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What's a box of "Bakewell Tarts" got to do with it? Performing gender as a judicial virtue in
the theatre of justice

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Abstract

On a July morning in 2013 a box of a popular English branded confection called "Cherry Bakewells" appeared in the court of the Lord Chief Justice of England and Wales. It generated much laughter. The event was the swearing in ceremony for Dame Julia Wendy Macur as a judge of the Court of Appeal. If her appointment was a cause for celebration, the backdrop to the event was the serious business of judicial renewal and the gender composition of the judiciary. Neither topic is a laughing matter. Drawing upon data generated through the observation of 18 swearing in events this chapter uses the gender/humour interface to examine the gender dynamics of the social world of the judiciary as an institution.

Keywords: ceremonial archive, gender, judicial diversity, wit

Biographical note: Leslie J Moran is a professor in the Law School at Birkbeck College University of London. He has undertaken pioneering research on judiciary. One strand focuses on judicial diversity. Another concentrates on judicial images including painted and photographic portraits, screen images and live performances. His previous work on humour involved a study of the uses of humour in focus group discussions about homophobic violence and safety. This paper brings these strands of work together. It also connects with his passion for cake. He is currently working on a book about judicial images.

Introduction

On the morning of 31 July 2013, just after 9.30 am, a pristine box of a popular English branded confection called “Cherry Bakewells” (Cherry Bakewell Tarts)¹ (pictured in Illustration 6.1) appeared in Court Four of the Royal Courts of Justice in London: the court of the most senior judge in England and Wales, the Lord Chief Justice.²



Illustration 6.1: An example of a small Bakewell tart with a cherry. The confection is based on a regional delicacy. A shortcrust pastry case contains a layer of jam with a sponge filling. In this case the top is covered in white icing and finished with a half a glacé cherry. A boxed set of six commercially manufactured tarts of this type was presented in court to the Lord Chief Justice on the occasion of Lady Justice Macur’s installation, 31 July 2013.

The incident occurred during the course of the swearing in ceremony for the installation of Dame Julia Wendy Macur as judge of the Court of Appeal. The box of tarts was offered to

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the Lord Chief Justice, then Lord Judge, by a barrister dressed in full courtroom garb, a black gown and wig, who approached the bench from the body of the court. The Lord Chief Justice, dressed in his scarlet and fur trimmed ceremonial robes, gold chain of office and a full bottom wig, took the tarts handed to him by the Clerk of the Court. Sitting with Lord Judge were three other bewigged judges dressed in ceremonial robes of black and gold: the Master of the Rolls and two Heads of Divisions of the High Court. Standing between the Lord Chief Justice to her right and the head of the Chancery Division of the High Court, then Sir Terence Etherton, to her left, Dame Julia Wendy Macur was the final member of the bench party. Like the others she was in full bottom wig and black and gold ceremonial robes as befits her status as a new judge of the Court of Appeal. The box of six tarts appeared during a speech by Queen's Counsel Deborah Eaton. Eaton's speech followed one delivered by the Lord Chief Justice which in turn was preceded by Lady Justice Macur reciting and signing two oaths; one of allegiance to the Crown, the other the judicial oath. Both speeches portrayed their subject, Lady Justice Macur, following the hagiographic conventions of judicial swearing in speeches (Moran 2011) in which the newly installed judge is portrayed as the very embodiment of the virtues of the judicial institution.

The laughter that accompanied the delivery of the box of tarts was not the first laughter during the course of this swearing in event. Nor did my earlier visits to the same court to witness the swearing in ceremonies of other judges taking up posts in the highest courts of England and Wales suggest laughter was unique to the swearing in of Lady Justice Macur. Laughter was a part of each of 18 swearing in events observed as part of a study of gender and the judiciary undertaken between 1 October 2012 and the end of October 2013 (see Table 6.1 below). All these ceremonies related to the installation of individuals into judicial posts in the higher courts; ranging from the Lord Chief Justice to High Court appointments. Seven related to the installation of women.

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Table 6.1: Swearing in ceremonies observed

Number	Date and time of ceremony	Judicial office	Gender	Name	Gender and number of speakers
1	1 st October 2012 @ 9.00am	Master of the Rolls	Male	Sir John Anthony Dyson	4x all male
2	1 October 2012 @ 9.30 am	Lord Justice Court of Appeal	Male	Sir David Lloyd Jones	2x all male
3	29 October 2012 @ 4.45pm	Lord Justice Court of Appeal	Male	Sir Richard George Bramwell McCombe	2x all male
4	30 October 2012 @ 4.30 pm	Justice High Court	Male	Sir George Andrew Midsomer Leggatt,	2x all male
5	11 January 2013 @ 9.00am	Head of Family Division High Court	Male	Sir James Lawrence Munby	3x male 2x female
6	11 January 2013 @ 9.00am	Head of Chancery Division High Court	Male	Sir Terence Etherton	3x male 2x female
7	7 May 2013 @ 9.30 am	Justice High Court	Male	Sir Stephen Paul Stewart.	2x all male
8	10 May 2013 @ 9.15 am	Lord Justice Court of Appeal Court of Appeal	Male	Sir Adrian Bruce Fulford	2x all male
9	13 May 2013 @ 4.30 pm	Justice High Court	Female	Dame Vivien Judith Rose	2x male
10	14 June 2013 @ 9.30 pm	Justice High Court	Female	Dame Sue Lascelles Carr	2x male
11	31 July 2013 @ 9.30 am	Lord Justice Court of Appeal I	Female	Dame Julia Wendy Macur	1x male 1x female
12	1 October 2013	Lord Chief	Male	Lord Thomas of	3x male

