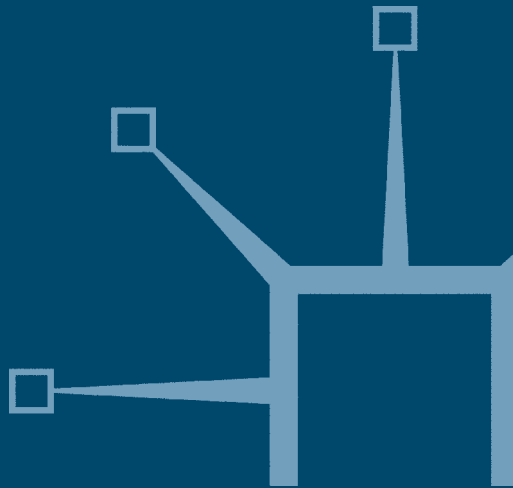


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# Literature, Politics and Law in Renaissance England

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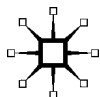
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# 1

## Introduction: Renaissance, Law and Literature

*Erica Sheen and Lorna Hutson*

### [I]

This collection had its beginnings in a conference on ‘Renaissance, Law and Literature’ organized by the editors at Wolfson College, Oxford in July 1998. The conference was the first of its kind to focus on the Renaissance, bringing together scholars from literary studies, English legal history, critical legal studies, intellectual and social history and the history of political thought.<sup>1</sup> The present collection of essays by a selection of the participants in the conference takes as its focus connections between law, literature and politics that are particular to England in the period 1580–1660, and as such, of course, it raises questions concerning the justification of its defining historical and geographical parameters.<sup>2</sup> What makes the study of English legal developments in relation to literary questions – questions of representation, subjectivity, authorship, genre – a subject of more than antiquarian or occasional interest? Why should we care about trying to understand relationships between the legal and the literary in the sixteenth and seventeenth centuries?

In answer to the first question, a number of recent studies in literature and rhetoric have shown that the habits of interpretation and expectations of genre which more or less define the reception of anglophone literary and popular culture are profoundly indebted to developments in Anglo-American common law. At the broadest level, Carol Clover has argued persuasively that our habits of interaction with a whole host of popular culture genres – film and television drama, board games, interactive software, internet tribunals – are affected by the distinctively adversarial structures and procedures of the Anglo-American jury trial: ‘we enact and reenact trials, in the

process of positioning ourselves, first, last, and always, as triers of fact'.<sup>3</sup> The literary genre which has seemed definitive of Western culture – the classic realist novel – has been shown, by Alexander Welsh, to have profound links with developments in the theory and use of circumstantial evidence in the eighteenth-century criminal trial.<sup>4</sup> Confession, still problematically held to be 'queen of proofs' in the Anglo-American law of evidence, is historically bound up with compulsory confession and inquisitorial trial in Roman canon law, whence it has informed, as Peter Brooks has shown, subjectivity effects in Western literature from Dante to Dostoevsky and Camus.<sup>5</sup> And while students of English and American literature were once taught to think of the term 'imagination' as being outside law and ideology, John Barrell's magisterial study has shown how Coleridge's enormously influential and significantly depoliticized account of the poetic imagination in *Biographia Literaria* emerged from the urgent hermeneutic pressure put upon the word in the 1790s as a result of its preservation in the legal language of the English statute of treasons of 1351, which made it treason to 'compass or *imagine*' the death of the king.<sup>6</sup>

This sample from recent work in literary and rhetorical studies indicates that the lessons of the previous decade's new historicist and cultural materialist approaches to literature, which argued for the situating of literary texts in relation to contemporary social institutions and practices, have not been abandoned, but have been modified in ways which take account of the specific institutional histories in question. Peter Goodrich's ground-breaking work has revealed that the law in particular is an institution which has tended to imagine its language as univocal and authoritative, 'avoiding ... the semantic implications of its own institutionalization, communicative forms' and specialized lexicon.<sup>7</sup> To examine the semantic implications of the English common law's institutional and communicative forms in relation to the production of literature, then, involves both analysing the rhetorical performativity of the law as discourse and institution, and being aware of the specific historical developments that shape the law's rhetorical possibilities, and its possible relationships with literary discourse. Thus, for example, where Renaissance new historicism and cultural materialism tended, when analysing the cultural workings of literary texts, to stick closely to a generalized Foucauldian model of the juridical and confessional subject (which Foucault partly based on an analysis of France's criminal system, derived from Roman-canon *Inquisitionsprozess*), work of the kind represented here, by contrast, develops specific links between

literary subjectivity and the languages and procedural structures of the English common law as it was concretely engaged in the political struggles of the early seventeenth century.<sup>8</sup>

That the languages and procedural structures of the common law should find their way into literary representations of subjectivity and agency in the sixteenth and seventeenth centuries in England is hardly surprising, given how closely identified were the cultural spaces of both legal and literary writing. Among the authors discussed in this collection, at least six studied at the Inns of Court, but every one of that six either had an interest in poetic and dramatic writing, or actually wrote poetry and drama. John Selden (1584–1654) practised law in the Temple, and was a good friend of the dramatist and poet Ben Jonson (with whom, for example, he corresponded on the controversial subject of transvestism on the stage). John Hoskyns (1566–1638), another friend of Jonson's, wrote poetry and libels, and penned an important treatise on rhetoric using Sidney's *Arcadia*, while practising as a serjeant-at-law at the Middle Temple. George Wither (1588–1667) was a poet and a member of Lincoln's Inn; he acknowledged in poems written in 1641 that 'the studie of the *Lawes* / For my profession was design'd'.<sup>9</sup> John Webster (c.1580–c.1625), now known primarily as a dramatist 'much possessed with death', was at one time a law student at the Middle Temple, while William Fulbeck (1560–1603?) of Gray's Inn, is described in the *Dictionary of National Biography* as a 'legal writer', although he collaborated with other members of Gray's Inn (including Francis Bacon) in writing Senecan speeches for an entertainment before Queen Elizabeth in 1588. Richard Brathwaite (1588–1673), a prolific writer in a variety of genres, was likewise desired by his father to take up law as a profession, but, like Wither (whom he described as 'my bonnie brother'), he used his knowledge of legal procedures and languages – the form of the trial, for example – to call existing structures of authority, including the common law, into question.<sup>10</sup>

The essays in this collection, then, examine the intricate politics of legal–literary relations in a period anterior to the full emergence of the professional distinctions that would come to separate these kinds of writing. While the questions explored by these essays are various, they are commonly affected by, or touch on, certain broadly defined topics specific to the legal, literary and political history of this period. One such question (which comes up again and again with instances of writers who assume the rhetorical position of martyrs in representing themselves as oppressed by common law) is that of the common law's assumption, at the Reformation, of a quasi-spiritual juridical authority.

How was the (male) subject's emergent self-definition as a citizen possessed of legal rights affected by the common law's repression of the memory of its own existence within a larger system of spiritual jurisdictions? Did the female subject's comparative marginality with respect to common law enable her symbolic alignment with a dissenting spirituality, as seventeenth-century common law came to underwrite definitions of citizenship? Another, related question concerns the common law's post-Reformation attempt to compensate for its lack of jurisdiction over conscience and inwardness, by developing an Aristotelian notion of equity. Equity, the principle of taking the law-giver's or defendant's intentions into account when considering the circumstances of a particular case, has an ancient affinity with the principles of fiction-making, and especially with the principles of dramatic composition, which is of acknowledged importance for Renaissance English drama.<sup>11</sup> As a hermeneutic principle, the questions of equity and the broader questions of how the law constructs and explores the inaccessible domain of human intention are further related to another topic treated in a number of essays in this collection: the topic of authorship, which we might define as legal liability for literary imaginings, a topic which is here explored in the form of literary writers' responses to politically motivated developments in the common law of defamation, as well as to the question of the political significance of the writerly activities not of authors, but of copyists and circulators of libels. Finally, a topic which is explored from various perspectives and through various media is that of the relation of the law to gender. Women are ambiguously positioned in Renaissance law and in ideology as aspects of men's private or domestic life.<sup>12</sup> Thus, in some forms of English Renaissance drama and fiction the forensic processes of discovering and punishing a wife's adultery may be represented as the legitimate prerogative of the husband alone (where in life such trials would have been conducted by the spiritual jurisdiction). Other dramatists identify the motif of the kinsman as both prosecutor and judge of his kinswoman with the rigour of foreign civil law systems, enabling the association of English common law equity with the pathos of an oppressed and resistant femininity. Women as writers may be excluded by the figurative language and homosocial culture of the law's theoretical discourses from being recognized as materially affected by the questions of natural and positive law which such discourses examine, or they may position themselves as writers in relation to the law's oppression of their husbands in ways in which increase the power and political effect of their textual presence.

## [II]

The essays collected here are presented in an order that is partly chronological, partly thematic. The collection as a whole represents a broad sweep from the early 1580s to the mid-1660s, but within this there are internal clusters that link chapters on friendship, theatre, treason, slander, libel, and authorship, both male and female. To begin, Peter Goodrich explores the ethical writings of two legally trained authors – one, William Fulbeck, writing largely under Elizabeth I, and the other, Richard Brathwaite, writing during the reigns of James and Charles, and through the Civil War and the Protectorate. Goodrich is interested in these writers' conception of law in relation to the regulation of affection. His engagement with this question is part of a broader concern with the unconscious of the law, and with the complex disavowals of the centrality of friendship in professional, academic life.<sup>13</sup> In the present chapter, Goodrich develops one aspect of his earlier deconstruction of modern Anglo-American legal positivism, which involved recovering the common law's repressed memory of its own once partial jurisdiction within a plural epistemological frame, which included, among other jurisdictions, the Church's juridical regulation of the soul.<sup>14</sup> From the context of this forgotten history, William Fulbeck emerges as an early agent of legal positivism, insofar as his writing works to incorporate spiritual jurisdiction into what he conceives as the broader domain of common law, identified with property regulation. His *Parallel or Conference of the Civil Law, the Canon Law, and the Common Law of this Realm of England* (1618) thus attempts to reconcile the diverse positions of the spiritual and secular jurisdictions on matters such as contracts, gifts, bargains, tenancies and so forth. Accordingly, as Goodrich shows, Fulbeck's *Preparative to the Study of the Law* tends to assume the 'sacred character' of the practice of common law, while his ethical writings evince an extraordinary asceticism, a distrust of the risks of self-dispersal in the shifting allegiances of emotional ties. Thus, religion and law lie down together, but other bedfellows are not allowed: 'At this founding moment of the common law tradition', writes Goodrich, 'the author of a best-selling treatise on life in the law devotes a popular book on ethics to making the argument that a lawful man cannot have friends' (30). A contrasting model of the relationship of law to friendship is provided by Richard Brathwaite, who writes in a slightly later historical moment, and from a position at the margins of the institution of the law. Brathwaite's play *Mercurius Britannicus* (1641) criticizes a discredited judicial system in the wake of *Hampden's Case*

(1637), subjecting the judges to mock-trial in the name of ethics and friendship. Even more surprising is the position on friendship taken in his popular conduct book, *The English Gentleman* (1630). Here, in a section on 'Acquaintance', he appears to be about to rehearse the usual lament that true friendship is hard to find, because of the opposition between prudence and affection: 'Now perfection in *friendship* is but a speculation', he writes, 'it is not given to man to *love* and be *wise*'. However, he interrupts this commonplace line of thinking with a statement that Goodrich singles out as a radical critique: 'my opinion is quite the contrary; for I hold this as a firme and undoubted *Maxime*; that he who is not given to *love* cannot be *wise*'.<sup>15</sup>

Alan Stewart's scholarly interests in English Renaissance texts have likewise focused on the ambiguous and uncertain boundaries between emotional and professional bonds between men.<sup>16</sup> Specifically, his work has tended to suggest that hierarchical structures of dependence and service within the feudal household were challenged in the sixteenth century by humanist forms of intellectual employment, which tended, under the sign of classical *amicitia*, to neutralize in unprecedented and anxiety-causing ways the traditional social differences between noblemen and the educated men in their employ. In Chapter 3, Stewart explores the eruption of such professional and emotional ambiguities into the sphere of the most extreme form of legal liability: liability for treason. Henry Cuffe, one of the second Earl of Essex's famously learned and able secretariat, was tried, condemned and hanged in 1601, not for taking part in the Essex uprising, but for having allegedly instigated the Earl's action by the persuasions of scholarship and learning. Here humanism, with its privileging of intellectual intimacies between men of shared literary tastes, intersects with the common law's imperative to discover the intimate space in which intentions are formed, the 'rootes and first motions' of attempted treason.<sup>17</sup>

From its earliest years in the reign of Edward III, treason was distinctive in the history of English law as a crime for which guilt could be inferred without an 'act done'. 25 Edw. 3, st. 5 c. 2 established the crucial phrase 'imagining and compassing the death of the king' – an open-ended formulation that makes the law unusually responsive to changes in the technologies by which imagination is mediated, like the printed word and the theatre. Essex's was the most famous of the treasonable acts of the imagination to take place in Elizabeth's reign: his bid for the throne at the end of the 1590s was acted out in an abortive 'coup' in February 1601 and followed by arrest, arraignment and

execution. In a much discussed conversation with Elizabeth I, justice of the peace and antiquarian William Lambarde referred to Essex's plot as a 'wicked imagination', and did not have to explain that he was thinking in both legal and theatrical terms when he did so.<sup>18</sup> Competing conceptions of imagination cluster around this event, demonstrating not only the often contradictory way in which the idea was understood, but also the relative ease with which these contradictions were sustained. Indeed, one could argue that they are structural to the way an idea of the 'imagination' began to emerge in this period at the intersection of literary, political and legal discourses. As is well known, Essex's supporters commissioned the Chamberlain's Men to put on a performance of *Richard II* just two days before the uprising. They clearly intended the play to be understood by the London public as an 'imagination' of the act of deposition. That being the case, what is less clear is why anybody involved in the episode thought they could get away with it, and why some were punished and others were not. Thus, in the investigation that followed, the Chamberlain's Men were let off, and Henry Cuffe, who did not attend the play, and certainly did not take part in the uprising, was found guilty and executed.

Alan Stewart suggests that this trial 'throws light on the underbelly of service relations in the period' (50), but the Essex episode as a whole shows that law, unlike 'power', was not simply in the business of enforcing or maintaining such relations. Rather, it was instrumental to the momentous changes that were taking place within them. The Chamberlain's Men were servants too. How do we understand the difference between the service they rendered to Essex, and Cuffe's? Is there something about a theatrical engagement with treason that renders it somehow above the law – or perhaps part of its terms of operation? In his account of Essex's trial, issued through crown publisher Robert Barker to the same public that Essex had imagined he could rouse to rebellion with a performance of *Richard II*, the lawyer Francis Bacon (who was striving to exculpate himself as one of the members of the Essex secretariat) drew on what was evidently already an available association between forensic and theatrical acts of investigation. Described as a man of 'high imagination', Essex is given the inwardness of a tragic hero, and the concluding stages of his insurrection are referred to as the '*Catastrophe*, or last part of that Tragedy, for which he came upon the Stage in *Ireland*.'<sup>19</sup> Theatre provided Elizabeth and her government with the interpretative framework by which an account of Essex's actions, and those of his supporters, could be presented to the public as evidence of their guilt.



