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CHAPTER THREE

Shakespeare on Proof and Fabricated Truth

[B]lessed he who has a skin and tissues, so it be a living one, and the heart-pulse everywhere discernable through it.¹

The imaginary English editor of Carlyle's *Sartor Resartus* observes that the imaginary philosopher Teufelsdröckh 'though a Sansculottist, is no Adamite'.² Commenting on this, Michael Carter explains that Teufelsdröckh (and, by implication, Carlyle) 'will have nothing to do with the notion that if we were to strip off our outer casings truth, equality and justice would blossom', for he knows 'that social being is "clothed-being"'.³ It is true that Carlyle wrote that man 'is by nature a *Naked Animal*; and only in certain circumstances, by purpose and device, masks himself in Clothes', but that observation was made in the context of comparing human zoological nature to the biological nature of plant and animal life.⁴ His point was only that the human is somewhat under-covered in its zoological nature compared to the almost complete covering that one sees on birds and most land-dwelling mammals. *Sartor Resartus*, Carter further elaborates, 'was never a renunciation of clothes, or even a criticism of elaborate costume. It was a manifesto for authenticity'.⁵

In this chapter, we will examine early modern suspicion of superficialities and the corresponding early modern appreciation that the truths on which civil life relies may be fabricated things. The very phrase 'naked truth' was a poetic fiction coined in the early modern period by the Scottish poet Alexander Montgomerie,⁶ a favourite of King James VI of Scotland (James I of England). This chapter will reveal that 'truth', for purposes of legal proof, is as much a fabricated or 'coined' fiction as the contemporary poetic concept of 'naked truth'.

1 Thomas Carlyle, *Past and Present* (London: Chapman & Hall, 1843), Book II, chapter 17.

2 Thomas Carlyle, *Sartor Resartus: The Life and Opinions of Herr Teufelsdröckh* (1833–4) (Boston: James Munroe and Co, 1836), Book I, chapter 9.

3 Michael Carter, *Fashion Classics from Carlyle to Barthes* (Oxford and New York: Berg, 2003), p.5.

4 Carlyle, *Sartor Resartus*, Book I, chapter 1.

5 Carter, *Fashion Classics*, p.11.

6 'The Cherrie and the Slae' (c.1585) (Edinburgh: Robert Waldegrave, 1597), stanza 82. (Stanza 81 commences with a call to test a truth by confrontation 'face for face').

Lorna Hutson has located *The Invention of Suspicion*⁷ in the early modern period, and she finds significant clues to a culture of suspicion in the creative, including theatrical, culture of England at that time. The focus of this chapter is specifically upon suspicion of dress in early modern England and the relation that this had to the trial of truth in society at large and in courts of law in particular. Significant indicators of that cultural connection are to be found within contemporary polemic (e.g. Phillip Stubbs complained in his *Anatomy of Abuses in England* that the ‘confuse mingle mangle of apparell’ had produced ‘general disorder’)⁸ and within literary and dramatic works, not least in the works of William Shakespeare (the son of a Warwickshire glove-maker and sometime lodger with a London wig-maker).⁹ Of course, suspicion, indeed cynicism, regarding proof and truth in courts of law was no new phenomenon. In Plato’s *Phaedrus*, the character of Socrates makes an observation that must have rung as true in Shakespeare’s day as it did in ancient Greece, as it does today:

[H]e who is to be a competent rhetorician need have nothing at all to do, they say, with truth in considering things which are just or good . . . For in the courts, they say, nobody cares for truth about these matters, but for that which is convincing; and that is probability, so that he who is to be an artist in speech must fix his attention upon probability.¹⁰

In the early modern period, general suspicion of an individual’s capacity to perform a false public persona was widespread, for this was the age in which the modern individual was beginning to emerge from the cocoon of collective social identity that had prevailed in the societies, guilds and feudal categories of the Middle Ages. Suspicion of evident forms was acute in the English law court, especially in relation to contractual and other documentary formalities in a world of increased monetary lending and mercantile trade, but it was nowhere more acute than in relation to individuals’ physical appearance in an England gripped by suspicion of covert Roman Catholicism (including concealed Jesuit spies) and even of witches in disguise. The rising popularity

7 Lorna Hutson, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (Oxford: Oxford University Press, 2007).

8 Phillip Stubbs, *Anatomy of Abuses in England* (London: Richard Jones, 1583), sig. C2^v.

9 Charles Nicholl, *The Lodger: Shakespeare on Silver Street* (London: Allen Lane, 2007).

10 *Plato in Twelve Volumes* (trans. Harold N. Fowler), Vol. 9 (Cambridge, MA: Harvard University Press, 1925), pp.272d–e.

of the 'masque' form of entertainment at the English court throughout the early modern period can be seen as an attempt by the ruling class to reassert respect for superficialities in the face of their diminishing reliability.¹¹

At the end of the sixteenth century, sumptuary laws were still on the statute books and dress was in theory supposed to be a trustworthy indicator of social role and social standing, but in practice the sumptuary laws were hardly enforced and dress was considered to be an increasingly unreliable indicator of social role, social rank and individual identity. There was great suspicion of dressing out-of-status, and that concern was particularly strong in relation to martial dress. In Shakespeare's *Henry V* when the herald from the King of France declared 'You know me by my habit' (3.6.87), he was declaring what was certainly true in the days of the historical Henry V but which had become much less certain in 1599 when Shakespeare first staged his play. Dress continued to operate in early modern England 'as a form of material memory' that 'incorporated the wearer into a system of obligations',¹² but respect for dress prescriptions were in decline. As the force of collective dress codes was on the wane, so the freedom and responsibility to fashion oneself appropriately was on the rise. Jurists understood this. William Dugdale wrote of the contemporary lawyer that 'even as his Apparell doth show him to be, even so shall he be esteemed'.¹³ This same responsibility is expressed in the advice Polonius gave his son Laertes in Shakespeare's *Hamlet*:

Costly thy habit as thy purse can buy,
But not expressed in fancy; rich, not gaudy:
For the apparel oft proclaims the man,
...
This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man. (1.3.73–5, 81–3)

11 Jennifer Chibnall, "'To That Secure Fix'd State': The Function of the Caroline Masque Form", in David Lindley (ed.), *The Court Masque* (Manchester: MUP, 1984), pp.78–93, 80–1; Robert I. Lublin, "'Whosoever Loves Not Picture, Is Injurious to Truth': Costumes and the Stuart Masque", in Cynthia Kuhn and Cindy Carlson (eds), *Styling Texts: Dress and Fashion in Literature* (Youngstown, NY: Cambria, 2007), chapter 4.

12 Peter Stallybrass and Ann Rosalind Jones, *Renaissance Clothing and the Materials of Memory* (Cambridge: Cambridge University Press, 2000), p.22.