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	9.00 am	Justice		Cwmgiedd,	1x female
13	1 October 2013 @ 4.45 pm	Head of Queens Bench Division, High Court	Male	Sir Brian Henry Leveson	3x male 1x female
14	2 October 2013 @ 4.45 pm	Lord Justice Court of Appeal	Female	Dame Victoria Madeline Sharp	2x male
15	3 October 2013 @ 9.30 am	Lord Justice Court of Appeal	Male	Sir Geoffrey Vos	2x male
16	7 October 2013 @ 9.30 am	Justice High Court	Female	Dame Geraldine Mary Andrews,	1x male 1x female
17	8 October 2013 @ 9.30 am	Justice High Court	Female	Dame Frances Silvia Patterson	2x male
18	28 October 2013 @ 9.30 am	Justice High Court	Female	Dame Ingrid Ann Simler	2x male

The court of the Lord Chief Justice and courtrooms more generally are not venues normally associated with humour and laughter. Roach Anleu, Mack and Tutton's (2014) review of existing research, policy and practice on humour in the courtroom suggests judicial humour is problematic; threatening to expose bias, undermining confidence in the judiciary and jeopardizing institutional legitimacy. While their review suggests that some types of humour used for particular purposes may have a role to play, to ease or relieve tension thereby facilitating participation by those unfamiliar with in the courtroom process, this is a limited exception to the general rule that humour and laughter have no place in the courtroom in general or as aspects of judicial activity in particular.

While important to note that the swearing in events take place in a courtroom it is equally important to recognise that these events are not part of the ordinary business of the court.

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There is no legal dispute to be resolved, no parties, no witnesses and no jury. But they are judicial events that take place in public. Installing a new judicial appointee in post, while a cause for celebration, is serious business. It is concerned with judicial renewal, the transfer of capacities and powers to new office holders and the maintenance and development of institutional legitimacy and authority. In the context of England and Wales the appointment of Lady Justice Macur to the Court of Appeal also connects judicial renewal to an ongoing struggle to improve the gender balance of the senior judiciary. In 2014 Baroness Hale, the UK’s most senior female judge, noted that the gender composition of the judiciary in the UK is out of step with the rest of the world. She explained, “The average across the judiciaries of the countries in the Council of Europe is 52% men and 48% women. In 2010, England and Wales was fourth from the bottom, followed only by Azerbaijan, Scotland and Armenia” (Hale 2014: 6-7). The problem is particularly acute in the highest courts (see Table 6.2 and Table 6.3 below).³

Table 6.2: Gender diversity in the senior judiciary for England and Wales, 2015-6

Court/Post at 1 April 2016	Number of male judges	Number of female judges	Total number of judges	Percentage female
UK Supreme Court	11	1	12	8%
Heads of Division	5	0	5	0%
Court of Appeal	31	8	39	21%
High Court	84	22	106	21%
Total	131	31	162	23%

Source: UK Supreme Court data: court website at <https://www.supremecourt.uk/about/the-supreme-court.html> (accessed 16 May 2017).

Other data: *Judicial Diversity Statistics 2016* (Judicial Statistics 2016a).

Table 6.3: Numbers of men and women in the High Court of England and Wales by Division, December 2016

Division	Gender Head of Division	Number and percentage of male judges	Number and percentage of male judges	Total number of judges
Queen's Bench	Male	55 (80%)	14 (20%)	69
Chancery	Male	15 (83%)	3 (17%)	18
Family	Male	14 (74%)	5 (26%)	19
Total	3	84 (79%)	22 (21%)	106

Source: *Judicial Diversity Data Tool 2016* (Judicial Statistics 2016b).

Journalists (Bowcott 2015) and senior judges (Hale 2013; Sumption 2012) have noted that, at current rates of change, gender parity will take over half a century to achieve. On this calculation the challenge that the lack of women in the highest courts raises for the legitimacy and authority of the judiciary is going to be an enduring problem. There is little here to

suggest that judicial renewal and the struggles to improve the gender diversity of the top judiciary are humorous subjects.

My primary purpose in attending the swearing in events was to collect data on the content of swearing in speeches with a view to exploring differences and similarities between speeches made about new male and female appointees. Observation was essential. In England and Wales the speeches are rarely published.⁴ Transcripts of the courtroom ceremonies are exceptional.⁵ It was not my original intention to collect data on or to study humour in swearing in events as I had no expectation that humour would be a part of the ceremonies. The hand written notes made during the courtroom observation not only recorded details of the content of the speeches but also included references to laughter identifying the substantive context in which it arose with comments on its nature and duration.⁶ Reflections about the courtroom, impressions of the ceremony were also included. Immediately after the ceremony and outside the courtroom the hand written notes were used as the basis for a verbal account of the event which was digitally recorded and later transcribed to produce my field notes. As Holmes (2000) notes, while participant observation and field notes are a common feature of research on humour, they are not methods best suited to the collection of data about humour. Other methods, audio and video recording may be better, capturing details about the voice (tone and pace) physical reactions (the presence or absence a smile, a raised eyebrow, exchanged glances and so on) and the interaction between individuals. But neither of these forms of data collection was viable for the swearing in project. Section 41 of the Criminal Justice Act 1925 makes video recording in courts unlawful.⁷ To capture all the relevant data in a courtroom full of people also raises considerable technical and ethical challenges for both audio and video recording.

