
The Making Sense

Introduction

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

Plato, *Apology*

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

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

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

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

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

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

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

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

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

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

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

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

Digit-ill

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

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

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

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

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

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

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

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

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

Hunger for Touch

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

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

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

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

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

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

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

'You Can Make It If You Try'

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

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

¹⁷ A phenomenon discussed in Chapter 8.

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

The Rhetorical Art of Making It Up

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

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

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

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

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

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

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

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

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

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

²¹ Westlaw UK 73 of 210 articles, February 2020.

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

Theatre of Make-Believe

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

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

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

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

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

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

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

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

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

(4.1.147–157)

The 'Actor' Factor

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

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

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

²⁸ *Rhetoric* 1403b22–23; 1404a12–19.

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

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

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

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

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

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

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

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

The Founding Fathers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁸ Ibid.

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

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

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

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

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

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

Making and Motivation

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

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

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

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

Sensation and Pleasure

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

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

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

Making an Impact

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

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

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

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

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

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

Make It So

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

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

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

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

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

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

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

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