13 William Dugdale, *Origines Juridicales* (London: F and T Warren, 1666), fo. 197.

The irony is that the theatre was a prime forum for the performance of falsehood. Indeed, the growing popularity of theatre served to heighten general mistrust of dress as an indicator of social status, not least because actors sometimes wore garments handed down from their noble patrons.¹⁴ (Although it has been observed that ‘when characters in Shakespeare’s plays change their clothes, and hence their status, they never of their own (represented) volition disguise up the social scale’.¹⁵) Meanwhile, courtiers were accused of dressing like actors.¹⁶ In the martial context, a significant contributor to the culture of mistrust was the fact that, although early Tudor militia regulations had communicated the debt of service ‘inherent in the king’s coat’ and had defined the ways in which it ‘covered men’s legal status’,¹⁷ the modern idea of military uniform did not yet exist.¹⁸ It was therefore expedient for vainglorious individuals to employ dress to make an outward but empty show of valour. It is with such doubts in mind that in Shakespeare’s *Henry V* the Duke of Orleans and the Constable of France take opposing sides in a mock trial of the Dauphin’s valour. Orleans argues that the Dauphin’s valorous virtue is obvious, to which the Constable contradicts that ‘never anybody saw it but his lackey. ‘Tis a hooded valour’ (3.7.80–1). On the eve of The Battle of Agincourt, Henry, disguised at this point as a gentleman soldier, prays that God will ‘steel’ his soldiers’ hearts (4.1.245). Earlier he had directly summoned his soldiers to ‘[d]isguise fair nature with hard-favoured rage’ (3.1.8), just as their fathers had proved themselves in war and thereby been made ‘war-proof’ (3.1.18). Such language indicates the widespread contemporary suspicion that fair and feint nature was all too often concealed in martial disguise, not only at war, where one might find a ‘counterfeit cowardly knave’ (5.1.51), but more especially in the counterfeit valorous dress adopted in peaceful civil life. Certain false or misleading indicators of martial prowess, such as the doublet (originally the comfortable

14 Peter Stallybrass, ‘Worn Worlds: Clothes and Identity on the Renaissance Stage’, in Margreta de Grazia, Maureen Quilligan and Peter Stallybrass (eds), *Subject and Object in Renaissance Culture* (Cambridge: CUP, 1996), pp.289–320.

15 Susan Baker, ‘Personating Persons: Rethinking Shakespearean Disguises’ *Shakespeare Quarterly* 43.3 (1992), pp.303–16, 313.

16 Thomas Nashe railed against ‘England, the players’ stage of gorgeous attire, the ape of all nations’ superfluities’. (*Christ’s Teares Over Jerusalem* [1593] [London: Longman, 1815], p.135.)

17 Vimala C. Pasupathi, ‘Coats and Conduct: The Materials of Military Obligation in Shakespeare’s Henry Plays’ *Modern Philology* 109.3 (2012), pp.326–51, 366.

18 In the Middle Ages, sumptuary laws had been passed in an attempt to prevent wealthy lords from kitting out private armies of retainers in their livery: Jane Ashelford, *The Art of Dress: Clothes and Society, 1500–1914* (London: National Trust, 1999), p.289.

second or 'double' layer worn under a breastplate) and slashed cloth were even items of general fashion at this time, and not just for men. The problem of false representation of martial valour was exacerbated by the fact that real soldiers, if we can read a contemporary complaint into Shakespeare's line, had savage manners and dressed in 'diffused attire' (5.2.61).

One of the recurring themes of Shakespeare's plays is that even the ceremonial vestments of kings are no sure proof of true kingship. The premise of Shakespeare's *Henry V* is that the King of France rules under a false title; that his title is founded on mere 'shows of truth' (1.2.74). At the start of the play, King Henry invites his counsellor, the Archbishop of Canterbury, to outline Henry's true title to France, and in doing so the king warns the archbishop to speak truthfully – not to 'fashion', 'colour' or 'suit' falsely (1.2.15–19). Having been reassured as to his own true title to France, Henry sends the Duke of Exeter to France, where he demands that the French king should 'divest' himself and 'lay apart . . . / all wide-stretched honours that pertain / By custom and the ordinance of times / Unto the crown of France' (2.4.82, 86–8). The metaphor represents the royal title of the French king as a stretched-out layer of 'costumary' title with which he has been falsely invested. The dress dimension of Shakespeare's notion of kingship is confirmed later in the play when King Henry, reflecting on the nature of a king, observes that 'his ceremonies / laid by, in his nakedness he appears but a man.' (4.1.96) and wonders to himself if a king's ceremony is anything other than 'place, degree and form / Creating awe and fear in other men?' (4.1.200–1). All of which recalls the moment when he became king of England and donned the 'new and gorgeous garment majesty' (2 *Henry IV* 5.2.45).¹⁹ In Shakespeare's *King Lear* we see how naked a king may become when he divests himself of his invested authority.²⁰

What does it mean to 'prove' a title? What qualifies as 'proof'? The word 'proof' is nowadays used to indicate material that withstands physical trial (we talk of 'bulletproof' and 'waterproof' clothing) and to indicate material evidence that withstands legal trial. When Shakespeare was writing, proof as a quality of clothing and adjudicatory proof as a quality of legal evidence

19 We might say that 'kingship itself is a disguise, a role, an action that a man might play': David Scott Kastan, "'The King Hath Many Marching in His Coats': Or, What Did You Do in the War, Daddy?", in Ivo Kamps (ed.), *Shakespeare Left and Right* (New York: Routledge, 1991), pp.241–58, 252. Compare the passing of the royal robes to the biblical King David, Israel (1 Sam. 18.4).

20 In the 2007 Royal Shakespeare Company production, directed by Trevor Nunn, Sir Ian McKellen in the title role made the point by baring himself completely below the waist.

were associated by a shared suspicion of appearances and a shared desire to employ processes of probation (processes of ‘probing’) to discover hidden things. The witch trials that were pervasive in the Old World and the New World throughout this period are terrible testimony to the force of this concern, for they were focused to a large extent upon the skin of alleged witches. One preferred mode of proof was to ‘prick’ or ‘to probe’ the suspect’s skin at the site of so-called devil’s marks.²¹ What makes this relevant to us today is that an awareness of Shakespeare’s (and other early modern) insights into proof can serve to cultivate a critical appreciation of the fabricated nature of modern legal notions of truth.

In *Othello*, we find what is surely the most famous of Shakespeare’s references to proof. It occurs when Othello challenges Iago to provide incontrovertible evidence of Desdemona’s marital infidelity: ‘Be sure of it: give me the ocular proof . . . / Make me to see’t, or at the least so prove it / That the probation bear no hinge nor loop / To hang a doubt on, or woe upon thy life!’ (3.3.398, 403–5). Othello demands proof through direct physical witness of Desdemona’s betrayal (so-called ocular proof). This is the sort of proof that we have when someone is caught ‘in the act’ or, which is the next-best thing, caught ‘red-handed’. When someone is caught red-handed, the staining of the skin with blood is deemed to obviate the need to probe any deeper to find the truth of the offence. This idea of the marked hand as (literally) ‘manifest’ proof goes back to antiquity; Cicero, for example, refers to *facinus manifesto compertum* (‘clear and manifest crime’) in his *Defence of Aulus Cluentius Habitus*.²² As it happens, Othello will settle for a lesser standard of material evidence of Desdemona’s infidelity, provided it admits of no relevant doubt (what he calls ‘probation’ that will ‘bear no hinge or loop’). When we understand what is meant when Othello refers to ‘probation’ without ‘hinge’ or ‘loop’, we will have fashioned a key to unlocking the significance of the idea of proof, not only in the works of Shakespeare but also in the world of law.

In the notes to his 2001 Arden edition of *Othello*, E. A. J. Honigmann relies on the Oxford English Dictionary entries for ‘hinge’ and ‘hang’ to

21 Heikki Pihlajamäki, “Swimming the Witch, Pricking for the Devil’s Mark”: Ordeals in the Early Modern Witchcraft Trials’ *The Journal of Legal History* 21.2 (2000), pp.35–58. See, further, Orna Alyagon Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England* (Farnham: Ashgate, 2011). Darr describes other skin-focused practises, including ‘scratching’.

