 2018) para. [14].

⁵ *Ibid.*

⁶ House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News'*, Final Report: Eighth Report of Session 2017–2019 (HC 1791) (18 February 2019) para. [3].

⁷ Hossein Derakhshan and Claire Wardle, 'Ban the Term "Fake News"', CNN, 27 November 2017.

⁸ Mark Thompson, 'From Trump to Brexit Rhetoric: How Today's Politicians Have Got Away with Words', *The Guardian*, 27 August 2016.

We are quite rightly suspicious of allegations of ‘fake news’, especially when levelled against professional news media, but there is also a danger in rejecting out-of-hand the possibility that mainstream news is ‘fake’. The danger is that the public, knowing full well that the business of the mainstream media is to Create and to Produce news, might see defensive resistance to accusations of ‘fake news’ as a denial of the role that professional media undoubtedly play in making news. It would be better to acknowledge that all news is made up, so that by attending diligently to the fabrication process the public might discern where the source (the seed) stops and media creativity starts. The danger, otherwise, is that a cynical public will reject the whole thing, and in the process throw out the grain of truth.

Media as Fakers

That all news is fake news does not mean that news should never be believed, but it does mean that we should be attentive to the ways in which, and the extent to which, the news as we receive it has been manipulated by human intervention, whether by accident or design. Respecting the difference between different Etymologies of Making (i.e. between Invention, Creation, and Production) will shine a light on the difference between creditworthy and uncreditworthy reports. Take the common case where there is a grain of truth at the source of a news story. If we consider this grain to be the seed of the news story, we can say that the reporter did not Invent the seed, except in so far as they made a choice in the very act of identifying the seed as a potential story. A news story in its seed form is essentially a found thing rather than a fabricated or faked thing. On the other hand, the stages that follow in bringing the story to public attention are active processes of making that generally afford the maker time to consider their own responsibility for the role they play in the making process. Those stages, which we normally refer to as ‘developing’ and ‘publishing’ the story, correspond respectively to the Etymologies of Making that I call ‘Creation’ and ‘Production’. We can quibble about the difference between making headlines and faking news, but the pejorative sense in which the word ‘fake’ is employed is a distraction from the point that even creditworthy news is to some extent made up. In her book *Making the News*, political scientist Amber E. Boydston acknowledges that the ‘news-generation process’ is a ‘craft’.⁹ A news reporter might not Invent the seed of the story, but they will always have a hand in cultivating it Creatively and Producing it to the public.

How often have we read a news story and thought to ourselves, ‘well, it might be true, but this outlet is *making* the most of it’? Sometimes a private or obscure event only becomes a matter of public concern through the very act of

⁹ Amber E. Boydston, *Making the News: Politics, the Media, and Agenda Setting* (Chicago: University of Chicago Press, 2013) 32.

its publication, so that the news outlet can in such a case be said to have made the story in terms of Creation and Production so far as its public impact is concerned. For example, it is not uncommon to read that some lout in a small town has desecrated or disrespected a war memorial. This is certainly liable to cause public outrage, but probably only a small section of the public would have been outraged if the press hadn't given the incident the oxygen of publicity. In quantitative terms, the activity of the press is the source of more public outrage than the activity of the offender. It is true that the news outlet didn't make the story out of nothing, but it did make the seed grow and it made a market for its product. This observation is not intended to advocate suppression or censorship of the press, but merely to highlight that the media are far from passive in the activity of news Production. The very word 'media' can misleadingly suggest that the press, television, and so forth are passive conduits, but it is more accurate to regard news as always being to some extent media-made. There are few spectacles more unedifying than the performed indignant outrage of a media outlet when, in the very act of reporting an antisocial occurrence (often with a view to titillating its own readership), it does more to spread the stench and smear than the original perpetrator would ever have achieved without the media's co-Productive assistance. The very best professional journalists can sometimes overlook the part that they play in generating stories. A fairly innocuous example appears from a BBC news comment made in response to a 2019 judgment of the UK Supreme Court. When the court held that the UK government had acted unlawfully in seeking to prorogue Parliament in the midst of the Brexit dispute,¹⁰ the BBC's assistant political editor, Norman Smith, announced that '[t]he chorus of voices calling for Boris Johnson to quit will now grow louder'.¹¹ The rhetorical apostrophe to the 'chorus of voices', as if they were 'out there' somewhere, distracts us from the fact that the reporter's own voice is one of the loudest and most influential in raising the possibility of the prime minister's resignation. Mr Smith wasn't reporting news; he was making it. In predicting events and passing judgment, he was acting as a co-Producer of the news of Mr Johnson's possible resignation.

On the subject of journalists being complicit in making news, a pronounced problem in the age of online news reporting is journalists and their editors resorting to lazy 'clickbait' headlines to draw readers in. The phenomenon is partly attributable to the fact that the news flow on social media has increased commercial competition in an already highly competitive online market for reader attention.¹² A glaring example of this clickbait phenomenon can be

¹⁰ *R (on the application of Miller) v The Prime Minister and Cherry and Others v Advocate General for Scotland* [2019] UKSC 41.

¹¹ Norman Smith, 'Opposition Furious as Defiant PM Demands Election', *BBC News*, 24 September 2019.

¹² For an analysis of the effects of commercial pressure on US journalism, see Victor Pickard, 'Media Failures in the Age of Trump' (2016) 4(2) *The Political Economy of Communication* 118–122.

found in the sports section of the *Liverpool Echo*, a local newspaper in the UK that has been subsumed within a media group that now controls more than 200 regional newspapers with a significant online presence. My suspicion was aroused when I read the headline ‘Liverpool Manager Jurgen Klopp Has No Sympathy for Departing Manchester United Boss Jose Mourinho’.¹³ It struck me as being inconsistent with Mr Klopp’s famously fair treatment of sporting opponents. True enough, the main body of the article contained the line: ‘Asked if he had sympathy for the ex-United boss, Klopp said: “100% . . .”’. The headline baited with the promise of zero sympathy, but in the bite the substance revealed 100 per cent sympathy. When professional journalism stoops to such blatant window dressing to sell its wares, what hope is there that members of the public using social media will put forward an accurate picture of current affairs?

Among the British tabloid ‘red tops’ few offenders are more infamous for producing dubious headlines than *The Sun*, and no instance is more notorious than the appalling lies it published in the aftermath of the 1989 tragedy at the Hillsborough football stadium in Sheffield, England, which caused the deaths of ninety-seven fans of Liverpool Football Club. The deaths were caused by the failings of officials responsible for crowd management, but a few days after the tragedy *The Sun*, under the editorship of Kelvin MacKenzie, carried the bold front-page headline ‘The Truth’. The headline was followed by the following bullet points: ‘Some fans picked pockets of victims’, ‘Some fans urinated on the brave cops’, and ‘Some fans beat up PC giving kiss of life’.¹⁴ Each of those statements was an unsubstantiated lie, which *The Sun* eventually retracted on its front page in 2012 (twenty-three years after the tragedy). On 26 April 2016, an inquest confirmed that the fans who died had been unlawfully killed and that no misbehaviour by the fans had contributed to their deaths. The day after that inquest there was no mention of the jury’s verdict on the front page of *The Sun*. *The Sun*’s more respectable sister paper, *The Times*, which was guilty of the same omission, was shamed into correcting the error in its second edition. The sheer sensationalism of the original headline would have made it seductive to the minds of many who, having not been there in person, were ignorant of the very different reality of that tragic event. And this is the nub of the problem. Remote consumers of news weren’t there when it happened, if indeed ‘it’ happened at all. Remote consumers see the current of affairs when it happens to flow past them but are seldom present at the source. Accordingly, our responsibility as members of the mass to which mass media market their wares is to stand against the flow of false news; to dam damn lies. If *The Sun* had published its original Hillsborough headline in the internet age, we must

¹³ James Pearce, ‘Liverpool Manager Jurgen Klopp Has No Sympathy for Departing Manchester United Boss Jose Mourinho’, *Liverpool Echo*, 18 December 2018.

¹⁴ ‘The Truth’, *The Sun*, 19 April 1989.

hope that the jury of the public, including eyewitnesses, would have countered the dishonest news with its own true account of that terrible event.

In 2018, the presenter of a BBC radio show observed in a general way that the British newspaper readership has become desensitized to the sensationalism of its tabloid press, saying, 'I suspect that most of us are not too alarmed by this manner of adding dramatic lustre to routine news stories. It's what the tabloids do . . . get over it!', but he wonders if this complacency might 'be a little bit more dangerous when such dramatization is applied to political stories and political information; and, when we live in an era when such representations receive hugely increased audiences via all those various digital platforms?'¹⁵

Law-makers in Germany, ever mindful that the Holocaust (Shoah) was fuelled by political propaganda, have contemplated the possible criminalization of fake news.¹⁶ Something must be done, of course, but how is criminalization to be achieved without making judges the arbiters of the difference between the illegitimate 'fake' and the legitimate 'fact'? In a liberal democracy, that judgment ought ideally to be left to individual readers or consumers of news. If the aim is to prevent a nation state from turning totalitarian, it must surely be counterproductive to concentrate enlarged powers of censorship in official hands. A related problem is the need for an objective assay of the difference between 'fake' and 'fact'. Computer science researchers in the UK have observed that '[r]egulatory or other mechanisms that might be introduced to disrupt, interdict or remove "fake news" from social media will confront serious challenges in robustly identifying what is or is not "fake news"'.¹⁷ Those researchers identify 'fake news' as a serious threat to consensus building on political issues, but that merely pushes the question back to asking, 'whose consensus, and what type of consensus?'. There are many worthwhile political aims (preventing totalitarianism being chief among them), the pursuit of which requires that certain forms of consensus should be broken down rather than built up.

The Public as Fakers: Receiver Responsibility

Alongside journalists and other members of the professional news media, the public must take some responsibility for making false news through propagation. It is significant that the Dictionary.com 'word of the year' for 2018 was 'misinformation' – a synonym for a species of fake news – and its 'word of the year' in 2017 had been 'complicit'. We are all complicit in misinformation whenever we propagate it or act upon it. It is a mistake to suppose that a story

¹⁵ Laurie Taylor, 'Post-truth', *Thinking Allowed*, BBC Radio 4, 19 September 2018, 20'40.

¹⁶ 'Is Criminalizing Fake News the Way Forward?', *Deutsche Welle*, 14 December 2016.

¹⁷ Carlo Kopp et al., 'Written Evidence to the Inquiry on Disinformation and "Fake News"', Digital, Culture, Media and Sport Committee, House of Commons (12 Dec 2018).

is only made by the original author. It is remade every time it is shared, for the act of passing on the story to others contributes to the Creation of the story in the etymological sense of *in-creasing* its influence and impact. Sharing a story also contributes to making the story by Producing it to a new audience. It follows that the consumer of ‘fake news’ becomes a co-Creator and co-Producer of falsehood whenever they pass it on, for example by retweeting it or even by the simple act of ‘liking’ a social media news report. It would be regrettable enough that this should occur when the consumer personally believes the falsehood, but journalism scholar Alfred Hermida notes that ‘[e]ven if some don’t quite believe it, they will share an article with the aim of entertaining, exciting or enraging friends and acquaintances’.¹⁸ Neither can we rule out the possibility of the innocent and mistaken propagation of false news. Not everyone has the time and skill to check the available evidence behind a news story. A BBC news feature about the spread of stories about false Covid-19 cures contained the following conversation between the reporter, Sima Kotecha, and her mother:

SIMA KOTECHA: This video you’ve sent me mum, where’s it come from?
 MOTHER: Someone called Chetna Ben sent me this video.
 SIMA KOTECHA: You don’t believe it do you?
 MOTHER: No, I don’t believe it.¹⁹

Such conversations are no doubt very common. They suggest that online sharing is sometimes a banal, almost automatic action; one that isn’t calculated to harm but is employed merely as a convenient vehicle for maintaining contact with friends and family.

To err is human. Even well-intentioned experts sometimes make mistakes. For all my best efforts to check my sources, there will no doubt be a word or two out of place among the many thousands of words in this book. An example of an innocent error appears, with some irony, in a recent piece on fake news written for an Oxford University Press publication. The academic author mistakenly claims that ‘fake news’ was the OED’s ‘word of the year’ for 2016, whereas it was actually ‘post-truth’. An understandable slip, but the weeds of fake news can grow from misplaced seeds.

Much more alarming than the commission of an innocent error is the possibility that the propagator of fake news knows that the story is fake and simply doesn’t care. One of the problems with fake news in political contexts is that ‘politicians no longer care about telling the truth, but only about the “optics” – how a given situation will play out in the media and the likely

¹⁸ Alfred Hermida, ‘Trump and the Triumph of Affective News When Everyone Is the Media’, in Darren Lilleker et al. (eds) *US Election Analysis 2016: Media, Voters and the Campaign Early Reflections from Leading Academics*. (Bournemouth: Centre for the Study of Journalism, Culture and Community, Bournemouth University, 2016) 76.

¹⁹ ‘Fake Covid Videos “Will Cost Lives”’, BBC, 10 February 2021.

“narrative” that will be constructed around it’;²⁰ and also that the public – the ones responsible for construing the optics and constructing the narrative out of politicians’ words – don’t care either. Dorothy L. Sayers identified this aspect of the problem as long ago as 1941 in her study *The Mind of the Maker*, when she observed that ‘[t]he Press and the Law are in this condition because the public do not care whether they are being told truth or not’.²¹ Politicians must take their share of the blame for promoting and exploiting this truth-casual behaviour. A blatant example of ‘the ends justify the means’ reasoning occurred in November 2017 when President Trump retweeted videos purporting to show violent behaviour by Muslims. The videos had originally been tweeted by an officer of Britain First, an extreme right-wing organization. When reporters challenged President Trump’s then press secretary, Sarah Huckabee Sanders, regarding the veracity of the videos, she replied: ‘Whether it’s a real video, the threat is real’, adding that Trump’s ‘goal is to promote strong border security and strong national security . . . the need for national security and military spending – those are very real things, there’s nothing fake about that’. She could hardly have relied more blatantly on the fallacy that real ends justify phoney means.²²

Politicians as Fakers

Before we turn to consider politicians as fakers, we should recall the point made in earlier chapters that the very essence of statecraft is to fabricate the idea of the nation state, to build political consensus, and to make social peace. Rhetorically constituted democracies have always been deeply reliant on the Making Sense, and this has often entailed the recognition of ideals that do not – or do not yet – correspond to present empirical reality. No modern nation state has been more consciously, deliberately, and artificially created through rhetorical performance than the United States of America, and at the heart of the performance is a call to accept the show and to suspend disbelief. Consider that the US Declaration of Independence was declared, as its opening paragraph says, out of ‘decent respect to the opinions of mankind’; in other words, to appeal to the judgment of an audience of critical public spectators. The second paragraph begins with those famous words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

²⁰ Martin Hirst, ‘Towards a Political Economy of Fake News’ (2017) 5(2) *The Political Economy of Communication* 82–94, 87; referring to James Ball, *Post Truth: How Bullshit Is Conquering the World* (London: Biteback Publishing, 2017).

²¹ Dorothy L. Sayers, *The Mind of the Maker* (London: Methuen & Co Ltd, 1941) xvi.

²² Emily Shugerman, ‘White House Defends Trump and Says It Doesn’t Matter if Video He Retweeted Was Fake: “The Threat is Real”’, *The Independent*, 29 November 2017.

The transcendental truth that human beings are equal in the eyes of God is not, and never has been, in any proper sense ‘self-evident’ to human eyes as they have looked over the state of their societies. What we actually see is a great deal of inequality in the starting points from which citizens commence their social existence. Human equality is not at all evident in practice, but on a closer reading we find that the framers of the Declaration didn’t say that it was. What they said was, ‘we *hold* these truths to be self-evident’ (emphasis added). They admit to a sort of manual handling of the truth – an activity that sometimes goes by the name of manipulation or manufacture. In other words, the framers of the Declaration expressed their commitment to maintaining as true a fact that is inconsistent with the preponderance of available evidence. Evidence of social, racial, and sexual equality is scarce enough today in a United States which, at the time of writing, has had just one Black (and not one female) president. Evidence was even harder to come by in the days when a group of white men (many slave-owners among them) first framed the Declaration of Independence. The Declaration was never intended to report the state of things then present, but to utter words with the rhetorical power to bring an ideal state into being. As a matter of logic, the framers were committing the mistake of turning an ‘ought’ into an ‘is’. As a matter of rhetorical performance, there was no mistake at all. It was a solemnly and dramatically performed commitment to realize a hoped-for future. I will not say that the Declaration of Independence was fake news, but neither was it reporting the evident state of the nation or the people within it. It was an aspirational document that stated and performed a set of political ends and left until another day the identification and the perfection of the means to achieve those ends.

