

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.