The study of humour in swearing in speeches draws upon two key insights. The first comes from a small body of work that has studied judicial swearing in speeches. For Roberts (2014) they are an important part of what she calls the ceremonial archive of the judiciary. Their importance is in good part due to the form of swearing in speeches. Dedicated to writing the life of the newly appointed judge, they are a particular form of life writing devoted to the portrayal of state officials (Moran 2011). As such they have a double function formulating and fashioning the subject not only as an exemplary individual but also as a subject that embodies the virtues of the judicial institution. Each swearing in speech offers a textual portrait that makes and makes public the values and virtues of the institution of the judge (Moran 2011, 274). As Roberts (2012a; 2012b; 2014) finds gender is one factor shaping the representation of the embodied virtues and values of the judiciary, influencing the way the legitimate authority of individual judges and the judiciary as a whole is imagined, having an effect on access to power, status and institutional resources. My own work (Moran 2011) on the appearance as to sexuality in swearing in speeches reveals another dimension of this aspect of the ceremonial archive. Despite my having been advised by a variety of judges that sexuality was an extra-judicial issue, the analysis of swearing in speeches demonstrated that references to sexuality were present in all the speeches analysed. This suggests that the content of swearing in speeches may be a rich source of what is otherwise formally absent from other representations and performances of the judiciary. Roberts (2012a) mentions the presence of humour in speeches but her analysis only makes passing reference to its appearance. Existing research is dominated by the analysis of the published texts of speeches. No research to date has examined the performance of these speeches in the courtroom and audience reactions to them.

The second insight comes from scholarship on the nature and uses of humour. Laughter is fundamentally social (Glenn 2003).⁸ Usually, humour depends upon the response; laughter is 'What's a box of "Bakewell Tarts" got to do with it? Performing gender as a judicial virtue in the theatre of justice' by Leslie J Moran, in *Judges, Judging and Humour* (Eds) Jessica Milner Davis and Sharyn Roach Anleu

one manifestation of this.⁹ Wittgenstein (1980: 83) illustrates this by way of an analogy with playing ball. Making humour is like throwing a ball to another with the expectation that it will be returned. For Bergson, this interactional quality highlights the communal and group nature and effects of laughter which he characterises as “a kind of secret freemasonry, or even complicity, with other laughers, real or imaginary” (1911: 6). Laughter has a potential to evidence and generate social and cultural connections (Critchley 2002). The study of humour can thus provide an opportunity to examine the becoming social and collective imagination (Bergson 1911, 2-3).

One of the contexts in which the potential of humour research to offer insights relevant to this study of the judiciary is to be found is research exploring the role of humour in the workplace (Boxer and Cortés-Conde 1997; Holmes 2000; Holmes and Marra 2002; Schnurr 2009). A commonplace of this research is the conclusion that the study of humour provides an opportunity to explore the values, beliefs and attitudes that underlie and shape an organisation’s culture and practice. The courtroom in general and as the place where the swearing in events takes place is certainly a judicial workplace location. Before leaving the workplace humour literature, one final insight is of relevance here. Holmes (2000) highlights the need to take account of the way humour interacts with workplace power structures and the social hierarchies that shape workplace communities. This has particular significance in relation to studying the role of humour in the judiciary as a workplace culture. The judiciary is an institution that is internally organised by way of a hierarchy; of higher and lower judges. That hierarchy also shapes the relations judges have with other people who work in courts.

The interface between humour, power structures and social relations in the workplace is central to work on humour and gender. For Crawford (2003) humour is one of the tools that shape the individual and collective imagination of gender as a system of meanings that

generates value and shapes access to power, status, and material resources. Helga Kotthoff points to the long duration of the “traditional incompatibility” of femininity and humorous activity (2006: 4). In this scheme of things making humour, especially in public and in mixed sex settings, is associated with the masculine. Women who make humour under these conditions have long been threatened with social ostracism; their femininity, modesty and decency under threat. In the past, she explains, while women were often the objects of humour they were rarely the subjects of humour, especially in public (Kotthoff 2006). Such a stark division may no longer operate in public or workplace settings but it remains the case that gender and humour are not only intimately connected but also continue to shape access to humour, its forms and content (Holmes 2006). The question of the impact of gender on making humour is important. The one who initiates humour is potentially in a position of sovereignty, with the creative power, and the freedom to intervene in imagining the gendered world, sometimes reinforcing the status quo but also with a potential to challenge it by violating gender norms and creating unconventional and new gender perspectives (Kotthoff 2006). Taking gender seriously calls for an examination of how humorous communication works to produce the gendered normality and normativity of the collective imagination (Zijdervelt 1976). Gender may also inform the performance of humour (Holmes 2006). Palmer (1994) observes that scholars have raised questions about the impact of gender on the type of humour used; do women use the same or different types of humour as men? Do women and men make equal use of slapstick, satire, humorous banter, or wit? These are some of the gender issues that will be investigated in this study of humour.

The swearing in context

A commonplace of humour scholarship is the importance of context. It is the case that the swearing in events and accompanying laughter that are the focus of this study do take place in

a courtroom but they are not a part of the ordinary business of the court. Swearing in events are examples of installation ceremonies; the final step in the creation of a new judge (Fortes 1967). One of the goals of an installation ceremony is to transfer to the duly invested holder the capacities and powers that are connected to the office. The ceremony is a type of rite of passage (van Gennep 1960). It is a process that manages the incumbent's separation from their former self, their journey to the new office that is antecedent to and transcends its necessarily transient occupant and their installation in that office (Fortes 1967). Fortes's comment that installation is often associated with symbolism, "material relics and insignia" (Fortes 1967: 8) echoes van Gennep's observation that rites of passage have "magico-religious" qualities (1960: 15). By the end of the ceremony the already appointed incumbent has been attached to the capacities and authority of the office.