Pretending comes in many forms, and by no means all of them are morally bad. The Declaration of Independence was a pretence in the etymological sense of idealistically reaching forward (*pre-tenere*) to achieve something (social justice) that in practice is always just out of reach. Other species of pretension are not so idealistic, and among these we can include the behaviour of putting forward a front designed to distract the viewer from the substance behind the show. During his term as president, Donald Trump was deeply committed to this type of pretension. That commitment was evidenced in the earliest days of his presidency when his aides responded to the publication of photographs of the crowds that attended his inauguration ceremony. The problem for Trump was that images of those crowds were published in the press alongside images of the much larger crowds that attended Barack Obama’s first inauguration. In response to this perceived threat to Trump’s prestige, the then White House press secretary, Sean Spicer, asserted in his first ever White House press conference that Trump had commanded ‘the largest audience to ever witness an inauguration, period, both in person and around the globe’ (21 January 2017). The main thrust of Spicer’s press conference was to berate the mainstream media for propagating fake news, and yet his

statement was itself a bold lie. Far from being the biggest ever, the crowd present in person on the National Mall for Trump's inauguration wasn't even the biggest that decade. Spicer's outlandish claim is one he subsequently confessed to being ashamed of.

The day after it was made, Spicer's assertion was put to Kellyanne Conway, counsellor to the president, in a 'Meet the Press' feature with *NBC News*.²³ In that television interview, she made the now notorious suggestion that Spicer had merely stated 'alternative facts'. The interviewer Chuck Todd interrupted her by saying: 'Wait a minute. Alternative facts? . . . Alternative facts are not facts. They're falsehoods.' One can see his point, but the absolutist language of true and false, while seductive, is not particularly helpful here. References to true and false are meaningless without express explanation of the basis on which true and false are distinguished. Not all 'alternative facts' are 'falsehoods', as we can clearly see from the widespread use in politics and elsewhere of different analyses of the same statistical data to establish widely diverging versions of factual reality. Instead of equating all alternate facts with falsehoods, it would have been more accurate if Chuck Todd had said that Sean Spicer's reading of the images of the inauguration crowds case was patently falsifiable, but journalists and presenters engaged in live, short-format media have neither the time nor the inclination to be accurate at the expense of impact, and even if they did, most members of the public wouldn't have the time or inclination to attend to it.

Kellyanne Conway's claim that Spicer had merely presented 'alternative facts' inadvertently reveals the reality that 'fact' and 'fake' involve closely related modes of making it up. The practical problem (which became a political problem) was simply that Sean Spicer's making process didn't make sense. It was too blatant a bluff and too easily falsifiable. Like badly applied make-up or botched cosmetic surgery, it ended up making its subject appear more grotesque than the original. The reason that Trump's public relations people went to such a patently falsifiable extent to manipulate public perceptions in this context is clear. For a populist, reality TV president, audience size (ratings) is the ultimate measure of success. Sean Spicer's use of the word 'audience' instead of 'crowd' was a small clue to the fact that political theatricality was dominating Spicer's – and by implication Trump's – mindset. (This theme was the focus of [Chapter 7](#), 'The Acting President'). The fabricating possibilities that reside in the close connection between fact and fake are a goldmine for a canny politician, but Trump's team of Spicer and Conway somehow managed to turn the goldmine into a minefield. Previous presidents have employed all the same tricks with impunity. Back in 2004, a reporter for the *New York Times* reported a conversation with a senior aide to President

²³ 'Kellyanne Conway: WH Spokesman Gave "Alternative Facts" on Inauguration Crowd', *Meet the Press*, NBC News, 22 January 2017.

George W. Bush in which the aide had boasted that politicians' capacity for creating news was superior to that of journalists:

We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.²⁴

There, in the language of 'actors' and their 'judicious' audiences, speaks the hubris of the public relations practitioner self-consciously putting on a show.

Spin: Press, Politicians, and PR

Public relations experts don't peddle lies; they peddle home-spun truths. As Richard Edelman, president and chief executive officer of the public relations company Edelman, puts it: 'there is no truth except the truth you create for yourself'.²⁵ Commenting on that quotation, Sheldon Rampton and John Stauber observe that '[w]hen there is no truth except what you create for yourself, lies become unnecessary, even irrelevant'.²⁶ Rampton and Stauber criticize the 'public relations worldview' that 'envision[s] truth as an infinitely malleable, spinnable thing . . . not a thing to be discovered but a thing to be created, through artful word choices and careful arrangement of appearances'.²⁷ It may disappoint Rampton and Stauber, but the practical reality is that social 'truths' are *not* discovered things. Unless one is talking about Divine or absolute truth, all truths are human made. (This is the main argument of [Chapter 4](#), 'The Truth Factory'.) The solution to the problem of deceit is not to deny that social truths are made up, but to demand higher standards in the processes by which truth and fact are manufactured. Indeed, what is required is a set of manufactory standards approximating as closely as possible to the rigorous standards of courts of law and even of scientific experiment, according to which a 'truth' only qualifies as such when it is potentially falsifiable and has been refined in the fiery crucible of expertly conducted trials and tests. The stakes are high. *The Sun's* reporting of the Hillsborough tragedy shows how a single page of lies – just twenty-four false words on a newspaper front page – can blight an entire community. In politics, the effects of false stories can change the course of whole nations. In the United States, a survey found that people who had voted for Barack Obama in 2012, but who in 2016 defected from the Democrats to vote for the Republican candidate Donald Trump, may have been influenced by fake news stories. When a sample of the 'defectors' were presented with three widespread

²⁴ Ron Suskind, 'Faith, Certainty and the Presidency of George W. Bush', *New York Times* (Magazine section), 17 October 2004.

²⁵ *Ibid.* ²⁶ *Ibid.* ²⁷ *Ibid.*, 11.

fake news items about Trump's opponent, Hillary Clinton, it was found that only 17 per cent of those who believed two or all three of the false stories voted for Clinton in 2016.²⁸

It is possible that public trust in politicians is even lower than public trust in journalists. In the UK, Peter Kellner reports that the March 2012 YouGov survey *Democracy on Trial: What Voters Really Think of Parliament and Our Politicians* found that 'newspapers score relatively well' compared to politicians, a fact which, he says, 'might raise some eyebrows' given that 'other YouGov research shows that few people trust the red-top and mid-range tabloids to tell the truth'.²⁹ He concludes that it 'is a sign of how unpopular our political system is that parties and politicians score even worse than journalists, when people are asked to compare their performance side-by-side'.³⁰ In practice, the lines between politicians and journalists can become somewhat blurred. Staying with the UK, Tony Blair's government (1997–2007) was renowned for turning political 'spin' into a journalistic art form in which it sought to micro-manage public presentation of its policies, right down to rebranding its party as 'New Labour'. By the time of David Cameron's period as prime minister (2010–2016), the journalistic style of government had become so blatant that Cameron went so far as to hire Andrew Coulson as the government's communications director even though he had previously resigned as editor of one of the least reputable red tops (*News of the World*) when one of its reporters was convicted of illegally hacking phones. Coulson was subsequently jailed for his involvement in the phone-hacking scandal. Cameron was himself employed by a media company before becoming an MP and remained a consultant to the company when in political office. Before he became prime minister (2019–2022), Boris Johnson was a journalist and editor of the weekly current affairs magazine *The Spectator*.

We can't hide from the fact that political freedoms require us to run the risk that the press will make mistakes (misinformation) and even tell lies (disinformation). We run similar risks in relation to the behaviour of our politicians and for similar reasons. It is indicative of this that the UK's Electoral Commission concluded its report on political advertising by recommending that it should be regulated voluntarily and not under the official scheme that regulates advertising standards in commercial contexts. According to the House of Commons Library website, electoral law 'doesn't require claims in political campaigns to be truthful or factually accurate', although 'it is a crime to make or publish a false statement of fact about the personal character or

²⁸ Richard Gunther, Erik C. Nisbet, and Paul Beck, 'Trump May Owe His 2016 Victory to "Fake News" New Study Suggests', *The Conversation*, 15 February 2018.

²⁹ Peter Kellner, *Democracy on Trial: What Voters Really Think of Parliament and Our Politicians*, YouGov survey (March 2012) 3.

³⁰ *Ibid.*

conduct of a candidate'.³¹ (A similar rule applies during House of Commons business in the UK Parliament to prohibit MPs from accusing their fellow MPs of lying.)³² A crowd-funded attempt to prosecute Prime Minister Boris Johnson for allegedly false claims made when campaigning for the UK to leave the EU ultimately failed on various grounds, including the fact that:

In a referendum there are at least two sides with competing arguments, both of which are highly likely to be contested to some degree. Even official data can, and will, be presented by campaigners in a way that favours their argument – that is the nature of political campaigns. It will not always be possible to establish the truth about campaign claims in an independent, truly objective sense.³³

This, it might be thought, sets the bar pretty low for assessing political honesty; and yet this, it might also be thought, is the price we have to pay to enable political free speech. It is an example of the courts' traditional and quite proper reluctance to interfere in political processes. Another example is demonstrated in the courts' traditional disavowal of any capacity to impeach an Act of Parliament, even when 'its introduction or passage through Parliament, was attended by . . . irregularity' and 'even on the ground that it was obtained by fraud'.³⁴ In theory, courts retain the authority to 'prevent an unconscionable use of the power to apply to Parliament for the enactment of a new private statute', but UK courts have shown great reluctance to exercise that authority.³⁵

The 2012 YouGov survey referred to earlier found that nowadays in the UK, 'it is the monarch who commands political respect by the general public, while Parliament is regarded with something approaching contempt'.³⁶ If that was the public attitude to politicians in 2012, one wonders how low politicians' public standing must be after the parliamentary goings-on since the 2016 UK referendum on membership of the EU. Her Majesty Queen Elizabeth II's strict political neutrality was no doubt a major reason for her popularity (which is to say that much of that popularity might have evaporated if she had become politically outspoken on contentious political issues) and makes one wonder if mainstream newspapers are missing a marketing trick when they align themselves strongly with one side or the other of the party-political divide.

When the public spreads fake news out of ignorance, or a well-intentioned academic spreads fake news inadvertently, it is certainly not so blameworthy

³¹ Lorraine Conway, 'Who Regulates Political Advertising?', *Insight*, House of Commons Library (4 November 2019).

³² 'Dawn Butler Thrown Out of Commons for PM Lie Accusation', *BBC News*, 23 July 2021.

³³ *The 2016 EU Referendum*, The Electoral Commission (September 2016) para. [3.99].

³⁴ *British Railways Board Appellants v Pickin Respondent* [1974] A.C. 765, House of Lords, per Lord Wilberforce at 793.

³⁵ *Re London, Chatham and Dover Railway Arrangement Act* (1869) LR 5 Ch App 671.

³⁶ Peter Kellner, *Democracy on Trial: What Voters Really Think of Parliament and Our Politicians*, YouGov survey (March 2012) 4.

as politicians spreading fake news for political gain. This is a mode of making news that has traditionally gone by the name of propaganda – a word which, by analogy to the propagation of plant seeds, expressly alerts us to the fact that its purpose is to broadcast the politician’s story in the hope that it will take root and grow. The most blatant example in recent times must surely be Russian President Vladimir Putin’s crass attempt to justify Russia’s invasion of Ukraine on the pretence that he was seeking to ‘denazify’ it. Less extreme, but not without danger to life, was the fake news perpetrated by populist French President Emanuel Macron at the height of the Covid-19 vaccine crisis at the start of 2021 when he cast doubt on the efficacy of the British designed Oxford-AstraZeneca (ChAdOx1) Covid-19 vaccine. Aesop told a fable about a fox which, because it couldn’t reach some grapes, broadcast the lie that the grapes were sour and told anyone who’d listen that it hadn’t really wanted them. This is pretty much what happened when Macron’s government couldn’t get hold of supplies of the ChAdOx1 vaccine. Speaking on 29 January 2021, Macron resorted to the fox’s trick and spread the fake news that the AstraZeneca vaccine was ‘quasi-ineffective’ in people over 65 years old:

We have to be realistic: the real problem with the AstraZeneca vaccine is that it doesn’t work in the way we expected. We’re waiting for the EMA [European Medicines Agency] results, but today everything points to thinking it is quasi-ineffective on people older than 65, some say those 60 years or older. What I can tell you officially today is that the early results we have are not encouraging for 60 to 65-year-old people concerning AstraZeneca.

‘Sour grapes’ produce a bitter whine. Soon after this, the EMA approved the Oxford-AstraZeneca vaccine for all age groups in the EU. It is true that there was a relative shortage of statistical data for over 65s when the UK started to roll out the Oxford vaccine, but a deficiency of positive evidence is not positive evidence of a deficiency. British scientists were confident in the efficacy of the Oxford-AstraZeneca and that confidence was subsequently vindicated.³⁷ The motive for Macron’s decidedly negative spin on the data might have been to reduce French citizens’ vaccine demand at a time when his government was struggling to meet it. If so, it worked. We can note in passing that Macron used the rhetorical trick of employing the term ‘quasi’ to give his comment a spurious scientific veneer in the very act of twisting the scientific evidence (‘everything points to’). Writing a month after the incident, BBC correspondent Hugh Schofield noted that the French medical profession, ‘which had no political axe to grind – said early on that the [ChAdOx1] jab was a welcome addition’, before adding, ‘[b]ut politicians set the tone’ and ‘must surely take

³⁷ Aziz Sheikh, Chris Robertson, and Bob Taylor, ‘BNT162b2 and ChAdOx1 nCoV-19 Vaccine Effectiveness against Death from the Delta Variant’ (2021) *New England Journal of Medicine*, <https://doi.org/10.1056/NEJMc2113864>.

some of the blame for the slow uptake of the vaccine since its launch in France last month'.³⁸

Swallowing Lies

The previous sections have been dominated by the horticultural analogy – ‘the seed of a story’, ‘grain of truth’, ‘dissemination’, ‘broadcast’, ‘propaganda’, and so forth. Another vivid way to appreciate the presentation of news is through the analogy of cuisine. The cuisine analogy is used in numerous contexts in which falsehood is at issue. We talk, for instance, of ‘cooking the books’ in relation to dishonest accountancy. More generally, lies are frequently described as things that are ‘fed’ to us, and as things that we ‘swallow’ or might find ‘hard to swallow’. It is therefore an unfortunate coincidence that mainstream news is delivered through ‘newsfeeds’. The image of the public as a hungry devourer of the newsfeed goes back a long way. In his 1625 play, *The Staple of News*, the dramatist Ben Jonson described news as ‘a weekly cheat to draw mony’, ‘wherin the age may see her owne folly, or hunger and thirst after publish’d pamphlets of Newes, set out euey Saturday, but made all at home, & no syllable of truth in them’.³⁹ The public is hungry for news, but whether it is persuasive in the sense of being palatable comes down to a matter of taste. This has two aspects: first, the ‘good taste’ or critical judgment of the potential consumer; and second, the savour of the morsel as it is served up. Both aspects – the work of the consumer and the work of the purveyor – go together to make up the persuasiveness of the news item. Together they exemplify participatory co-Production. The cooking analogy has a long historical pedigree in relation to the rhetorical arts of persuasion. Sincerity has often been put in issue by portraying successful rhetoric as the addition of pleasing sauce to increase the flavour of the underlying substance of the matter. In Plato’s *Gorgias*, he gives Socrates the somewhat tongue-in-cheek (or deliberately argumentative) complaint that rhetoric gives a merely cosmetic impression of the justice that is essential to political health (462b–66a). Socrates likens his claim that ‘self-adornment personates gymnastic’ to the claim that ‘cookery is flattery disguised as medicine’ (465b).⁴⁰ The complaint can be read as a tacit admission that rhetoric works in practice. That pragmatic view is made express by the early modern rhetorician Thomas Wilson in his manual *The Arte of Rhetorique*, where he praises the pleasing effects of enhancing meat with a good sauce:

³⁸ Hugh Schofield, ‘Coronavirus: What’s behind France’s AstraZeneca Turnaround?’, *BBC News, Paris*, 2 March 2021.