In the light of this remarkable collusion, perhaps we should query Peter Goodrich's suggestion that 'Theatre had long been in competition with law'<sup>20</sup> and follow instead the suggestion made by a number of studies of the affinity between Aristotelian tragic poetics and forensic rhetoric. These studies make it clear that there is an increasingly close relationship, in this period, between the rhetorical invention of signs or 'proofs' of guilt or innocence, and the dramatic processes of composition that relied on similar practices of rhetorical invention in order to supply motivation and inwardness to *dramatis personae* through dialogue and plot.<sup>21</sup> The historian Barbara Shapiro has recently shown that sixteenth-century justices of the peace were advised to make use, in their pre-trial examinations of suspects, of classical rhetorical texts, such as Cicero's *De Inventione*, which detailed ways of presenting the known facts about a case as calculated to arouse 'suspicion' in a judge. The rhetorical techniques – technically known as 'artificial proofs', or proofs which require art (*'probationes artificiales'*) – were identical to those which humanist schoolmasters asked their students to analyse in the texts of Latin drama.<sup>22</sup> Not only, then, were male bonds forged through shared Latin learning, and theorized under the sign of *amicitia* (as Peter Goodrich, Alan Stewart and others have shown), but that very Latin learning, in turn, was associated with a distinctively forensic habit of mind, a readiness to invent 'proofs' or to construct 'evidence' from any set of given facts (*'narratio'*). Literate men of all sorts – especially dramatists – acquired the rhetorical habit of considering, in the words of William Lambarde, how to 'ingender Suspicion' from any set of circumstances.<sup>23</sup>

The identification of the educated gentleman as one defined by his control over forensic and theatrical techniques of investigating evidence is part of Subha Mukherji's concern in her discussion of Thomas Heywood's *A Woman Killed with Kindness* (1603). Mukherji reads Heywood's play against a fascinating case of adultery brought before the Vice Chancellor of Cambridge in 1596, in which the husband who brought the case carefully prepared his wife's letters as documentary evidence of the likelihood of the act.<sup>24</sup> Although adultery is obviously not only a thought-crime, its forensic investigation seems to have been symbolically linked to the forensic investigation of matters of inwardness, imagination and intention because of its secrecy: proof of adultery is usually hypothetical, a matter of imagining, from uncertain signs, the not-to-be-witnessed act. And being called upon to imagine acts of which one is denied the pleasures and traumas of full witness is, as Katherine Eisaman Maus has argued, a condition which the theatrical audience,

watching the synecdochic action of the play, shares with the figure of the jealous husband.<sup>25</sup> Frankford, the hero of Heywood's play, however, is less a Shakespearian or Jonsonian husband in the grip of someone else's manipulation of his suspicion, than a husband whose very husbandry or *oikonomia* is identified as a form of forensic control. He defines himself as a 'gentleman' by means of a threefold qualification: his possession of revenues, his being 'studied in all arts', and his certainty of possessing a 'chaste and loving wife'.<sup>26</sup> He utters this self-definition from his private study, a space which localizes and realizes the relationship between his education in the arts, and his control of his household and wife. From his study a gentleman controls his 'evidences', the legal means of furthering his revenues, and from thence Frankford plots the discovery and punishment of his wife's adultery. Thus, Frankford's *oikonomia* or oeconomy – his household management as directed from the space of the study – is a spatial metaphor for the forensic form of the play, which discovers and brings to justice the improvised, occasional plot of friendship: violation and adultery. It is notable, too, that Frankford is cuckolded by Wendoll, the male 'friend' he has chosen as companion of all his pleasures ('He hath plac'd me in the height of all his thoughts ... He cannot eat without me', says Wendoll, with awe). For Peter Goodrich, Richard Brathwaite's exaltation of friendship above law was a radical move, but Brathwaite, exactly like Heywood, imagines friendship as leading inevitably to adultery: 'What delight can any one reape in his *pleasure*, wanting a friend to partake with him his pleasure?', Brathwaite asks, quoting an epigram on the ubiquity of that 'ancient crest', the horn of cuckoldry.<sup>27</sup> Forensic husbandry is required to police the limits of *amicitia*.

Mukherji places the play's representation of the Frankford household, with its network of public and private spaces, in a historical context in which 'a growing sense of privacy was inextricable from a matrix of public interest and accountability' (81) – and, one might add, where this accountability was mediated by theatre as much as by the law. The play is careful to link the audience's access to the scene of the crime with the gate through which the audience passed to come to the Red Bull, the theatre where the play was most often performed. Mukherji argues that, in its refusal to allow Anne to undergo public penance, the common penalty for adultery, the play encloses the process of justice within the household, identifying the husband with the law, rather than (as under the ecclesiastical, or bawdy courts) as a mere subject, along with his wife, of the spiritual administration of justice. But one could also argue that the play locates the processes of

justice on the stage with the performers, rather than allowing it to go back out through the gate with the audience when they leave at the end of the play.

From this perspective the enhanced status given to female agency by Anne's self-starvation – as Mukherji puts it, a reclaiming of the dignity denied her by the inequality of the unanimous verdict – might appear to be more a theatrical than a legal resource. This is an issue also raised by Ina Habermann in Chapter 5, 'Femininity as Challenge in the "Equitable Drama" of John Webster'. Habermann argues that Webster's drama allies itself with the principles of equity, in that his plays focus on the particular circumstances of individual cases and explore the broader moral and ethical framework on which a judgement about these circumstances should be made. Ever since the lawyer Christopher St German had argued in 1530 that English law required equitable interpretation in order to be conformable to the law of God ('equity followeth the law in all particular cases where right and justice requireth, notwithstanding the general rule of law be to the contrary'), post-Reformation common law had developed in increasingly equitable ways.<sup>28</sup> Initially, it had seemed as though the detailed consideration of particular circumstances which went by the name of equity was better suited to the Court of Chancery than the common law courts. Gradually, however, the common law developed equitable principles of its own: Plowden's *Commentaries* (1571–79) offered learning on the 'equity of statutes', which licensed a departure from the narrow literal interpretation of the words of the law in accordance with a hypothesized intention for the public good. Equitable actions also developed, known as 'actions on the case', which were more flexible than the older common law writs, and which, in the cases of contract and defamation, took over from existing spiritual actions.<sup>29</sup> Habermann argues that the dramatic culture from which Webster's work emerged was one in which the identification between the workings of dramatic fiction and equitable hypothesis were taken for granted. However, whereas an author like Thomas Heywood might see this identification as one which empowers homosocial masculinity (associating the husband's forensic discovery of his wife's adultery with the drama's own movement), Webster (who once was Heywood's dramatic collaborator) rather more disruptively suggests that femininity represents an access to intimate knowledge that proves the limits of all forensic and rhetorical techniques of proof. In *The Devil's Law Case*, Leonora brings a case to court against her son's lawful inheritance, announcing that he is a bastard on the grounds of the only 'lawful proof i'th' world', which is 'the oath of

the mother'.<sup>30</sup> While Leonora's oath turns out to be false, the ludicrously improbable means by which its falsity is discovered does nothing to enhance confidence in the power of forensic arguments and artificial proofs to discover the truths of disputed paternity, so that, as Habermann argues, the secrets of the womb arrest the flow of legal ink, and the play shows 'that the law is structurally unable to alleviate anxieties caused by femininity' (107). In his subsequent plays Webster tends to identify an equitable impulse both with the audience's sympathetic response to an embattled femininity, and with English Protestantism's challenge to the oppressions of foreign, Catholic powers (and possibly also with the jurisdiction of the Court of Chancery, which was increasingly being identified with arbitrary government).<sup>31</sup>

If Renaissance drama encourages us to conclude that early modern women are always already on trial, the assize records examined by Luke Wilson in Chapter 6 may give us grounds to think otherwise. In June 1593, Alice Dade went to check up on the progress of young Brian Perrett, a lad she had sent to

weed wheat in 'le eighte acres' field. About one'o'clock she went to the field to see how the work was progressing, and found Perrett lying asleep. She shouted at him and, intending only to chastise the boy, struck him with the weed-hook(1*d.*). It hit him on the head, causing a wound from which he died on 22 June. (130)

Surprising as it may seem, this post mortem was not converted into an indictment: as Wilson puts it, 'the coroner's jury did not want to see the case go to trial; and evidently the grand jury at assize agreed' (131). Clearly, it's important to counterbalance an account of the assimilation of legal discourse into non-legal institutional contexts like theatre with an understanding of the way law worked as a framework for daily life. Despite the predominantly rural quality of the lives recorded in these documents, for Heywood and Webster's female spectators, the everyday experience of the law was likely to be in certain significant respects more like that of Alice Dade than Vittoria Corombona or even Anne Frankford: that is to say, one of accidental liability rather than fundamental ideological confrontation (though Marcus Nevitt's chapter on the hardships suffered by Quaker women for the non-payment of tithes suggests a strongly contrasting position).<sup>32</sup> Indeed, one might even propose that something like this distinction constitutes the very basis of a female spectator's capacity to attend the theatre and respond to stories such as Heywood's and Webster's.

However, suggestive as his research is of ways in which a study of early modern law might extend an understanding of early modern female agency beyond questions of sexuality, Wilson's concern is not with gender. Rather the opposite in fact, since Chapter 6 is a discussion of objects rather than subjects. His interest is in the defining instrumentality of human behaviour and its epistemic configuration within the law. As he puts it, 'If tool use is traditionally taken as the defining capability of human beings it is because the tool is unique in the way it articulates its user's relation to the world' (122); and as the death of Brian Perrett demonstrates, that relation might change in a way that requires interpretation. Wilson shows how such an interpretation functions within the laws of homicide, in the emergence across the sixteenth century of a concept of 'the sudden': a principle of temporality operating in an action like that of Alice Dade that displaces premeditation and in doing so sets up a distinction between manslaughter and murder.

To the extent that it characteristically arises from contexts of manual labour, tool abuse foregrounds questions of social status, and it is here that this complex analysis of the relation between action and intention comes to serve as a model for authorship. In an account of Philip Sidney's revision in the *New Arcadia* of his own earlier version of Ovid's account of unpremeditated tool abuse in the battle of the Centaurs and Lapiths as the model for the drunken birthday party that turns into a murderous rebellion mercilessly quashed by Pyrocles, Wilson examines the relation between the instrumentality associated with the 'unpremeditated' deployment of tools as weapons and that of Sidney's own 'literary labour'. He focuses on the painter who is engaged in using the scene as, precisely, a model for a painting of the Centaurs and the Lapiths; the painter whose presence thus draws our attention both to Sidney's use of Ovid and to his revision of him, and whose subsequent mutilation by Pyrocles serves to disengage his agency as a writer from the model of peasant action associated with tool abuse, and to politicize his own aristocratic version of the instrumentality of authorship. As Wilson puts it, 'In Sidney the tool abuse topos and the sense of the sudden for which it stands similarly begins to articulate the ways in which liability will come into play in defining the emerging category of the author' (139).

Wilson's argument thus develops into a contribution to recent debates about early modern authorial agency, and makes a link with his earlier work on the temporal logics of compositional activity, and those of represented action in drama.<sup>33</sup> It helps focus a strand of

argument that runs through several of the chapters in this collection, and which emerges in two of these as an explicit concern with the legal liabilities that are inseparable from the emergence of the category of authorship. Alan Stewart's discussion of Henry Cuffe shows how imagining and compassing the death of a king opens up questions of authorship, its attribution and accountability within the law. Both Michelle O'Callaghan and David Colclough, in chapters 7 and 8, take up these questions in explicit response to revisionist work in the theory and history of censorship and silence. Recent theoretical approaches to censorship, following Foucault's relocation of the analysis of domination from the juridical, sovereign state to the diffused and decentralized operations of institutional discourses of all kinds, has seen censorship not as the official suppression of speech, but as the productive and pervasive condition of speech itself.<sup>34</sup> This theoretical move has made it harder to speak of poets' writings as manifest acts of resistance to censorship as opposed to merely aspects of the productivity of self-censoring discursive communities. Such a difficulty is aggravated, moreover, in the politically controversial historiography of early seventeenth-century England by recent empirical accounts of the mechanisms of early press censorship which have argued that licensing mechanisms were piecemeal and commercially motivated and by no means the efficient instruments of a centralized ideological control of public opinion.<sup>35</sup> In addition, the literary critic Debra Shuger has argued, in two related articles which look set to become a book justifying Tudor-Stuart legislation against oppositional writing, that early modern English censorship laws are essentially benign and civilized responses to scurrilous personal attacks on the ruling magistracy, and as such are to be contrasted with the repressive, ideological censorship laws of Counter-Reformation Europe and with the ideological censorship that the 'puritan leadership' of the opposition to the Stuarts would have imposed, had Charles not dissolved Parliament in 1629.<sup>36</sup>

In Chapter 7, Michelle O'Callaghan explicitly contests the argument implied by revisionist historians of press censorship, namely that censorship must necessarily be identified with an efficient, centralized system of press control, and that if there is not such a system, there is are no ideologically motivated attempts on the part of those in power to repress the utterances of those who appear to criticize them. Where Sheila Lambert and Cyndia Susan Clegg have argued that the licensing system of the Stationers' Company was largely concerned with emergent property rights in printing texts, and that the campaigns by peers against individual authors were personally, rather than ideologically

motivated, O'Callaghan points out that the legal scope of the common law action on the case for defamation extended to oral and manuscript writing, and so was not limited to press control. Moreover, she contends that magnates' use of defamation laws can hardly be described as 'personal', that is, non-political and non-ideological, in a period when defamation law itself was redefined by Sir Edward Coke to equate slander of a magnate or magistrate with slander of the monarch and the state.<sup>37</sup> O'Callaghan takes the poet George Wither as her example of how a writer responded to being held legally liable for the construing of his writing as defamatory personal attack, but he was by no means the only such author: to take just one other example, poet and dramatist Ben Jonson was imprisoned for co-authorship of *The Isle of Dogs* (1597), cited before the Lord Chief Justice for *Poetaster* (1601), accused of treason before the Privy Council by Henry Howard, Earl of Northampton for *Sejanus* (1603), imprisoned for his share in *Eastward. Ho!* (1605), 'accused', according to William Drummond, for *The Devil is an Ass* (1616); examined by the attorney-general in relation to verses approving of the assassination of the Duke of Buckingham (1629) and held liable by the Court of High Commission for references to Arminianism in *The Magnetic Lady* (1632).<sup>38</sup> In Jonson's case, a range of different legal strategies – imprisonment, summoning before the Privy Council, examination by the attorney-general, arraignment by the Court of High Commission – are employed in response to a range of different accusations – slander, treason, religious heterodoxy – all of which require an authorial *intention* to defame, if not to enact treason, to have been inferred from the figurative language of dramatic fiction. O'Callaghan similarly observes how improbable it was that George Wither's *Abuses Stript, and Whipt* (1613) which consists largely of generalized satire against topical abuses, should be interpreted as a defamatory personal attack. And yet it was on these grounds that Henry Howard, Earl of Northampton ostensibly signed the warrant for George Wither's imprisonment in the Marshalsea in 1614. Wither, however, was not only perfectly aware of the ideologically motivated nature of his imprisonment as an act of censorship, he was, as one whose profession had been designed 'for the studie of the *Lawes*' well able to fashion a written response which used the terms of law itself to express opposition to its unjust manipulation in his case. Wither, in fact, articulated as a hermeneutic problem of legal writing the very problem of lack of control over subsequent constructions of meaning which he faced as a poet. Wither addressed his *A Satyre* to the king, imagining him as supreme legislator and, as such, as a type of author whose

meaning is subject to interpretation and whose intentions must be inferred by others:

Nay, your owne *Lawes*, which (as you doe intend)  
In plain'st and most effectuall words are pend,  
Cannot be fram'd so well to your intent,  
But some there are will erre from what you meant.  
And yet (alas) must I be ty'd unto  
What never any man before could doe?  
Must all I speake, or write, so well be done,  
That none may picke more meanings thence than one?<sup>39</sup>

Wither here brilliantly deploys the concept of equity of the statute, which (as we have seen) was an ethical principle of interpretative licence, allowing lawyers as readers to depart or 'err' from the words of the law in order to make constructions that conformed more nearly to the hypothesized intention of the law in general for the good of the public.