As a zone of transition installation rites of passage have a particular quality; liminality. It is a time and space "between two worlds" (van Gennep 1960: 18) when the ordinary rules of decorum are subject to suspension; the rite is also a time and space of disturbance. One marker of the liminal nature of the swearing in rite is the time of swearing in events. They take place outside the time of the 'ordinary' business of the courthouse; in the time between the 'ordinary business' of justice. For example the swearing in of Lady Justice Macur occurred at 9.30 am. The ordinary business of justice does not begin until 10.00 am. Other swearing in events take place after the ordinary business of the day is over, at 4.45 pm. Another, though less popular time is during the lunch break, at 1.45 pm. For anyone planning to visit the court to observe a swearing in ceremony, the timing of these public events generates a curious state of affairs. The visitor is faced with a building that is not yet formally open, has already closed, or in the case of a lunchtime event, a building in which the business of law appears to be taking a break. Mohr's (1999) study of incidents in courts in Australia that take place in the time between the ordinary business of justice suggests humour and 'What's a box of "Bakewell Tarts" got to do with it? Performing gender as a judicial virtue in the theatre of justice' by Leslie J Moran, in *Judges, Judging and Humour* (Eds) Jessica Milner Davis and Sharyn Roach Anleu

laughter are possible forms of disturbance that take place during these times in between. He proposes that this is a particular time of ‘satire’ and ‘carnival’ in courtrooms.¹⁰ Thus far from being an exceptional aspect of the workplace culture of the courtroom humour may well be an integral part of the judicial workplace when that place is the site of rituals such as a swearing in event.

Two aspects of the swearing in context are considered in more detail before turning to the content of the humour. The first is the composition of the audience that attends swearing in events. This provides an opportunity to think about the nature of the community that is brought into being in and through the laughter. This will be followed by consideration of who is making the humour and more specifically the impact of hierarchy and gender.

Audience

Swearing in events, like other court room activities, are open to the public. Reference is made to them in the public notices that list the proceedings taking place in the Royal Courts of Justice. While this is not the only notice of the event, it would appear to be the most public of the notices. In most swearing in events I attended the audience filled the benches in the body of the court. But my field notes report little evidence of members of the public attending these events. Fellow judges in their working robes standing to the left and right of the bench were always a part of the audience as were barristers sitting in the body of the court dressed both formally, in wig and gown and less formally in business attire. The audience’s make up also reflected the particular career of each appointee. For example my field notes record that the swearing in of Francis Silvia Patterson as a judge of the High Court was attended by several members of the Law Commission for England and Wales. Between 2010 and 2013 she was the Law Commissioner with responsibility for Public Law. One description that has been given to swearing in events is they are “a family occasion” (Hope 2011: 10). The

presence of the new judge's biological and domestic family sitting at the front of the court is some evidence in support of this description. However, family is also a term that is used to refer to the legal professional community as a kinship network (Moran 2011). The swearing in audiences fit this wider definition of family; fellow judges, legal professionals with whom the judicial incumbent has had close relationships during their earlier career, professional contacts and ex-colleagues, judicial back office staff and court support staff. The gender composition of the audience was always mixed but it did vary. My field notes record that women attended in larger numbers when the new judge was female.

Before leaving this consideration of the nature of the community that is the audience, a number of other matters deserve comment. The first comes from literary and cultural theorist Alan Sinfield (1991). Using an audience of a Noel Coward play as his example he points out that the simultaneous laughter of two individuals sitting in adjoining seats is not necessarily evidence that they are having the same experience; they may perceive the humour very differently yet simultaneously. A variety of relationships are possible in and through laughter; laughing together, laughing along, laughing against, laughing at, laughing along and resisting (Glenn 2003). This list is not exhaustive. An audience is not necessarily either a single or a homogenous community. Second, it is problematic to assume that those who are making the humour are seeking to address the whole of the audience. Lawrence Baum's *Judges and their Audiences* (2006) is relevant here. He argues that judges, as members of a social elite, devote much attention to image making and image management. While the resulting images may be consumed by a variety of audiences other members of the judiciary are an important if not the primary audience in the mind of judges. Baum's insights suggest that when social elites, such as judges and senior members of the legal profession make humour while the audience present may be diverse, the audience they are addressing is judges, legal professionals. With

these thoughts in mind, I now turn to the speakers who initiate the swearing in speech humour.

Who is making the humour?

As a general rule, the humour of the swearing in events is not conversational in form. It occurs in formal speeches. Adlibs are rare. There is an order of speakers reflecting the hierarchy within the judiciary and legal professional community more generally. The Lord Chief Justice delivers the first speech from the Bench. The second is delivered from the body of the court by a barrister who speaks on behalf of the Bar. Exceptions to these rules are rare and limited to swearing in events that relate to the top judges; the Lord Chief Justice, Master of the Rolls and heads of the divisions of the High Court. On these occasions a speech is also delivered by the President of the Law Society of England and Wales representing the solicitors' branch of the legal profession. This hierarchy of roles is also gendered. Both Lord Chief Justice observed were men; no woman has held this office. In 13 out of 18 events attended all the speeches were delivered by men. As such formal access to making humour and thereby access to its capacity to form the collective imagination of the judicial workplace culture in this setting is dominated by those with particular professional backgrounds¹¹ and gender perspectives.¹²

The Lord Chief Justice, the leader of the judiciary of England and Wales appears to set the humorous tone of these events. A transcript of speeches made at the swearing in of Sir David James Tyson Kitchin to the Court of Appeal (Anon 2011) offers rare published evidence. The shorthand writer has inserted "(Laughter)" in the transcript. It first appears at the end of the second sentence in the first paragraph of the speech delivered by Lord Judge, Lord Chief Justice. That paragraph has four of the eight references to laughter in a seven paragraph speech that makes up one page of transcription. My field notes offer more evidence of the

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key role played by the Lord Chief Justice. There is more formal acknowledgment of humour's place in the ceremony and in the speeches made in response to the Lord Chief Justice in comments made by barristers about the nature of the speech they are delivering. Two examples will suffice. The first comes from the swearing in of the Head of the Queen's Bench Division, Sir Brian Henry Leveson. At the start of the third and final speech, the barrister described himself as having the role of the 'court jester' (Moran 2013). During the course of her speech at the swearing in of Lady Justice Macur, Deborah Eaton QC explained that the stories in her speech were chosen because of the need to entertain (Eaton 2013: 5).