³⁹ Thomas L. Berger and Sonia Massai eds, *Paratexts in English Printed Drama to 1642* Second Intermeane after the Second Act of *The Staple of News* (Cambridge: Cambridge University Press 2014) 570–571.

⁴⁰ Plato, *Lysis. Symposium. Gorgias*, W. R. M. Lamb (trans.), Loeb Classical Library 166 (Cambridge, MA: Harvard University Press, 1925) 319.

[H]im cunne I thanke, that both can and will ever, mingle sweete among the sower, be he Preacher, Lawyer, yea, or Cooke either hardly, when hee dresseth a good dish of meate.⁴¹

Adding that:

[W]hen a mannes stomacke is full and can brooke no more meate, he may stirre his appetite either by some Tarte sawce, or elles quicken it somewhat by some sweate dishe.⁴²

Despite Wilson's praise for the rhetorical art of dressing the dish, it matters if we are tricked into swallowing lies. According to Cicero's account, the Roman actor Polus enhanced his performance of Electra mourning her brother by bringing onto stage an urn with the ashes of his own dead son. Brecht called this 'barbaric', and resorted to the cuisine analogy to object specifically to the way in which apparently true emotions can be employed to obscure the truth of the play:

[T]he object is to fob us off with some kind of portable anguish – That's to say anguish that can be detached from its cause, transferred *in toto* and lent to some other cause. The incidents proper to the play disappear like meat in a cunningly mixed sauce with a taste of its own.⁴³

Elsewhere Brecht uses the term 'culinary theatre' to decry drama that pampers to the audience's tastes and which seeks to feed them through feelings rather than provoking them to think.⁴⁴ This talk of emotional veneer being applied at the performance stage to obscure the underlying truth of a matter surely speaks to us in our present post-truth times, in which news and political views frequently present the sober meat of events in sensationalized and emotionally charged terms. Lawyers reading this might consider themselves to be enthroned above the sway of such vices, but they also know the rhetorical art of seasoning a story, and occasionally they make the error of seasoning the matter too strongly. As Bassanio says in *The Merchant of Venice*, 'In law, what plea so tainted and corrupt, / But, being seasoned with a gracious voice, / Obscures the show of evil?' (3.2.75–77). When Peter Goodrich noted that 'law and sauce' are 'rather directly related',⁴⁵ he was referring indirectly to the suggestion made by Horace in his *Satires* that 'it is worthwhile to study well the nature of the compound sauce' (*est operae pretium duplicis pernoscere iuris*

⁴¹ Thomas Wilson, *The Arte of Rhetorique* (London: Richard Grafton, 1553) (1560), G. H. Mair (ed.) (Oxford: Clarendon Press, 1909), 4.

⁴² *Ibid.*, 105.

⁴³ Berthold Brecht, *Brecht on Theatre: The Development of an Aesthetic*, John Willett (ed.) (1964) (London: Methuen Drama, 2001), 271.

⁴⁴ Werner Hecht, 'The Development of Brecht's Theory of the Epic Theatre 1918–1933' 6(1) *The Tulane Drama Review* 40–97.

⁴⁵ Peter Goodrich, *Advanced Introduction to Law and Literature* (Cheltenham: Edward Elgar, 2021) 13.

naturam),⁴⁶ by which Horace meant a sort of vinaigrette or salad dressing. Goodrich was referring more directly to Charles J. Darling's punning observation that Horace's aphorism applies as well to 'the kind of *jus* served out in our courts of law'.⁴⁷ Judge Learned Hand employed the same metaphor when he described judicial craft in terms of Confectionary Performance (as to which, see [Chapter 8](#)):

[T]he good judge is an artist, perhaps most like a chef. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance.⁴⁸

Shows of Truth

There is no doubt that dramatic interest lies at the heart of much that makes news stories appetizing to consumers. The UK government's definition of disinformation describes it as information 'that is intended to deceive and mislead *audiences*'.⁴⁹ If we want to be effective in the way we critique what Shakespeare termed 'shows of truth' (*Henry V* 1.2.72), we need to take seriously the theatrical modes of making and rhetorical performance by which truth is represented in media. We might begin by taking seriously the possibility that the public now consumes news, and construes news, from the perspective of an audience to an entertainment. Observations made by James W. Carey in 1978 seem eerily prescient of the internet age of Web 2.0:

[T]he public exists now largely as a statistical artifact: as the concatenation of individual judgments expressed through opinion polls, but most critically, not as a sphere of rational discourse. Our system of communication is not addressed at the public but at private individuals. We have evolved a radical form of mobilized privacy: the individual hooked into long lines of communication from remote sources. This transformation involved the displacement of the reading public – a group who spoke to one another about the news in rational and critical ways – into a reading and listening audience.⁵⁰

If mass media have had the effect of constituting the public as audience, it is correspondingly true that the public has constituted mass media as a form of

⁴⁶ Horace, *Satires*, H. Rushton Fairclough (trans.), Loeb Classical Library 194 (1926) (Cambridge, MA: Harvard University Press, 2015) II.IV, 63–64.

⁴⁷ Charles J. Darling, *Scintillae Juris* (London: Stevens and Haynes, 1889).

⁴⁸ Learned Hand, review of Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) 35 *Harvard Law Review* 479.

⁴⁹ House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News'*, Final Report: Eighth Report of Session 2017–2019 (HC 1791) (18 February 2019) para. [3], emphasis added.

⁵⁰ James W. Carey, 'A Plea for the University Tradition' (1978) 55(4) *Journalism Quarterly* 846–855, 854.

entertainment. Communications scholar Vincent Price writes in his book *Public Opinion* that:

The political power of an attentive public is on occasion exercised directly (e.g., in an election), but it also operates indirectly and more continuously through the perceptions of the political actors who play to the audience and who gauge their own efficacy in the political world by indicators of public response.⁵¹

The relationship between mass media and public audience operates as a two-way process in which each confirms the identity of the other through misleadingly simple labels – ‘public’ on the one side and ‘mass media’ on the other. The reality is much more complex. On one side, the so-called public is not unitary and neither do its members share any unitary, identifiable opinion. On the other side, journalistic standards and modes of dissemination vary greatly among the media. ‘Media’ is, after all, a plural word. There is in fact such variation within the crowd of television and radio broadcasters, print press, and online professional media that they together constitute more of a ‘mess media’ than a ‘mass media’. We ought also to be cautious when we purport to find a neat line between media and the public as if it corresponds to a tidy distinction between actor and audience. The mess of mediating communication between them is one reason why the dividing line is never static and is certainly never neat. Price notes that although Walter Lippmann set up a distinction between ‘actors’ (officials and citizens who try to influence politics directly) and ‘spectators’ (interested observers who constitute an audience for political performance), Lippmann also acknowledged that very often ‘the actors in one affair are the spectators of another’, so that ‘there is often a mixture of the two types of behavior’.⁵² Crossover between passive and active roles also informs Augusto Boal’s term ‘spect-actors’, which he used to describe participants in his public forum style of theatre. His ‘spect-actors’ are those ‘who observe (*spectare*, in Latin – to see) in order then to act’.⁵³ More recently, Susan Bennett reprises this idea of the empowered audience in her book *Theatre Audiences*,⁵⁴ where she focuses on the ‘productive and emancipated spectator’⁵⁵ and the audience that ‘emerges as a tangibly active creator of the theatrical event’.⁵⁶

Falsehoods and half-truths sometimes flourish in the mainstream press, but in social media they can reproduce virally to pandemic proportions. Not that

⁵¹ Vincent E. Price, *Public Opinion* (London: Sage, 1992).

⁵² Walter Lippmann, *The Essential Lippmann: A Political Philosophy for Liberal Democracy*, Clinton Rossiter and James Lare (eds) (1963) (Cambridge, MA: Harvard University Press, 1982) 90.

⁵³ Augusto Boal, *Legislative Theatre: Using Performance to Make Politics* (Abingdon: Routledge, 1998) 9.

⁵⁴ Susan Bennett, *Theatre Audiences: A theory of Production and Reception*, 2nd ed. (Abingdon: Routledge, 1997).

⁵⁵ *Ibid.*, 1. ⁵⁶ *Ibid.*, 9.

it is possible to draw any definite line between the professional and the amateur press nowadays, given that the traditional tabloids publish much of their content free online and allow members of the public to gloss it via the 'comment' sections of their web pages. When a newspaper article appears online together with readers' commentary, the whole becomes a new artefact co-Produced through the joint activity of journalist with commentator and the joint activity of commentator and commentator. One of the factors that lends authority to mainstream media is that we know the names of the authors and can therefore research and assess their level of expertise. In contrast, members of the public who comment on the story are generally shielded by whole or partial anonymity and have limited or non-existent personal accountability for what they post.

Our response to fake news ought to acknowledge the active part played by the audience in the Production of stories. We need to work towards a notion of Receiver Responsibility, in which, by analogy to theatre, the audience of fake news is considered a co-Producer of the artefact. There is no show without the audience, and without a public the media cannot perform their mediating role between news source and consumer. In a traditional theatrical context, the audience is expected to suspend its disbelief. If a playgoer is for some reason duped into believing that the fabrication is fundamentally real, the fault lies with them. Their co-Productive participation has made the performance into something it isn't and something it wasn't intended to be. A competent spectator must, says Keir Elam, have 'the ability to recognize the performance as such'.⁵⁷ He adds that:

Every spectator's interpretation of the text is in effect a new construction . . . It is the spectator who must make sense of the performance for himself, a fact that is disguised by the apparent passivity of the audience. However judicious or aberrant the spectator's decodification, the final responsibility for the meaning and coherence of what he constructs is his.⁵⁸

The same 'final responsibility' falls upon members of the public when they consume the spectacle of a news report. It falls to receivers of a news report to recognize that they are witnessing not the truth itself but a show of truth, and it falls to them to discern where the performance lies.

In comparing the responsibility of a consumer of news to that of a theatre audience, I am mindful that outside of traditional and self-evidently theatrical contexts, it will not always be fair to expect the consumer to be alert to fabrication, still less to falsehood. With the modern development of 'deep fake' digital fabrications the task of discernment is almost impossible to discharge. It is not, though, a wholly recent challenge. Nowadays digital

⁵⁷ Keir Elam, *Semiotics of Theatre and Drama*, 2nd ed. (London: Methuen, 2002) 78.

⁵⁸ *Ibid.*, 85, following Juri M. Lotman, *The Structure of the Artistic Text* (1972), Gail Lenhoff and Ronald Vroon (trans.) (Ann Arbor: University of Michigan Press, 1977).

technology can be employed to fool the masses, but for so long as there have been technologies for telling truths the same technologies have been turned to telling lies. Consider the well-known instance of Orson Welles' radio adaptation of H. G. Wells' novel *The War of the Worlds*, which was presented in the form of fake news bulletins aired on 30 October 1938. The bulletins announced that aliens from Mars had invaded the US state of New Jersey and this is said to have led to widespread panic among listeners who took the reports at face value. Assuming for now that mass panic did indeed ensue, should listeners to the show have been responsible for their credulity in believing that the broadcast was a real news item? The broadcast had been framed from the outset by an announcement introducing a presentation by Orson Welles and *Mercury Theatre on the Air*, complete with a classical music overture (Tchaikovsky's Piano Concerto No. 1 in B-flat minor) of the sort that might accompany the raising of a curtain in a physical theatre space. This should have given the theatrical game away, but listeners coming late to the show might have missed the very clear framing of the fabrication. They might have tuned in late but in time to hear the narrator, Orson Welles, declaring in hyper-realistic mode that '[o]n this particular evening, October 30, the Crosley service estimated that thirty-two million people were listening in on radios'; or just in time to hear a standard format weather report; or perhaps their attention was first grabbed by lively Latino music and a new voice saying '[g]ood evening, ladies and gentlemen. From the Meridian Room in the Park Plaza in New York City, we bring you the music of Ramón Raquello and his orchestra. With a touch of the Spanish.' One can imagine listeners turning up the volume to hear that music, only to have it interrupted with the following sober announcement:

Ladies and gentlemen, we interrupt our program of dance music to bring you a special bulletin from the Intercontinental Radio News. At twenty minutes before eight, central time, Professor Farrell of the Mount Jennings Observatory, Chicago, Illinois, reports observing several explosions of incandescent gas, occurring at regular intervals on the planet Mars.

And with that, the alien invasion began. There were so many frames within frames, so many falsehoods wrapped in truths and truths in falsehoods, that it would hardly be surprising if a radio audience were taken in. At one point, the fictional head of the radio station even says, 'believing that radio has a responsibility to serve in the public interest at all times, we are turning over our facilities to the state militia'. Orson Welles might have argued in his defence that this was indeed public service broadcasting; a sort of mass lesson in being alert to propaganda.

The 'I was alerting the public' defence was run by Channel 4 television in the UK when it broadcasted a 'deep fake' message to the nation on Christmas Day 2020 through the medium of a hyper-realistic computer-generated avatar of Queen Elizabeth II, at precisely the time that the real monarch was

delivering her annual Christmas message on the BBC and ITV channels. Do we believe that Channel 4 was genuinely acting in the public interest with its fake royal message, or was this merely self-serving sensationalism under the pretence of public service? In other words, could this be an example of the Trump-like technique noted earlier by which an apostrophe to fake news is itself faked for the purpose of enhancing the faker's own credibility? As things turned out, Orson Welles' public service defence was more apt than he could have anticipated at the time. Less than a year after his *War of the Worlds* stunt, the same American radio audience would be tuning in to hear real reports of the outbreak of World War II. And yet, as it also turned out, reports of mass panic in response to Welles' radio production might have been the real 'fake news' story in *The War of the Worlds* affair. Scholars have questioned the veracity of contemporary news reports of panic (e.g. *The Boston Daily Globe's* front-page banner headline 'Radio Play Terrifies Nation'), and even of recent documentary style retrospectives on the panic (e.g. Desert Penguin Pictures' production for PBS's *American Experience* series).⁵⁹ We shouldn't forget that, like Orson Welles, makers of broadcast news and makers of documentaries are working in show business.

'If You Have the Truth, Rest Quiet'

The statement with which I opened this chapter – 'all news is fake news' – is deliberately provocative. Maybe it is sensational. It is, of course, a rhetorical technique for alerting the reader to a surprising and hitherto unseen truth. In other words, I took a seed of truth – the fact that news is always in some sense and to some degree made by human craft – and I developed it and published it in a way calculated to make the truth more tantalizing. It was a journalistic move. Actual journalists, who may be working under commercial or partisan political pressures, will rarely have the freedom (even supposing that they have the time and inclination) to be so transparent in revealing their rhetorical methods. Many journalists work under the same sorts of pressures that entertainers are under. Their role is to put on a show and they rely upon a critically discerning readership to understand that journalism rarely presents the naked seed to public view.

We might lament the fact that all news is fake news, but an unadorned news story is no guarantee of naked truth. The problem with the naked seed is that it is seldom as unambiguous as we might think. Unlike actual biological plant seeds, the seeds of stories can be grown into a species quite different from the original. It is also possible that a member of the public, receiving the naked seed of a story, might, like an unskilled gardener, plant the seed in the wrong soil at the wrong temperature and with the wrong fertilizer. They might

⁵⁹ Jefferson Pooley and Michael J. Socolow, 'The Myth of the War of the Worlds Panic', *SLATE*, 28 October 2013.

produce something stunted, deformed, and unattractive from a seed that was originally sound and full of potential. It is therefore sometimes a good thing that a professional journalist has taken hold of the seed of a story and sought to grow it in such a way that it resists rot. Indeed, we might say that the very essence of good professional journalism is that it takes responsibility for cultivating the seed of a story in such a way that it becomes bigger and better, yet undeniably of the same species as the original. It will be recalled from [Chapter 10](#) that this quality of being the same (**sem-*) despite growth (*crescere*) is the etymological meaning of the word 'sincere'.