Central to O'Callaghan's argument is the case of *Attorney General v. Pickering*, from which Sir Edward Coke developed the medieval statute of *scandalum magnatum* (2.Ric. 2, st. 1 c. 5) in such a way as to make the libelling of a magistrate into a crime against the state. Poets like Nashe, Wither and Jonson might base the defence of their satirical writing on the denial of any defamatory personal reference, but what about the culture of libelling itself? In Chapter 8 David Colclough complements O'Callaghan's chapter with his account of the role of manuscript miscellanies in the development of a parliamentary freedom of speech. In contrast both to the older 'freedom of the press' argument and its more recent Foucauldian rejection, Colclough identifies a humanist model of counsel that combines the parliamentary acceptance of limitations on the freedom of speech with the circulation of parliamentary debates alongside libels in manuscript miscellanies, so that he builds a complex model of a politically educated people, self-consciously engaged in reflecting on political events. Where Shuger sees the oral and carnivalesque culture of libel as essentially pre-political, as merely the use of words 'to hurt another person', Colclough emphasizes the circulation and copying of defamatory libels alongside both famous and less well known attempts of persons outside of the government (Philip Sidney, John Stubbs, Thomas Bywater) to address the monarch on matters of government. Coke's judgement against Lewis Pickering in 1605 attended only to the scandalous nature of the poem which Pickering pinned on the hearse of Archbishop Whitgift, but, as Colclough shows, that poem's



discovery itself testifies to a culture of collecting and circulating oppositional political speech, for Pickering's libel was subject to prosecution on a copy being found in the study of Thomas Bywater, a preacher who had presented to the king himself a political tract critical of James's failures to listen to counsel. Not only, then, did Bywater perceive Pickering's libel as continuous with his own project of addressing the king on the need for more open and accountable government, Bywater's own tract emerges subsequently, in the manuscript miscellany of a godly minister named Robert Horn, amongst a number of texts which take frank speech to political leaders as their common theme: Philip Sidney's 1579 letter to the queen against the Alençon marriage, libels by John Hoskyns, John Stubbs's *A Gaping Gulf*, and so forth. Libelling as a form of political opposition has a long history,<sup>40</sup> but Colclough's article shows that early seventeenth-century libelling is inflected by the humanist tradition of counsel, and the humanist practices of keeping commonplace books, in ways that enable the emergence of something like an early modern public sphere – a political community united by the reading, transcribing and interpreting of texts that intervene critically in processes of government.

Marcus Nevitt shares with O'Callaghan and Colclough a sense of the emergence in the early seventeenth century of a public sphere, but Chapter 9 shows how the political complexion of this formation – and our sense of its historical potential – changes in the course of the crucial period of political transformation it might itself be said to have initiated. If O'Callaghan and Colclough identify the emergence of a public sphere in which voices of opposition and dissent find ways of achieving social participation, Nevitt's account of the dependence of debates about tithes in the 1650s on John Selden's 1618 *Historie of Tithes* suggests that, for women, the terms of that participation were already limited in ways that would have negative implications for the concept of a public sphere in the 1650s and 1660s.

Nevitt takes a 72-page pamphlet collectively written by various local groups of Quaker women and published in 1659 as the test case for his argument. As he points out, Quakerism was 'affording an astonishing number of early modern women new opportunities of authorship' (191). Yet despite the fact that the tithe controversy had become a 'pure signifier' of Quakerism, few women wrote on it until 1659, and even then their intervention was disregarded: 'In a pattern all too familiar to students of early modern women, non-aristocratic women's voices and texts are thus ignored at the very moment they threaten to enter the political and legislative arena' (191). The fact is that the tithe debate was seen as a peculiarly male discursive practice. Nevitt finds that John

Selden's *Historie of Tithes*, as well as amassing historical evidence for the origin of tithes in secular law and specific customary practices, employs a rhetoric of comic misogyny similar to that found in the same author's *Table Talk*. As a result, the importation of Selden's arguments into the Quaker debate by way of Anthony Pearson's *Great Case of Tythes* (1657) must be seen to qualify the usual assumption of Quaker proto-feminism.<sup>41</sup> As a result of the masculinist antiquarianism of Selden's text, and of its foundational place within the anti-tithe tradition of the Quakers, argues Nevitt, 'the vast majority of women ... were excluded from debate of an issue which affected them materially'. For Nevitt, as for Mukherji and Habermann, the conceptual resources of humanism's engagement with the law have a fundamentally oppressive, even excluding, effect on women.

Sue Wiseman (Chapter 10) agrees, but finds that, by the early 1660s, this act of exclusion provided a basis on which women would begin to assimilate the discourse of law into their own distinctive position of enunciation. As the concluding essay, her chapter brings together many of the interrelated but often opposing questions that have linked these discussions. Like Stewart, Mukherji, Habermann and O'Callaghan, her concern is 'the world of trials and of treason'; like Stewart and O'Callaghan, she shows that participation in that 'world' provided a rhetorical opportunity that offers a point of historical articulation for an authorial agency; like O'Callaghan she shows that the mode of that opportunity is martyrological. However, the decisive shift in the particular historical period with which she is concerned has an equally decisive effect on the implications of all these arguments, and here our collection comes full circle: Wiseman's chapter is situated firmly in the historical moment ushered in by the legal 'reforms' that followed the controversial *Case of Shipmoney*, the subject of Richard Brathwaite's play discussed by Peter Goodrich in the first chapter. Taking the concern of this volume into the interregnum and beyond, the historical context of her analysis is one in which the law had been repositioned as the expression of the will of parliament rather than the king. But if, in theory, the legal reforms of 1640 to 1660 broadly affirmed the ethical spirit of Brathwaite's commitment to friendship, in practice they could be said to have ushered in a period of what J.H. Baker has described as 'repressive illiberality':

Their [the military dictatorship's] High Court of Justice was a worse infringement of liberty than the Star Chamber had ever been, since it could inflict the death penalty without the safeguards of indictment or jury trial; it was the most fearsome political tribunal ever suffered in England.<sup>42</sup>

Wiseman records the experience of one of its victims, the Presbyterian Christopher Love, tried for treason in 1651, and of his unsuccessful attempt to draw on the martyrrological stance of Leveller John Lilburne in his trial two years earlier. Both men tried to put issues of rights and citizenship at the core of their trials; both presented their defences as an appeal to 'the Laws and Liberties of this nation'. But while, like Lilburne, Love insisted on publishing the narrative of his trial, for Wiseman the important story is that told by his wife Mary, and by the wife of one of the witnesses against him. In a way that contrasts strongly with the account of the relation between private space and the operations of a (male) justice in *A Woman Killed*, Mary Love's narrative of her husband's life displaces the legal record and supersedes the public sphere with the private, so that we see that one significant, if contingent, consequence of the interregnum 'reforms' is a change from the public mode of narration offered by Bacon on Essex or Wither towards an affective idiom that embodies the female voice within the court of literature rather than law. Writing her husband's exemplary life, she situates it within the bodily rhythms of her own as the generative basis of her production of this narrative, thus encouraging us to see a shift across the period of this volume from an idea of narration as a forensic habit of mind to a recognition of its role in the construction of a distinctively literary subjectivity.

Our collection began by noting that the sixteenth and seventeenth centuries in England constitute a period anterior to the full emergence of distinctions between legal, literary and political discourses. We remarked as proof of this that many of the male writers discussed in these pages studied law and wrote literary texts. In these concluding essays by Nevitt and Wiseman, however, women's writing emerges from its shadowing of, and suppression by, male cultural forms, and begins to produce a distinctly feminine literary voice. Our collection thus begins with the analysis of a political culture in which ways of being and doing are ordered by the category of 'law', and ends with one in which they are coming increasingly to be ordered by the category of 'literature'.

## Notes

1. The Association for the Study of Law, Culture and Humanities has, since 1998, had an annual conference bringing together scholars from law, critical legal studies, literature, sociology, political thought and a variety of other disciplines, but 'Renaissance, Law and Literature', sponsored by the University of Sheffield and Queen Mary, University of London,

was the first international conference to focus such an interdisciplinary gathering on law in the early modern period. We are happy to acknowledge grants from the British Academy and the British Council in support of this event.

2. A number of the contributions to the 1998 conference appear in Victoria Kahn and Lorna Hutson (eds), *Rhetoric and Law in Early Modern Europe* (Yale University Press, 2001).
3. C.J. Clover, 'Law and the Order of Popular Culture', in Austin Sarat and Thomas R. Kearns (eds), *Law and the Domains of Culture* (University of Michigan, 1998); see also Carol Clover, 'God Bless Juries!', in Nick Browne (ed.), *Refiguring American Film Genres: History and Theory* (University of California Press, 1998), 255–77.
4. A. Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Johns Hopkins University Press, 1992).
5. P. Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (University of Chicago Press, 2000).
6. J. Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide, 1793–1796* (Oxford University Press, 2000).
7. P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987), 176–8.
8. J.H. Langbein's *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard University Press, 1974) details the differences between sixteenth-century French and German *Inquisitionsprozess*, and the criminal justice system obtaining in England at the same time. The French *ordonnance royale* of 1539 established the 'penal arithmetic', or the 'arithmetic modulated by casuistry' which constitutes the secret, written trial which Foucault analyses in *Discipline and Punish: the Birth of the Prison*, trans. Alan Sheridan (Penguin, 1977), 37. As Foucault notes, 'In France, as in most European countries, with the notable exception of England, the entire criminal procedure ... remained secret' (our italics), 35.
9. G. Wither, *Hymn XXXI*, 'for a Lawyer', in *Haleluiah, or Britans* [sic] *second remembrancer* (1641).
10. On John Selden see Sir Leslie Stephen and Sir Sidney Lee (eds) (1921–22), *The Dictionary of National Biography from the earliest times to 1900* (henceforth *DNB*); Winifred Schleiner, 'John Selden's Letter to Ben Jonson on Cross-Dressing and Bisexual Gods', *English Literary Renaissance* 29:1 (1999), 44–74. On John Hoskyns, see Louise Brown Osborn, *The Life, Letters and Writings of John Hoskyns 1566–1638* (Yale University Press, 1937); David Colclough, "'The Muses Recreation": John Hoskyns and the Manuscript Culture of the Seventeenth Century', *Huntington Library Quarterly* 61:3 and 4 (2000), 369–400. On George Wither, see Michelle O'Callaghan, *The 'Shepherds Nation': Jacobean Spenserians and Early Stuart Political Culture, 1612–1625* (Clarendon Press, 2000). On John Webster, see T.S. Eliot, 'Whispers of Immortality', *Collected Poems 1909–1962* (Faber and Faber, 1963), 55; Gunby's introduction to D.C. Gunby (ed.), *John Webster: Three Plays* (Penguin Books, 1972), 9–14. On William Fulbeck, see *DNB* and Henry Carson Grumbine (ed.), *The Misfortunes of Arthur by Thomas Hughes and Others* (Berlin: 1900), 58–9. On Brathwaite (also spelt 'Brathwait' and 'Braithwaite') see *DNB*.

11. On equity in the common law in this period, see Stuart E. Prall, 'The Development of Equity in Tudor England', *American Journal of Legal History* 8 (1964), 1–19; J.H. Baker, *The Reports of Sir John Spelman*, 2 vols (Selden Society, 1978) 2:40–3; Lorna Hutson, 'Not the King's Two Bodies: Reading the "Body Politic" in Shakespeare's *Henry IV*, parts 1 and 2', in Kahn and Hutson (eds), *Rhetoric and Law in Early Modern Europe*, 166–98. On the affinity between equity and drama, see Joel Altman, *The Tudor Play of Mind* (University of California Press, 1978); Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton University Press, 1986); Luke Wilson, 'Hamlet: Equity, Intention, Performance', *Studies in the Literary Imagination* 224 (1991), 91–113.
12. See J.H. Baker, 'Unity of Person', in *An Introduction to English Legal History*, 2nd edition (Butterworths, 1979), 395: 'It was a common saying among canonists and common lawyers alike that in the eyes of the law husband and wife were but one person ... This one person was the husband.'
13. See Peter Goodrich, 'Laws of Friendship', *Law and Literature* 15:1 (2003), 23–52; 'The Immense Rumor', *Yale Journal of Law and Humanities* (forthcoming).
14. P. Goodrich, 'Salem and Bizance: a Short History of Two Laws', *Law in the Courts of Love and Other Minor Jurisprudences* (Routledge, 1996), 9–28.
15. R. Brathwaite, *The English Gentleman* (John Haviland, 1630), sig. li2r.
16. See 'Epistemologies of the Early Modern Closet', in Alan Stewart, *Close Readers: Humanism and Sodomy in Early Modern England* (Princeton University Press, 1997), 161–87.
17. F. Bacon, *A Declaration of the Practises & Treasons attempted and committed by Robert late Earle of Essex and his Complices* (Robert Barker, 1601) sig. B1<sup>r</sup>.
18. The 'Memoirs of William Lambarde, Esq' are published in J. Nichols (ed.), *Bibliotheca Topographica Britannica* (London 1780–90), Vol. 1, 493–531.
19. Bacon, *A declaration of the practises or treasons*, sig. B1<sup>r</sup>; sig. C1<sup>r</sup>.
20. p. 32.
21. See Altman, *The Tudor Play of Mind*; Eden, *Poetic and Legal Fiction*; Wilson, 'Hamlet: Equity, Intention, Performance'; Terence Cave, *Recognitions* (Clarendon Press, 1989), 283; Barbara Shapiro, 'Classical Rhetoric and the English Law of Evidence', in Kahn and Hutson (eds), *Rhetoric and Law in Early Modern Europe*, 54–72.
22. Shapiro, 'Classical Rhetoric and the English Law of Evidence', 55–9, 61–70; Martin J. Herrick, *Comic Theory in the Sixteenth Century* (University of Illinois Press, 1950).
23. See William Lambarde, *Eirenarcha, or of the office of Iustices of the Peace, in foure bookes: reiuessed, corrected and enlarged* (1614), 217. See also Lorna Hutson, 'Spenser and Suspicion', *The Spenser Review* 33:1 (2002), 32–40.
24. See Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge University Press, 1987).
25. K. Eisaman Maus, 'Horns of Dilemma: Jealousy, Gender and Spectatorship in English Renaissance Drama', *ELH* 54 (1987), 561–83. See also Maus, 'Prosecution and Sexual Secrecy: Jonson and Shakespeare', in *Inwardness and Theater in English Renaissance Drama* (University of Chicago Press, 1995), 128–81.
26. T. Heywood, *A Woman Killed with Kindness*, in Keith Sturgess (ed.), *Three Elizabethan Domestic Tragedies* (Penguin, 1969), II.i.3–11; 203.