22 *Pro A. Cluentio Habito* XIV.41. Michael Grant (trans.), *Cicero: Murder Trials*, rev. edn (London: Penguin, 1990), pp.121, 145.

support the view that Othello is referring to something that swings or pivots, so that Othello is demanding proof so secure 'that doubts will not move it'.²³ As an explanation, this is insufficiently precise. In the 1958 Arden edition of the play, M. R. Ridley had observed that Othello's metaphor of 'hinge' and 'loop' is very unusual in Shakespeare's works, and that 'we have therefore to start from scratch' in discerning its meaning. Ridley continues: 'it is not easy to see what the force of the figure is', observing that it is not like Shakespeare 'to combine in one picture incongruous specific concrete details', and, significantly:

This may all seem to be making a fuss about nothing, since the 'general sense' is clear; but with an artist of Shakespeare's vivid pictorial imagination we should never, I think, be easily satisfied with 'general sense' and a consequently woolly apprehension when he himself is being concretely specific.²⁴

It is submitted that the hitherto mysterious signification of Shakespeare's supposedly mixed metaphor of 'probation', 'hinge' and 'loop' is to be found in the technical terminology of military dress. 'Probation' is an allusion to the process by which medieval and early modern armourers tested or 'proved' their finished work for weaknesses, a process which required the armour to be, quite literally, 'probed' by a range of weaponry. The 'hinge' and 'loop' in Othello's quote refer to the weak points in a suit of armour – these are, as Othello puts it, the main sites of 'doubt'. No suit of armour could function without the loops or buckles by which it was strapped together, and in certain places sections of armour were joined by metal hinges. As Charles Ffoulkes writes:

It is almost superfluous to mention the straps which join the various portions of the suit. These are always placed, where possible, in positions where they are protected from injury; as, for example, on the jambs they are on the inside of the leg, next to the horse when the wearer is mounted, and the *hinge* of the jamb being of metal is on the outside.²⁵ (emphasis added)

23 William Shakespeare, *Othello* (E. A. J. Honigmann ed.) (London: Arden Shakespeare, 2001), p.232.

24 William Shakespeare, *Othello* (M. R. Ridley ed.) (London: Arden Shakespeare, 1965), p.115.

25 Charles Ffoulkes, *The Armourer and His Craft* (London: Methuen, 1912), pp.54–5.

Thus Othello's image of 'probation', 'hinge' and 'loop' is not an inconsistent mix of metaphors, but a single extended metaphor, and one that he, as a military general, would naturally employ. The metaphor also fits perfectly well with Othello's express concern to establish adjudicatory 'proof'. Armour that passed the process of probation (the process of being proved) was said to qualify as 'proof'. This sequential process is paralleled in an earlier part of Othello's narrative, where he says: 'I'll see before I doubt; when I doubt, prove; / And on the proof, there is no more but this: / Away at once with love or jealousy' (3.3.213–15).

In the medieval and early modern periods an armourer's proof found distinctively physical expression in the very surface of his work. The armourer would shoot arrows and crossbow bolts to establish the thickness of his armour and the resulting 'proof marks' would be left on display (and sometimes decorated) deliberately to demonstrate the impenetrable quality

Figure 3.1 Bullet 'proof mark' on an English Civil War era breastplate (courtesy of The Stratford Armouries, Warwickshire).

Source: Image © Gary Watt 2012.

of the metal.²⁶ (Figure 3.1 shows a seventeenth-century breastplate complete with proof mark and hinges).

As early as the end of the fifteenth century, firearms were in frequent use and several pieces of armour from this period ‘show a proof mark: a bullet “bruise” in some inconspicuous place, by which the armourer had proved that the plate could withstand the shot of handguns’.²⁷ The armourer’s practice of probation and proof continued to be current and widespread in Shakespeare’s lifetime.²⁸ Proof was frequently made by bullet or crossbow bolt, but it could also be made by the stroke of a sword. Ffoulkes observes that ‘as late as the seventeenth century we have evidence that armour was proved by the “*estramaçon*” or sword blow’,²⁹ noting that armour was graded as ‘full proof’ (*à toute épreuve*) or ‘half proof’ (*à demi épreuve*) according to its resistance to different types of weapon. Such gradation of proof is highly reminiscent of those theories of legal proof (which had prevailed in the Civil Law of mainland continental Europe since the early medieval period), that distinguished ‘full proof’ (*plena probatio*) from ‘half proof’ (*semiplena probatio*).³⁰ Thus the language for describing the quality of legal proof established by degrees of ocular and other evidence developed in a culture in which remarkably similar language was taken to indicate the quality of material proof as evidenced by the marks which armourers inflicted upon the surface of their work. A similarly close cultural relationship existed between legal and material proof in England, which should not surprise us when we consider that trial by battle had been a normal method of disposing of legal disputes in England after the Norman Conquest, and that it survived as an occasional novelty (but latterly without actual combat) until it was finally abolished in 1819.³¹

We can be confident that it is a military and metallic metaphor of proof that Othello is applying to the evidence of Desdemona’s infidelity when he refers to probation without a ‘hinge’ or ‘loop’ of doubt. Elsewhere in *Othello* we find frequent clues to the fact that Othello (and, by extension,

26 Ibid., p.55.

27 Stephen Slater, *The Illustrated Book of Heraldry* (London: Hermes House, 2006), p.21.

28 Harold Arthur Dillon, ‘a Letter of Sir Henry Lee, 1590, on the Trial of Iron for Armour’ *Archaeologia* 51 (1888), pp.167–72.

29 Ffoulkes, *The Armourer and His Craft*, p.62.

30 See James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore: The Johns Hopkins University Press, 2001), pp.15–23.

31 Stat 59 Geo III c46. See James Bradley Thayer, *A Preliminary Treatise on Evidence* (Boston: Little, Brown, & Co, 1898), pp.7–46.

Shakespeare) has in mind an idea of proof that measures the quality of external evidence by its thickness, as if it were clothing, armour or some other thing that covers the unclothed state that is optimistically imagined to be the 'naked truth'. When Roderigo makes a pass at Cassio with his sword, the undercoat to Cassio's armour protects him from injury. Presumably Cassio had been struck between the joints of his armour. If so, he seems, like Othello, to conceive the joint as a site of doubt. Thus he emphasizes Roderigo's inability to know if he (Cassio) is protected beneath his metal outside: 'That thrust had been mine enemy indeed, / But that my coat is better than thou know'st: / I will make proof of thine' (5.1.24–6). Early in the play, when Othello's own probity is called into doubt, the weakness of the evidence against him is directly compared to the thinness of clothing: 'To vouch this is no proof, / Without more wider and more overt test / Than these thin habits and poor likelihoods / Of modern seeming do prefer against him' (1.3.118–21). It is fitting, then, that when Iago presents Othello with the final damning piece of 'evidence' to establish Desdemona's supposed infidelity, it takes the form of a thin piece of cloth. Desdemona's strawberry-spotted handkerchief (Othello's first gift to her) is the thin material which, added to the rest, will, as if it were armour, at last attain the thickness of sufficient 'proof'. As Iago puts it: 'this may help to thicken other proofs / That do demonstrate thinly' (3.3.473–4). Significantly, and tragically, we know that this fabricated 'proof' did not provide an authentic account of Desdemona's conduct, even though it was taken to be a sufficient show of truth.³²

As we noted earlier, when Shakespeare was writing and staging his plays, fashionable dress had a distinctly military feel. The fact that the doublet was worn by Queen Elizabeth at once confirmed and confused its military pretensions. The culture of suspicion or doubt concerning external martial appearances coincided with a concern to discover the quality of a person's inner metal. Central to this concern was a renaissance of Plato's metaphorical categorization of citizens in his mythical Republic according to different types of metal.³³ A version of Plato's idea was reprised by Barnaby Rich (the same who supplied the immediate narrative source for

32 On forging, fabrication and the weaving of lies in *Othello*, see, further, Catherine Bates, 'Weaving and Writing in *Othello*' *Shakespeare Survey* 46 (1993), pp.51–60.