Professional journalists and editors do what they are vocationally accustomed to do. Our role as audience and critics is not to dismiss their work because it is a work of make-believe, but to appreciate it as such. Judgment is left to the public as audience and reader to decide if the making was fairly or unfairly done. We are called to critical judgment, and that (as the etymology of 'criticism' informs us) is a process of sifting. We need to sift the grain of truth from the chaff. We are the audience to the journalists' show and the responsibility falls on us to sit as critics and not as passive recipients. As I said earlier, we have Receiver Responsibility. It is not inconsistent with that responsibility for us to suspend disbelief, but we should be knowing and responsible in how we suspend it. Ben Jonson's Prologue to *The Staple of News* urged his theatre audience to exercise their own critical judgment in relation to the cozening (a good old synonym for 'deceiving') effect of news stories. Immediately following his assertion quoted earlier in this chapter (that the Saturday newspapers are 'made all at home' and have 'no syllable of truth in them'), he continues:

[T]here cannot be a greater disease in nature, or a fouler scorne put upon the times. And so apprehending it, you shall doe the Author, and your owne judgement a courtesie, and perceive the tricke of alluring money to the Office, and there cooz'ning the people. If you have the truth, rest quiet, and consider that *Ficta, voluptatis causa, sint proxima veris*.

What he is saying here is that it falls to the audience to discern where the seed of truth in a news report has been corrupted by mercantile and self-serving interests. Jonson's Latin motto *ficta, voluptatis causa, sint proxima veris* is from Horace's *Ars Poetica*.⁶⁰ It means: 'fictions meant to please should be close to the truth'. In other words, just as a made-up face can enhance the natural beauty of the original, so a made-up story can enhance the truth. What we must be alert to is the sort of make-up that disguises the truth and stories that render the original more beautiful – or indeed more ugly – to such an extent that the original is lost in the telling.

⁶⁰ Horace, *Ars Poetica*, §338, H. Rushton Fairclough (trans.), *Satires. Epistles. The Art of Poetry*, Loeb Classical Library 194 (Cambridge, MA: Harvard University Press, 1926) 478.

Making Mistakes

Trial by Twitter and Cancel Culture

‘Cancel culture’ is a new variant of an old phenomenon. When Ben Jonson cautioned his playgoers each to ‘exercise his owne Judgement, and not censure by Contagion’,¹ he was alerting them to the fact that passing judgment on others can pass from person to person like a plague. If we ask why the infection starts and why it spreads so fast, we will find that the answer to both questions is the same: ‘everyone’s a critic’. The growth or spread that we associate with the contagion of cancellation has ‘making’ at its heart. The initial judgment plants the germ in Inventive mode. Causing the judgment to increase in consequence and extent makes it grow in Creative mode. Giving the judgment the air of publicity makes something new of it in Productive and co-Productive mode. Making a mistake triggers a whole series of making processes, and our language reflects this. We talk of a person *making* a mistake and of others *making* a judgment; critics *make* assumptions about the suspect’s character and motive, and seek to *make* an example of them. In response to all this, the suspect might *make* an excuse, or *make* an apology, and might even seek to *make* amends. Might the dominance of ‘making’ language in relation to individual errors and collective responses to those errors indicate that an individual’s fracture of the social fabric is made up for by the fabricating impulses of society at large? If so, the pathological metaphor of contagion might one day be supplanted by a more positive metaphor of healing in which the clustering of criticism against infractions is comparable to the cells of a body that rush to heal cuts in skin and breakages of bone – sometimes making the recreated tissue stronger than it was to begin with. If as a society we are to encourage criticism that is truly constructive in this way, we must begin by identifying and addressing some of the common errors that have given cancel culture a bad name.

What Is ‘Cancel Culture’?

Cancel culture is a performative phenomenon characterized by collective action directed at individuals in ways that result in them being punished

¹ Ben Jonson, *Bartholomew Fayre: a comedie, acted in the yeare, 1614 etc.* (London: Printed by I.B. for Robert Allot, and are to be sold at the signe of the Beare, in Pauls Church-yard, 1631) Induction 86–87.

through shaming, silencing, boycotting, or banning their work, and sometimes through loss of employment and career opportunities. An example of the last of these is the no-platforming of speakers who are deemed too controversial to be heard, for example the no-platforming of academic feminists who hold views offensive to many transgender women.² In the UK, the cancellation of academic speakers risks infringing the Education Reform Act 1988, a statute which enables academics to 'question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions'.³ No-platforming also risks a breach of the Education Act (No. 2) 1986, which protects the freedom of speech of visiting speakers.⁴

No-platforming can even strike at the public personas of the dead, as occurs for example when historic statues and memorials are literally removed from their platforms – perhaps because of an association with slavery or another colonial-era offence. Iconoclastic protests of this sort are included in this chapter as part of a broad concern with performative modes of passing judgment. Alongside cancellation by online or physical gatherings, and often as a result of it, there are numerous examples of cancellation carried out by commercial companies – frequently in the form of commercial sponsors cancelling their contracts with celebrity endorsers who have been shamed. Donald Trump is a notable celebrity casualty of corporate cancellation, having been banned from Twitter and Facebook in response to the violent storming of the Capitol Building by a mob of his supporters on 6 January 2021. Trump's Twitter account was 'permanently suspended' two days after the assault on the Capitol Building. The reasons given ranged from those that were entirely plausible (e.g. to stop Trump from denying the legitimacy of the vote to elect President Biden) to those that were far less so (e.g. Twitter's speculation that Trump's ostensibly innocuous tweet, 'I will not be going to the Inauguration on January 20th', might 'serve as encouragement to those potentially considering violent acts that the Inauguration would be a "safe" target, as he will not be attending'). Perhaps Twitter CEO Jack Dorsey felt pressured to support the ban by the prevailing mood and by the implications for the company's financial bottom line. After all, the share price of a commercial corporation is the product of the mob we call the market (for the meaning of 'mob', see the conclusion to [Chapter 10](#)). Outraged or offended shareholders have their own small-scale power to cancel a company by selling their shares in it. The corporation itself is a sort of refined legal distillation of the indirect and imperfectly expressed mood of a mass of people (the directors, shareholders,

² The 'Reindorf Review' into 'no platforming' at the University of Essex concluded that the university acted illegally when it no-platformed on the basis of advice commissioned from the LGBTQ+ pressure group Stonewall (Akua Reindorf, 21 December 2020; publication version 16 September 2021).

³ Education Reform Act 1988, s.202(2)(a). ⁴ Education Act (No. 2) 1986, s.43(1).

and customers of the company) and as such is susceptible to being caught up and carried along by the social swells and tides of cancel culture.

'Cancel culture' is, then, a broad catch-all label for modes of collective judgment and punishment. It is almost too loose a label and too wide a phenomenon to be definitionally useful – it might even encompass the imposition of economic sanctions against individuals (e.g. oligarchs) associated with pariah states (e.g. Russia). In the face of such a broad cultural phenomenon of collective judgment and punishment, my aims here must be modest. It is not my intention to cancel 'cancel culture', but to caution against the phenomenon of collective judgment when it strays into error and excess. Since our subject is the Making Sense, we will seek to make sense of the art of making judgments in the court of popular opinion by looking to the time-honoured arts of making judgments in courts of law, and to the wisdom of those who have reflected upon the difficult task of making critical judgments on works of creative art. Courts of law and professional critics of art and literature have in common a cultivated capacity for judging persons and performance, and this sort of criticism has the potential to cut to the core of the phenomenon we call 'cancel culture'. We will not go far wrong if we approach the performative art of making social judgments as a craft which, like the craft of law, demands a slow and bespoke process entailing attention to detail, respect for the material at hand, and respect for the contingencies of the relevant context.

The US-based website *Canceledpeople.org*, which maintains a database of cancelled people, employs the following elements in its definition of a cancelled person: first, they are 'targeted for behavior that falls within the boundaries of "reasonable expression"'; second, they have 'lost their job or position (this includes forced resignations)', their 'professional opportunities have been limited', or 'they have suffered financial losses from a boycott or sabotage of their company'; third, they have 'faced a coordinated effort to silence them', which 'seeks to render their person or their ideas unfit to discuss'; and fourth, they have 'faced a coordinated effort to shame them and destroy their reputation', which 'seeks to damage their self-worth and will likely target their personal or professional relationships'. These characteristics set helpful definitional parameters, but for the purposes of the present chapter I broaden the discussion to people who are accused of behaviour that goes beyond 'reasonable expression' – even to the extent of being accused of criminal acts – where the allegation has not yet been proven by a judicial or other expertly, professionally, and fairly conducted due process.

Let us consider an example, which happens to be one of the entries on *Canceledpeople.org*. In May 2019, English journalist and radio presenter Danny Baker made a much-publicized mistake on Twitter when he was at that time employed by the BBC as the presenter of his own Saturday morning radio comedy show, *The Danny Baker Show*. The mistake had racist implications and as a result he was swiftly sacked from the BBC. Mr Baker is a white

English male from a working-class background who at the time of the mistake was more than sixty years old and had been a journalist for four decades. In that long career he had apparently never been accused of racism and no historic accusations of racism came to light following his Twitter mistake. Every element of this biographical sketch is relevant to what follows. He might appear to be the very picture of social privilege where it not for those crucial words 'working-class background'. In the UK today, the young, white, working-class male, far from being a bastion of privilege and opportunity, is one of the demographic groups most deprived of educational opportunity (a recent survey found that in the UK 'Black Caribbean boys were the only group less likely to go to university than white boys')⁵ and has been called the most derided demographic in the country.⁶ Older white men like Danny Baker are sometimes scorned as being 'pale, stale, male' – an insult that achieves the rare distinction of being racist, ageist, and sexist in the space of just three words. (It seems remarkable that the phrase has apparently become acceptable even in mainstream news reporting.⁷ One can only begin to imagine the furore if a journalist were to trot out equivalent language in relation to females of colour.)

In Mr Baker's case, it is also important to bear in mind that a large part of his performed persona is that of the quick-talking, cheeky, working-class 'cockney' chap – certainly not to everyone's taste, but in matters of taste there is no ground for dispute (*degustibus non est disputandum*, as a useful Latin maxim puts it). If Mr Baker's Twitter mistake had simply been in bad taste or had been outright tasteless – which it surely was (if only because he compared a newborn baby to an animal) – one might hope and expect that the consequences for him would not have ended his BBC career. Satire, after all, almost always offends somebody's idea of good taste. Unfortunately, his mistake was much more serious in its implications because it was taken to imply racism. In response to an announcement that a child had been born to a member of the British royal family, he tweeted an archive black and white picture from the early twentieth century of a well-to-do man and woman standing outside the entrance to a building either side of a young chimpanzee that was standing in a posh coat, bowler hat, white gaiters, and holding a walking cane. Accompanying the image, Mr Baker added just four words of text: 'Royal baby leaves hospital.' Regarded without context the image is comically ridiculous and Mr Baker is reported to have said subsequently that '[m]y go-to photo when any posh people have a baby is this absurd chimpanzee in a top

⁵ Graeme Paton, 'White Working-Class Boys Becoming an Underclass', *The Telegraph*, 18 June 2008.

⁶ Helena Horton, 'Young White Men Are the Most Derided Group in Britain', *The Telegraph*, 15 December 2015.

⁷ Witness, for example, its appearance in a piece by Camilla Tominey, Associate Editor of *The Telegraph*: 'Unflustered Liz Truss has already shown she is captain of her own ship', *The Telegraph*, 7 September 2022.

hat leaving the hospital. I didn't know which of our royal princesses had given birth.⁸ Having apologized and deleted the offending tweet, he wrote in a further tweet that it '[w]as supposed to be joke about Royals vs circus animals in posh clothes' (8 May 2019). If Mr Baker is to be believed, the tweet was, thus far, a tasteless gag at worst. What made it fundamentally flawed was that the baby in question had been born to Prince Harry and his wife Meghan Markle. Ms Markle is the daughter of a Black mother and a white father, and Mr Baker's choice of a chimp to depict the royal baby therefore evoked a disgusting racial slur.

So, should Mr Baker have lost his job for this single hasty and ill-judged tweet? My own answer is 'yes – probably'. The qualifier 'probably' is crucial here because the word brings in a process of probation or trial. The decision to cancel a person's contract or career should not be made lightly, but ought to be based on a process in which evidence (the stuff we see) is probed deeply in search of its substance and in which both sides ought to have an opportunity to present their case. The need for a reflective process is all the more necessary when the error and the judgment in reaction to it are performed in a hasty fashion. It is precisely when the preponderance of evidence appears to point all one way that someone needs to point the other way. Someone has to play devil's advocate. After all, even the Nazis on trial at Nuremberg were afforded advocates and due process. It seems that the process by which the BBC decided to terminate Mr Baker's employment was a summary one. Whether there was anything like a fair trial, giving adequate opportunity to present and prove (probe) reasons for dismissal, seems doubtful. My conclusion that Mr Baker should probably have been dismissed by the BBC is not based on the offensiveness of his motivations in sending the offending tweet – there is no corroborating evidence to suggest that he was motivated by racism – but on the fact that a quick-talking presenter of a popular radio show ought to be better attuned to popular culture than to employ the image of a chimp in a context where racism *might* be inferred. To be that 'tone deaf' might be said to go to the root of his fitness to present a popular call-in radio show. The BBC would have been justified in sacking Mr Baker for that reason alone if they had first given him a chance to present his side of the story. If Mr Baker had produced evidence of a non-racist motivation (say, by demonstrating a past pattern of using chimps in posh clothes to depict upper-class people of all races), a case might be made for clemency on the basis that this was a one-off error causing accidental offence. Of course, and perhaps better still, Mr Baker might have voluntarily resigned when he appreciated the offending nature of his mistake.

I am not focusing on Mr Baker's case because I disagree with the decision to cancel his contract, but because the manner in which judgments were made in

⁸ Matthew Moore, 'Danny Baker Sacked from BBC Radio 5 Live for Royal Baby Chimp Tweet', *The Times*, 10 May 2019.

response to his mistake exemplify shortcomings that a great many offences and cancellation reactions have in common. These are, first, that the judgment was made in an imprudently swift and succinct manner (so too, it must be said, was Mr Baker's offending tweet); second, that the error was judged on face value – by which I mean not only that the tweeted image was subjected to superficial scrutiny, but also that both Mr Baker and the royal baby were regarded (a seeing word) according to just one aspect (another seeing word) of their beings – namely, that Mr Baker is white and the royal baby is of mixed race; third, whereas some online respondents to Mr Baker's error were willing to imagine a disjunction between the error and Mr Baker's private character (to paraphrase, 'the tweet can be read as racist, but it doesn't mean Mr Baker is racist'), many respondents refused to admit the possibility of any gap between Mr Baker's erroneous act and his underlying attitude to race (to paraphrase, 'I think the tweet is racist, I assume it was motivated by racism, that makes Mr Baker a racist').

On Criticism

I now turn to consider each of these three characteristics of 'trial by Twitter' leading to a cancellation verdict under the headings 'fools rush in' (dealing with the problem of speed), 'face values' (dealing with the problem of superficiality), and 'mind the gap' – (dealing with the problem of censoriousness and hypocrisy). Working outwards from the Danny Baker case, I identify principles that will assist us to make better sense of – and to make better judgments in – the court of popular opinion. Each of the three sections begins with a quotation from Alexander Pope's 1711 'Essay on Criticism', every one of which is now a well-known common-sense maxim that urges caution and ethical restraint on those who judge the expressive work of others. Thus, we have 'fools rush in where angels fear to tread' for the section on imprudent speed; 'A little learning is a dang'rous thing' for the section on superficiality; and 'To err is human; to forgive, divine' for the section on hypocritical judgment. In its original context, Pope's essay was intended primarily as a salutary treatise on the art of judging art, and was directed specifically at critics of literary art. It is a long essay, and in his manner of writing the author exemplifies the very qualities that are promoted in it. His was no rushed reaction but a deeply reflective critical analysis running to almost 800 lines – rather more than a standard tweet and considerably more sophisticated and extensive than a mere retweet, 'thumbs down' emoji, or any other cursory online gesture. As to face values, the quality of Pope's work defies any surface judgment that might be made against him on the basis of his being a young man aged only twenty-two when he wrote it. As to the third issue, hypocrisy: Pope was an author who through his own competence as an artist was well-qualified to judge art and to judge those who judge art.