27. Heywood, *A Woman Killed*, II.iii.38–41; Brathwaite, *English Gentleman*, sig. li2<sup>v</sup>.
28. C. St German, *Doctor and Student, or Dialogues Between a Doctor of Divinity and a Student in the Common Laws of England*, revised and corrected by William Muchall (Lawbook Exchange, 1998), 45. See also John Guy, 'Law, Equity and Conscience in Henrician Juristic Thought', in John Guy and Alistair Fox, *Reassessing the Henrician Reformation, 1500–1550* (Basil Blackwell, 1986); John Guy, *Christopher St German on Chancery and Statute* (Selden Society, 1985).
29. On Plowden, see Hutson, 'Not the King's Two Bodies', in Kahn and Hutson (eds), *Rhetoric and Law in Early Modern Europe*, 166–98; on equitable actions on the case, see Baker, *Reports of Sir John Spelman*, II: 37–43.
30. John Webster, *The Devil's Law Case*, IV.ii.169–70; 380.
31. On Webster's anti-Catholicism, see Alison Shell, *Catholicism, Controversy and the English Literary Imagination, 1558–1660* (Cambridge University Press, 1999), 23–55.
32. But see Laura Gowing, *Domestic Dangers: Women, Words and Sex in Early Modern London* (Clarendon Press, 1996) for a sophisticated reading of women's testimony in the spiritual courts, in which women were obliged to testify in cases of rape and sexual slander using a masculine language which ascribed blame for sexual dishonour solely to women. For women and the criminal courts, see Jennifer Kermode and Garthine Walker (eds), *Women, Crime and the Courts in Early Modern England* (UCL Press, 1994) and Laura Gowing, 'Secret Births and Infanticide in Seventeenth Century England', *Past and Present* 156 (1997), 87–115; for women and property, see Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge University Press, 1998) and Amy Louise Erikson, *Women and Property in Early Modern England* (Routledge, 1993). For the legal affinities of 'complaint' literature by women, see Lorna Hutson, 'Renaissance Equity and the Literary Voices of Women', in Danielle Clarke and Elizabeth Clarke (eds), *'This Double Voice': Gendered Writing in Early Modern England* (Macmillan, 2000), 142–63.
33. See Luke Wilson, *Theaters of Intention: Drama and the Law in Early Modern England* (Stanford University Press, 2000), 33.
34. See Post's introduction to Robert Post (ed.), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Research Institute for the History of Art and the Humanities, 1998), 2.
35. The standard Whig history, which has now been discredited by the revisionists, is Frederick S. Siebert, *Freedom of the Press in England 1476–1766* (University of Illinois Press, 1952). Revisionist work, which emphasizes the haphazard nature of mechanisms of censorship of the drama and the press, includes Richard Dutton, *Mastering the Revels: the Regulation and Censorship of English Renaissance Drama* (1991); Sheila Lambert, 'State Control of the Press in Theory and Practice: the Role of the Stationers' Company before 1640', in Robin Myers and Michael Harris (eds), *Censorship and the Control of Print in England and France 1600–1910* (1992), 1–32; Cyndia Susan Clegg, *Press Censorship in Jacobean England* (Cambridge University Press, 2001).
36. D. Shuger, 'Civility and Censorship in Early Modern England', in Post (ed.), *Censorship and Silencing: Practices of Cultural Regulation*, 89–110 and 'Roman Catholicism, Roman Law, and the Regulation of Language in Early Modern

- England', paper delivered at the University of Southern California Center for Law, History and Culture, 13 May 2002.
37. See T.F.T. Plucknett, *A Concise History of the Common Law* (Little, Brown and Co., 1956), 487–90; Sir Edward Coke, 'The Case *de Libellis famosis*, or of Scandalous Libels', in *The Reports of Sir Edward Coke, in English*, 7 vols (1776–77), vol. 5, 126, and O'Callaghan's and Colclough's analyses, Chapters 7 and 8.
  38. See Martin Butler, *Modern Philology* 89 (1992), 469–81 and C.H. Herford and Percy and Evelyn Simpson (eds), *Ben Jonson*, 11 vols (Clarendon Press, 1925–52) I.141.325–6.
  39. G. Wither, *A Satyre dedicated to His Most Excellent Majestie* (1614) sig. D2<sup>v</sup>.
  40. On the defamatory posting of libels as oppositional political activity in late medieval England, see Wendy Scase, "'Strange and Wonderful Bills": Bill-Casting and Political Discourse in Late Medieval England', in Wendy Scase, Rita Copeland and David Lawton (eds), *New Medieval Literatures* (Clarendon Press, 1998), 225–47.
  41. The Quaker historian W.C. Braithwaite was one of the first modern writers on the movement to assert that the Friends advanced the 'equality of men and women in spiritual privilege and responsibility'; *The Second Period of Quakerism*, 2nd edition (Cambridge, 1961), 270. Feminist literary scholars have been quick to follow this lead. See, for instance, Hilary Hinds, *God's Englishwomen: Seventeenth-Century Radical Sectarian Writing and Feminist Criticism* (Manchester and New York, 1996); Phyllis Mack, *Visionary Women: Ecstatic Prophecy in Seventeenth-Century England* (Berkeley and Los Angeles, 1992); Elaine Hobby, *Virtue of Necessity: English Women's Writing, 1649–1688* (London, 1988). However, recent revisionist work has begun to question the assumption that the movement's advocacy of spiritual equality necessarily reveals a commitment to more straightforward gender equality amongst Friends. See Su Fang Ng, 'Marriage and Discipline: the Place of Women in Early Quaker Controversies', *The Seventeenth Century* 18:1 (2003), 113–140.
  42. Baker, *Introduction to English Legal History*, 245.

## 2

# *Amici curiae*: Lawful Manhood and Other Juristic Performances in Renaissance England

*Peter Goodrich*

In the course of a discussion of the ethics of friendship, Jacques Derrida makes a curious and seemingly offhand remark: 'One has no friendship for law.'<sup>1</sup> His immediate point is that the classical *teneritas amicitiae* or fondness of friendship has no place in law. Friendship is a relation to a person, law administers things. Within the Western tradition, and specifically within the scholastic and highly legalistic doctrine of friendship that we inherit from a Latinate past, it is secrecy and subjectivity that make the bond of friendship and it is precisely that subjective bond that must be given up by all who enter the portals of law. In a paradoxical sense, it has long been the case and continues to be the case that the ideal-type of the lawyer is that of someone estranged from both friendship and personhood. The lawyer acts for persons, persons speak through or are represented by lawyers, but the fate of the advocate or orator, of Nietzsche's epigone, the filing clerk, the jurist, is that they are friendless, that at root they are alone.

The solitude of the lawyer, their recusal from amity or intimacy in public life, has been a productive seam within the legal tradition. Curiously it is lawyers who have most often written about friendship and it is law that has formed the context of almost all of the treatises on friendship. Aristotle, while not a lawyer, famously states that good legislators pay more attention to friendship than to justice.<sup>2</sup> Cicero, a lawyer, wrote his treatise on friendship in the form of a dialogue with his law teacher, Publius Mucius Scaevola.<sup>3</sup> Tacitus discusses friendship in the context of law, and defines the successful legal life as that of the orator who has never failed his friends.<sup>4</sup> To continue into the Renaissance, Francis Bacon, author of a famous essay on friendship was



not simply a lawyer but for a while Lord Chancellor of England; Michel de Montaigne trained as a lawyer, and the list could be greatly enlarged. The tradition and the politics of friendship have an uncanny proximity to law. In one sense, lawyers write of what they do not have. They romanticize friendship as the other of law, as a heterotopia that the lawyer can long for but cannot have unless, like Maternus in Tacitus' *Dialogue*, they give up the practice of law.<sup>5</sup> In Lacan's terms, the lawyer falls in love with what he lacks. I suspect that this is dangerous both in that it models friendship on an external projection of what is internally missing, and in that it places those who use lawyers in dangerous proximity to a cognitive gap. It is not however so much at the level of interaction but at that of structure and discipline that I wish to pursue the schism between friendship and law.

The fact that it has so often been lawyers who have written the discourse on friendship is a sign of the structural significance of the split between lawyer and friend, between eros and law. There is a significance to the tension between justice and amity, and there is a further importance to the repetition of this theme within Renaissance discourses on law. I want here to engage in a reconstruction of this shadowy fault-line, this trace or symptom of an inherited politics of the intimate public sphere. I want to argue that the antinomy of friend and law, the fact that even Derrida accedes that one cannot have friendship for or in law, is of massive importance both to the politics of the disciplines, and to the existential formation of the public sphere. We can learn a lot about the politics of law, both intimate and extimate, from painstakingly reconstructing the life that law prescribes through its discourse upon friendship. More than that, the discourse upon friendship, and specifically the lawyer's hostility to the exposure of any aspect of the intimate practices of amity or relationship, also plays out in the demarcation of the disciplines and the conflict of interpretations. The legal discourse on friendship relegates intimacy and amity, the affective practices of public life, to literary discourse, to the outside of law. It is no accident that the discourse on friendship and the conversations of friends defined the early genre of the novel, that the 'amie' of Madeleine de Scudery was the emblem of her fictions and that while this literature developed its own laws it was placed in structural opposition to the homosocial seriousness of positive law.

The juristic trajectory or path of Renaissance discourses on friendship has been little travelled. The legalism of that discourse has passed largely without notice or comment.<sup>6</sup> The references to friendship are treated as part of the rhetoric of law and thus to modern eyes are

viewed as peripheral and unimportant. It is necessary, in other words, first to bridge the gap between the Latin tradition of Renaissance law and our modern vernacular or simply less conscious interpretations. The references to friendship are rhetorical and up until long into the early modern era that means precisely that they are part of law. It is that specific fault-line that I will pursue. I will use two examples, works that emblematically fall between disciplines and so highlight the antinomy of amity and law. The first is a book by the Renaissance lawyer William Fulbeck, *A Booke of Christian Ethicks*.<sup>7</sup> Fulbeck was a member of the Inns of Court and a prolific author of treatises on common, as well as canon and civil law. He was also the author of various plays. By way of contrast I will juxtapose Fulbeck's ascetic juristic ethics to Richard Brathwaite's *The English Gentleman*.<sup>8</sup> Brathwaite was not a lawyer but his life was lived in close proximity to or flight from the law. He escaped the law in the sense that he was sent to London by his father to train as a lawyer but he fled to the provinces and became a successful author of, amongst other things, a variety of critiques and satires of law. He also wrote on friendship in the context of law, and it is his critical account of lawyers that I will suggest offers a way into refiguring the disciplines and remaking the practice of friendship within a life that is still lived amongst the ruins of law.

### Religion and law do lie down together

Latin more than anything else separates the contemporary from the Renaissance. The Renaissance was after all defined by the recovery of *latinitas*, of the Latin tradition and its law.<sup>9</sup> The demise of Latin, or at least the removal of Latin from what Du Marsais termed 'the ordinary course of studies' means that our access to the classics and their Renaissance interpreters is limited.<sup>10</sup> Contemporary jurisprudence has little if any sense of the symbolic, of the Latin context and meaning of the inherited forms or long-term structures of the universal law of which common law (*ius commune*) is a local form. The demise of Latin is not the equivalent of its death. It has not disappeared, it has rather been absorbed into the vernacular and it takes careful reconstruction to unpack the various meanings and inferences of the translated Latin terms that we use still in both politics and law. Renaissance also has the meaning of plenitude. It refers to the multifaceted quality of the human and to the plurality of forms and perspectives that an individual can adopt. I will not, therefore, focus on the death of Latin – I do not think that it is dead, I think that it is unconscious, absorbed like a

minority dialect into a dominant vernacular – but rather I will address the multifaceted quality of the scholarly enterprise in its Renaissance form.

The generic context of Fulbeck's work on friendship is not literature but Christian economy – the moral *oeconomie* of everyday life. The Latin tradition within which Fulbeck explicitly wrote was not simply that of a dual law or *utrumque ius*, but more than that: it was one in which there was an express and inseparable hierarchy that tied all laws into one. In his *Parallele or Conference* of the diverse laws, Fulbeck states with wonderful clarity and in the coincidental form of a floral figure that 'the common law cannot be divided from the civil and canon laws any more than the flower from the root and stalk'.<sup>11</sup> Every part of the law is bound to the *hieros* or sanctity that belongs to the legal order as a whole, because each part of the law, whether civil, canon or common, belongs to a whole that is ordered by God, by *Deo auctore*, the author of all laws. At one level this observation is not entirely lost to modernity in that the theological genealogy of secular law is occasionally noted if not entirely understood. Law is here recognized as a calling – a vocation – and Fulbeck's advice to students of law, his highly successful *Direction or Preparative* is full of advice on the sacral character of the practice of common law. The practice of law was the practice of a divine truth and 'both lawyer and judge are the ministers and dispensers of justice, of the gifts of God, and are servants to God himself'.<sup>12</sup>

The absolute bond of law to divinity, Fulbeck's assertion that 'religion and law do lie down together', may seem to be archaic, but it is in fact structural to his conception of the jurisdiction and function of legality. The aim of all things was to approach as close to the space of divinity as possible and law was no more than a primary means of such an approach. A life devoted to law was not a merely professional vocation, an art or trade, it was a total undertaking and occupied the entirety of a life. In his *Direction*, Fulbeck, in common with the rhetorical curricular manuals, makes this clear by offering a detailed account of every aspect of a student's life. They are to live in a temperate manner, they should rise with the sun and go to bed early because dawn is the friend of the muses (*aurora musis amica*).<sup>13</sup> They should study hard during the day because Sol, Venus and Mercury are the planets most favourable to erudition. They should eat red meat only at night because meat 'which is a distillate of heat, doth wax raw and doth putrify in the stomach' and so resolves into 'gross vapours' which cloud the mind. They should not drink or dance or be rowdy.<sup>14</sup> In Thomas Wilson's elegant phrasing,

they 'should accompany with women rarely' because of the harm that intercourse will do to memory and will alike.<sup>15</sup> In his speech for *Certain Devises and Shewes*, a revel presented to the Gentlemen of 'Grayes Inne', Fulbeck waxes lyrical and in no uncertain terms about the fate of those whose behaviour leads them to 'black Coeytus' or the rivers of Hell. They will face 'the floods of death, the lakes of burning souls; where hellish frogs do prophesy revenge'.<sup>16</sup>

The history of the two laws and particularly the joint nature of the 'civil and ecclesiastical polity' requires a certain effort of recollection. The temporal law was moulded upon a spiritual regnancy, it was a shadow of a greater power, it mimicked a regency that ordered the soul and all its externalizations, including property and chattels. That 'the last mark of the law is God's glory' has significant impact upon the content of law as well as its jurisdiction. What is included and excluded from what Fulbeck in his play terms 'the lawful' comes down to the most intimate details of lifestyle and affections. The common law is explicitly 'a nursing father' and the subjects of law are not simply nurslings or pupils, they are children, the infants of both God and law.<sup>17</sup> Where Roman law spoke of the task of *vitam instituere*, of instituting life, common law translated this task of institution into that of law's spiritual or 'ghostly' jurisdiction.<sup>18</sup> Common law necessarily absorbed the ecclesiastical function of being *specula pastoralis* or a watchtower to the members of the dual polity, the subjects of what we might now term equity and law.<sup>19</sup> It is just such a function that the now seemingly archaic sections of Fulbeck's *Direction* address in the full juristic detail of astrological, temperamental and moral dictates of belonging to the Christian polity.

Turning to the *Ethicks* of 1587 we moderns might expect that the work would belabour the sexual virtues of chastity, and outline the contours of gender roles, and the dictates of domestic economy. There is, of course, a literature on such issues, though it largely post-dates Fulbeck and is written by divines rather than lawyers, but what is significant here is that the relation and duties between the sexes are not an important issue for Fulbeck. It is true that his work, as its extended title states, addresses the 'opposition of the two incompatible qualities, virtue, and voluptuousness', but the lengthy illustration chosen to evidence this antinomy is not fornication or some other emblem of sexual propriety as enacted between the genders, it is rather friendship within the masculine sex. Fulbeck does briefly mention the difference between 'Apollo, his school, and an old wives cottage'; between 'the Temple of Virtue and the theatre of Pleasure'; between

law and 'the trumpet of Cupid' as well as 'the Court of Venus', but these references are made in passing, they assume a proper and uncontentious knowledge of gender roles and domestic duties.<sup>20</sup> My point is that Fulbeck's devoutly juridical ethics is focused upon a more structural issue, that of demarcating or instituting the intimate public life of men as subjects of a fundamentally Christian law.