Before leaving the matter or the impact of hierarchy on the making of humour, I want to consider an incident that occurred during a speech by Queen's Counsel Ben Hubble delivered at the swearing in of Sue Carr as a judge of the High Court. He described Carr as, "A person with a precious combination of outstanding intellect, sound and practical judgment and ruthless efficiency" (Hubble 2013: 1). My field notes relating to this moment in the delivery of the speech read as follows: "'She is well known for her ruthless efficiency'. (That generated much laughter)". My notes continue:

The Lord Chief Justice intervened at that point and commented that he noted a slight chill reverberating round the court at that description of her. (Again that was followed by much laughter.) He followed that by apologising for the interruption. (Again much laughter.) (Moran 2013a)

The humour in this exchange is in sympathy with the hagiographic requirements of the genre. In this case, it occurs in the context of the attribution of the virtue of 'ruthless efficiency' as a judicial virtue that the new judge embodies. The intervention of the Lord Chief Justice, Lord Judge, is a rare example of an 'ad lib'; a more conversational exchange that breaks away from the norm of formal scripted humour. Here the ad lib is both initiated and ended by the

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Lord Chief Justice. This example and the absence of any examples of ad lib interventions by other speakers breaking into the speeches delivered by the Lord Chief Justice suggests that the latter occupies a central role in controlling access to and shaping the role of humour in this setting.

What follows is a selection of examples of humour that are recorded in my research data. A variety of factors have informed the selection. One is the speaker who initiates the humour: the Lord Chief Justice or senior barrister. The gender of the speaker and substantive references to gender is another factor. Recurring themes identified by a review of my research notes is a third. Last but not least the selection seeks to identify different types of humour used.

Laughing matters

The first example is of humour generated by a judge, not the Lord Chief Justice but the judge immediately below him in the judicial hierarchy; the Master of the Rolls, then Lord Dyson. He delivered the first speech at the swearing in of the new Lord Chief Justice, Lord Thomas, as prior to the installation, Lord Dyson was the most senior judge in England and Wales (see Illustration 6.2 below).



Illustration 6.2: Lord Thomas (right), dressed in the ceremonial robes and regalia of office, stands with Lord Dyson, Master of the Rolls (left) and Mr Chris Grayling, the Lord Chancellor (centre) at the back entrance of the Royal Courts of Justice in central London, smiling for photographers. Photography by the author (part of his judicial images research, see Moran 2015a, 2015b). ©Leslie J Moran 2018. Reproduced with the permission of the author.

The hyperbolic tone of the speech follows the usual hagiographic conventions. Lord Thomas's academic record is "brilliant". He was "no ordinary commercial practitioner". His career was "exceptional". At the Bar he was in the "top commercial chambers". On the Bench, his judgments are "outstanding" and "remarkable". As an illustration of Lord Thomas's "prodigious energy" and "industry" Lord Dyson continued:

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When he was SPJ [Senior Presiding Judge], he and his secretary were staying in a hotel. John was working, as is his custom. He wanted to have a bath, but he did not want to stop working. So his secretary took notes in the bedroom as John talked to him whilst he was in the bath with the door ajar. In this way no time was wasted and efficiency was maintained. (Dyson 2013)

My field notes record that this comment generated much laughter. Here the judicial virtues of “prodigious energy” and “industry” are represented through a story that offers a dramatic juxtaposition; of the now highest judge in the land dressed in full bottom wig and scarlet fur trimmed ceremonial robes standing before the assembled courtroom audience and that same man sitting naked in the bath tub in a hotel dictating notes his secretary in the adjoining bedroom. If the laughter is in part a response to the absurd juxtaposition and conflation of courtroom and bath tub the story is told in order to celebrate the incumbent judge’s industry and energy. The gender dimension of this story sets those skills in a homosocial context; of labour being produced through male intimacy; between a male judge and his male secretary. The story evidences the judge’s homosocial skills as a virtue of judicial office. The presence of the “door ajar” keeps the homosocial skills from tipping over into skills that might be read as skills commonly associated with homosexual desire.

The next example is from a speech by the Lord Chief Justice, Lord Judge and returns to the swearing in ceremony with which this chapter opened. It touches on a recurring theme of swearing in humour; regional rivalries within the Bar. The representation of Lady Justice Macur’s social capital is the hagiographic purpose of the story. In part her social capital is represented and gendered by way of a story about her long links with the male Lord Chief Justice; from their first meeting when she joined the Bar in 1979 to the time when she was one of his colleagues on the Midland Circuit Bar. She was “assistant circuit junior” (a role

that involves organising professional as well as social events) when he was head of the Midland Circuit Bar. Lord Judge then uses the regional marker “Midland Circuit” to further embellish Lady Justice Macur’s social capital. He does this by way of the term “leading” which connotes first, supreme, primary and so on. He explained that Lady Justice Macur worked in the *leading* set of chambers, in the *leading* city (Birmingham) of a *leading* circuit (the Midland Circuit).