'Fools Rush in'

[F]ools rush in where angels fear to tread.

Alexander Pope, *Essay on Criticism*

Danny Baker was foolish when he rushed to post his offending 'Royal baby leaves hospital' tweet, and many of the responses to Baker's error were as foolishly swift as the error itself. Cancel culture is characterized by a rush to judgment. Sometimes a judgment will prove to be justified in retrospect, but the instant nature of the mob reaction makes it flawed even if the ultimate judgment is shown on reflection to have been justified. In any rushed judgment, the rush is always objectionable even when the ultimate outcome is not. Haste is a feature of cancel culture that is exacerbated by the inherent high speed of the various media through which online mistakes and online judgments are made. In the past, textual methods of expressing civic outrage, such as posting a handwritten letter to the editor of a national newspaper, to one's democratic representative, or to the head of a commercial corporation, were inherently slow and as such opened space for reflective consideration, thoughtful drafting, and even for changing one's mind. In legal negotiations, the last of these is sometimes termed the 'cooling off' period. Another legal term for it is '*locus poenitentiae*', meaning 'a space for repentance'. Online communication rarely allows or encourages such a space. Before the internet, there was also a small transaction cost of time and money for the sender of a complaint (if only the cost and effort of posting a letter) which served to suppress any misguided sense that making a complaint might be cost-free. It never is. There is always a social cost to conflictual communication, and it is no bad thing that there was once a small financial price to pay at the threshold to filter out frivolous complaints and those which – to express it in economic language – aren't 'worth it'. Today, the person who joins an online mob suffers very little in the way of threshold deterrent cost, still less any sense of the price to be paid long term through increased social conflict. This is especially so where the complainant participates anonymously. Instead of having to overcome a threshold cost before making a complaint, the anonymous complainant is given an instant incentive and reward in the gratification they receive from expressing outrage and from the Making Sense that they are participating with others in the co-Production of a social performance that will 'make a difference'. The famous tagline #MeToo speaks expressly to the sense of value associated with feeling that one's voice has been heard in chorus with others. It is of course right that everyone should have a voice, especially when it comes to calling out criminal acts, and online outlets can be valuable and powerful democratic media of expression. The problem we are primarily concerned with here is not the problem of freedom of speech but the problem of speed of speech. If a technological solution cannot be found to that problem, we should at least acknowledge the cost.

The speed of online cancellation reactions is one of the problems highlighted by the group of 153 cultural and intellectual figures who wrote 'A Letter on Justice and Open Debate' to *Harper's Magazine* in 2020.⁹ Among their number were scholars (including Francis Fukuyama, Noam Chomsky, Deirdre McCloskey, and Steven Pinker) and such household names as J. K. Rowling, Garry Kasparov, and Salman Rushdie. This is no 'mob' in the original sense of *mobile vulgus* (i.e. the moveable or malleable mass of common people), but a sophisticated caucus of scholars and expert practitioners in various fields. Some argue that the flaw in the group was not that they were members of the popular mass, but that they were members of a powerful and influential elite.¹⁰ Despite this, their objection stands to be judged on its own terms. The core of their complaint was expressed as follows:

We uphold the value of robust and even caustic counter-speech from all quarters. But it is now all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought. More troubling still, institutional leaders, in a spirit of panicked damage control, are delivering hasty and disproportionate punishments instead of considered reforms.

The signatories place the element of speed – 'swift' social reactions and 'hasty' institutional responses – at the heart of the problem, alongside the 'severe' and 'disproportionate' extent of the response. Their sought-for alternative to excessive haste is 'considered reforms'. In a similar vein, the online *Urban Dictionary's* definition of cancel culture attributes the cultural phenomenon to 'a critical mass of people who are quick to judge and slow to question'. Sound judgment, especially in matters of performance – whether on the theatrical, legal, or social stage – ought to be slow. This is an argument that is beautifully made by Julen Etxabe in his book *The Experience of Tragic Judgment*, where he cautions against the wrongheaded notion that judgment is a single act in a single moment like the falling of an axe. He argues that judgment ought to be understood as a process which brings conflicting human interests and human relations into a sophisticated conversation. Etxabe writes that the judge in a court of law 'must tune into the complexities of the case without making interpretative decisions that would foreclose any real consideration of the issues'.¹¹ The point applies as well to judges in the court of popular opinion. A hallmark of sound judgment is that we should be swift to judge ourselves and slow to judge others. One obstacle in the way of achieving this is the troubling fact that unsophisticated and unskilled judges tend to be poor judges of their own shortcomings and vociferous judges of others. As Bertrand

⁹ 'A Letter on Justice and Open Debate', *Harper's Magazine*, 7 July 2020, <https://harpers.org/a-letter-on-justice-and-open-debate/>.

¹⁰ Hence the critical response, 'A More Specific Letter on Justice and Open Debate', *The Objective*, 10 July 2020.

¹¹ Julen Etxabe, *The Experience of Tragic Judgment* (Abingdon: Routledge, 2013) 85.

Russell once said, ‘in the modern world the stupid are cocksure while the intelligent are full of doubt’.¹² He was describing a phenomenon that psychologists have demonstrated experimentally and labelled the Dunning–Kruger effect. David Dunning, in an article written with Erik G. Helzer, summarizes the effect by saying that ‘poor performers are not in a position to recognize the shortcomings in their performance’.¹³

Celebrated Australian actor Geoffrey Rush might have thought that his very name was cursed when he was the subject of a rush to judgment after incidents alleged to have occurred with a young actress on and off stage. He was playing the title role in *King Lear* and the actress was playing Lear’s daughter Cordelia. It was alleged that Rush had on more than one occasion touched the actress inappropriately after being asked by her to desist, and that he had sent her suggestive text messages. The truth of her allegations was never tested at a full trial, but there was a trial in Rush’s lawsuit against the newspaper that first published the allegations (including under the headline ‘King Leer’).¹⁴ In this trial, the judge criticized the newspaper for rushing to judgment. Justice Michael Wigney accepted Mr Rush’s contention that the newspaper’s conduct was ‘unjustified and improper because they were reckless as to the truth or falsity of the defamatory imputations conveyed by the articles and had failed to make adequate inquiries before publication’.¹⁵ This case can be put down to poor journalistic and editorial standards, but it prompts the question whether those standards are more likely to slip when there is a wider (including online) culture of passing knee-jerk judgments against figures in the public eye. The key argument of this section, I stress again, is that regardless of the possible validity of the complaint and the resulting cancellation, the ‘rush’ element is a procedural defect that strikes at the heart of due process.

The error of haste can also be exacerbated by insufficient attention to history. If we rush to judge a person on the basis of an isolated act there is a danger that we will pay insufficient attention to the accused’s exemplary history prior to the incident and to their efforts to reform since it occurred. The defining success of the #MeToo movement in establishing an individual’s offending behaviour is the fact that it does so by establishing a history of offending. A complainant is within her rights to come forward on the basis of a single incident, but that incident must be placed in the context of the accused’s whole history. Favourable conclusions should be drawn when their

¹² Bertrand Russell, ‘The Triumph of Stupidity’, in Bertrand Russell, *Mortals and Others: Bertrand Russell’s American Essays, 1931–1935*, Vol. 2 (10 May 1933) (New York: Routledge, 2009) 28.

¹³ David Dunning and Erik G. Helzer, ‘Beyond the Correlation Coefficient in Studies of Self-assessment Accuracy: Commentary on Zell and Krizan (2014)’ (2014) 9(2) *Perspectives on Psychological Science* 126–130.

¹⁴ ‘King Leer’, *Sydney Daily Telegraph*, 30 November 2017.

¹⁵ *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 Federal Court of Australia (file number NSD 2179 of 2017) Wigney J (11 April 2019) para. [737].

history shows no pattern of offending, just as surely as unfavourable conclusions should be drawn when a pattern of offending emerges.

'Face Values'

A little learning is a dang'rous thing.

Alexander Pope, *Essay on Criticism*

In the previous section we considered the 'rushing in'. Now it's time to consider the fools. It is foolish to rush to judgment on the basis of superficial knowledge of the events on which a person is being judged, and on the basis of superficial knowledge about the person who is being judged. Both aspects – knowledge of the events and knowledge of the individual – bring in the danger of judging on shallow facts, or (which is to put the same point another way) of judging on face values. As regards superficial knowledge of the person being judged, we would do well to bear in mind the point, well made by lawyer Joanne Cash, that '[e]ven the most privileged person will have gone through life with suffering of some sort', that '[e]very single individual has a private story', and that 'one of the dangers we're seeing in the dialogue at the moment is that we lump people together in a very unsympathetic way'.¹⁶ As regards superficial knowledge of the issues, we need to bear in mind the danger of indiscriminate reliance on the internet. The Web has given us the most immense and extraordinary repository of facts and resources for research, but the breadth of a library is no guarantee of the depth to which it is read. One of my own methods for whittling out the rotten wood of a Google search is to prioritize resources on Google Scholar and Google Books and to click through until I find books and articles written by people whose expertise has been established through professional or practical experience. This is seemingly in contrast to the prevailing current practice in which 'many citizens no longer trust the traditionally authoritative sources of evidence (scientists, academics, nonpartisan government agencies, and the "elite" press)'.¹⁷ My method of scraping down to the sound, heartwood of a subject serves, I hope, to prioritize opinions that are not only better informed but also expressed with better balance. Ideally, the author will have no personal axe to grind, but there can be no objection to a biased author who is self-critical and fairly grinds both sides of the axe even when they are seeking to show that their side has the sharpest arguments. Andrew Keen, author of *The Cult of the Amateur*, is rather one-sided in his critique of the internet and at times more polemical

¹⁶ Lucy Burton, 'Ditch "Woke" Agenda and Unconscious Bias Training, Bosses Told', *The Telegraph*, 24 May 2021.

¹⁷ David C. Barker and Morgan Marietta, 'Misinformation, Fake News, and Dueling Fact Perceptions in Public Opinion and Elections', in Elizabeth Suhay, Bernard Grofman, and Alexander H. Trechsel (eds), *The Oxford Handbook of Electoral Persuasion* (Oxford: Oxford University Press, 2020) 493–522, 493.

than scholarly, but – as his surname promises – he makes several points that cut to the core of the problem. The essence of the problem, as he sees it, is the superficiality of online opinion. In his opening chapter, ‘The Great Seduction’, he contends that:

The Web 2.0 revolution has peddled the promise of bringing more truth to more people – more depth of information, more global perspective, more unbiased opinion from dispassionate observers. But this is all a smokescreen. What the Web 2.0 revolution is really delivering is superficial observations of the world around us rather than deep analysis, shrill opinion rather than considered judgment.¹⁸

One of the most pernicious forms of superficial judgment is judgment based upon the racial appearance of a person’s skin. We rightly condemn the racism inherent in assuming that a person with non-white skin must have a character conforming to certain stereotypes – not least, but not only, where those stereotypes are patently negative. We should likewise condemn the racism inherent in making stereotypical assumptions about the character of a person who has white skin. In his most famous speech, the Reverend Dr Martin Luther King Jr said, ‘I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character’.¹⁹ Sadly, the skin-depth persecution that he objected to has been replaced with skin-depth prejudice of other sorts. We are nowadays in danger of achieving equality only by treating people of all colours equally badly. The long walk to racial justice is in danger of becoming a race to the bottom. I’m aware that Martin Luther King’s quote has been used by conservatives as a basis for resisting affirmative action, but that is not my intention here. I am not discussing efforts to treat people more favourably on the basis of their background – that is, I think, something to be encouraged in relation to people of all races. Institutions in the USA, in light of that nation’s distinctive historic debt to African Americans, must make their own decisions on how to achieve distributive and symbolic justice without causing undue social division.²⁰ My concern here is not with passing positive judgment, but with the phenomenon of passing negative judgment on people because of surface appearances. This is precisely the sort of poor judgment that Martin Luther King Jr was determined to remedy.

Earlier in this chapter we discussed online public reactions to Danny Baker’s offending tweet about the baby born to Prince Harry and Meghan Markle. It must be obvious that if Mr Baker had been Black no racist intent would have been inferred. Mr Baker was in that sense judged by the colour of his skin. That observation may be banal, but broadly related to it is the fact

¹⁸ Andrew Keen, *The Cult of the Amateur* (New York: Doubleday, 2008) 16.

¹⁹ Martin Luther King Jr, ‘I Have a Dream’ (28 August 1963).

²⁰ See the section ‘The Unique Experience of African Americans’, in James Boyd White, *Keep Law Alive* (Durham, NC: Carolina Academic Press, 2019), 54–58.

that some respondents were willing to imagine a disjunction between his error and his private character whereas others were seemingly unable to imagine the possibility of any distance between Mr Baker's erroneous act and his underlying attitude to race. The former 'minds the gap', the latter doesn't. An example of the former is the anonymous online commentator (identified only as 'jcm') who wrote the following response to Mr Baker's tweet:

I don't necessarily think he's a racist. I do think he must be quite thick not to have realised this wasn't sensible. Our public discourse is better off without this stuff. I think people who think this stuff is OK once are likely to think it's OK again and are thus not well suited to jobs where they have to make jokes in real time in public. (9 May 2019)

An example of the latter is a tweet by Joseph Ejiofor, a Labour Party councillor for Haringey Council in London, who tweeted:

RACIST RACIST RACIST Danny Baker @prodnose should be given today to resign and clear his desk. If he is still there at 16.59 @bbc MUST FIRE HIM! I'm disgusted by the hate and racism inherent in his Tweet Unforgivable He's not fit to be a broadcaster employed from the public purse. (9 May 2019)

Councillor Ejiofor's tweet exhibits the standard sequence of 'making' processes by which social judgments are frequently formed and performed. The councillor made an assumption about Mr Baker's character ('hate and racism inherent'), then made a judgment ('I'm disgusted'), and then sought to make an example of him by cancelling him ('He's not fit to be a broadcaster employed from the public purse'). This is an unreasonably extreme reaction, but racism is extremely unreasonable and reactions to racism, actual or perceived, can therefore be forgiven for being emotive and at times unreasonably extreme in the way that they are expressed and performed. 'Forgiven' is the crucial word here and must be our focus if any progress in social discourse is to be achieved. Accordingly, it is the councillor's use of the word 'unforgivable' that is hardest to forgive.

Let's play along with Mr Ejiofor, and for the sake of argument assume, as he assumes, that Mr Baker's tweet was deliberately racist and that it was the product of 'hate'. What sort of world does Mr Ejiofor envisage in which a one-off error in a forty-year career is not susceptible to forgiveness? The Black cricketer Michael Carberry, who played in six Test matches for England between 2010 and 2014, was equally forthright in a radio interview with the BBC when a current England player, Ollie Robinson, was revealed to have sent racist and sexist tweets between eight and nine years earlier when he was a teenager. Carberry said that, 'if it was down to me, honestly, Ollie Robinson wouldn't be playing Test cricket, because for me ... I don't believe this is a problem where you can rehabilitate someone'.²¹ If that were true, it would

²¹ 'Ollie Robinson: PM Boris Johnson Supports Oliver Dowden's Comments that ECB "Has Gone Too Far"', *BBC Sport*, 7 June 2021.

make a mockery of efforts to promote education on matters of race and gender. Prince Harry, who now spends a great deal of his time seeking to educate people in matters of social justice, is living proof of the power of rehabilitation. This is a man who in his youth wore a Nazi uniform at a fancy-dress party, and during his army career was recorded casually using the racist epithet 'P*ki' to describe a Pakistani colleague as well as saying that another colleague looked like a 'r*ghead'.²² Even the sustained systemic racism of South African apartheid was healed, or is on the way to being healed, by attempts to forgive past wrongs. Nelson Mandela did not receive the Nobel Peace Prize because he adamantly refused to forgive others, or because others refused to forgive him for his own youthful resort to violent resistance. Forgiveness is key to unlocking the riches of racial justice in South Africa. For all its practical flaws, the commission established by Mandela to record the wrongs of apartheid South Africa at least got the political performance right in so far as it defined its role in terms of seeking not only 'truth' but also 'reconciliation'.²³ Our society is obsessed with making judgments, when what is required, as Michele Mangini argues, is the sort of education that will refocus society's attention on 'the main goal of judging' which is 'making justice'.²⁴ Forgiveness is the attribute which more than any other enables us to move beyond making judgments to making justice.