The form that the *Ethicks* takes is that of a trial before the court of time, the ultimate seat of the law. The question posed is that of what mark – what works, what labours, what monuments – has the subject left as the inscription of his passage through time?<sup>21</sup> The question for this final or last judgement opposes the temporal and ephemeral to the immutable and eternal. Voluptuousness, sensuality and pleasure are discounted and improper to an ethical 'manhood'. Flowers and fancies fall away, while voluptuousness is associated irredeemably with 'effeminate passions'.<sup>22</sup> The trial then lists the forms of impermanent pleasures, of Epicurean distractions, and the lure of vanities. When it comes, however, to a statement of the proper modes of 'a lawfull life', and of 'just practices', the inscription of this Christian care of the self takes the peculiar form of a discourse on the dangers of friendship. The issue, in other words, that Fulbeck deems most moot and so most in need of exposition and clarification is that of the role of friendship in the life of the just man.

The question of how a man should live does not relate directly either to questions of sex or gender role. It is initially a homosocial question, a matter of self-definition, of identity within the contours of the same. It would seem that what matters to Fulbeck is a definition of lawful manhood that is internal to masculinity and so uncontaminated by the errors of 'effeminacy' or by attributes that exist outside the singularity of the male. It is for this reason that Fulbeck turns to Aristotle's definition of the friend as *alter idem* or another self. If identity is a question of similarity, if the politics of community is spelled out in the *Nicomachean Ethics* in terms of the amicable bonds of similars, then the attempt to elicit a unique masculinity will start best with a discussion of friendship as the political form of the ideal male.<sup>23</sup> Friendship is the structural problem of the masculine, its fault-line, its proving point. The question of amity, in other words, is central to law but it transpires that in Fulbeck's analysis the centrality of the question of friendship betrays the fact that the desire for friends and the pleasures of friendship are the most proximate and lethal of threats to a properly masculine life.

Friendship, the desire for similars, hides the threats of difference and dispersion. Fulbeck is concerned to expound the lures or voluptuous

dangers of friendship to the devout life of the lawful man. In a curious reprise of Diogenes' report of Aristotle's aphorism 'Oh my friends, there is no friend', Fulbeck expatiates the immediate form of the threat of friendship as being the plurality of friends.<sup>24</sup> The logic of the threat of the plurality of friends is set out in terms of the dissipation of the self. Many friends means many different moods, temperaments, characters and beliefs. If each, in Aristotle's terms, represents 'another self' then the self is helplessly dispersed in 'discord of affections, disagreement of inclination, dissent of notions, contrarieties of humours'.<sup>25</sup> Fulbeck then provides a gloriously symptomatic example of the impossibilities generated by multiple friendships. Suppose, he says, that the man 'be a dancer. His Stoical friends are at his elbows with a pair of pincers to keep him in tune. If he be no dancer, his Epicurean friends think straight away that he be in a trance, that he is dispossessed of his lively spirits.'<sup>26</sup> A third sort of friend is 'of mean pitch' and will allow their friend 'some kind of dancing' but will judge it and thereby both allow and discount his dancing on the strength of Aristotle's dictum that not all dancing is unlawful.<sup>27</sup> Finally, there is the friend as '*alter idem*' or another self. For this friend it is impermissible for their friend 'to give his mind to anything, to which they do not addict themselves' and so, if they are disinclined to dance they will view the dancer as 'a schismatick'.<sup>28</sup>

Is the choice of dancing accidental? Dancing, which the medievals called 'bishopping', was always viewed within the Christian tradition as being dangerously close to coitus. Dancing was a rite of externalization of the self. It expressed, to borrow Legendre's phrase, a desire to be another.<sup>29</sup> It was an emblematic form of threat to the singularity and closure of purpose that the lawful man should seek. Carnal friends and their 'worldly cares and cogitations' should be discarded as a threat to the devout life of the jurist or man of law. For Fulbeck the Aristotelian notion that 'there is no friend' transpires to have a literal meaning. It should be understood in the nominative. The true friend, the other self, the person for whom one would willingly die, whose tears are your tears, 'such a friend is the beauty of the world and his friendship a rare mystery'. Unfortunately, however, and here Fulbeck is surprisingly a realist, 'such a friendship is an imagined friendship ... the good philosopher could not give an instance of a perfect friend'.<sup>30</sup> The other self was a fantasy, a wishful dream, and not a practice or performance in the world.

Fulbeck's conclusion, and it is a radical one, both then and now, is that the fantasy of the perfect friend be abandoned as a mirage, an

obstacle to Christian progress. Friendship in the end suggests entry into the domain of the appetites, into the infernal triangle of Bacchus, Venus and Cupid and so should be eschewed in favour of a solitary life: 'The Hermite, having nothing, has nothing to be robbed of.'<sup>31</sup> For Fulbeck, in a paradoxical reprise of the notion that 'one has no friendship for law', one can only be friends with the law because affections are dangerous if directed anywhere other than the life of the spirit and its promise of a life beyond. All of which is to say that in this particular exposition of the *lex amicitia*, in this rigorously extreme account of friendship and Christian law, friendship is internalized as a negative quality, it is a weakness, a lure to worldly attractions, the first hedonistic wrong. That Fulbeck treats friendship as the primary example of the voluptuousness that he writes against, gives amity a pivotal importance. At this founding moment of the common law tradition, the author of a best-selling treatise on life in the law devotes a popular book on ethics to making the argument that a lawful man cannot have friends: he must rather be a 'perfitte solitarian'.<sup>32</sup>

The point I wish to draw from Fulbeck's work is that the concept of friendship is a key – a symptom or opaque sign – to the life of the law. The notion of the friend is legally negated. It is important enough to be the focus of the treatise on ethics but it is internalized or incorporated in law in a negative form. The saturnine lawyer, the melancholy jurist dressed in sad colours, is a friendless man, someone recused from life who nonetheless harbours within himself a fantasy of perfect friends, of other selves. He wants to dance. He wants to be another. He would settle even for passion but the law will not allow him to let himself go. His pleasure must be *austera et solida*, which is to say ascetic and turned away from both worldly pleasures and from other men. Those also, however, are what attract him: the lawful man wants other men, he desires friends, he defines himself by reference to another self – his father, his brother, his conscience (*alter idem* is here *alter ego*) – but that definition is in the end negative and internal.<sup>33</sup> He is not allowed to dance and by explicit association the same is true of the discipline of law. The last feature of the *Ethicks* that deserves noting is that the dangerous effeminacy with which worldly friends are associated is linked directly to poetry, to rhetoric and to what we would now term aesthetics.

The lawful man must eschew the lures of poetry, the colours of flowers or floral tropes, music and painting. The principal example of the victorious striving for lawfulness may involve overcoming the desire for friends, but it is a striving that can equally be read at the

level of disciplines. One can have no friend but the law and, as Abraham Fraunce so notably and critically put it, the lawyer 'would love the law, but *sine rivali*: [he] would reign, but alone: *hinc illae lachrymae*'.<sup>34</sup> The refusal of friendship in the intimate public sphere is repeated in the claim to the autonomy or the singular logic of the discipline of law. It is a solitary discipline, it eschews the aid of other arts and sciences, it lives its ignorance all on its very own. At the risk of inverting the normal order of causes, the prohibition on friendship offers a structural key to the disciplinary practice of law. The subjects that it moulds as melancholic and friendless types, reverent or priestly followers of the image of an eternal and immutable law, enact a discipline and its knowledges. Their professional performances, in other words, reflect their friendless lives.

### The censor censured

Towards the end of the *Ethicks*, Fulbeck gives an example of the perfect solitarian as one who does not seek to have his name 'blazed to the common people, nor travaile[s] for popular friendship'.<sup>35</sup> In his usual style he goes on to illustrate this proposition by referring to its opposite, and here this means the righteous decay or destruction of the sumptuous buildings which the Romans consecrated to popular pleasure, the theatres, amphitheatres, and circuses that were dedicated to the idols of plebeian popularity. If Richard Brathwaite and law were not born enemies, they rapidly ended any friendship that there might have been. It is perhaps unsurprising, therefore, that his one treatise on law – *The Lawes of Drinking* – was a satire, and that his most expansive criticism of the law, *Mercurius Britannicus*, took the form of a play.<sup>36</sup> Antagonism or an enmity toward law – civil, canon, and particularly common – runs through virtually all of Brathwaite's extensive *oeuvre*. His inversion of Fulbeck's Christian ascetic of denial of friendship, his use of theatre, his attention to gender and to the dance of friendship, all offer not simply a counterpoint to the jurist's ethics but also an early glimpse of a radical tradition within the borders of common law.

The context of Brathwaite's account of friendship is not religion but law, and more specifically the critique of law. *The Lawes of Drinking* belongs to a not uncommon genre of satires of law and it mocks the civil law through a feigned seriousness and attention to absurd detail of what is in essence the etiquette of drinking.<sup>37</sup> The topic itself, however, the bacchanalian rites of social inebriation, is not simply a juristic *reductio ad absurdum*, it is also a foray into rituals of hedonism



that challenge both the ethos and the *gravitas* of the legal lifestyle that Fulbeck inscribed. The courtroom drama of *Mercurius Britannicus* is equally in genre a hedonistic challenge to the solitary splendour of the discipline of law and of the person of the lawyer or, in the idiom of the time, the gentleman legist. Theatre had long been in competition with law, and the dramatic enactment of critiques of law challenged not only the sanctity of law's own theatre but also offered substantive critiques of specific laws.<sup>38</sup> The *Mercurius* is a curious blend of satire and seriousness, of general and particular, as also of attacks upon both the form and content of legal decisions.

The form of the play is that of the trial of law before 'the excellent School of virtue and literature'. It is before the parliament of virtue and literature that the jury of common subjects of the law congregates to hear the judgement to be rendered on 'the conscript Fathers'. These are the judges, 'whose purple we once adored' but who are now charged with being 'sicke of judiciaall Feaver by reason of their corrupt sentence given, to the grievance of the subject, and favour of their Prince'. It is a judgement that we later learn from the specific roll-call of charges is that in the *Case of Shipmoney*.<sup>39</sup> This refers to the decision in *Hampden's Case*,<sup>40</sup> a case in which the Crown not only subverted procedure by demanding a pre-trial decision from the judges, but in which the judiciary supinely supported the royal imposition of extraordinary taxes upon ships. The decision that is put on trial in *Mercurius* is both deadly serious and politically highly charged. That literature, theatre and poetry – the schools of rhetoric – are explicitly the occasion and forum for this trial of the 'venerable and conscript Fathers' is not simply an inversion of the hierarchy of the disciplines, a revenge of the periphery, it is also a direct and radical critique of law. It would be a mistake therefore to treat the form of the *Mercurius* as belonging within the genre of the English utopia, that of the land of cockaigne, it is both more serious and more critical than a simple inversion would suggest. We should not read contemporary definitions of theatre as entertainment back into a Renaissance genre that was both political and popular. Theatre was virtually the only public sphere within which debates about laws, edicts or legislation could be conducted.

The *Mercurius* offers a relay of general and particular complaints against the law. The play provides very direct evidence of Brathwaite's critique of law and so its structural features deserve brief description. The particular focus of the play is upon the judiciary, upon the personnel of law and their 'corrupt sentences', meaning both their grammar and their judgements.<sup>41</sup> The ethics of the judges, both in the sense of

their ability to communicate or engage with their audience and in the more modern sense of their honesty, is impugned. While the play notes the common Renaissance criticisms of law – its prolixity, its delays, its indirection – the principal charge relayed in *Mercurius* is aimed most directly at the person of the lawyer and the ethics of lawyers' actions. The courtroom scene, the drama of law being tried by its subjects in the forum of virtue and literature, thus begins with the invocation of the ghost of Coriolanus. The judges pray:

That justice in your Courts may still bear sway;  
Confer pure justice candid souls to all,  
Temper your votes with honey more than gall.  
Better those judges are that opt to spare,  
Than those that anger do possess and war.<sup>42</sup>

It is already the spiritual virtue, the motive or ethic of judicial behaviour that is in issue, and honesty is the prime criterion of the judgements that will be meted out 'more diligent and honest' than those in *Hampden's Case*.

The specific charge that is brought against each judge, 'from the puny [i.e. puisne] judge to the Lord Chief Justice' is that: 'in the tearme of Hilary 1637, against the peace of the Commonwealth, the liberty of the subject and the testimony of their own conscience, not setting God before thy eyes, didst most perfidiously, and wickedly deliver up thy opinion in the case of shipmoney to be paid to the Lord King, forasmuch as there was no urgent occasion in the King to demand it'.<sup>43</sup> Each judge in the case is in turn indicted and called upon to respond. Each judge is in turn found guilty and sentenced to be hanged or, in the words of the play: 'Stand by, thy place is changed for disgrace, thy degree for a tree, thy robe for a rope.'<sup>44</sup> The only judge who escapes sentence of death, one Trivius, is spared not so much because of the triviality of his part but because he admits fully to his sins: 'thou has described me to an haire; I confess myself to be an ignoramus in law, and like a blind man was led by the sleeveless sleeves of my brethrens opinions'.<sup>45</sup>

The admission of responsibility, the ethical recognition that it is a subject who judges and who must in turn accept judgement, is seemingly what frees Trivius from a harsher penalty. The theme that runs through the play is an old rhetorical axiom, one that contrasts 'the spiders webs of the laws' to *oratio recta* or direct and honest speech.<sup>46</sup> It is the characters of the judges, the qualities that are reflected in their

sentences – in their words and their judgements – that are subject to the censure of virtue and literature. If virtue and literature are set up against law, the ground of this opposition lies in a rhetorical critique of law. The character of the orator – the lawyer or judge – is impugned for bad sentence, meaning lack of virtue in judging, and for bad sentences, meaning poor language and lack of rhetorical skills. The political critique of law is staged in terms of a battle between disciplines: ethics and rhetoric play the law. Rhetoric, Quintilian's art of *bene dicendi scientia*, of just speech, is set up as a law prior to the secular law.<sup>47</sup> The staging of the trial plays out both an immediate grievance, that of the mode of imposition or law of an unjustifiable tax, and a more general theme of injustice understood as rhetorical infelicity, the inability to speak or act well.

There is one final feature that is of particular significance to the play. It is the seemingly incidental fact that the play is inscribed from the viewpoint of two 'familiar friends', Theocritus and Euthymius.<sup>48</sup> Friendship stands as a metaphor for virtue and for the proximity of ethics to rhetoric. It also, however, signals an outside of law, or at least a space within literature that Fulbeck's law has ascetically and arbitrarily renounced. It is no accident, in other words, that the figure of the narrator, of the author of this censure of the law, is that of friendship. It is friendship that stands as the marker of character, as the emblem of just speech and of honest judgement. It requires the ethic of amity and the judgement of the court of literature to bring law back to justice. Just as the friendless lawyer is a poor orator so a friendless discipline of law is inadequate and unjust. The figure of friendship is both marked and understated. What is it about friendship that aligns literature and ethics against law? What is it within literature that allows for a practice of friendship, an ethics of speech and of judgement that is lost to law?

The broad answer to those questions is historical. Literature and law, which is to say rhetoric and law, became estranged during the Reformation by virtue of the movement toward the vernacular. In synoptic terms, rhetoric translated a Latinate grammar into the ordinary forms of native English. The close association of rhetoric with speech, with the theatre and performance of words, made for an integral relationship between the character and practice of the orator and the ethical and political concerns of the community or audience to which they spoke. An orator without friends was also a speaker without effect. Law, by contrast, clung to what Coke fondly termed its *vocabula artis*, its bad Latin and worse French.<sup>49</sup> Law escaped reformation because it prized more than anything else a sclerotic dialect as the expression of

an immutable and so untouchable law. Lawyers fought to preserve the hieros and hierarchy of the legal order. Religion – the Anglican Roman Church – and law remained in bed together and resisted most of the efforts to reform or modernize the tradition.