My field notes record that the final “leading” generated much laughter (Moran 2013b). The humour involves word play and a keen awareness of grammar. It also requires knowledge about the organisational culture of the Bar which is divided into six regions called “circuits”. Each circuit provides professional and social support and networks (Bar Council 2016). In part the humour is linked to the shift from the use of the definite article ‘the’ to ‘a’, the indefinite article. The description of the Midland Circuit, the Lord Chief Justice’s home circuit and the one he headed immediately prior to his appointment to the High Court as “a leading circuit” qualifies the status of the Midland Circuit, and thereby the Lord Chief Justice himself. The humour, in good part, arises from this surprise shift. The humour is also linked to a comment from Lord Judge that followed, drawing attention to this substitution. My field notes record he explained, “He had to be careful because he had just been elected to the Welsh circuit so the Midland circuit was ‘a’ leading circuit rather than ‘the’ leading circuit. He added that he didn’t want to tread on anyone’s toes” (Moran 2013b: 2). By drawing attention to this, by explaining it, Lord Judge makes humour out of his split loyalties, demonstrating his own commitment to loyalty across multiple professional communities at the same time avoiding potential loss of face by recuperating the status of the Midland circuit as ‘the best’. The success of Lord Judge’s comment as humour begs a question about the composition of the community that comes into being through the laughter. If knowledge of the organisational culture of the Bar is a pre-requisite of laughter then there is the potential ‘What’s a box of “Bakewell Tarts” got to do with it? Performing gender as a judicial virtue in the theatre of justice’ by Leslie J Moran, in *Judges, Judging and Humour* (Eds) Jessica Milner Davis and Sharyn Roach Anleu

for those without that knowledge to miss the humour. Earlier comments about the ‘family’ nature of the audience would help in part to explain why this comment generated laughter. This example is also of interest as the humour in good part seems to refer not to the subject of the speech, Lady Justice Macur, but to the Lord Chief Justice himself.

Regional rivalry this time between two north of England counties, Lancashire and Yorkshire, provides a different context in which to think about gender; sport. The example comes from his speech about Lord Justice McCombe. My field notes report “The first half of the speech is dominated by the theme of cricket” (Moran 2012: 2). Sport is a common theme in speeches delivered by Lord Judge. The humour linked to regional rivalry is generated by the following juxtaposition. Lord Judge describes the judge as a “left hand bowler” from Lancashire. He went on to draw attention to the absurdity by explaining that it is well known that left hand bowlers are from Yorkshire. My notes record, “This is one of many comments that raise a gentle laugh.” The following comment shines some light on how the metaphor of ‘left hand bowler’ fit the hagiographic scheme of things;

[Left hand bowlers] are a proven tough adversary in sports, and especially in cricket, where left-handed bowlers... provide a different perspective to the game. Left-handed bowlers have always been difficult to face... These bowlers are an asset to their team because of their ability to be different than the rest. (Sharma 2014)

This commentary about the particular qualities associated with a left hand bowler highlights the rich potential of this metaphor to connote a number of judicial virtues; toughness, a unique and different perspective, and at the same time a key member of “team judiciary”. This reference to cricket is linked to other references to the new judge’s interest and prowess in sport; rugby, cricket, scuba diving, being a pilot and walking in Yorkshire. Sport, and more specifically team sports, is a location in which the production of masculinity as a virtue of the

judicial institution is put on display. ‘Manly sports’ are a rich and regular source of metaphors by which the judicial gendered virtues of being a team player, a high achiever are articulated (Moran 2011). While there is no overt reference to masculinity in the description of the judge as a keen sportsman in general of a “left handed bowler” in particular the dominant gender tends to appear as the unmarked, by way of its absence; as the unspoken norm.

The only reference to sport in my data-base relating to the swearing in of a female member of the judiciary is found in a speech made by Lord Judge at the swearing in of Sue Carr. After noting her “stunning career” at the Bar and the early date of her first judicial appointment, Lord Judge turned his attention to sport. He began by noting that in recent swearing in speeches there had been a recurring theme of sport; rugby, cricket. This was followed by a reflection on his own sporting limitations. He didn’t have a rugby ‘blue’. He had never run a century in cricket. He had never scored a hat trick at football. He continued, that while there had been a shortage of judges with a rugby background, one had recently been appointed and he was a ‘rugby blue’, but that achievement was somewhat compromised by the fact that the judge had been to Oxford rather than to Cambridge, the latter being the university attended by Lord Judge. These comments attracted much laughter. Having thus set the sporting scene, he turned to the subject of new judge.

He began by explaining that Mrs Justice Carr was an expert in “a strange sport that involved tying a fishing net to the end of a stick and then running around with that stick”. The sport he was referring to is the team sport, lacrosse. He followed this by noting her achievements in that sport. She received the equivalent of three ‘blues’ in the game on consecutive years. My field notes continue, “The most important point seemed to be that she got the awards while she was at Cambridge. Again there was much laughter” (Moran 2013a: 2).

The sporting reference to lacrosse ultimately satisfies the hagiographic needs; lacrosse is a fast moving team sport that requires high skill and energy levels. References to the incumbent's success in this sport in the speech translate them into virtues relevant to the judiciary. However the characterisation of the sport as "strange" and the description of lacrosse offered by Lord Judge has negative gender connotations; not only separating it out from the manly team sports mentioned earlier in the speech but also rendering it a sign of perverse institutional dysfunction rather than supreme virtue. Holmes notes the way in which humour may be used to reduce the threat of negative associations made through a comment; she described this as a negative politeness strategy (Holmes 2000).

In this instance the negative characterisation of lacrosse needs to be linked to those aspects of Lord Judge's characterisation of Carr's sporting prowess that make links and forge collegiality with Lord Judge. This is done not only by reference to their common elite educational attributes; both went to Cambridge. It is also done by reference to the elite institutional recognition of her sporting prowess; the award of the equivalent of three 'blues'. A 'blue' is an award particularly associated with sporting prowess performed at Oxford and Cambridge Universities in the UK. Last but not least is Lord Judge's use of self-deprecation. Holmes notes that humour associated with self-deprecation is a form of "face saving humour" (2000: 169) that protects the hierarchical position the speaker occupies. In their combination the negative face threatening humorous references by Lord Judge to lacrosse are rendered polite by the combination of self-deprecation and negative gender connotations are recuperated by way of references to elite education and thereby social class.