If I were to read too much into Councillor Ejiofor's brief and hasty tweet on the Danny Baker affair, I would run the risk of judging him too harshly and of committing the very act of hypocrisy that in this chapter (and especially in the next section) it is my aim to caution against. Maybe, on reflection, Mr Ejiofor would remove that word 'unforgivable'. Perhaps, after more considered rumination on Mr Baker's error, he would even admit the possibility that it was just that – an error – rather than an expression of racial hate. Mr Baker says that it was an outpouring of comic contempt for the privileges of class and wealth. I wouldn't expect Mr Ejiofor to concur with that, still less to change his verdict that Mr Baker should have been sacked. What we can expect of Mr Ejiofor, and of all elected politicians, is that they should not spark up their flaming brands and rush in with the mob. They should rather perform, through the example of their own behaviour, a model of reasonable and considered judgment of the sort that they would want to see performed whenever judgments are made by people with political power. After the Danny Baker incident, and unrelated to it, Mr Ejiofor was deselected by the Labour Party and barred from standing for re-election as a party candidate. Ironically, his reported response to his own cancellation was to complain of a

²² Abeni Tinubu, 'Can Meghan Markle Forgive Prince Harry for His Racist Actions?', *Showbiz CheatSheet*, 27 June 2019.

²³ Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (establishing the South African Truth and Reconciliation Commission).

²⁴ Michele Mangini, 'Ethics of Virtues and the Education of the Reasonable Judge' (2017) 2 *International Journal of Ethics Education* 175–202, 188.

lack of due process: 'I feel I have been targeted by my own party in a Kafkaesque process resulting in an unjust ruling. After all, how can it be right that someone is asked to submit their defence before even hearing the charges?'²⁵

So, how do official judicial institutions approach the sensitive issue of suspected racist behaviour and speech? In the UK, there is a definite effort within judicial officialdom to emphasize the possibility of a gap between an individual's particular behaviour and their underlying character. The Judicial College, which has responsibility for formal aspects of the professional training of judges in England and Wales, publishes an *Equal Treatment Bench Book* which is regularly updated and is available free online. The February 2021 edition defines racism as follows:

'Racism' is a term defined more by effects/outcomes than by motives: A racist action, or a person who acts in a racist way, is not necessarily racially prejudiced. However, the term is often used to describe a combination of conscious or unconscious prejudice and power to implement action which leads, however unintentionally, to disproportionate disadvantage for BAME [Black, Asian, and minority ethnic] people. People who use the term 'racist' to describe the actions of others may or may not mean that the other person is personally prejudiced.²⁶

Something along the lines of this official reading of the term 'racist' was applied in a case in which a 49-year-old white cleaner at the end of his cleaning shift at a gym wrote in the handover book that 'three coloured guys were messing around (i.e. play fighting and not really training)'.²⁷ The three men he was referring to were racially South Asian. A fellow cleaner, a Black man, read the written comment and was so outraged by it that he angrily confronted the writer, who immediately apologized and said he hadn't intended to be offensive or racist. He explained that he had thought that the word 'coloured' was less offensive than 'Black' (the fact that he even thought that 'Black' might an acceptable description of people of South Asian race demonstrates the cleaner's ignorance of politically correct terminology). Despite the accused's immediate and apparently sincere apology, the aggrieved cleaner pursued a harassment claim at law. When the matter was heard, the judge dismissed it on the basis that the cleaner's mistake was a genuine one committed in a misguided effort to use sensitive language, which he did not realize was outdated. The judge noted that socially acceptable terminology changes over time and that not everybody has the educational and social opportunities to keep up to date with the latest changes. It rather bears out this point about linguistic evolution to note that one of the leading and

²⁵ Charles Thomson, 'Former Haringey Council Leader Removed as Labour Party Election Candidate', *Hampstead Highgate Express*, 21 February 2022.

²⁶ *Equal Treatment Bench Book* (2021 edition) para. [295].

²⁷ Phoebe Southworth, 'Older White People Who Use Term "Coloured" Are Not Necessarily Racist, Judge Rules', *The Telegraph*, 13 April 2021.

longest-established civil rights organizations in the USA is still called the National Association for the Advancement of Colored People, albeit usually known nowadays by the abbreviation NAACP. No doubt the term ‘colored’ was originally chosen as being preferable to many of the alternatives then employed to describe Black people. Today in the USA, an acceptable generic description of non-white people is ‘people of color’. In a world in which ‘people of color’ is politically correct and ‘colored’ is politically offensive, the judge in this case was surely right to forgive a middle-aged cleaner for not being perfectly attuned to the difference. Again, the word ‘forgive’ is key, and it unlocks another concept – hypocrisy – which is crucial to making sense of popular judgment and cancel culture.

‘Mind the Gap – the Hypocrisy Problem’

To err is human; to forgive, divine.

Alexander Pope, *Essay on Criticism*

There is a famous biblical anecdote about hypocrisy and mob judgment that has given us a salutary maxim. The anecdote is the quasi-canonical account of Jesus coming to the aid of a ‘woman caught in adultery’ who was about to be stoned to death on religious grounds by a gang of men.²⁸ The maxim is Jesus’ challenge to the men: ‘Let anyone among you who is without sin be the first to throw a stone’ (John 8:7). Perhaps the men in the story were condemning the woman out of a misguided sense of religious duty, or perhaps their motivation was misogynistic delight in their capacity to exert power and pass judgment. Human nature hasn’t changed. When modern stone-throwers ‘call out’ and ‘cancel’, their outrage and judgment is likely to be to some extent hypocritical. As for their motives, these will range as they always have from a sense of duty and a sense of collectively ‘making a difference’ to a sense of pleasure, and everything between. A glaring example of the glee that sometimes motivates the Twitter mob in pursuit of its prey is provided by the case of Justine Sacco, who was senior director of corporate communications for multinational internet and media company IAC. Shortly before a flight to South Africa, she tweeted to her 170 Twitter followers ‘Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!’ (20 December 2014). Sacco, a South African, explained later that she was trying to make a tongue-in-cheek allusion to prevailing ignorance about the true impact of Aids. Had the text of Sacco’s tweet been delivered as a spoken line in a comedy show, contextualized as part of a routine about Western ignorance of African realities, and delivered with a heavily sarcastic tone of voice, it would have been completely uncontroversial

²⁸ I have described the passage (John 7:53–8:11) containing the story of the woman caught in adultery as ‘quasi-canonical’ because many New Testament scholars consider it to be a later interpolation added after the inscription of the earliest gospel manuscripts.

and much funnier. Whatever Sacco meant by her tweet, what she couldn't have foreseen was the turbulence on Twitter that would brew up while she was on the flight. Even her employer chipped in with a tweet while she was still airborne: 'This is an outrageous, offensive comment. Employee in question currently unreachable on an intl flight'. By the time she landed, she had been fired. (She was subsequently, more discretely, rehired.) The employer's tweet was motivated by the desire to protect the company's brand, but a great many of the tweets launched at her had nothing to do with duty and everything to do with delight at the entertainment that was unfolding: 'All I want for Christmas is to see @JustineSacco's face when her plane lands and she checks her inbox/voicemail'; 'We are about to watch this @JustineSacco bitch get fired. In REAL time. Before she even KNOWS she's getting fired.'²⁹ The hashtag #HasJustineLandedYet trended on Twitter during the duration of her flight.

One wonders if the outrage in the case of Justine Sacco would have been quite so great in the case of a high-flying male executive. The use of the word 'bitch' in one of the tweets quoted above reeks of misogyny. In this connection, it may be significant that the biblical story of the stoning of the woman caught in adultery described religious men passing judgment on a woman. Could it be that women are especially at risk of being cast into the flames of social judgment? *Guardian* journalist Suzanne Moore thinks so. She has written that '[a]lmost every week now a different woman is put on the pyre: JK Rowling, Rosie Duffield, Selina Todd. It's always a woman who is some sort of heretic and must be punished.'³⁰ The examples alluded to in this chapter have been men for the most part – Danny Baker, Ollie Robinson, Geoffrey Rush – but Moore might have a point. After all, the women she mentions, unlike the men just listed, were hounded for expressing honestly held (albeit sometimes intemperately expressed) opinions on the transgender debate that they still hold and see no reason to apologize for. Rosie Duffield MP has tweeted that 'only women have a cervix' (1 August 2020); J.K. Rowling has tweeted "'People who menstruate.'" I'm sure there used to be a word for those people. Someone help me out. Wumben? Wimpund? Woomud?' (6 June 2020); and Selina Todd is a supporter of Woman's Place UK, which argues that transgender women should not have access to women-only spaces. When it comes to witch hunts, women have long been cast as the villains and made the victims, and usually by male authority. Without prejudice to that point, it must be said that Duffield and Rowling made the error of tackling a large and sensitive issue with an inappropriately brief form of communication: the 'tweet'. It is hard enough to handle a highly controversial issue in a long book chapter. To attempt to do so in a short tweet is doomed to failure. It might

²⁹ Jon Ronson, 'How One Stupid Tweet Blew Up Justine Sacco's Life', *New York Times Magazine*, 12 February 2015.

³⁰ Margarette Driscoll, 'Suzanne Moore: "I Was Betrayed and Bullied for Saying that Women Should Not Be Silenced"', *The Telegraph*, 15 November 2020.

make an impact, but it has little potential to make a constructive contribution to the issues.

One very good reason why we shouldn't censor or cancel or cast stones when someone expresses an opinion that we disagree with is the basic fact that none of us is perfect. That's the point of the biblical challenge: 'Let anyone who is without sin be the first to throw a stone.' A similar maxim against lapidation advises that 'people who live in glass houses shouldn't throw stones'. The truth is that we all live in glass houses. Where an offending utterance might have been made by mistake or is susceptible to a benevolent construction, we should be especially slow to judge. We all make mistakes – to err is human. The fact that Jesus' target in the stoning story was a mob of religious leaders should serve to warn online mobs that when they pick up their virtual sticks and stones, they are acting in precisely the way that puritanical hypocrites have always acted. Indeed, a simple and sobering parallel can be drawn between puritanical religiosity and politically correct intolerance of opinions that are considered heretical to the so-called woke agenda. The passing of judgment on the ground that someone is a heretic has always gone hand in hand with hypocrisy, and so too – as the biblical anecdote tells us – has the act of passing judgment on a woman's sexual promiscuity. Shakespeare, as so often, expresses the point vividly:

Thou rascal beadle, hold thy bloody hand!
 Why dost thou lash that whore? Strip thine own back;
 Thou hotly lust'st to use her in that kind
 For which thou whipp'st her

(4.6.160–163)

The point is that the person making a judgment is very often guilty of an offence similar to, if not worse than, the one that they are calling out. In such a case, judgment passed against a supposed offender is not justified by the measure of the judge's own character but according to a standard that critic and suspect both fall short of. It is precisely this disjunction between inner reality and outer pretence that defines the critic in such a case as a 'hypocrite'. The word *hypokrisis* was originally a description of masked actors in Attic Greek theatre and also a description of rhetorical performers.³¹ Hypocrisy later came to describe the error of people who pretentiously put forward a public or social mask that is more heroic or otherwise more attractive than the underlying substance of their private character. The word 'hypocrisy' means 'under critical' or 'under separation' and indicates that the person making the judgment is under critical of themselves and has failed to acknowledge the gap that separates their personal character from their performed social persona.

³¹ Alberto J. Quiroga Puertas, *The Dynamics of Rhetorical Performances in Late Antiquity* (Abingdon: Routledge, 2018) 21.

Brevity Is the Soul of Folly

In the preceding three sections we have discussed the errors of speed, superficiality, and censoriousness. I have discussed these errors in association with bad judgment, but it must be acknowledged that each of them is frequently also an error associated with the original offence against which judgment is raised. If Danny Baker had not rushed to send his offending tweet about the royal baby, and if his joke hadn't been so superficial and judgmental, he would not have suffered the swift and superficial censorship that he did. Brevity is another error touched upon by Alexander Pope in his essay, where he reproaches critics who '[f]orm short ideas'. The same criticism can be levelled at offenders who form short tweets. In the world of online media, alacrity frequently goes hand in hand with brevity. The mission of a medium like Twitter is to promote fast, short-format communication and this creates the perfect breeding ground for the twin errors of speaking too swift and speaking too short. When Shakespeare had Polonius utter the adage 'brevity is the soul of wit' (*Hamlet* 2.2.92) he was being ironic, for Polonius is pompous and verbose – a full rushing stream of speech clogged with clichés. Brevity may be the soul of a quick wit, but it is seldom a hallmark of scholarly analysis, of judicial judgment, or of any species of expert critique deserving the label 'authoritative'. It is foolish to enter large debates with small texts. Despite a doubling of the original 140 characters limit on the length of tweets, single messages on Twitter are still terse to the point of being cursory. Sometimes an argument (or polemic) is stretched across the span of a series of tweets, but on Twitter one will seldom find anything resembling a developed and structured argument, still less anything approximating the classic format of a scholarly essay in which the writer sets out a thesis and tests it against the strength of an antithesis.

In Danny Baker's case, all it took to lose his job was a tweet containing four words and an image. Even more brief was a tweet by television celebrity Rachel Riley who simply wrote 'Good advice' accompanied by an egg emoji and a labour red rose emoji (3 March 2019). She was retweeting a two-month-old tweet by *Guardian* journalist Owen Jones in which he had offered this uncontroversial recommendation: 'if you don't want eggs thrown at you, don't be a Nazi' (1 January 2019). What made Ms Riley's retweet contentious was the fact that it came on the day that Jeremy Corbyn, the then leader of the Labour Party, was pelted with an egg on a visit to a mosque. Even more controversial was the tweet sent in response to Ms Riley's tweet by Labour Party activist and Corbyn supporter Laura Murray (shortly before she was appointed – with some irony – to be the Labour Party's head of complaints). Ms Murray interpreted Ms Riley's tweet as a criticism of Jeremy Corbyn's poor reputation on the issue of anti-Semitism in the Labour Party and the intemperate tweet that Murray immediately sent in response contained the lines 'Rachel Riley tweets that Corbyn deserves to be violently attacked because he is

a Nazi. This woman is as dangerous as she is stupid. Nobody should engage with her. Ever' (3 March 2019). In other words, Ms Murray went full-on 'call out and cancel'. She called out Ms Riley as 'dangerous' and 'stupid', and by decreeing that '[n]obody should engage with her. Ever', she invited the tweet-reading public to cancel Riley for life. Clearly Ms Murray was in too great a hurry to respond to Riley's tweet and she also ran the risk of error by responding so effusively to so brief and open-textured a missive as Riley's two-word tweet. Ms Riley's tweet was susceptible to several alternative constructions to the one that Murray put on it. It is foolish to rush to judgment, and especially so where the terrain is too small to afford a secure foothold. Ms Murray's mistake was not lost on Ms Riley and her legal advisors, who subsequently pursued a successful libel action against her.³² Trial by Twitter in the kangaroo court of popular opinion is a perilously short hop from a real court of law.

The 'N-Word'

Even a single word can be enough to ruin a career. Donald McNeil Jr, a distinguished newspaper reporter for more than four decades, found this to his cost. Among his many journalistic awards was the 2002 National Association of Black Journalists award for international reporting, which he and his colleague Rachel Swarns won for a series of articles on the HIV epidemic in South Africa.³³ He was also a leading reporter on the Covid-19 pandemic until a potentially career-limiting error came to light. On 28 January 2021, the *Daily Beast* reported accusations that he had uttered racist language in conversation with a group of high school students who were attending a *New York Times*-sponsored educational visit to Peru in 2019. Donald McNeil Jr mentions in a subsequent blog that the trip was 'arranged by Putney Student Travel in Vermont. They're expensive, and most of the students are from private schools.'³⁴ Like Mr McNeil, none of the students was Black. The worst offence alleged against McNeil is that he used the 'N-word'. It is not said that he used it as a description of Black people, but that he uttered it while discussing with the students a case in which a high school student was suspended from school for historic use of the offending word when they were twelve years old.³⁵ The students on the study trip had asked Mr McNeil whether he felt that the student in question ought to have been suspended. In an entry in his personal blog on 1 March 2021, in which he sets out the content of the explanatory email he sent to his employer, McNeil clarifies that he had responded to the

³² *Riley v Murray* [2021] EWHC 3437 (QB) (20 December 2021).