The historical or institutional explanation of law's estrangement from rhetoric is only a very partial answer to political questions that are raised by the key figure of friendship within the debate as to a lawful ethics or the proper character of the legal orator. Brathwaite tells the story or drama of his critique of law through the eyes of friends. Friendship is consistently the criterion of sociality and the substrate of all communication. The friend, as for all of the scholastic tradition, is a man but Brathwaite does partially acknowledge the gender implications of sociality and so also of friendship. In his treatise on *The English Gentlewoman* he states the conventional constraint upon the feminine and in discussing 'how to behave herself in company' elaborates that 'she should conduct herself silently', she should be 'circumspect in the intercourses of courtesies', and cautious in her choice of companion.<sup>50</sup> Communication – and here the lack of communication – suggests the structural importance of communication, of just sentences, even if justice for the feminine comes in the form of being auditor rather than speaker. Women are by implication participants in the sociality that is constituted by amity and it is that feature of the work that is implicitly radical: it simply requires that the qualification of femininity change for women to become friends. The proper title of friendship, however, is saved for the homosocial male friend, though not without ambiguity: there is a 'collaborative homoerotics', a figuration of desires between men, that mixes Petrarchan love and male friendship.<sup>51</sup> Whatever the outcome, the question of the structural place of friendship between men, the issue of the intimacy of the public sphere, and the deliberation upon the proper mode of manhood as lawful being get extended treatment in Brathwaite's best known work, *The English Gentleman*, which went through numerous printings and revisions in the mid-seventeenth century.

Where Fulbeck offered a theocratic and highly abstract ethics, the ascetic of eschewing friends and finding friendship in law, in the beyond of life, Brathwaite offers a practical ethics. His study of friendship comes in the centre of his treatise under the rubric of a Latin motto *certum amor morum est* which translates loosely as 'the love of law [of precepts, practice, mores, custom, will] is a secure thing'.<sup>52</sup> Following this motto, friendship is immediately depicted as a practice, as 'two bodies individually incorporated, and no less selfley than sociably

united'. Friends are 'affectionately dear', they 'hug' one another, they 'consort' and remain together. The key feature to his analysis of friendship devolves, as it should, from the conflation or at least the proximity of love and the precept or law that his motto and the subsequent synopsis suggest. Brathwaite's work offers a species of care of the self, a guide to an ethical life structured by practices of amity and the norms of intimacy and affection that they generate. The subject or person who inhabits the social stage is for Brathwaite someone who loves, who touches, who dances, someone who criticizes and rebukes, in short someone – a gentleman – who lives out the drama of the public sphere as a lifestyle, an ethic, a choice.

The substantive details of Brathwaite's account of friendship are a curious mixture of an inherited scholasticism and its idiosyncratic revision. The starting point is Aristotelian, the friend is a second self, one soul ruling two hearts, one heart in two bodies. Throughout the subsequent discussions many of the *topoi* from the *Nicomachean Ethics* resurface. The friend should not bare his soul to his friend because secrecy preserves amity: 'we never unzip our bosom so far, as to give our friend power over us ... though there be some Hushaies, or faithful friends, so there be some false brethren ...'.<sup>53</sup> The *telos* or goal of friendship is equally borrowed from Aristotle and is defined as virtue, by which he means moral or civil good. Similarly, the friend is defined 'as a Brother' and to this Brathwaite adds the gloss of the Christian faith.<sup>54</sup> The various marks of homosocial masculinity are apparent in details of the gentleman friend as faithful, constant and moulded to Christ's image. Women are excluded except as the objects of choice of wife with respect to which we are told: 'there is one flower to be loved of women, a good red, and that is shamefastness'.<sup>55</sup>

The homosocial recirculation of the scholastic tradition of friendship as the love of the similar is only part of the story of Brathwaite's account of acquaintance or friends. The seemingly conventional surface of the discourse betrays a more radical and ambivalent counter-text. There is, as Masten has pointed out, a certain ambivalence or doubling, a vein of homeroticism, but there is also a remarkable antipathy to the profession, the person and practice of law. In discussing the concept of *telos*, the end towards which a thing tends, Brathwaite gives the example of law. Nothing, in his view, 'proceeds in a course more contrary to nature, than suits of law, whose object is end without end; censuring time and substance in frivolous delays, and multiplicity of orders, which like Hydra's heads, by lopping off or annulling one, gives way to decreeing another.'<sup>56</sup> Law is posed here as

the antonym of 'familiar friendship' and it is in the Court that Brathwaite discerns the greatest abuses of friendship.

The shift from laws and courts to the Court is not an unbridgeable one. The ellision occurs in the context of a discussion of law, and the King's Court is both historically and politically the zenith of the hierarchy of the Royal Courts that mimic royal expressions of will. All of which is to say that a strong argument can be made to the effect that the amicable and amatory failings of the Court are an intrinsic part of Brathwaite's critique of law. In an interestingly proleptic phrase, Brathwaite captures the unity of his critique of law and the Court in attacking the pretence of friendship that the law must necessarily impose: *amici curiae, parasiti curiae* – friends of the court, parasites of the court. These are the actors and lawyers who pretend friendship but are Janus faced.<sup>57</sup> If one recollects the theocratic and so monarchical character of the law that Brathwaite impugned in the *Mercurius*, it is evident that what occurs in the Court is emblematic of what will prevail in the courts, and so the parasites referred to are best thought of as actors and lawyers feigning friendship but seeking clients or reward.

The critique of the *amici curiae* or friends of the court, the lawyers, is an extravagant one. They are false friends who love only in the hope of gain. They profess love and practise hate; they practise 'the abuse of friendship and sociable acquaintance ... they vow themselves ours in protests, congies, and salutes: but whereto winde us in and so become engaged for them'.<sup>58</sup> The lawyer is a timist and a Timonist, a sycophant and a misanthropist. Of Timonists, Brathwaite reports that they are to be avoided for the injustice of their opinions 'which dissent so far from society' and its preservation. Timon, interestingly, was not only friendless but was harsh and uncivil both to men and to women. Going forth one morning and finding a woman hanging on a wild fig tree, he remarked 'O God that all trees brought forth such fruit.'<sup>59</sup> If misogyny is the opposite or antonym of friendship it is because Brathwaite recognizes that it threatens the social and intimates an unethical practice towards others, whatever their gender. That doubling, which is reminiscent of Andreas Capellanus and the *duplicem sententiam* of the troubadour ethic,<sup>60</sup> can provide an important initial insight into the more radical aspects of Brathwaite's concern with amity and law.

In Brathwaite's account, friendship is lodged intransigently at the level of everyday practice. It is based in the practice of affect, and specifically in the expression of love: 'I hold it a firm maxim: that he

who is not given to love, cannot be wise.' In friendship the line between love and law, between literature and doctrine, between politics and knowledge, is transgressed or conflated. Friendship is an affective practice, and at its borders it is an erotic pursuit. It is an eros or intimacy, however, that is intrinsic to the public sphere: 'for without friendship, societie is but nothing, acquaintance a formall or ceremoni-all greeting'.<sup>61</sup> In a similar vein, the aim of 'true friendship' is depicted as that of spending time in conversation that will benefit the 'inward man'. The reason for this is that the goal of amity is practical knowledge or learning in civil society. Thus the practice of friendship consists 'in conversing and conferring with [friends], the better to enable us in employments public or private'.<sup>62</sup> What Fulbeck saw in terms of terror and the need to flee to austere isolation and the life of the hermite, Brathwaite reconfigures as the affective practice of civil society, and as the intimacy of all sociality.

Friendship is for Brathwaite a species of care of the self. It attends to the intimate or inward life that is intrinsic to civil society and to public life more generally. It is equally clear that for Brathwaite law lacks a concept and so also a practice of friendship and that lack defines the injustice of law. In this sense law needs the supplement of friendship; that indeed is its greatest ethical weakness, its civic flaw, its political failing. The *Mercurius* perhaps provides the best clue as to what the absence of friendship, the lack of an intimate or inward practice of civility, means for law. Lacking the judgement and where appropriate the censure of friends, the lawyer becomes a hermite and the law in turn becomes deaf to criticism. The political function of amity is that of acting as a 'friendly monitor', it is that of saying hard things, offering reproof, correction, and tough love. Friendship, for Brathwaite, dictates sincerity in practice, honesty in conversation, and criticism of faults or flaws or errors: 'The rebukes of a friend are better than the kisses of an enemy'.<sup>63</sup> The value of friendship, in other words, is ethical at the level of the erotic. It is 'the most precious thing' because its value is incorporated and acted out in all of our dealings with others.

The critical friend represents the deepest substrate of civil society, the practice of its ethics and expression of its faith. It is in this context that Brathwaite concludes his account of friendship by returning to the issue of honesty and criticism as the ultimate test of the fidelity of the friend. Friendship in the temporal world of politics and law is necessarily judgemental, engaged and active. The politics of friendship is that of bearing witness and offering criticism: 'as they are, so they appear, affecting nothing ... Their absolute aim or end of friendship is to

improve, reprove, correct, reform, and conform the whole image of that man with whom they converse.’<sup>64</sup> To return to the example of law, it is not enough to affect reverence, to appear venerable, to gloss justice, it is necessary rather to embody and enact a practice of critical amity and so to engage in an intimate way with the social and political consequences of judgements and other promulgations.

The friend that Brathwaite depicts is as much a principle of performance, an actor on the stage of public life, as he is properly speaking an ethical type in the scholastic sense. The subject as friend, like Brathwaite himself, is a man who straddles the cultures of rhetoric, ethics and law. Lawful manhood, to revert to the idiom that Fulbeck uses, is here a boundary-crossing enterprise, an active and contingent principle. The subject that makes the law is likewise bound to use the resources of intellectual amity. The virtues, the resources and criticisms offered by other disciplines have to be attended to and incorporated into the dictates of law. What is true of the friend, in other words, is true of the law: both are marked best by an ethic of dialogue and of response to hard criticisms. Their sentences should be just and that requires attention to friendship, both to who speaks and to whom their speech is directed. The *amici curiae*, the real friends of the law, are not the hermits or ghostly and friendless lawyers that Fulbeck proposes in his thoroughly Anglican *Ethicks* but rather the critics, the familiar friends who attended the trial of the ‘conscript Fathers’ before the court of virtue and literature. The indictment of the judges in the *Mercurius* is an indictment of the failings of legal subjects, the lack of ethics and the injustice exercised by lawyers who had lost contact with their friends both personal and disciplinary.

## Images and endings

It is striking and in some respects surprising that Fulbeck and Brathwaite share so many concerns and yet come to such radically alternative conclusions. For both authors friendship is central to a Christian law. In both cases the discourse on friendship is structured around a concern with the practice of law. Both authors also start from the axioms of the scholastic tradition. There is the impression of a discourse in common, a spiritual brotherhood, that holds these discourses together despite their significant practical differences.<sup>65</sup> It is also true that whatever the differences between these two expositions, one dating from the height of the Renaissance, the other from the early modern period, it is Fulbeck’s scholastic concept of the friend as an



impossible similar, the notion of an aspirant friendship that lodges ideally in eternity or death, that has survived within the Western tradition and still holds captive its lawyers and laws. Brathwaite's active and embodied concept of friendship is curiously further from us, more foreign and fanciful, than Fulbeck's sombre and unhappy image of the solitary and friendless lawyer.

The structural similarities should not be forgotten. They represent the pivotal if often overlooked question of friendship within jurisprudence. They can equally remind contemporary students of law of the structural task of law, that of instituting a subject of law, an ethics and a lifestyle that constitute the inner life of the lawyer. The question of the legal subject is the question of friendship and it is played out, as Brathwaite reminds us, both in ethics and in literature or rhetoric. Fulbeck, who wrote earlier and was more steeped in the various laws nonetheless addressed the question of friendship in the context of poetry and rhetoric. He instituted a subject of law by reference to amity, but it was a negative conception of friendship, the lawyer was defined as a friend who renounced friendship in honour or pursuit of a perfect similitude, unity with God, the author of the laws. Brathwaite escapes that tradition and institutes a subject of difference and a subjectivity within law.

There are various ways in which one can understand the radicalism of Brathwaite's legal subject. I will restrict myself to two aspects of the novelty of his concept of the friendly lawyer, one epistemic and one imagistic. I adverted earlier to the traditional concept of the double meaning of amatory and amicable discourse. The notion of the subject has a similar ambivalence that is neatly illustrated by the epistemic divide between Fulbeck and Brathwaite. For Fulbeck the subject is thrown under or subjected to a higher law. The art of lawful subjectivity is thus not amicable but adulatory, the subject is a status, a position, an observance of a beyond of law that is protected by legal rules. The legal hermit has to hide from social life and specifically this means renouncing friends and the public expressions of friendship that occur in rhetoric, poetics and literature. The perfect solitarian, the Christian lawyer, has spiritual brothers but no friends and no practices of friendship. At the level of the discipline of law this means a practice of subsumption rather than criticism or appraisal: the lawyer follows the law and applies the rule without fear or favour. The lawyer acts in this model exclusively in the domain of the law and this is, of course, a sphere outside social and amicable relations.

Fulbeck's lawyer is a saturnine and extreme creature who lives not for the present world but for the next. His friendship is exclusively professional and his love is reserved entirely for God. There is in this context no inward subject, but rather an expansive subjection: the soul is watched and regulated according to patterns of observance and rites of reverence or obeisance to law. There is much literature on the ghostly or spiritual jurisdiction of the law, it nurses and institutes, but it does so in the form of an infantile subjectification and not in that of creating a subjectivity in any modern or existential form. The legal subject is a child, a helpless and amorphous site of prescriptions, a *tabula rasa* upon which law must write its commandments. Brathwaite in this regard represents a radical shift or epistemic break with the subject as subjection. For him the ethical and legal subject is a friend, indeed there is no subject and there is no justice without friendship.

The epistemic break between our two authors – our imaginary friends – is expressed most strongly in Brathwaite's conception of the practices of an inward subject who not only converses to empower and improve the political practices of the interlocutor, but also criticizes, monitors and reprovcs. This notion of a critical subject of law is quite foreign and threatening to the legal tradition. The threat lies in part in the notion of a critical appreciation of the human acts of lawyers. The notion of a legal subject whose judgements are the acts of a subject still troubles the law. It implies a subject that chooses, a subject that speaks and writes the law rather than applying or declaring it. At the level of the disciplines, criticism implies both ethics and rhetoric, virtue and literature. Here again the law has eschewed friends within the arts. It has renounced criticism and the dialogue of disciplines that criticism implies both in its antique and its modern meaning. An appreciation of the laws, a friendship for law, means saying harsh things about law and that in turn implies a subject of law substantial enough or simply competent to hear such criticism and to process it across the boundary that historically has separated law from other disciplines. The problem is that lawyers have no such subjective capacity, there is no professional subject of law capable of such friendship or competent to attend to criticism as an internal function of lawyering.

I will end with a contrast between two images of friendship that are contemporary with Fulbeck and Brathwaite. One is a painting and the other a drawing of friends. Each shows two friends and thereby poses the ultimate question for the law of friendship, namely how to represent the relationship, the intimacy or eros, that amity marks as the social space between friends. The doubleness of friendship is here a

reference to the paradox of eros in the social, of intimacy in public, of affect and embodiment in law. The images can thus illustrate in a visual form the distinctive possibilities of friendship within the forum of law. They do so in the starkest fashion. The first image is a painting from 1554, entitled: *A Double Portrait: the Painter and his Friend, Strangwish* (Figure 1). The artist is the slightly assonant Gerlach Flicke, and an inscription above the artist's self-portrait states in Latin: 'Such was the face of Gerlachus Fliccius when he was a painter in the City of London. This he himself painted from a looking-glass for his dear friends, that they might remember him after his death.'<sup>66</sup> The picture of Strangwish or possibly Strangways has a vernacular inscription: 'Strangwish thus strangely depicted is One prisoner for tother has done this/Gerlin, hath garnisht, for his delight This woorck whiche you see before youre sight.'

