4

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).

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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).

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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.

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> [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].

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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 wisdome 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 Beever observes that judges were

[37] Ibid., 1523–1524. [38] Ibid., 772–774. [39] Ibid., 1520–1521.
[40] Michael Kiernan (ed.), *Francis Bacon, The essayes or counsels, civill and morall* (Oxford: Clarendon Press, 2000) 165.

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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 venere*, 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.

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> 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 Shoomakers 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.

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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.

Poiēsis and *Autopoiesis*

Jeanne Gaakeer, an appellate judge and legal scholar, reminds us that *poiēsis* was the ancient Greek term for 'handcraft . . . the creation and artistic bringing into appearance, a "making"'.[57] *Poiēsis* 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'; *poiēsis* '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 *poiēsis* 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.

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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 vtteraunce 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.

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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.

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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.

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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).

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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].

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