The remaining examples of humour all come from the speeches delivered by senior barristers on behalf of the Bar in response to the Lord Chief Justice. The first comes from the swearing in of Lord Dyson as Master of the Rolls. My field notes of the speech are as follows;

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He began his speech by saying that he did a ‘Google search’ using ‘Dyson’. What came up was ‘5 year guarantee and free delivery’, ‘20% off’. There was much laughter in response, as he commented that he had the wrong ‘Dyson’, these being references to the white goods manufacturer. (Moran 2012a: 3)

This example of humour again involves a play on the word ‘Dyson’; both the surname of the new incumbent of the second highest judicial office in England and Wales and the name of a brand of high tech domestic appliances. The humour is generated by the connection between what appear to be two incompatible things. The incongruous link is both explained and repeated by the references to the guarantee and a variety of inducements to encourage consumption. This humorous comment also has a gender component; the man in one of the highest judicial posts is juxtaposed with one of the worst paid jobs, domestic labour, dominated by women.

This is an example of a form of humour particularly associated with ‘wit’. It is a form of humour said to involve the higher faculties of intelligence, insight, imagination, wisdom. It calls for and exploits linguistic ability and a keen sense of social and cultural conventions. In this case it requires knowledge of the ‘Dyson’ brand and the range of domestic products the company produces. It works by drawing attention to the gap between, “two or more inconsistent, unsuitable or incongruous parts or circumstances, considered as united in one complex object or assemblage...” (Beattie quoted in Stott 2005, 136).

This example of humour needs to be put in the context of legal professional and judicial power structures and hierarchies. In this case the humour depends upon a momentary inversion of the hagiographic conventions of swearing in speeches. Writing the life of the new occupant of one of the highest judicial offices by reference to domestic appliances is a gendered inversion that takes the form of a mild satire; a form of humour that seeks to

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challenge and deflate the status quo (Goodrich 2004). But as Mohr (1999) notes, carnivalesque inversions are by their nature of short duration; the status quo quickly returns. Also in this instance aspects of the incongruity temper the threat, and provide assurances to the addressee. The name 'Dyson' is of particular significance. 'Dyson' is not a bargain basement brand. It is a flagship English brand associated with top of the range domestic goods, technical expertise, creativity and entrepreneurial zeal. Dyson vacuum cleaners are more likely than other cleaners to preserve the elite position of men in the home who engage in domestic labour. This is another instance of humour that both threaten the addressee as it reduces the threat and expresses deference (Holmes 2000).

The final examples return to the "Bakewell Tarts" incident. They come from the speech delivered by Deborah Eaton QC which offers some evidence of women making humour, the types of humour used and the uses made of humour by a woman in this context.

The first example comes from a section in the speech devoted to three anecdotes relating to holiday jobs undertaken, in the past, by Lady Justice Macur. Eaton discloses firstly that "there was a time when My Lady worked at the Mr Kipling cake factory where...her job was to work in the Bakewell tart section." Just like her later judgments, her work there was "exceedingly good" (Eaton 2013: 6). The punch line of this particular anecdote is that Lady Justice Macur's job was to put the cherry on top of each tart, which Eaton describes as, "A crucial task". She continued. "From where I stand, it seems to me to be a rather similar job to being in the Court of Appeal saying 'I agree and have nothing further to add'" (Eaton 2013: 6). As Eaton spoke, the barrister carrying the box of "Cherry Bakewells" moved to present them to the Lord Chief Justice and she explained, "In case My Lord is unaware of the intricacies of the Bakewell Tart I now produce as an Exhibit, a selection for My Lord to try!" (Eaton 2013: 6).

The incident involves a variety of styles of humour. There is parody of courtroom practice in the characterisation of the tarts as “an Exhibit”. It is an example of wit. It requires and demonstrates excellent language skills, an ability to identify and portray surprising parallels that reveal absurdity and depends on knowledge of the culture of the courtroom as well as popular culture. There is an element of satire in the comment that reduces the experience and skills normally associated with giving judgement in the Court of Appeal to a simple single gesture akin to putting a cherry on top of a cake that takes the form of “I agree”.

Easton’s use of humour takes a rather different turn in a comment that appears to echo a reference to Lady Justice Macur’s family in Lord Judge’s speech that while building a successful career at the Bar, “...she was also blessed with children.” (Moran 2013b: 2). Eaton’s reference to the judge’s family comes early in her speech;

I am immensely proud today to welcome to My Lord’s Court Lady Justice Macur’s sons Ben (who has recently graduated from Essex University) and Nick (who is just about to go to Bristol University), both of whom are here today with their father, David.

She continues:

Of course all three are to be congratulated for their respective roles in both My Lady’s progress to date as well as for keeping her feet not just firmly on the ground, but nailed to it. (Eaton 2013: 1)

Here the good fortune of children and family more generally are given a surprising and sinister twist. While judges are criticised for their unworldly condition and encouraged to keep their feet on the ground the punch line here, “but nailed to it” uses irony to suggest that for a woman on the bench this is not so much an aspiration but the phrase “firmly on the

ground” suggests it’s a powerful reality. “[N]ailed to it” reinforces this. It is something women with family responsibilities cannot escape from and a challenge which they have to struggle with. The humour here might be described as ‘gallows humour’, drawing attention to the challenges and pains of pursuing a successful career at the Bar at the same time as having considerable domestic responsibilities. The laughter is tinged with discomfort. It is Palmer suggests (1994) not a form of humour commonly associated with women.

The first example from Eaton’s speech in making light of the skills and talents needed to be a judge in the Court of Appeal is another instance of humour that involves a challenge to the status quo. At the same time it shares many of the characteristics of humour that in other examples has been associated with humour that clothes it with politeness and due deference (Holmes 2000). The second example is more explicit in the way it threatens to re-imagine judicial workplace culture. In considering the nature and effect of laughter in response it is important to remember a variety of relationships that are possible; laughing together, laughing along, laughing against, laughing at, laughing along and resisting (Glenn 2003).