The double portrait is inscribed under the most dramatic aegis of law. There could be no more extreme depiction of the mournful eros of friendship and no better illustration of the legal subject as subjection. Friendship is here portrayed wholly in the context of law. Both men are sentenced to death and their portrait is addressed to the archetype of the Christian's lawful friend, to the higher self, the subject before the judgement of God. The portrait thus depicts two men who love each other but it equally displays that this is an abstract love, a love that is emblematically portrayed as finding its proper place and expression only in and through death. The friends are faced partly toward each other but their gaze is directed beyond or out of the picture, they look toward the eternal addressee, toward posterity and so invoke the perfect consummation of amity that theology and law dictate will only occur in the afterlife.

Less obviously the painting is explicable precisely by reference to Fulbeck's slightly later elaboration of the law of the same. Taking account of the appropriate aesthetic maxim, *ut pictura poesis*, as in painting so in poetry, the diptych is most strikingly a depiction of the community of amity and of friends as similars, as separate yet overwhelmingly alike, the same.<sup>67</sup> Both are dressed in black and both carry the insignia of the eternal, a Bible and a lute, the eternal word and the sound of the infinite.<sup>68</sup> They are pictured alike, as in a mirror, daubed on separate panels turned abstractly towards each other, looking away, looking beyond, looking not toward man but toward God. These, finally, are similars captured alike in a loving relationship whose *telos* or meaning is ultimately beyond both life and law. The truth of their friendship is contained in its death, in their death, in their gaze captured

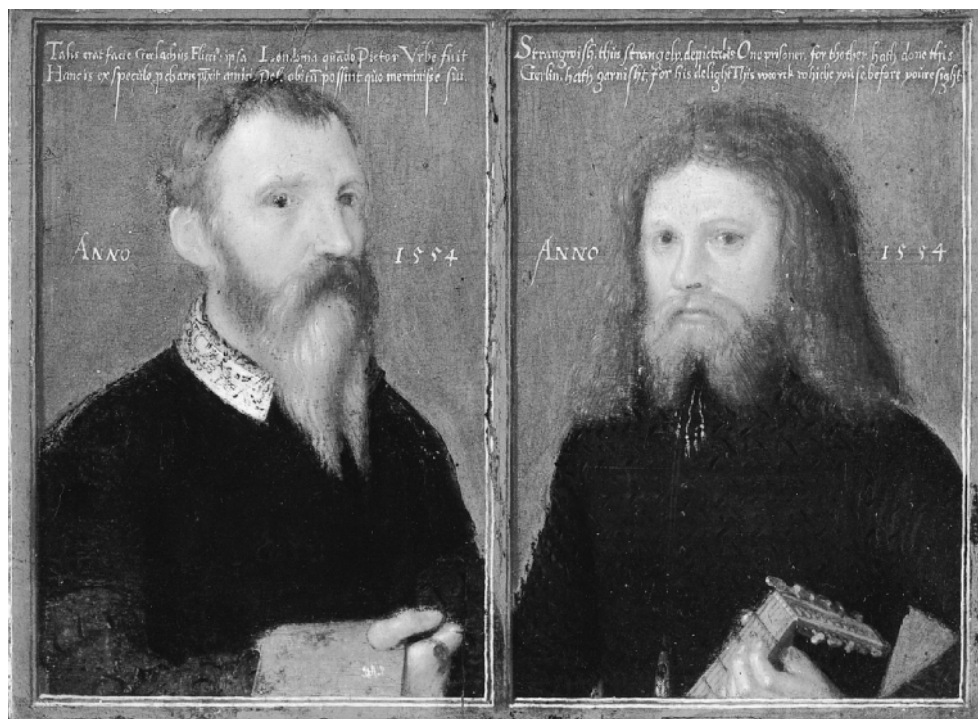


Figure 1 Gerlach Flicke, Gerlach Flicke and Henry Strangwish, 1554

looking forward toward a death that will immortalize their love and so render it true.

Where Flicke portrays the mournful and dark subject of an antique and traditional Western law, the negated friendship that Fulbeck elaborates in his *Ethicks*, Brathwaite offers a much less rigid image of a male couple. The frontispiece to his *English Gentleman* provides an emblem of each of the topics addressed. For friendship there is a black and white drawing of two men in courtly dress hugging each other under a window. Friendship, in Brathwaite's description, is that of two bodies encountering, touching, hugging each other (Figure 2). The simultaneous barrier and caress of the body is here used as the emblem of amity, the men face each other and they are talking. One says to the other '*certus amor morum est*', the love of law is a secure thing. In an alternative translation it would read the love of desire is a secure thing. I prefer law in the sense that *morum* refers more to the law of literature, a rhetorical law, an everyday law, an ethics or habit, than to its shadow form, the positive or municipal rule that is handed down by Christian or 'perfitte' solitarians.

The drawing of the two friends locked in curious embrace raises the problematic of friendship in its most immediate form. Here we see what Levinas later terms 'the face to face' of justice, the embodied exigency of judgement and law. Contrary to tradition and thus in a very radical mode, Brathwaite's picture offers neither a portrait nor the singular separation of the traditional juristic friend. His couple is more theatrical and expressive. They are conjoined and conversing. They are subjects who one might imagine making the law rather than simply pretending to hand it down. They are active friends, two bodies embracing, and there is even a smile or pout on the face of the one who is listening. A final point or envoi: Brathwaite refers to the couple as hugging. It is true that their arms are rather distantly stretched out around each other. A better and more accurate image of the grasp of these friends is that they are dancing. The most striking feature of the picture is the legs of the two friends. They are in rhyme, they are in rhythm, they are doing a dance. To borrow the Christian idiom that distinguishes the quick and the dead, they are doing the quickstep. That seems a fitting anagram of a living friendship and of a critical law. It is also curiously contemporary. It poses directly the question of the performativity of both friendship and law, it stages the demand for justice as a question of the theatre or drama of the relationships that constitute the lived forms of legality.

I began by citing the axiom that one can have no friendship for law. Fulbeck and Flicke illustrate well how friendship for law is friendship for death, and it is hard to be friendly with death. Death and dead friends –



Figure 2 Richard Brathwaite, *Acquaintance*, from *The English Gentleman* (1630)

the friends we most explicitly and often acknowledge – are in one sense an easy if unhappy option. The alternative is a critical practice of friendship, the dance of the quick if not necessarily the quickstep. As Brathwaite's drawing illustrates, it is a dance that acknowledges the body and the conversations of friends. It suggests a visceral law and an attention to the affective practices of intimates within the public sphere. What that implies is an openness to practice, a dance of becoming, the body rather than the corpse, living fiction rather than dead law. It suggests, finally, a friendship that is closer to justice than to an autonomous or other worldly law.

## Notes

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1. J. Derrida, *Politics of Friendship* (Verso, 1997), 252.
2. Aristotle, *Nicomachean Ethics*. *A New Translation of the Nicomachean Ethics of Aristotle*, 4th edition (J. Vincent, 1846), n.t., 235, 252: 'Friendship and justice appear ... to be about the same things, and between the same persons.' Plato, *Gorgias*, makes a similar point. Leo Bersani, 'Sociality and Sexuality', *Critical Inquiry* 26 (2000), 641–56 offers an account of the Platonic theory of the homoerotic. Because the legal tradition is scholastic in its accounting of friendship, and for brevity, I will restrict analysis to that genre.
3. Cicero, *De amicitia*, trans. W.A. Falconer (Harvard University Press, 1923).
4. Tacitus, *Dialogus de oratoribus*, eds R.M. Ogilvie and M. Winterbottom, trans. W. Peterson and M. Hutton (*Loeb Classical Library*, 1914), vol.1.
5. Tacitus, *Dialogus*, 23–5.
6. Weir, 'Friendships in the Law', 6/7 *Tulane Civil Law Forum* 61 (1991–2), 61–7 is the only explicit discussion of friendship and law that I am aware of, and it is simply a tabulation of a few famous legal friendships. Other work that deserves to be addressed in this context include Lorna Hutson, *The Usurer's Daughter: Male Friendship and Fictions of Women in Sixteenth-Century England* (Routledge, 1994); Alan Bray, *Homosexuality in Renaissance England* (Columbia University Press, 1995); Jeffrey Masten, *Textual Intercourse* (Cambridge University Press, 1998); and Alan Bray, *The Friend* (Chicago University Press, 2003).
7. W. Fulbeck, *A Booke of Christian Ethicks or Moral Philosophie: Containing the True Difference and opposition, of the two incompatible qualities, Vertue, and Voluptuousness* (1586). Fulbeck was also and importantly the author of a successful work on the study of law, *Direction or Preparative to the Study of the Law* (1599), and of *A Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England* (1602).

8. R. Brathwaite, *The English Gentleman, Containing Sundrie Excellent Rules or equisite observations rending to direction of Every Gentleman* (1630). Brathwaite's most explicit attack upon law and lawyers comes in the form of a play, *Mercurius Britannicus. Juridicialis censura; vel, Curialis cura* (no date, c. 1640).
9. The reference to *latinitas* is to Guillaume Bude, *De philologia* (1536) where he praises *litterarum studium* and the life of or life among texts. Françoise Waquet, *Latin: or the Empire of a Sign* (Verso, 2003) provides an excellent account of the long-term demise of Latin.
10. Du Marsais, *Des Tropes* (1730/1757), vi. For discussion, see Peter Goodrich, 'Distrust Quotations in Latin', *Critical Inquiry* 29 (2003), 193–215.
11. Fulbeck, *A Parallele*, sig. 2<sup>r</sup>.
12. Fulbeck, *Direction*, 85. On the popularity of the *Direction*, it was not simply reprinted many times but was famously emulated, by W. Phillips, *Studii legalis ratio* (1667) and to a lesser extent by Sir Roger North, *A Discourse on the Study of the Laws* (1650).
13. Law was to govern all aspects of their lives and, as North later put it, 'no day should pass without its recitation of cases [*nulla die sine linea*]' (*A Discourse*, 7).
14. Fulbeck, *Direction*, 47–8.
15. T. Wilson, *The Arte of Rhetorique* (1585), 212.
16. W. Fulbeck, *Certaine Devises and Shewes presented to her Maiestie by the Gentlemen of Grayes Inne* (1587), fol. G.
17. R. Coke, *Justice Vindicated from the false fucus put on it by Thomas White Gent, Mr Hobbes, and Hugo Grotius* (1660), 43. For discussion, see Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (1996), 6–15.
18. *Digest 1.3.2: The Digest of Justinian* (635), ed. Theodor Mommsen, trans. Alan Watson et al. (University of Pennsylvania Press, 1985). On *vitam instituere*, see Pierre Legendre, *Sur la question dogmatique en Occident* (Fayard, 1999), 106–9. On the ghostly jurisdiction of common law, in addition to Coke, *Justice Vindicated*, see the discussion of the unity of the laws in the form of the Crown in Richard Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiastical* (1591), 25–6; and for a later example, see Edward Stillingleet, *Ecclesiastical Cases* (1698), 319, 329.
19. The clearest statement to this effect is probably R. Hooker, *The Lawes of Ecclesiastical Polity* (1576). On equity and the concept of dual jurisdictions, see L. Hutson, 'Not the King's Two Bodies', in V. Kahn and L. Hutson (eds), *Rhetoric and Law in Early Modern Europe* (Yale University Press, 2001).
20. Fulbeck, *A Booke of Christian Ethicks*, 8–11.
21. *Ibid.*, 15.
22. *Ibid.*, 20.
23. Aristotle, *Nicomachean Ethics*, Book viii, ch. iv, 274–5, starts with the proposition that: 'the feelings of friendship towards friends, and all the definitions of friendship, seem to flow from the feelings of a man towards himself'. In ch. ix of Book ix, 29, Aristotle explicitly formulates the topos that Cicero will later elaborate at length: 'But the good man feels towards his friend as he does towards himself; for the friend is another self.'
24. This statement is belaboured lengthily in Derrida, *Politics of Friendship, passim*, where he eventually explains that the statement should be read



not in the vocative but in the dative. The stress is on 'there is no friend', there is no singular friend and perhaps also no proper form of amicable auto-affection.

25. Fulbeck, *A Booke of Christian Ethicks*, 51.
26. *Ibid.*, 51.
27. *Ibid.*, 52.
28. *Ibid.*, 53.
29. P. Legendre, *La Passion d'être un autre. Etude pour la danse* (Seuil, 1978). Parts of that book are translated in P. Goodrich (ed.), *Law and the Unconscious: a Legendre Reader* (Macmillan, 1996).
30. Fulbeck, *A Booke of Christian Ethicks*, 82.
31. *Ibid.*, 50.
32. *Ibid.*, 63.
33. The theme of the homosociality of masculine desire in the medieval period is well pursued in Jean Claude Huchet, *L'Amour discourtois* (1987); on the Renaissance, see particularly Masten, *Textual Intercourse*, 12–28.
34. A. Fraunce, *The Lawiers Logike exemplifying the praecepts of Logike by the practise of the common Lawe* (1588), preface.
35. Fulbeck, *A Booke of Christian Ethicks*, 64.
36. R. Brathwaite, *The Lawes of Drinking. A Solemn Joviall Disputation, Theoretike and Practicke, briefly shadowing the Law of Drinking ... Freely and Fully Discussed according to the Civill Law* (1642). Brathwaite's *Mercurius Britannicus* (1641) appeared both in Latin and in a translation by the author.
37. My favourite examples of works in that genre are Richard Head, *Proteus Redivivus or the Art of Wheedling* (1675); Charles Sorel, *Les loix de galanterie* (1644).
38. Esther Sowernam, *Esther hath hang'd Hanman: Or an answer to a lewd Pamphlet* (1617), provides another significant instance of a theatrical trial in which both the form of law and the content of laws are indicted. On the historical relation of theatre to law, see Peter Goodrich, 'Law', in Tom Sloane (ed.), *The Oxford Encyclopedia of Rhetoric* (Oxford University Press, 2001), discussing *Digest* 3.2.1 which records the penalty of *infamia* (civil death) for any citizen who recites or acts upon the stage.
39. Brathwaite, *Mercurius*, fol. A2<sup>r</sup>.
40. *Hampden's Case* (1637) 3 S.T. 825. For brief discussion of the context of that decision, see T.F.T. Plucknett, *A Concise History of Common Law* (1956), 52.
41. Brathwaite, *Mercurius*, fol. A2<sup>r</sup>.
42. *Ibid.*, fol. A4<sup>r</sup>.
43. *Ibid.*, fol. B1<sup>r</sup>.
44. *Ibid.*, fol. B2<sup>r</sup>.
45. *Ibid.*, fol. B2<sup>r</sup>.
46. The concept of *oratio recta* (*rectorica*) is taken from the mid-fourteenth century rhetorical handbook, *Las Leys d'amors* (Anglade ed., 1929 edition).
47. This translation of Quintilian comes from Pierre Legendre, *Les Enfants du texte. Etude sur la fonction parentale des Etats* (Fayard, 1992), 384. See Peter Goodrich, 'Rhetoric and Somatics: Training the Body to do the Work of Law', *Law, Text, Culture* 5:179 (2001), 241–70.
48. Brathwaite, *Mercurius*, fol. A2<sup>r</sup>.