33 Plato, *The Republic* III.4 (trans. D. Lee, 2nd edn (Harmondsworth: Penguin, 1974)).

Shakespeare's *Twelfth Night*) in his 1578 work, *Allarme to England*.³⁴ In another publication of 1578, Walter Darell's treatise *Concerning Manners and Behaviours*, we find the earliest reference in the English language to inner 'metal' or 'mettle' as a quality of character that is resistant to a probe (and which would therefore qualify as 'proof' of character). Darell's complaint is that he sees too many gloriously adorned courtiers who 'like tender mylkesops that can beare no brunt: or that, / beside a glorious outside, haue not mettall inough in / them to abide a flea byting'.³⁵ Shakespeare's late drama, *Cymbeline* (1610), treats a number of the motifs that concern us here, including false proof of female infidelity, cross-dressing and disguise. In its final act we find a speech of Posthumus Leonatus which precisely echoes *Walter Darell's* concern to expose the deceit inherent in the fashion for glorious garb:

Let me make men know
 More valour in me than my habits show.
 Gods, put the strength o'th'Leonati in me!
 To shame the guise o'th'world, I will begin
 The fashion, less without and more within. (5.1.29–33)

Sir John Falstaff is a Shakespearean archetype of the fashion for false outward show of martial valour. In *The First Part of Henry IV*, when Falstaff claims he is 'no coward' (2.2.48), Prince Henry's short response is most meaningful when we appreciate that outward appearance and inner character are connected by material considerations of probation and metallurgy. Henry simply says: 'We'll leave that to the proof' (2.2.49). Later in the play, Falstaff employs the language of false form ('counterfeit') to describe the action of faking his death on the battlefield in order to save his life: 'to counterfeit dying, when a man thereby liveth, is to be no counterfeit, but the true and perfect image of life indeed. The better part of valour is discretion.' (5.3.116–17). Another Shakespearean exemplar of the type is the character of Sir Andrew Aguecheek in *Twelfth Night*. Sir Toby Belch advises Sir Andrew, ahead of his encounter with Cesario (the disguised Viola), to set

34 Barnaby Rich, *Allarme to England foreshewing what perilles are procured, where the people liue without regarde of martiall lawe* (London: Henrie Middleton, 1578).

35 Walter Darell, 'Concerning Manners and Behaviours', in *A Short Discourse of the Life of Servingmen* (London: Ralphe Newberrie, 1578), p.56.

up an outward show of martial prowess as a false proof of the inner metal which in truth he lacks:

[S]o soon as ever thou see'st him, draw, and as thou draw'st swear horrible, for it comes to pass oft that a terrible oath, with a swaggering accent sharply twanged off, gives manhood more approbation than ever proof itself would have earned him. (3.4.132–5)

Yet another example is Parolles, a follower of Bertram in *All's Well That Ends Well*. In one scene, Bertram defends Parolles as a soldier of 'very valiant approof', but Lafeu does not trust the outward appearance of the man: 'there can be no kernel in this light nut. The soul of this man is his clothes. Trust him not in matter of heavy consequence' (2.5.33–4). The name 'Parolles' would have amused the lawyers and landed gentry in Shakespeare's audience, for they will have been aware that title to land could be proved by formal deed or by non-documentary (parole) evidence.³⁶ The typical non-documentary evidence was word of mouth supported by public performance of transfer known as livery of seisin.³⁷ The joke is that the form and deeds of Parolles, the liveried follower of Bertram, present contrary evidence for the state of his character. It is significant, therefore, that at the end of the play Parolles is called by the king to act as a witness in the trial of Bertram's character.

For all the orthodox associations that are made between men and martial metal, it is the women in Shakespeare's plays who supply some of the most interesting studies in the probation of appearances and the proof of inner matter. This is in part because of the layering inherent in the fact that the women in Shakespeare's plays were originally young male actors dressed in female garb. It is also, in related part, because Queen Elizabeth portrayed herself as a palimpsest of military man concealing woman's flesh concealing a man's heart. The 'Virgin Queen' invited public probation to the point of her inner metal, most famously at Tilbury Docks when she addressed the troops assembled to repel the Spanish Armada of 1588: 'I know I have the body of a weak and feeble woman, but I have the heart and stomach of a king, and

36 It was generally said that a person is not permitted to 'create an uncertain estate in land by parol' (quoted in Sir Edward Coke, *The First Part of the Institutes of the Laws of England* [1628], III.299).

37 Samuel E. Thorne, 'Livery of Seisin', in *Essays in English Legal History* (London: The Hambledon Press, 1985), pp.31–50.

a king of England too.’³⁸ In *Twelfth Night*, when Viola asks, in reference to Sir Andrew Aguecheek, ‘what manner of man is he?’, Fabian’s (mocking) reply cuts straight to the point of form and substance; of clothing and proof: ‘Nothing of that wonderful promise, to read him by his form, as you are like to find him in the proof of his valour.’ (3.4.199–200). In her reply, Viola admits that she is not martially inclined but is one who would ‘rather go with sir priest than sir knight’; adding, crucially, ‘I care not who knows so much of my mettle’ (3.4.203–4).

Shakespeare explores in numerous places women’s potential to demonstrate proof of inner metal. In *Hamlet*, it is demonstrated negatively where the Prince complains that his mother should have a heart that is penetrable and human rather than of impenetrable proof metal: ‘let me wring your heart, for so I shall, / If it be made of penetrable stuff, / If damnèd custom have not brazed it so / That it is proof and bulwark against sense’ (3.4.40–3). In *Julius Caesar*, it is demonstrated positively where Brutus’s wife, Portia, employs the yielding frailty of her flesh to demonstrate the fortitude of her character; piercing the surface of her skin to prove herself and to leave a proof mark in the form of a scar:

Tell me your counsels, I will not disclose ‘em.
I have made strong proof of my constancy,
Giving myself a voluntary wound
Here in the thigh: can I bear that with patience
And not my husband’s secrets? (2.1.310–14)

Even today, men and women seek to prove their mettle by their mode of dress. The painful and permanent marking of tattoo is an especially potent form of wound or mark by which to prove individual character and social allegiance. Prisoners and gang members are frequently marked out this way. Prison officers are also marked out by distinctive dress. Like the members of many other uniformed services, prison officers must pass through a probationary period as part of their ritual initiation into the uniformed corps. Probation is an intriguing liminal state in which the probationer has been set

38 ‘Queen Elizabeth’s Armada Speech to the Troops at Tilbury’ (9 August 1588), in Leah S. Marcus, Janel Mueller and Mary Beth Rose (eds), *Elizabeth I: Collected Works* (Chicago: University of Chicago Press, 2000), p.326. See Carla Spivack, ‘The Woman Will Be Out: A New Look at the Law in *Hamlet*’ *Yale J.L. & Human* 20 (2008), pp.31–60, 46.

apart from the general polis but has not yet been fully admitted to the role of its protector. The probationary process can be observed in most uniformed professions, perhaps most notably in the military, where servicemen and women are often admitted to their corps by the appropriation of coloured headdresses – red berets, green berets and so forth. When police cadets in New York City pass their probation, they change from probationary grey uniforms to the standard blue.³⁹ Similar probationary processes existed in the ancient world; indeed the word ‘probation’ alludes to the requirement that a man be shown to be of good quality (*probatus*) before admission as a legionary in the Roman Army. We still ‘decorate’ soldiers who prove their martial metal in time of war, by awarding them a piece of metal (a medal) to be worn on their uniformed chest where once upon a time they would have borne an armoured breastplate.