³³ 'Death and Denial', *New York Times*, Special Series, 28 November 2001.

³⁴ Donald G. McNeil Jr, 'NYTimes Peru N-Word, Part Four: What Happened in Peru?', *Medium.com*, 1 March 2021.

³⁵ Anthony Zurcher, 'Cancel Culture: Have Any Two Words Become More Weaponised?', *BBC News*, 18 February 2021.

question by asking the student discussants whether the twelve-year old had called someone a [*at this point McNeil uttered the offending word*] or were they 'singing a rap song or quoting a book title or something?' The blog entry continues with McNeil stating that throughout the whole episode he had been willing (short of endorsing the *Daily Beast's* characterization of him) to apologize for offence caused by uttering the N-word, and with McNeil stating his belief that '[i]f the Times had not panicked' and he had been given the opportunity to clarify and apologize, the *Daily Beast* might 'have rewritten or even spiked its story', adding that '[a]lmost undoubtedly, the reaction inside the Times itself would have been different'.³⁶

The last point is a reference to that fact that the *New York Times* peremptorily sacked McNeil because of the incident and to the fact that 150 of Mr McNeil's colleagues at the *New York Times* undersigned an indignant letter to their employer in response to the *Daily Beast* report. Their letter opened with the lines: '[l]ast week's revelations about Donald G McNeil Jr.'s reported behaviour and the company's subsequent response deeply disturbed many of us. Our community is outraged and in pain.' It ended with: '[w]e hold ourselves to a high standard. We ask you to do the same.'³⁷ One might think that high in the list of journalistic standards would be a professional commitment to checking sources in relation to what the complainants acknowledged to be merely 'reported' behaviour, but their letter was really nothing more than a hasty and sanctimonious cancellation performed in well-crafted journalistic prose. Perhaps the signatories are all faultless, as they claimed to be in their closing lines, but one suspects that in truth they are just a bunch of flawed human mistake-makers like everybody else. For many African Americans, the very sound of the 'N-word' coming from a white person's lips, however innocuous the context in which it is uttered, is understandably resonant of an appalling and long history of systemic racism. Donald McNeil Jr ought to have avoided it at all costs. The question, though, is whether his utterance, which apparently lacked abusive intent, should have been enough to generate such outrage from his colleagues or to have cost him his job.

Suppose that the word hadn't been spoken but had been written down – perhaps in the context of a scholarly discussion such as this one. Such usage wouldn't be a spoken utterance of the word, and it certainly wouldn't be to use the word as a racial slur. We might ask in such a case whether any actual harm has been caused and any offence committed. If an offence were committed, it is presumably the offence of infringing a taboo. The rule that non-Black people cannot write or say the N-word is respected in something like the way that we respect a religious article of faith. Civil society requires, as it

³⁶ Donald G. McNeil Jr, 'NYTimes Peru N-Word, Part Two: What Happened January 28?', *Medium.com*, 1 March 2021.

³⁷ Erik Wemple, 'Opinion: What Happened with New York Times Reporter Donald McNeil?', *Washington Post*, 9 February 2021.

requires in the toleration of religious differences, that we shouldn't wilfully offend others. Many writers, especially white writers, now use the vague code 'racial slur' as a way of referring to the 'N-word'. Dictionaries, encyclopaedias, and Wikipedia are among the few modern outlets in which the word itself is still spelled out in full. Perhaps it is permitted in that context because such outlets have no individual 'author' as such and therefore cannot be presumed to have a non-Black author. Such works as dictionaries and encyclopaedias, including Wikipedia, are repositories of communal knowledge and are therefore hopeful symbols or expressions of communal peace. If the taboo against expressing the N-word ever extends to excluding it from works such as these, we will have struck at the very root of our hope to evolve from our history and to have a racism-free social conversation.

As with any religious or mystical totem, the more the word is excluded as taboo the more mystique it garners and the more it takes centre stage. In this respect, it has some of the properties that silence imparts to an actor's speech. Silence is not empty, it is full – it is a pregnant pause. Silence fills the theatre because it captures the attention of an audience more than any spoken sound does. As we anticipate the utterance of the N-word, we see its shape delineated by the frames that are delicately placed around it. This is no bad thing, for it is appropriate that the national shame of America's racial history should be performed as a long, drawn-out, and awkward silence at the centre stage of American public life (although this begs the question where we should draw the line between public life and private life, e.g. in the case of a conversation between a journalist and a group of high school students on an educational trip to Peru). The taboo status of that ineffable word should be acknowledged for what it is – a human-made artefact which now makes humans behave in certain ways. It confronts us silently like a law inscribed on a stone which has been set up in the public square for all to look on and despair.

It is perhaps to relieve the tension that emanates from the magnetic totem of the N-word, or perhaps to experience the existential thrill of approaching a taboo artefact, that white comedians have occasionally teased white members of their audience by tempting them to within touching distance of the forbidden fruit. For example, the song 'Prejudice' by Australian songsmith Tim Minchin contains the lyric: 'In our modern free-spoken society / There is a word that we still hold taboo', 'A couple of Gs, an R and an E, an I and an N / Just six little letters all jumbled together.' The red-headed Tim Minchin delivers the punchline: 'Ginger'. Another example is the *South Park* episode 'With Apologies to Jesse Jackson', which features the white character Randy uttering the N-word in answer to a television quiz question, and consequently being shunned as an object of hate and derision. The episode received a mixed response from Black viewers. Notable and perhaps surprising supporters were Kevon and Jill Flowers who co-founded the Abolish the 'N' Word project. They said that the show, 'in its own comedic way, is helping people to educate the power of this word, and how it can feel to have hate language directed at

you'.³⁸ Comedy has become an especially fraught context for politically incorrect speech acts with consequences ranging from judgment in the court of popular opinion to litigation in courts of law. A question raised by the comedy context is whether we need to protect professional fools when they venture where the rest of us fear to tread.

Comic Fools

The comic actor Rowan Atkinson is an outspoken critic of cancel culture, complaining that 'what we have now is the digital equivalent of the medieval mob roaming the streets looking for someone to burn'.³⁹ He is most famous for his performance in the role of Mr Bean, in which role he has attained a global popularity enhanced by the fact that Mr Bean (following in the tradition of Charlie Chaplin's Tramp) communicates for the most part in the international language of silent mime. It is therefore to Atkinson's credit that this silent performer has voiced his support for his fellow artists, including comedians, who have to speak for a living and who therefore risk the ire of censorship and of cancel culture. The BBC seems to be especially sensitive to the risk of causing offence to any social minority, as one might expect from a broadcaster that is publicly funded by a direct tax (the 'licence fee') levied on users in the UK. One does wonder, though, if it made the right decision when it refused to rebroadcast a stand-up routine because of complaints from just two viewers. This decision was reached in the case of comedian Jack Whitehall in relation to a comic bit about attending a pop concert with a female friend who has dwarfism.⁴⁰ A couple of years previously, the BBC had carried an article discussing a new law against hate speech in Germany and the case of the German comedian Sophie Passmann who had a tweet deleted for breaching that law.⁴¹ In the tweet she had joked that '[a]s long as it's a tradition in Germany to watch "Dinner for One," refugees can totally come to Germany and destroy our culture'. *Dinner for One* is an old British film – virtually unknown in the UK – which has become a staple of German New Year festivities. Sophie Passmann objects to the film because the doddering old lady in it is also called Sophie. Passmann's reference to refugees is clearly a light-hearted and ironic sideswipe at the stereotype that depicts immigrants as destroyers of the host's indigenous culture. It is not a very funny joke, but as Passmann puts it: 'There shouldn't be a law against bad jokes, because that would mean that half the comedians in Germany wouldn't be allowed on stage.'⁴²

³⁸ Paula Zahn Now, CNN, 8 March 2007.

³⁹ Naman Ramachandran, "Mr. Bean" Actor Rowan Atkinson Weighs in on "Cancel Culture", *Variety*, 5 January 2021.

⁴⁰ Jack Whitehall "Dwarf Routine Complaints Upheld", *BBC News*, 26 November 2020.

⁴¹ 'Is a New Hate Speech Law Killing German Comedy?', *BBC News*, 21 April 2018. ⁴² *Ibid.*

In this section, I pose the question whether a society which is forbidden to touch taboo subjects needs comedians to touch them on society's behalf. My own view is that there is indeed a need to approach and address taboo topics and that comedy has a unique capacity to meet that need. Comedy has developed this capacity because it has always been the counterpoint to the greatest and perennial human taboo: death. Death is the essence of tragedy, and every human's inevitable, irresistible downwards trajectory towards the grave is the great universal taboo of our existence. It is against the compulsion of death that comedy has always set its face. Comedy takes us within touching distance of the tragic, helping us to laugh at things that might otherwise make us cry. Comedy reassures us that not even the finality of death can kill off the never-ending cycle of human folly. Comedy is the last laugh. Cruel mockery that laughs at individuals or vulnerable sections of society is not true comedy and is seldom funny, for true comedy mocks the universal human condition even to the extent of laughing in the face of death – it brings us together through laughing *with*, rather than by laughing *at*. That said, it is important that comedians should be permitted to run the risk of laughing *at* in their quest to bring people together in the experience of laughing *with*. The quest for true comedy is so important to our common humanity that the comedian must be permitted to take all risks and all necessary steps to undertake it. As audience members, each of us rightly has our own power to cancel a comedic experiment by switching off the television, or refusing to attend the show, or by walking out of the theatre, but to cancel comedy because of a mob reaction is seldom, if ever, justified. As social creatures we must somehow live with the darkest taboos of our shared human experience, and comedy, no less than philosophy and religion, is one of the chief means by which we cope with the human condition.

Perhaps there are topics that can never be the subject of comedy, but it's hard to imagine what they might be. The test of success depends upon the Making Sense. Comedy succeeds when it makes us smile and when it makes us laugh – even, perhaps, when it makes us cringe in recognition of our shared human foibles – for in that moment of connection it makes a community in which performer and audience participate in their common humanity. Canadian comedian Mike Ward argues that 'it shouldn't be up to a judge to decide what constitutes a joke on stage', for the crowd's laughter has 'already answered that question'.⁴³ Ward was sued by disabled celebrity Jeremy Gabriel when Ward lampooned him to make the point that Gabriel, like the singer Celine Dion, has become a sacred cow of Québécois culture. Michael Lifshitz, a Canadian stand-up comedian who jokes about his own disability in order to educate people, agrees that it sets 'a dangerous precedent when the court says what you can and can't say – that should be left to the court of public opinion'.⁴⁴ There is, then, a tension for the comedic performer between relying

⁴³ Jessica Murphy, 'How a Joke Ended Up before Canada's Top Court', *BBC News, Toronto*, 15 February 2021.

⁴⁴ *Ibid.*

upon popular feedback for critical support while rejecting popular judgment that promotes cancellation. Ward has since said that he wouldn't do the same routine today because public sensitivities have changed. It seems therefore that his aim is to touch the boundary of the taboo without entering the inner sanctum and getting blood on his hands. As he says, '[t]he thing I love most about comedy is when you go, "Oh, f-k, I can't believe he or she said that, and I can't believe I laughed at that." I like it when they [the public] judge themselves.'⁴⁵ This, it seems to me, is the proper mission of a wise fool – to cross the boundary of good taste just enough to show us where the boundary is. When comedy is regarded in this way – as a process of Artefaction in which a joke is made for the purpose of drawing people into a constructive relationship – it is not then unrealistic to regard comedy as in some ways equivalent to law. They both create an artefact – they make a law or make a joke – that makes society look at itself critically. Both law and comedy do their job well when they keep pace with social change and adapt to social evolution by marking the bounds of what is acceptable and necessary in making civil peace in a particular society at a particular time. It's just that law and comedy look at the boundary line from different sides. Law looks towards the limit and sets out the point beyond which we should not stray. Comedy looks back at the limit having helped us to experience, within a licenced context, what it feels like to cross the line and to live a little beyond the pale.

Sometimes a subject is too recent and too raw to work well as a topic for professional comedy. A daring or reckless comedian might try to take on a topical tragedy – and might even acknowledge the risk by teasing their audience with the rhetorical question, 'too soon?' – but the truth is that sometimes it really is too soon. When the blood is still wet, comedy is liable to taint itself by touching on the tragic. Only foolish fools rush in. Wise fools know to wait, for they know that after a sufficient lapse of time no territory is absolutely off limits to comedy. There have, for example, been no shortage of celebrated cinematic and televisual comedic engagements with wars, including World War I,⁴⁶ World War II,⁴⁷ the Vietnam War,⁴⁸ and the Korean War.⁴⁹ There have even been comedic engagements with Hitler, the Nazis, and the Holocaust. The three movies I discuss next were in each case directed by their leading actor and this perhaps indicates the intense artistic control that such projects call for. Charlie Chaplin's *The Great Dictator* (dir. Chaplin, 1940) was a satire on Hitler and the Nazi party in which Chaplin plays a parody of Hitler. Taika Waititi also plays a parody of Hitler in his film *Jojo Rabbit* (dir. Waititi,

⁴⁵ Marie-Danielle Smith, 'The Joke That Went to the Supreme Court', *Maclean's*, 10 February 2021.

⁴⁶ For example, *Black Adder Goes Forth*, BBC (1989).

⁴⁷ For example, *Inglourious Basterds* (dir. Quentin Tarantino, 2009).

⁴⁸ For example, *Good Morning Vietnam* (dir. Barry Levinson, 1987), and *Tropic Thunder* (dir. Ben Stiller, 2008), which parodies the many clichéd tropes of Vietnam War films.

⁴⁹ The most famous example being the television series *M*A*S*H*, CBS (developer, Larry Gelbart, 1972–1983).

2019), in which the chief protagonist is a member of the Hitler youth. The celebrated comic actor Roberto Benigni created and starred in a film – *La Vita e Bella* ('life is beautiful') (dir. Benigni, 1997) – set in a Nazi concentration camp, for which he won the Best Actor Oscar at the 1999 Academy Awards. The film won the Oscar for Best Foreign Language Film and won the award for Best Jewish Experience at the 1998 Jerusalem Film Festival, which is perhaps the strongest testament to the film's success in navigating the narrow path at the borderline between tragedy and comedy. When a comedy engages with tragic subject matter it is sometimes labelled a 'black comedy' or 'tragi-comedy', but the truth is that all comedy confronts us with tragic or painful aspects of life and death without allowing us to succumb to them.

Mercy

Confronted with a world of human error, Alexander Pope said that forgiveness is 'divine'. This can sound like an abdication of human responsibility, but Pope was of course encouraging humans to aspire to higher virtues. This book began with the observation that creative making is an aspect of human identity which, according to whether one does or does not believe in the reality of the divine, humans have inherited from the nature of God or have attributed to our idea of the divine. Forgiveness is a feature of human social life in which the aspirational values of divine making can play a powerful part in improving our collective life together, because forgiveness responds to making mistakes not by making judgments but by creating an opportunity for the offender to make an apology and make amends. In the biblical anecdote of the woman caught in adultery (discussed earlier in this chapter), Jesus' last words to the woman were a prescription for an improved future: 'Go now and leave your life of sin' (John 8:11). The rock star Nick Cave, known for his thoughtful, doubt-dominated musings on the nature of the divine, has set down some provocative thoughts on the connection between creativity and forgiveness. Writing in his blog *The Red Hand Files* in response to a fan's question, 'what is mercy for you?', he expresses the fear that cancel culture stymies creative growth:

Without mercy society grows inflexible, fearful, vindictive and humourless. Frances, you've asked about cancel culture. As far as I can see, cancel culture is mercy's antithesis. Political correctness has grown to become the unhappiest religion in the world. Its once honourable attempt to reimagine our society in a more equitable way now embodies all the worst aspects that religion has to offer (and none of the beauty) – moral certainty and self-righteousness shorn even of the capacity for redemption. It has become quite literally, bad religion run amuck.⁵⁰

⁵⁰ Nick Cave, *The Red Hand Files* (blog) Issue #109, August 2020.