Taking humour seriously; some reflections

While there may be limited opportunities to examine humour in the published swearing in speeches, this project suggests that observation of swearing in events offers new opportunities not only to explore the place of humour and laughter in the judicial ceremonial archive but also to offer new insights into the way social and cultural relations that make up the judicial institution are formed. Unlike humour that arises out of conversational interaction this chapter discusses a study of workplace humour that is formalised through the scripts that are the basis for the speeches and performances associated with a particular judicial ritual.

The scripts and performances of Lord Judge who presided over twelve of the eighteen ceremonial events offer examples of the role of the Lord Chief Justice plays in setting the

humorous tone of these events. The speakers who occupy a place lower in the professional social and cultural hierarchy perform accordingly; sometimes by way of formal recognition of the need to integrate humour into their speech but more commonly by way of practice.

Men play a key role in framing the swearing in ceremony as an opportunity for humour. In the 18 ceremonies observed men take on most of the speaking roles. As such men occupy a dominant position with regard to the use of humour as a device for reproducing the judiciary in the collective imagination of the community of laughers that come into being in the courtroom of the Lord Chief Justice. Deborah Eaton is one of a minority of women speakers. Her speech offers examples of her ability to use a range of styles of humour in the public setting of the swearing in event. Glenn's (2003) categories, laughing together, laughing along, laughing against, laughing at, laughing along and resisting, suggests that the audiences responses to Eaton's re-imagining of the gendered workplace culture of the judiciary suggests that the laughter does not necessarily create a single new worldview or a single community. But the multiplicity of responses and thereby perceptions and experiences of the social and cultural world of the judiciary is not peculiar to laughing at Eaton's humour. Laughing in response to male speakers raises the same issue. Self-analysis of my own laughter—and I laughed in all the eighteen events I attended—offered many examples of how laughter helped constitute my complex relationship with the judicial and legal professional institutional world. Sometimes I laughed with the legal professionals in the court. At other times I laughed at them. On some occasions I laughed but I caught myself wondering what I was laughing at. And then there were occasions when I sat with a furrowed brow not sure what people were laughing at.

The hierarchical structure of the judiciary not only has an important impact on the context in which the humour takes place but also on the content of the humour. The self-deprecating

humour of Lord Judge can be understood as a well-known strategy to inscribe hierarchy and at the same time temper its potential negative impact upon those lower down the hierarchy. While gender may be a part of that hierarchy it is not the sole dimension of it. The examples above are also informed by social class, educational privilege, and intra-professional rivalries. When the one making the humour speaks from a position subordinate to the Lord Chief Justice there is evidence of humour being used to challenge those who occupy the elite offices. The examples considered here offer some evidence of the way in which this is institutionalised, for example through the use of wit, and uses strategies of polite behaviour to simultaneously produce the required deference.

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Endnotes

¹ The Bakewell Tart is an English regional delicacy, associated with the town of Bakewell in the Derbyshire Dales, although there is no evidence that it actually originated there (see Cloake 2013 for more information about the history and recipes). The commercial version offered in court has a shortcrust pastry case, a plum and raspberry jam and sponge filling with a white icing covering topped with half a glacé cherry. The branded box, sold in most British supermarkets, contained six small tarts.

² Since 2005 the Lord Chief Justice has been head of the judiciary. See Constitutional Reform Act 2005 s.7.

³ Hale is the only woman ever appointed to the UK's highest appeal court: the Appellate Committee of the House of Lords and since 2009 the UK Supreme Court. In the 10 years plus that she has been in that post thirteen new appointments have been made and all have been men.

⁴ On a small number of occasions it was possible to obtain a written copy of speeches delivered by the lawyers who spoke after the Lord Chief Justice. See Bennathan 2013, Eaton 2013, Hubble 2013. Dyson (2013) is a speech delivered by the then most senior judge of England and Wales on the occasion of the swearing in of Lord Thomas as Lord Chief Justice.

⁵ At the time the research was undertaken cameras were not allowed in the courts. The only exception was the UK Supreme Court. In that court since 2013 videos of swearing in ceremonies have been published via the courts website. In England and Wales, the first video recording of a swearing in ceremony in the court of the Lord Chief Justice was made in October 2016. Elizabeth Truss as sworn in as the first woman to hold the office of Lord Chancellor. See <https://www.youtube.com/watch?v=wknVZecoTTE>

⁶ This practice was shaped by previous research that noted the importance of humour as research data in the past (Moran, Skeggs, Tyrer and Corteen 2002).

⁷ Limited changes affecting the Supreme Court were introduced by the Constitutional Reform Act 2005. s. 32 Crime and Courts Act 2013 made some changes to the prohibition on cameras in the courts of England and Wales. In both cases the use of cameras is strictly controlled.

⁸ Glenn notes the possibility of laughing at one's own jokes as a possible exception that supports the general rule.

⁹ One context in which the relevance and nature of the response is examined is in a debate about the status of 'failed humour'; where the speaker's humorous intention is not acknowledged or responded to by the audience. For example see Holmes 2000. This is not an aspect of humour considered here.

¹⁰ The swearing in events are not the only case of humour taking place in the time in-between the ordinary business of justice at the Royal Courts of London. The cathedral like space of the main entrance hall of the court complex is used out of court time for a number of leisure activities such as badminton competitions, the performance of operas, debutants balls, wedding receptions, conference cocktail parties and celebratory dinners. All have strong associations with entertainment and the frivolous.

¹¹ Humour was not a part of any of the speeches delivered by the Presidents of the Law Society of England and Wales.

¹² None of the speakers or judges in this study could be identified as from a black or visible ethnic minority background.