As Shakespeare’s *Othello* establishes the connection between proof of an accusation and proof of armour, so Shakespeare’s *Twelfth Night, or What You Will* connects these concerns to early modern preoccupation with documentary proof and procedural proof in courts of law. It has been said of Shakespeare’s *Twelfth Night* that the ‘plot is a pretext’ and the ‘theme of the play is disguise’.⁴⁰ Disguise is introduced as an important theme at the very outset of the play. In the second scene, when the freshly shipwrecked Viola conceals herself in the clothing and outward form of her brother Sebastian, whom she fears has died in the wreck, she invites the ship’s captain to assist in her concealment and she employs the language of disguise to express her confidence in the captain’s character: ‘I will believe thou hast a mind that *suits* / With this thy fair and *outward* character . . . / *Conceal me* what I am, and be my aid / For such *disguise* as haply shall become / The *form* of my intent’ (1.3.52–3, 55–7) (emphases added). The theme of disguise makes a brief appearance even as early as the short opening scene of the play, where we are told that the lady Olivia will not entertain the suit of Orsino, Duke of Illyria, but instead, in mourning for her recently deceased brother, ‘like a cloistress . . . will veiled walk’ (1.1.29). Later in the play, the lady Olivia also declines to entertain the suit of her steward Malvolio, who is tricked into proving his affection for his mistress by appearing before her in cross-gartered yellow stockings. The lady Olivia, is, in turn, spurned by the disguised Viola (masquerading as the

39 See, generally, Nathan Joseph and Nicholas Alex, ‘The Uniform: A Sociological Perspective’ *American Journal of Sociology* 77.4 (1972), pp.719–30.

40 Jan Kott, *Shakespeare Our Contemporary* (London: Methuen, 1965), p.207.

gentleman Cesario). When Olivia falls for Viola's seeming masculinity, Viola muses: 'Fortune forbid my outside have not charm'd her! . . . / Disguise, I see, thou art a wickedness, / Wherein the pregnant enemy does much' (2.2.13, 22–3). The central theme of the play is disguise, but the theme of disguise can also be read as a theme of proof. Consider the scene in which Viola, disguised in her brother Sebastian's outward form, is mistaken for him by Sebastian's rescuer, Antonio. Viola naturally translates the language of dress and disguise into the language of proof:

Prove true, imagination, O, prove true,
That I, dear brother, be now ta'en for you!
 . . . even such and so
In favour was my brother, and he went
Still in this fashion, colour, ornament,
For him I imitate. O, if it prove,
Tempests are kind and salt waves fresh in love. (3.4.296–7, 301–5)

When Sebastian is finally reunited with his twin Viola (she disguised as the man Cesario), he probes the apparition of himself with a salvo of questions: 'Do I stand there? . . . what kin are you to me? / What countryman? What name? What parentage?' (5.1.211, 215–16). In early modern England, this quick-fire form of interrogation was a standard method for proving ('probing' or 'testing') facts in the context of legal and ecclesiastical inquisition. In the religious context, the orthodoxy of an adherent's faith was proved through catechism, and in the Court of Chancery, which was originally an ecclesiastical court, the concern of the court was to interrogate the conscience of the party, to which end it employed a method of serial questioning which seems to have been inspired by the methodology of religious catechism.⁴¹ W. J. Jones notes that the Court of Chancery asked such questions as: 'do you not know or have you not credibly heard or are you not fully persuaded in your conscience that it was the true intent, will and meaning of the said Nicholas Bristowe, deceased, that . . . ?'.⁴² Elsewhere in *Twelfth Night*, Shakespeare makes express reference to proof by catechism and to proof by constant

41 Oliver W. Holmes, 'Early English Equity' *Law Quarterly Review* 1 (1885), pp.162–74, 162 n.1. Citing Rot Parl 84; 3 Hen V pt 2 46, No23.

42 William J. Jones, *The Elizabethan Court of Chancery* (Oxford: Clarendon Press, 1967), p.238; cited in Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham: Ashgate, 2010), p.84.

question. On both occasions the process of proof appears, as we would now expect, in the context of a related concern to probe through the external coverings of dress.

The first instance appears in the witty interchange between Olivia and her licensed fool, Feste, in which, through diverse probations, he attempts to persuade his mistress to cast off her mourning veil. It begins with Feste's aside in which, making an apostrophe to 'Wit', he asserts that '[t]hose wits, that think they have thee, do very oft prove fools' (1.5.25–6). The relevant passage deserves to be quoted at length for the way in which it shows how Feste employs processes of testing or probation (including syllogism and catechism) to demonstrate the unreliability of external appearances presented in the form of clothes. The text of the passage is a tapestry in which themes of probation and proof are interwoven with textile references to the fool's official garb (the motley), to sartorial processes of patching and mending and to the maxim *cucullus non facit monachum* ('a hood does not a monk make'). The stimulus for the scene is Olivia's request that her servants should take away the 'fool':

FESTE . . . bid the dishonest man mend himself. If he mend, he is no longer dishonest; if he cannot, let the botcher mend him. Anything that's mended is but patched: virtue that transgresses is but patched with sin, and sin that amends is but patched with virtue. If that this simple syllogism will serve, so. If it will not, what remedy? As there is no true cuckold but calamity, so beauty's a flower. The lady bade take away the fool: therefore, I say again, take her away.

OLIVIA Sir, I bade them take away you.

FESTE Misprision in the highest degree! Lady, *cucullus non facit monachum*: that's as much to say as I wear not motley in my brain. Good madonna, give me leave to prove you a fool.

OLIVIA Can you do it?

FESTE Dexteriously, good madonna.

OLIVIA Make your proof.

FESTE I must catechize you for it, madonna. Good my mouse of virtue, answer me.

OLIVIA Well, sir, for want of other idleness, I'll bide your proof.

FESTE Good madonna, why mourn'st thou?

- OLIVIA Good fool, for my brother's death.
 FESTE I think his soul is in hell, madonna.
 OLIVIA I know his soul is in heaven, fool.
 FESTE The more fool, madonna, to mourn for your brother's
 soul being in heaven. Take away the fool, gentlemen.
 OLIVIA What think you of this fool, Malvolio? Doth he not mend?
 (1.5.33–55)

The themes of this passage anticipate the scene later in the play in which Malvolio, who has been 'misprisioned' (arrested) and wrongfully imprisoned on a charge of madness, is visited by Feste disguised as a priest. On that occasion, Malvolio submits to probation by interrogation, saying 'I am no more mad than you are. Make the trial of it in any constant question' (4.2.34–5). What we see in the scene between the lady Olivia and the fool Feste is the fool's attempt to prick a hole in the formality of his lady's mourning as represented in the form of her veil. He does so by means of logical (syllogistic) probation and by catechism-like interrogation. Today we might describe his efforts by means of another sartorial metaphor used in legal contexts: 'picking holes' in an argument.