Iconoclasm

One of the regrettable features of ‘bad religion run amuck’ is iconoclasm. In recent times we have witnessed the appalling wholesale destruction of cultural artefacts in the Mosul Museum and elsewhere by members of the Islamic State of Iraq and the Levant intent on wiping out images of ‘false gods’. Puritanical religious doctrine also helps to explain widespread sacrilegious vandalism by Oliver Cromwell’s parliamentarians in the period of the English Civil War, and indeed the Greek word *Eikonoklastes* (‘iconoclast’) meaning ‘destruction of icons’ was chosen by parliamentarian John Milton as the title of the book he wrote to justify the execution of King Charles I. It was an answer to the book *Eikon Basilike* (‘the royal portrait’) which was attributed to the authorship of the king during his time awaiting trial and execution (although more likely written by cleric John Gauden, as we noted in [Chapter 6](#)). In our own time, protestors – especially those associated with the #BLM (Black Lives Matter) movement and other movements devoted to the eradication of the legacy of European colonialism – have frequently resorted to iconoclasm in various forms. In England, the most famous instance occurred in Bristol, where the statue of slave trader Edward Colston (1636–1721) was torn down and thrown into the waters of the city’s dock. In this case the action seems to have been popular with a large section of the Bristol citizenry and when four of the self-confessed statue-topplers were subject to trial by jury on charges of criminal damage, they were found not guilty. Perhaps the jury appreciated the accused’s performance positively, as being an instance of what Richard Clay calls the iconoclastic ‘transformation of signs’.⁵¹ At the time of the toppling, one of the protestors, Jen Reid, took her chance to stand on the empty plinth and a resin statue of Reid by Marc Quinn was subsequently placed on the plinth where it stayed briefly until the city council removed it. Sir Tony Robinson, the actor best known for playing alongside Rowan Atkinson in the BBC’s *Blackadder* comedy series, has promoted an alternative to the iconoclastic destruction of unpopular statues. Commenting on the Bristol incident, he says, ‘I would love to see the original statue and the one they put up afterwards [to Black Lives Matter protestor Jen Reid] next to each [other] in the museum. That way they can themselves become part of our culture.’⁵² This approach has the merit of putting conflicting standpoints in constructive opposition to each other. Applied to the case of Colston and Reid it would serve to perform the drama of ideological evolution by means of a symbolic dialogue between iconographic representations of antagonistic standpoints. Bristol-born artist Banksy proposed a solution with similar benefits (in his words, one ‘that

⁵¹ Richard Clay, *Iconoclasm in Revolutionary Paris: The Transformation of Signs* (Oxford: Voltaire Foundation, 2003).

⁵² Alex Diggins, ‘Tony Robinson on the History Wars: ‘I Wouldn’t Have Thrown Colston’s Statue in the Dock’, *The Telegraph*, 3 December 2020.

caters for both those who miss the Colston statue and those who don't): 'We drag him out the water, put him back on the plinth, tie cable round his neck and commission some life size bronze statues of protesters in the act of pulling him down.'⁵³ Compare this call for an enlarged performance to what President Barack Obama said in an address to the UN General Assembly: 'In a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities . . . the strongest weapon against hateful speech is not repression; it is more speech'.⁵⁴

The iconoclasm through which we bury or drown out the voices of history serves only to silence and subjugate the past to the prejudices of the present time. It might be said that this is well and good, for power should reside with the living rather than the dead, but simply replacing a snapshot of the past with a snapshot of the present fails to represent the dynamic of social change. A political 'movement' properly so-called will speak more powerfully to the future when it maintains connection to the past, for a movement can only be appreciated as such where it conveys a dynamic sense of its trajectory over the distance covered and the journey yet to come. In short, because there is never anything identifiable as the present point of view, sequential images will communicate social change more clearly than any single image can. Consider the range of responses that artists performed to show their support for Ukraine after the 2022 Russian invasion. On the one hand, two university ensembles in Ireland (Trinity Orchestra and UCD Symphony Orchestra) are reported to have removed all Russian music from their repertoires.⁵⁵ On the other hand, Lithuanian conductor Mirga Gražinytė-Tyla, the musical director of the City of Birmingham Symphony Orchestra, continued with a performance of a piano concerto by Russian composer Tchaikovsky but alongside it sang a Ukrainian folk song. Which was the more effective performance – the simplicity of cancellation or the complexity of juxtaposition?

In Washington, DC, there is a powerful example of dynamic and co-productive cooperation between opposing points of view, for in that city the memorial statue of Martin Luther King Jr looks resolutely out over the waters of the tidal basin towards the Thomas Jefferson Memorial on the opposite shore. In this way, King confronts America's complex and troubled racial history. Jefferson, as is well known, had an ambiguous relationship with slavery. He signed the Act Prohibiting Importation of Slaves and made other progressive gestures and statements in his official roles, but he personally owned hundreds of slaves who worked on his plantations. The section 'Jefferson and Slavery' on the Thomas Jefferson Foundation (TJF) website for Jefferson's former home, Monticello, summarizes Jefferson's equivocation

⁵³ Banksy, *Instagram*, 9 June 2020.

⁵⁴ Editorial, 'President Obama at the U.N.' *New York Times*, 25 September 2012.

⁵⁵ Patrick O'Donoghue, 'Trinity and UCD Orchestras Ban Russian Works in Solidarity with Ukraine', *The Times*, 15 March 2022.

by observing that he called ‘slavery a “moral depravity” and a “hideous blot,” but continued to hold human beings as property his entire adult life’.⁵⁶ It is generally believed that his complex relationship to slavery even extended to taking an enslaved woman as his mistress. Sarah ‘Sally’ Hemings (c. 1773–1835) was seven-eighths white and a half-sister to Jefferson’s late wife. DNA evidence commissioned by the TJF indicates that Thomas, or a close Jefferson relative, probably fathered all six of Hemings’ children mentioned in the Monticello records.⁵⁷ Other circumstantial evidence supports that conclusion. On the other hand, the TJF minority report in response to the DNA evidence rejects that conclusion, and the Thomas Jefferson Heritage Society, which includes in its mission statement the resolution ‘[t]o stand always in opposition to those who would seek to undermine the integrity of Thomas Jefferson’, argues that Jefferson’s younger brother Randolph (1755–1815) is a more plausible candidate to have been the father of Sally Hemings’ children.

This kind of considered debate, based as it is upon critical readings of expert evidence, is precisely how the complex controversies of history ought to be engaged with. The solution to past ills is not to erase them but to keep them constantly in view and under critical supervision. Scholar Erich Hatala Matthes has said something similar in relation to the work of writers and artists accused or convicted of offensive behaviour or beliefs. As he says in the blurb to his book *Drawing the Line*, ‘[r]ather than shunning art made by those who have been canceled, shamed, called out, or even arrested, we should engage with it all the more thoughtfully and learn from the complexity it forces us to confront’.⁵⁸ I visited the Martin Luther King Jr Memorial in 2011, shortly before its official inauguration, and in all the years since then Martin Luther King Jr has had his eyes fixed on Jefferson’s memorial. He stands like a stern supervisor stonily rebuking the errors of the nation’s youthful days. As an alternative to iconoclasm, such silent confrontations between cultural icons can become a new conversation through which mistakes made in the past can contribute to making future peace. Flawed statues, like flawed statutes, are sometimes more profitably amended than repealed entirely.

As we approach our last word on this subject, it is fitting that we should turn to someone who is living out the full potential of improved racial and gender justice and understands well the complexities of the race conversation and the need for nuance. Kemi Badenoch MP was born in London to Nigerian parents and in her childhood lived in the UK, Nigeria, and the United States. She was the first woman to be elected MP of her constituency and in 2022 was

⁵⁶ Thomas Jefferson Foundation, ‘Jefferson and Slavery’, www.monticello.org/thomas-jefferson/jefferson-slavery/.

⁵⁷ *Ibid.*

⁵⁸ Erich Hatala Matthes, *Drawing the Line: What to Do with the Work of Immoral Artists from Museums to the Movies* (Oxford: Oxford University Press, 2022).

shortlisted in the Conservative Party's internal vote to find a party leader following the resignation of Prime Minister Boris Johnson. On 20 October 2020, in Black History Month, she made a compelling speech in the House of Commons of the UK Parliament in which she stated that 'we cannot improve history; we can only learn from it. What we can improve is the future.'⁵⁹ Having stressed that the 'Black History' of the USA, of Africa, and of the UK, are all very different and ought to be approached with appropriate respect for their differences, she pushed back against racially divisive claims made by so-called critical race theorists, including their claim (in Badenoch's words) that 'African history was interrupted by slavery':

As probably the only Member of this House who actually grew up and went to school in Africa, I can tell the House that that is not what we are taught. Much more is taught about the history of black slave traders who existed before and after the transatlantic slave trade.⁶⁰

She adds that:

[T]he most notable statue in the city of Lagos, where I grew up, is that of Madam Tinubu. It is the biggest one in the equivalent of Trafalgar Square. She was a slave trader, but she was also a freedom fighter and a much-loved icon. Her slave trading is not celebrated, but her fight against colonisers is. In Nigeria, she is recognised as a complex character, as all historical figures are – and heaven help anyone who would try to pull her statue down. There is much that we can learn from Nigeria about how to handle the issue of statues.⁶¹

Oladipo Yemitan's book *Madame Tinubu: Merchant and King-Maker* majors on positive aspects of Tinubu's iconic status, but nevertheless acknowledges that on one occasion she was arraigned on the charge of selling a young boy into slavery and reportedly sought to justify it by saying, 'I have a large household and I must feed them well. I need money to do that.'⁶² In the mid-nineteenth century, in the context of British efforts to abolish slavery in Nigeria (pursuant to the Slavery Abolition Act 1833, which outlawed slavery in all parts of the British Empire), Tinubu is reported to have had a conversation with fellow slave trader Domingo Martinez in which she said of twenty of her slaves that she would 'rather drown the slaves than sell them at a discount'.⁶³ Tinubu's statue is surely a candidate to follow Colston's into the water, but the decision to tear it down or to leave it standing is a decision for the Nigerian people to make in the light of all their history. For the time being they have chosen not to and have preferred to regard it, warts and all, as a testament to the complex nature of their nation's historic struggles.

⁵⁹ 'Black History Month', *Hansard*, Vol. 682 (20 October 2020). ⁶⁰ *Ibid.* ⁶¹ *Ibid.*

⁶² Oladipo Yemitan, *Madame Tinubu: Merchant and King-maker* (Ibadan: University Press, 1987) 28.

⁶³ *Ibid.*, 21.

The positive potential inherent in performing both sides to a controversial debate did not commend itself to the crowds of protestors who massed to protest against the statue of colonialist Cecil Rhodes which (at the time of writing) stands prominently on the facade of Oriel College in Oxford. Nor to the 150 or so academics who undersigned to withhold their teaching services from the college so long as Rhodes remains upon it. Resisting calls to tear it down, Lord Patten, the chancellor of the University of Oxford, notes that it would be hypocritical to ‘throw the statue . . . in the Thames’ while at the same time accepting the philanthropic benefits of Rhodes’ legacy (including the admission of one hundred Rhodes scholar each year, a fifth of them from Africa). He adopted the opinions expressed by Nelson Mandela at a celebration banquet for the Rhodes Trust in 2003, where Mandela acknowledged Rhodes’ controversial record in Africa but also hoped that posterity would remember him. Mandela even concluded with a toast to Rhodes. When Mandela said that the Rhodes celebration helps ‘to remind us of the dramatic changes as well as the themes of continuity in the course of the history of our beloved country’, he was alert to the positive possibilities of performing the drama of social change in contrast to the iconoclasm that would supplant a snapshot of a past historical moment with a snapshot of the present. Mindful of the same performative possibilities, British sculptor Antony Gormley proposed that the Rhodes statue at Oriel College should be left in place but turned around to face the wall.⁶⁴ To make peace we need to perform both sides of the debate, not as snapshots or as isolated statements, but as an ongoing dynamic discourse. As the protestors against Rhodes know well, it is in the nature of civilized human expression to make a drama out of a crisis, and many of the best dramas revolve around a villain or antagonist. A playwright might choose to kill off an evil character to make a moral point but would never dream of excising them from future performances. The irony is that the protestors calling for the removal of the Rhodes statue can only put on an effective performance for their message so long as the statue – the villain of the piece – remains in place. The ideal outcome in performative terms is that they should continue to protest the statue’s removal but never succeed. Making great play of it is the way to make peace with it.

Cecil Rhodes’ fellow Victorian, the Australian-born scholar Gilbert Murray, attributed the success of the Greek drama to the sympathetic expression of both sides to a dilemma or debate:

This power of entering vividly into the feelings of both parties in a conflict is perhaps the most characteristic gift of the Greek genius; it is the spirit in which

⁶⁴ Damien Gayle, ‘Oxford Rhodes Statue Should Be Turned to Face Wall, Says Antony Gormley’, *The Guardian*, 29 May 2021. At the time of writing, Oriel College authorities have voted to take the statue down subject to the permission of the relevant public authorities, and in the meantime have placed a plaque in the vicinity of the statue to contextualize Rhodes’ legacy.

Homer, Eschylus, Herodotus, Euripides, Thucydides, find their kinship, and which enabled Athens to create the drama.⁶⁵

The Greek idea that truth emerges from, or is expressed in, the discourse of opposites is evident not only in their drama but also in their dialectic philosophy and rhetorical practice. In other words, it lies at the heart of their statecraft, as it did subsequently in the statecraft by which the Roman Republic was made and maintained. Ann Vasaly observes that:

The picture of the world that emerged from Ciceronian rhetoric was never simply black or white but was *both* black and white. That is, strong statements of the positive aspects of a place are often balanced at other times and in other speeches by equally strong statements in which the negative aspects of the same place are demonstrated. This was to be expected, in light of the varying exigencies of times and subjects, of the training in speaking *in utramque partem* designed to anticipate the arguments of one's opponent, and of the existence of commonplaces providing negative and positive positions on the same subject. This was also to be expected when we keep in mind that the orator was attempting to respond to his audience's prejudices about the world, and when we remember that the Roman audience of the late Republic had no single vision of reality. Like all of us, they were capable of entertaining various, often mutually inconsistent ideas about places and the people in them.⁶⁶

Even today, legal advocates are trained to argue 'cross-brief' (that is, from their opponent's point of view) as a way of testing and refining the strength of their client's side of the argument. The exercise is a direct successor to the rhetorical exercise of *argumentum in utramque partem* (arguing both sides of a debate).

When the chancellor of the University of Oxford cited Mandela in defence of Rhodes' legacy, Oxford City Councillor Shaista Aziz said that Lord Patten's response was 'tone deaf'. On the contrary, he was simply advocating that we should hear both sides of the argument. It is a maxim of legal due process and an essential guarantor of a fair hearing that when an accusation is put to a judge, the judge should hear the other side (*audi alterem partem*) before passing judgment. This should equally be an indispensable feature of judgments made in the court of popular opinion. In other words, conflicts in courts of law and courts of popular opinion should be appreciated and conducted as high political drama. The first quotation in this book was from Plato, and as we near our conclusion it is fitting to recall that '[i]n the activity of maintaining the *polis*, Plato's Lawmaker is engaged in the finest tragedy –

⁶⁵ Gilbert Murray, *History of Ancient Greek Literature* (New York: D. Appleton and Company, 1906) 43. Discussed in Jennifer Wise, *Dionysus Writes: The Invention of Theatre in Ancient Greece* (Ithaca, NY: Cornell University Press, 1998) 13.

⁶⁶ Ann Vasaly, *Representations: Images of the World in Ciceronian Oratory* (Berkeley: University of California Press, 1993), 187, <http://ark.cdlib.org/ark:/13030/ft109n99zv/>.

one rivalling those of the tragic poets (*Laws* 817B).⁶⁷ To this Aristotle added his 'insistence throughout the *Poetics* that the tragic representation must excite fear and pity in order to fulfill its function'.⁶⁸ Where history is shameful the performance should be tragic. As we heard from Plato at the outset of this book, so we heard early on from Martin Luther King Jr and his 'I have a dream speech'. There he said: 'we have come here today to dramatize a shameful condition'. Instead of cancelling the performance on any side of today's most controversial debates, justice demands that the show must go on.

⁶⁷ Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 1986) 29.

⁶⁸ *Ibid.*, 34.

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