Of the classical rhetorical proofs that will still persuade a court today, one of the most significant is the commonplace proof. Judges will accept without trial or probation that 'apples fall down', that 'rain makes wet' and that 'night follows day'. They are said to take 'judicial notice' of such things. They hold, as the drafters of the *United States Declaration of Independence* once held, that certain truths are 'self-evident'. Shakespeare places an example of commonplace proof in the mouth of the provincial judge, Justice Shallow, in *The Second Part of Henry IV*: 'Certain, 'tis certain, very sure, very sure: death is certain to all, all shall die . . .' (3.2.26–7). Another example appears in *Twelfth Night* where, demonstrating yet another aspect of the play's central concern with proof, Viola observes 'tis a vulgar proof / That very oft we pity enemies' (3.1.104–5).

There is, though, a wide range of facts that the law will not accept as proof unless they are established by a certain documentary form or by a process of trial. The law will not always accept the factual evidence – the evident outer appearance of proof – but will sometimes demand that a claim be clothed or armoured in a certain pre-approved form or will demand that unfamiliar facts be proven, like unfamiliar armour, by process of trial. Take the fact

of an oral promise. If I orally promise to make a gift to you, the promise is not enforceable against me in the absence of an actual transfer of the subject matter of the gift.⁴³ The same is true of a voluntary promise to enter a bargain. If the other party makes no promise to give or do something in exchange, my promise is considered to be a 'bare' promise. Writing in 1530, Christopher St German put it this way:

What is a nude contract, or naked promise, and whether any action may lie thereon

Student: . . . a nude contract is, when a man maketh a bargain, or a sale of his goods or lands without any recompence appointed for it: as if I say to another, I sell thee all my land, or else my goods, and nothing is assigned that the other shall give or pay for it . . . no action lieth in those cases, though they be not performed . . . for it is secret in his own conscience whether he intended for to be bound or nay. And of the intent inward in the heart, man's law cannot judge, and that is one of the causes why the law of God is necessary, that is to say, to judge inward things.⁴⁴

The discovery of inner truth under outward signs is, of course, a perennial theme, and the human need of divine assistance in that process of discovery figured especially prominently in the theology of Thomas Aquinas (1225–74). As Lorna Hutson has observed, the passage from St German, just quoted, expresses a 'Thomist commonplace'.⁴⁵

St German rationalizes the problem posed by a bare promise (*nudum pactum*) as a problem of proof. The reason the law will not enforce the promise is because the law has no means to probe inner conscience. What the law requires, therefore, is that intent should be clothed by some outward form that will withstand the law's probation and thereby qualify as sufficient proof. Even today in English law, a unilateral voluntary promise (i.e. a promise not made in exchange for a benefit promised by the other party) is not binding on the promisor, whereas the same promise made in the documentary form of a deed is regarded as a binding covenant.⁴⁶ It

43 It is said that there is no equity to perfect an imperfect gift (*Milroy v. Lord* [1862] 4 De G F & J 264).

44 Christopher St German, *Doctor and Student* (1530) (Theodore F. T. Plucknett and J. L. Barton eds) (London: Selden Society, 1974), pp.228–31.

45 Hutson, *The Invention of Suspicion*, p.55.

46 Patrick S. Atiyah, *Introduction to the Law of Contract* (Oxford: Clarendon Press, 1961), pp.22–3.

is significant that legal suspicion of mere words and legal insistence upon proper documentary form reached a peak (though by no means its only peak) at precisely the time that Shakespeare was writing and first staging *Twelfth Night*. The first known performance of *Twelfth Night* occurred on 2 February 1602 in the Hall of the Middle Temple (one of the 'Inns of Court'), and the important litigation in *Slade's Case*, which had been running since 1596, finally concluded in November 1602.⁴⁷ The essential question in *Slade's Case* was whether an action for debt had to be pursued by an exceedingly formal writ of debt in the Court of Common Pleas, or whether a claim in debt might be expedited by the less formal action of *indebitatus assumpsit* in the court of King's Bench under which the plaintiff would put it to a jury that the debtor's oral promise to pay amounted to a binding assumption of liability. The case concerned basic questions about the enforceability of contracts, and it therefore became famous beyond the walls of the lawyers' world.⁴⁸ The uncertainty caused by the case as it progressed through various courts had an impact on commercial practice. The legal historian David Ibbetson notes that '[t]he records of the King's Bench for 1600 show a significant shift away from the use of *assumpsit* in place of debt'.⁴⁹ Eventually the judges decided that debt could be pursued on *assumpsit* as an alternative to the old form of action in debt, and thereby opened the way to a modern flexible law of contract. The following extract from the report of the final judgment emphasizes that one of the major sticking points in *Slade's Case* was the question of proof:

And as to the Objection which hath been made, that it shall be mischievous to the Defendant . . . forasmuch as he might pay it in secret: To that it was answered, That it shall be accounted his folly that he took not sufficient witnesses to prove the paiment he made.⁵⁰

Twelfth Night was written during the period in which (as Professor Ibbetson notes) there was a 'significant shift away from *assumpsit*', so we should expect to find that if the play alludes to *Slade's Case*, it will do so by casting

47 *Slade's Case* (1602) 4 Co Rep 91 (Court of Exchequer Chamber).

48 William J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (London: Allen and Unwin, 1971), pp.49–50.

49 David Ibbetson, 'Sixteenth Century Contract Law: *Slade's Case* in Context' *Oxford Journal of Legal Studies* 4.3 (1984), pp.295–317, 303.

50 *Slade's Case* (1602) 4 Co Rep 91 at 92b, 95a.

doubt upon words unsupported by formal documentation. We do indeed find such doubts expressed in the play, notably when Feste laments that ‘words are grown so false, I am loath to prove reason with them’ (3.1.17–18). For the lawyers in Middle Temple Hall who constituted the first known audience for the play, there could hardly have been an issue of greater topical interest than that of doubtful words. The documentary evidence for the first performance on 2 February 1602 is an entry in the diary of John Manningham, a student barrister at the Middle Temple. It is notable that Manningham fixes upon the significance of a counterfeit document:

A good practice in it to make the steward believe his lady-widow was in love with him, by counterfeiting a letter as from his lady, in general terms telling him what she liked best in him and prescribing his gesture in smiling, his apparel, etc. and then, when he came to practice, making him believe they took him for mad.

As we have seen, there was a side to the debate in *Slade’s Case* that was resistant to the avoidance of the old documentary formalities and that emphasized the unreliability of mere spoken words. Here the student lawyer picks up on the fact that Shakespeare was playing on the equally unreliable nature of documentary evidence. In the scene where Malvolio scrutinizes the counterfeit letter and satisfies himself as to its meaning and import, he concluded that his interpretation of the document was ‘evident to any formal capacity’, before admitting, a little later, that his interpretation does not stand up to ‘probation’ (2.5.90, 98). How deep must have been the resonance of these lines with Shakespeare’s audience of lawyers, who, when they weren’t feasting and watching plays, would have been mooting the points of *Slade’s Case*. The dress aspects of the play would also have appealed to them. Student barristers were infamous for their obsession with fashionable dress. *An Act for the Reformacyon of Excesse in Apparayle* (1533),⁵¹ which was the last statute to lay down sumptuary laws in the reign of Henry VIII, had been relatively indulgent to students of the Inns of Court or Chancery. It allowed them to wear doublets and partlets of satin, damask and camlet or jackets of camlet, if received as gifts. They were not permitted to wear crimson, purple, scarlet or blue, but they could wear marten and

51 Statute 24 Hen VIII c13.

black rabbit fur.⁵² Apparently the Inns of Court indulged the students within the licence of the law, provided that their apparel indicated ‘no lightness or wantonness in the wearer’.⁵³ That licence must have been stretched to snapping point by the time of the vainglorious fashions of the 1580s, for in the period 1580 to 1600, the various Inns of Court introduced strict orders concerning the wearing of gowns.⁵⁴ No doubt the rules were followed as a matter of form, but they did nothing to suppress the students’ passion for fashion. Sir Thomas Overbury complained that student barristers were more concerned with their luxurious clothes than with their legal cases.⁵⁵

In civil (non-criminal) cases, including cases of contract law, the required standard of proof is proof established ‘on the balance of probabilities’, which is sometimes called proof that is ‘more likely than not’ or proof based on a likelihood of at least 51 per cent. In criminal matters, the defendant is presumed innocent until proven guilty and the defendant should be acquitted unless the jury is ‘sure that the defendant is guilty’.⁵⁶ The traditional formulation of being ‘sure’ is that the jury is satisfied of the defendant’s guilt ‘beyond reasonable doubt’ (variously expressed as ‘beyond a reasonable doubt’, ‘beyond any reasonable doubt’ and ‘beyond all reasonable doubt’). Recall Othello’s willingness to waive his demand for positive ‘ocular proof’ in favour of a lesser degree of proof that will, in a negative sense, ‘at least’ be proof against doubt. Consider how close that formulation is to the legal standard of ‘proof beyond reasonable doubt’. Neither formulation is concerned to establish fundamental truth. Each formulation is concerned only to remove evident doubt.

There is a lively academic debate concerning the nature of the early modern origins of the concept of ‘proof beyond reasonable doubt’.⁵⁷ To that debate we can now add a new and material layer. Barbara Shapiro has

52 Maria Hayward, *Rich Apparel: Clothing and Law in Henry VIII’s England* (Farnham: Ashgate, 2009), p.38.

53 John H. Baker, ‘History of the Gowns Worn at the English Bar’ *Costume* 9 (1975), pp.15–21, 16.

54 These sumptuary regulations might represent an effort ‘to represent in visual terms the polity of the Protestant State’ (Paul Raffield, *Images and Cultures of Law in Early Modern England: Justice and Political Power, 1558–1660* [Cambridge: CUP, 2004], p.161).

55 Sir Thomas Overbury, *His Wife* (1614) (London: Robert Allot, 1628), sigs K4^r–K5^r; quoted in Emma Rhatigan, ‘“The Sinful History of Mine Own Youth”: John Donne Preaches at Lincoln’s Inn’, in Jayne Elisabeth Archer, Elizabeth Goldring and Sarah Knight (eds), *The Intellectual and Cultural World of the Early Modern Inns of Court* (Manchester: MUP, 2011), pp.90–106, 91.

56 *R v. Majid* [2009] EWCA Crim 2563.

57 See, for example, Barbara J. Shapiro, ‘The beyond Reasonable Doubt Doctrine: “Moral Comfort” or Standard of Proof?’ *Law and Humanities* 2.2 (2008), pp.149–73; James Q. Whitman, ‘Response to Shapiro’ *Law and Humanities* 2.2 (2008), pp.175–89.

convincingly argued that the process of proof beyond reasonable doubt aimed to establish practical satisfaction or moral comfort as inquirers found it increasingly hard to discover the absolute truth of facts within the complexities of the early modern world.⁵⁸ We can now see how closely this parallels early modern notions of proving armour. Armour was never required to be absolutely impenetrable. It would be nonsensical to suppose that armour could be made to resist all the weapons of the age in all contexts of conflict, and in fact armour died out precisely because attempts to make it proof against increasingly sophisticated weapons eventually required such a thickness of metal that soldiers were no longer able to bear it. Armour was never required to be positively invulnerable to any possible assault; it was merely required to offer sufficient practical protection and comfort against reasonably likely attack. Proof of armour was not proof as an absolute truth; it was merely proof to the point of practical satisfaction. The same was true, and is true, of legal proof. To sum up, we can say that the concept of satisfactory legal proof in early modern England was formulated in the context of a wider cultural appreciation of proof as a material quality of clothing and of armour in particular. With this in mind, the conclusion we reach is this: that legal proof beyond reasonable doubt is proof with holes in it, but with holes too small to allow the inquirer to probe to a deeper reality and too small, therefore, to admit injury. When such reliable outward proof is established, the law is then content to presume that it has probed to the point of a person's inner mettle and to the point of truth. An eighteenth-century preacher once said in a sermon addressed to judges that righteousness is necessary, but outward judgment is 'perhaps more useful'. He described private righteousness as a silver-embroidered vest and public judgment as a gold-fringed robe.⁵⁹ It is said that the law requires, not only that justice must be done but also that it should be seen to be done. One wonders, though, whether the law might not be content for justice to be seen to be done according to its processes regardless of whether it is actually done in fact.

58 Barbara J. Shapiro: *A Culture of Fact: England, 1550–1720* (Ithaca, NY: Cornell University Press, 2000); *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton, NJ: Princeton University Press, 1983); 'Beyond Reasonable Doubt' and 'Probable Cause': *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991).

59 Bunker Gay, *The Accomplished Judge; or, a Complete Dress for Magistrates* (a sermon preached at Keene, at the first opening of the Inferior Court, in the county of Cheshire, 8 October 1771) (Portsmouth, New-Hampshire: D. Fowle, 1773), p.16.

When Pontius Pilate asked, ‘what is truth?’ in the course of the most significant show trial in history,⁶⁰ he no doubt appreciated that the purpose of legal trial is not to discover truth but rather to cover the case in such a way that public onlookers will be satisfied. An argument of the present book is that legal processes of trial, right up until the present day, are still concerned to cover cases with a satisfactory semblance of truth. To express the point in terms of clothing, we can say that legal processes of trial do not seek to discover or uncover layers of lies that might be obscuring naked truth, but rather that they endeavour to cover each case in a way that will deflect doubt. Something similar has been observed by ethnographers investigating local conceptions of what counts as being socially unclean. They have found that ‘purity is not simply about following rules but also about the strategic capacity to project a virtuous public image. In other words, one must *appear* to follow the rules’.⁶¹ The dominant metaphor for truth – the *discovery* metaphor – is misleading. The truths that most concern us for the purposes of civil life are not discovered from hidden depths, but fabricated before our eyes. Agamben sees this dynamic at work in the legal context: ‘The ultimate aim of law is the production of a *res judicata*, in which the sentence becomes the substitute for the true and the just.’⁶² Scott was right when he said that we ‘weave’ when we ‘practice to deceive’,⁶³ but it is also the case that we establish forms of truth through processes of fashioning and fabrication.

To some extent I am agreeing with Warwick and Cavallaro where they observe that ‘fashion’s penchant for obfuscating the very distinction between deception and truthfulness’ renders ‘the boundary between “telling lies” and “telling truth” . . . precarious and uncertain’⁶⁴ and where they argue that truth may reside *in* ‘superficial phenomena’.⁶⁵ However, where Warwick and Cavallaro posit the latter possibility to the exclusion of the existence of absolute truth, I would argue that it is entirely compatible with the possibility of absolute truth. Indeed, fabricated truth may be regarded as a

60 Jn 18.38.

61 Adeline Masquelier, ‘Introduction’, in Adeline Masquelier (ed.), *Dirt, Undress and Difference: Critical Perspectives on the Body’s Surface* (Bloomington and Indianapolis: Indiana University Press, 2005), pp.1–33, 11.

62 Giorgio Agamben, *Remnants of Auschwitz* (1999) (trans. Daniel Heller-Roazen) (New York: Zone Books, 2002), p.18.

63 Sir Walter Scott, *Marmion* (1808) 6.17.532–3.

64 Alexandra Warwick and Dani Cavallaro, *Fashioning the Frame: Boundaries, Dress and the Body* (Oxford and New York: Berg, 1998), p.xviii.

65 Ibid., p.133.

counterfeit of, or pragmatic approximation to, absolute truth. Satisfactory proof established by evidence for the practical purposes of civil life is one thing; absolute truth may be quite another thing. Even scientific method, properly-so-called, does not aim to discover underlying truth. It is merely concerned to prove (i.e. to 'probe' or test) working hypotheses.⁶⁶ A scientific theory is never 'true'. It can, at best, have the status of being 'not disproved'. Likewise, when a judge makes a finding of fact on disputed evidence in a legal case, the effect is to create a fact where previously there had been merely conflicting theories. The judge in this sense makes a reality in legal terms that is satisfactory for legal purposes. Science operates in the same way. It identifies scientific 'facts' in terms that are satisfactory for scientific purposes. Indeed, the 'fic' in 'scientific' is a clue to the fact that scientific proofs comprise knowledge (*scientia*) that is fashioned (*facere*). Facts may be manufactured things.

When Warwick and Cavallaro assert that 'dress, by encouraging us to make and remake ourselves over and again, renders the very idea of essence quite absurd',⁶⁷ they are making a statement which, in its absolutism, is essentialist in itself. In any case, the fact that there is variety in the nature of particular forms of dress does nothing to indicate that there is no essence to dress. It may be that for certain practical purposes we do not need to identify an essential truth, but this does not mean that there isn't one. No matter how we dress, the essential fact is that we do dress. Warwick and Cavallaro make a similar mistake when, having observed that the language of dress may assist us to question such metaphysical categories as true and false, they go on to claim that it also has the potential to subvert all such 'binary mythologies'.⁶⁸ Actually, talking dress confirms such truths as the truth that we all, for some reason, go dressed in public. Talking dress therefore confirms the binary distinction between dress and non-dress. If any myth is threatened by the timeless cultural category of dress, and such cognate categories as law, it is the postmodern conceit that there are no such categories anymore. Warwick and Cavallaro eventually seem

66 For Francis Bacon, 'penetration' was a preferred metaphor for the 'discovery' of knowledge about nature (see, for example, Francis Bacon, *Novum Organum* [London: John Bill, 1620], Aphorism XVIII). The metaphor has proved controversial with some feminists because Bacon personifies nature as a female.

67 Warwick and Cavallaro, *Fashioning the Frame*, p.116.

68 Ibid., p.xxiii.

to admit as much, when they confess that '[a]s a moulding agency, dress may seal the body's subjection to invincible collective mythologies'.⁶⁹ They also acknowledge, likewise, that the social subject's 'vestimentary envelope will inexorably carry traces of its primordial fantasies of self-realization and pre-linguistic expression, which challenge the requirements of the adult domain of laws and institutions'.⁷⁰ Warwick and Cavallaro are right to suggest that dress allows for 'playful experimentation' with categorical boundaries, but it is an error to think that this playfulness is a threat to the essential existence of those boundaries. On the contrary, playing with a boundary is a mode of making it; just as lawyers' practice of playing with laws contributes to their creation.

There is a painting hanging in the main criminal courtroom of the Palais de Justice in the town of Montpellier in the South of France which seems to me sum up the fact that lawyers conceive of truth as a fabricated thing. Arrayed within a series of paintings in classical style depicting various virtues of legal process, it depicts the naked female figure of *Veritas*;⁷¹ except this figure of truth is concealing much of her nakedness by means of a book held in one hand and a drape of cloth held in the other (Figure 3.2). Her right breast is exposed, as is the entire contour of her right side – foot, leg, hip and torso – but she is essentially 'decent', as the law requires. The Montpellier image of *Veritas* can be read as an acknowledgement of law's cultural affinity with the layer of cloth and a confession that the true nature of legal trial is not to discover naked truth, but to produce a certain satisfactory proof in the form of textile and text. The covering, not the content, is the heart of the matter in the worlds of dress and law alike. In short, law prefers fabricated truth to the naked variety.

Occasionally the law has gone out of its way to cover up the naked female figure of Justice. The huge statues standing in the Great Hall of the Robert F. Kennedy Department of Justice Building in Washington, DC – the female figure *Spirit of Justice* (which has one breast exposed) and the bare-chested male figure *Majesty of Law*⁷² – were for a time concealed behind curtains,

69 Ibid., p.5.

70 Ibid., p.41.

71 The painting, dating to around 1878, is by the Montpellier-born artist Ernest Michel. I am grateful to Professor Nathalie Vienne-Guerrin (Université Montpellier III) and to Ms Dominique Santonja of *La Cour d'Appel de Montpellier* for assistance in identifying the artist.

72 1933–6, C. Paul Jennewein (sculptor).

Figure 3.2 Ernest Michel, 'Veritas' (c.1878).

Source: Image © Ms Dominique Santonja of La Cour d'Appel de Montpellier.

allegedly on the orders of the former Attorney General John D. Ashcroft.⁷³ One wonders what he would make of the statue *Verity* by Damien Hirst, which was unveiled on the pier of the English seaside town of Illfracombe on 17 October 2012. Standing more than 20 metres tall and weighing more than 25 tonnes, the naked pregnant female figure is an allegory for truth and justice. She holds the Sword of Justice erect in her left hand and with her other hand she holds the skewed Scales of Justice behind her back. She stands on a plinth of books, so there is some contact with text, but there is no textile in sight. Far from being covered up, even her skin is peeled away along the entire front of her right-hand side above the knee. Her skull, the tissue of her breast, her muscle fibres and her unborn child are all displayed in detail. This is how truth might appear if stripped of the curtain of censorship and the artifice of law. The fact is, though, that the arts of law are not as free as other arts. We cannot throw off the artificial fabrication of truth, and nor

73 Dan Eggen, 'Sculpted Bodies and a Strip Act at Justice Dept', *Washington Post*, 25 June 2005.

should we wish to. Fabrications are the nearest thing we have to satisfactory truth for the purposes of law, order and civil life. Still, it will be no bad thing if we dare to doubt the evidence of our eyes and to probe continually the proofs that are placed before them. As Professor Teufelsdröckh informed us: 'The beginning of all Wisdom is to look fixedly on Clothes, or even with armed eyesight, till they become transparent.'⁷⁴

74 Carlyle, *Sartor Resartus*, Book I, chapter 10. On transparency and judgment, see Thomas Docherty, *Confessions: The Philosophy of Transparency (Wish List)* (London: Bloomsbury Academic, 2012).