49. This theme is pursued at length in Peter Goodrich, *Languages of Law: from Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990) chs 3 and 4. This paragraph offers a brief description of the argument of that book.
50. Brathwaite, *The English Gentleman* (1641 edition), 293.
51. Masten, *Textual Intercourse*, 37.
52. Masten, *Textual Intercourse*, 30; suggests a more Lacanian translation and offers 'the love of desires is a secure thing'.
53. Brathwaite, *The English Gentleman*, 283.
54. *Ibid.*, 298, 301.
55. *Ibid.*, 261.
56. *Ibid.*, 293.
57. *Ibid.*, 250.
58. *Ibid.*, 293.
59. *Ibid.*, 256.
60. A. Capellanus, *De Amore* (1176), trans. P.G. Walsh (Duckworth, 1982), Book 3, line 117. Discussed in Peter Goodrich, *Law in the Courts of Love* (Routledge, 1996), 34–6.
61. Brathwaite, *The English Gentleman*, 243.
62. *Ibid.*, 295–6.
63. *Ibid.*, 239–40.
64. *Ibid.*, 301.
65. The reference to spiritual brotherhood is to the older Christian conception of spiritual friendship as membership of the community of the faithful. The source of that notion is Aelred of Rievaulx, *Spiritual Friendship* (1150).
66. *Gerlach Flicke and Henry Strangwish*, National Portrait Gallery, 6353.
67. On the relation of image to prose and so to questions of interpretation, see Peter Goodrich, 'The Iconography of Nothing', in C. Douzinas and L. Nead (eds), *Law and the Image: the Authority of Art and the Aesthetics of Law* (Chicago University Press, 1999).
68. Although the catalogue describes the object held by Flicke as a Bible, it looks equally as if it might be the painter's palette – particularly because the finger appears to pass through and hold the object by means of a hole in the board. That would be unlikely in a Bible. If it is a palette the argument remains the same for two reasons. First, the lute and music represent the universal in the same manner as does poetry. It is still an instance, in other words, of *ut pictura poesis*. Second, the painting explicitly renders the image eternal. It has the same function as the word understood as a sign or as *verba visibilia*, the manifestation of the spirit in visible forms and most notably the sacraments.

# 3

## Instigating Treason: the Life and Death of Henry Cuffe, Secretary

*Alan Stewart*

High treason was the most serious crime in early modern England, and in its most heinous form threatened the life of the monarch. Yet treason did not consist in the actual assassination of a monarch, nor the attempt of assassination, nor even the discussion of such an attempt, but in the circumstances ‘when a man doth compass or imagine the death of our Lord the King’.<sup>1</sup> In this chapter, I analyse one of the most notorious treason trials of the Elizabethan period, that of Robert Devereux, second earl of Essex and his followers, for treason against the queen following Essex’s abortive rebellion in 1601. I suggest that in exploring the ways in which a death might be compassed or imagined, the trial throws light on the underbelly of service relations in the period, and points in particular to the fatal vulnerability of a man who makes his living through scholarship: the secretary.

### **Dying like dogs: the demise of the scholar**

I come adiuged to die for plotting a plott not acted, and for actinge an act not plotted. Justice will haue her course, accusers must be heard, greatness must haue the victory, lawes must be executed, schollers & martialists (thoughe learninge & valoure should haue their pruilidge) must yet in England die like doggs & be hanged. To dislike this is folly, to gainesay it is time lost, to alter it impossible: but to endure it is manly, to score it magnanimity. The prince is displeased, y<sup>e</sup> Lawe is iniurious, y<sup>e</sup> Lawyers vncharrytable, & death terrible: but I aske pardon of the prince, forgiue the Lawyers & y<sup>e</sup> world & desire to be forgiven: & welcome death.

(Henry Cuffe’s scaffold speech at Tyburn, 13 March 1600/01)<sup>2</sup>

Henry Cuffe died like a dog on 13 March 1600/01, hanged at Tyburn.<sup>3</sup> His crime was his alleged involvement in the abortive uprising into the City of London on Sunday 8 February led by Robert Devereux, second earl of Essex, in whose secretariat Cuffe had been employed since 1595. Several other 'conspirators' lost their lives after Essex implicated them during the weeks before his own execution. What was unique about Henry Cuffe was that it was never suggested that he took to the streets on that February morning: he remained firmly behind closed doors, refusing to take part. Instead, he was arraigned and sentenced for his *advice* to those who did rebel – most notably, Essex, Sir Henry Neville, and the earls of Rutland and Southampton.<sup>4</sup>

Recent scholarship in several fields has begun to explore the territory occupied by late Elizabethan men such as Henry Cuffe, providing us with a specifically text-oriented analysis of political action, a new brand of applied intellectual history. Lisa Jardine and Anthony Grafton have detailed the political readings of the Cambridge scholar Gabriel Harvey in the company of, among others, Philip Sidney and Thomas Smith,<sup>5</sup> while William Sherman has shown how the so-called 'magus' John Dee carried out scholarly readings for particular patrons or bodies such as the Privy Council.<sup>6</sup> Moving out from a more traditional political history tradition, Paul Hammer has drawn attention to the importance of the male secretaries employed by the earl of Essex, secretaries that included Henry Cuffe.<sup>7</sup> Several of these accounts have drawn attention to the problematic social and political space occupied by these secretaries or scholar-readers: anxieties about intimacy with their employers and its concomitant potential influence on their thought could express itself in rumours or direct accusations of other, unacceptable intimate male relations: plotting, conspiracy, sodomy, and, as here, treason.<sup>8</sup> But the only secretary of this period who suffered the acute consequences of these anxieties, who indeed died for them, was Henry Cuffe. His potent story provides us with a case study of patronage, scholarship, attribution and responsibility in the last years of Elizabeth's reign.

Over time, Henry Cuffe was systematically transformed into the ultimate cause of the treacherous uprising, 'a Mephistophelis to Essex's Faust', a 'Machiavel' among 'simple men'.<sup>9</sup> Essex's biographer G.B. Harrison supplies a fairly standard portrait, drawn from contemporary dramatic stereotypes:

Henry Cuffe was in many ways Essex's evil genius. Outwardly he was one of those malcontents whom dramatists of the time were so

fond of portraying, a man who affected learning, and would utter his mind with such candid frankness that he passed for honest. Inwardly he was overweeningly ambitious, and hoped by following his master to insinuate himself into great place.<sup>10</sup>

Harrison is echoed by A.L. Rowse: ‘Marlowe and Cuffe were alike in some other ways too: each had a dash of the Machiavellian about him, a restless spirit of ambition, each was fascinated by power, driven on by pursuit of it – one of intellectual power, the other political. Each was something of a misfit, driven by a daimon; each came by a sticky end.’ Rowse, however, more sympathetic to his subject, detects ‘Hamlet-like qualities ... which would in the end pull him down.’<sup>11</sup>

Early accounts were less certain as to the secretary’s over-reaching. Henry Cuffe is oddly absent from several seventeenth-century accounts of Essex’s fall, from William Barlow’s 1601 ‘short discourse of the late Earle of Essex, his confession, and penitence, before and at the time of his death’, to the anonymous 1679 *The Arraignment, Tryal and Condemnation of Robert Earl of Essex, and Henry Earl of Southampton*.<sup>12</sup> Indeed, there is evidence of near-contemporary sympathy in Francis Osborne’s *Advice to a Son*, which suggests that the vilification of Cuffe was a textual process that took place after the event. For Osborn, Cuffe is the innocent party, caught in the machinations of Essex the politician:

*Mingle not your Interest with a Great Mans, made desparate by Debts or Court-injuries, whose breakings out prove fatall to their wisest Followers and Friends: averred in the last Earl of Essex but one, where Merrick his Steward, & Cuffe, his Secretary, though of excellent Parts, were both hang’d. For such unconcocted Rebellions turne seldome to the hurt of any, but the Parties that promote them: being commonly guided by the directions of their Enemies, as this was by Cecil, whose creatures perswaded Essex to this inconsiderate Attempt.*<sup>13</sup>

The posthumous vilification and scapegoating of Cuffe, I suggest, resulted from an orchestrated and systematic campaign that cost him his life. For Cuffe’s downfall was not immediate. In court, Essex protected his followers and servants to the best of his ability. However, after his condemnation he turned on his associates in what Mervyn James describes as ‘a remarkable volte-face’,<sup>14</sup> and denounced them. In particular, he suddenly felt the need to perform his alleged distance from his secretary Henry Cuffe, and to do so went to quite elaborate

lengths, as related in this contemporary account, written before Cuffe's execution:

Vppon Saturday the 21. of februarye after the late Earle of Essex had deseried [i.e. desired] vs to come vnto him aswell to deliuer his knowledge of those treasons, *which* he had formerly denied at the Barr, as also to *recomm*end his humble and earnest request, that her *majestie* would be pleased out of her grace and fauour to suffer him to dye priuatly in the Tower, he did merualous earnestly desire that wee would suffer him to speak vnto Cuffe his Secretarie against whome he vehemently complained vnto vs to haue been a principall instigator to these violent courses, which he had vndertaken. wherein he protested that he chiefly desired that he might make it appeare that he was not the only *perswader* of these violent offences *which* he had committed, but that Blunt, Cuffe, Temple and those other persons whoe weare at the priuat conspiracie at Drurie house (to which though these three weare not called yet they weare priuie[]) and had more dangerous and malitious ends for the disturbance of the Estate, then he doth now finde coulde haue been preuented, if his proiect had gon forewards as well appeared by the confusion they drew him to, even in his owne house, that morning that he went into the Cittye. This request being graunted him and Cuff brought before him, he there directly and vehemently charged him and amongst other speechess vsed these words Henry Cuffe call to god for mercy and to the Queene, and deserue it by declaring truth, for I that must now prepare for an other world, haue resolued to deale clearely with God and the world, and must needs say this to you, that none hath been a greater Instigator of me then your selfe to all these disloyal courses, Into *which* I haue fallen.<sup>15</sup>

In this elaborately staged affair, Cuffe becomes the active instigator; Essex passively and helplessly 'falls' into disloyal courses. The evidence against Cuffe included statements given by Sir Charles Davers, Essex himself, and most damagingly the ambassador in Paris, Sir Henry Neville. Essex's attack on Cuffe draws attention to the methods by which the secretary influenced the master:

Within one month after I departed from Sir Richard Barkley, Cuffe [(]hauing accesse vnto me) vsed words of *perswasion*, to thinck of the iniurie and dishonour to me, of the misery of my frends and

of my countrie, and of my necessitie to hold correspondencye with my frends for *which* purpose he moued mee to lett Sir Charles Dauers come vnto mee.<sup>16</sup>

Cuffe's evil influence in this account can be specified in a few points: (1) his intimate access to his master; (2) his use of 'words of persuasion' in forcing Essex into an imaginative reconceiving of his position; (3) his promotion of 'correspondencye'; (4) his bringing together of Essex and Dauers.

It now seems likely that Essex's 'volte-face' was prompted by Thomas Arundell, whose wife was the sister of Essex's fellow condemned conspirator, Henry Wriothesley, earl of Southampton. Arundell was concerned that if Southampton were convicted of treason, then not only would he be executed but his lands would be forfeited, and lost to the family. This was of particular importance to Arundell since he believed that it was Southampton's nephews, his sons, who stood to inherit. He therefore suggested to his reluctant patron, Principal Secretary of State Sir Robert Cecil (who was active in Essex's prosecution), that perhaps Southampton was not responsible for his own actions. Writing on 18 February 1600/01, he placed the blame elsewhere:

There is one Cuff a certayne purytane skoller one of the whottest heades of my lord of Essex his followers. This Cuff was sente by my lord of Essex to reade to my lord of Southampton in Paris where he redd Aristotles polyticks to him with sutch expositiions as, I doubt, did hym but little good: afterwards hee redd to my lord of Rutlande. I protest I owe hym no mallyce, but yf hee showd [?] faultye heerein, *which* I greatlye doubtte [suspect], I can not but wish his punishment. verbum sapienti [a word will suffice to the wise].<sup>17</sup>

The details of this scholarly reading for political ends have proved seductive to some scholars – and indeed, there may be truth in Arundell's accusations: Arundell had intimate access to Southampton, and Southampton *was* in Paris in 1598, a year which also saw the publication of a new English translation, from Loys Le Roy's 1596 French edition, of Aristotle's *Politics*.<sup>18</sup> However, my aim here is not to recreate this moment of scholarly persuasion, but to understand Arundell's document as it was intended: as an accusation. For the above passage was contained in an unsigned, unaddressed enclosure inside Arundell's letter to Cecil. Cecil might well have used the information against Cuffe, but it seems Arundell's sly and effectively anonymous insinuation somehow

made its way to Essex, who then acted on the information – perhaps seeing a possibility to save Southampton, perhaps even hoping that he too might be seen as a victim of the evil and suddenly ‘purytane’ scholar (the epithet is not echoed elsewhere), hence his casting of Cuffe as the greatest ‘Instigator of me ... to all these disloyal courses.’ Of course, this can remain only a hypothesis, but Essex’s words, oddly echoing Arundell’s letter, set the tone for a concerted campaign of vilification of Cuffe.

The earl’s outburst was given wide currency when included in the influential ‘official’ account of the Essex uprising, penned by Francis Bacon and allegedly edited by the queen herself, in which Cuffe is presented as ‘a notable Traytor ... being otherwise of a turbulent and mutinous spirit against all superiours’.<sup>19</sup> But perhaps the key text for the propagation of Cuffe’s evil reputation was Sir Henry Wotton’s *A Parallel betweene Robert late Earle of Essex, and George late Duke of Buckingham*. Although not published until 1641, this tract circulated widely in manuscript in the years after Buckingham’s death (the British Library alone now holds seven manuscript copies).<sup>20</sup> In this account, Wotton, once Cuffe’s colleague in the Essex secretariat, spills the secrets of their years together:

There was amongst his nearest attendants one *Henry Cuffe*, a man [o]f secret ambitious ends of his owne and of proportionate Counsell smoothed<sup>21</sup> under the habit of a Scholler, and slubbered over with a certayne rude and Clownish fashion, that had the semblance of integrity.

This person not above five or sixe weekes before my Lords fatall irruption into the City, was by the Earles Speciall Commaund suddainely discharged from all further attendance, or accesse unto him, out of an inward displeasure then taken against his shape and importune infusions, and out of a glimmering oversight, that he would prove the very instrument of his Ruine.

At the news of his discharge, Cuffe ‘in a private Chamber was stricken therewith into a Sound almost dead to the Earth, as if hee had fallen from some high steeple, such turrets of hope hee had built in his owne Fancy’. According to Wotton, in Cuffe’s absence, Essex was advised by the Countess of Warwick to take an out-lodging at Greenwich, and if the queen ‘went abroad in a good humour’, Essex (forewarned by the countess) ‘should come forth, and humble himself before Her in the field’. To Wotton this seemed ‘the best advise that, I thinke, was ever



given from eyther Sex'. However, the earl's resolve to follow this advice was destroyed when, after 'some dayes',

in the meane time through the intercession of the Earle of *Southampton*, whom *Cuffe* had gained, hee was restored to my Lords eare, and so working advantage upon his disgraces, and upon the vaine foundation of vulgar breath, which hurts many good men, spun out the finall destruction of his Master and himselfe, and almost of his restorer, if his pardon had not been wonne by inches.

While, as Wotton admits, Essex at his trial 'did in generall disclose the evill perswasions of this man; but the particulars which I have related of his dismissal and restitution, hee buried in his owne breast for some reasons apparent enough', probably '(as I conjecture) not to exasperate the Case of my Lord of *Southampton*'.<sup>22</sup>

Although some of Bacon's and Wotton's epithets are derogatory signifiers of low rank ('ambitious', 'rude and Clownish'), there is no comparable reaction against the similarly low-born Sir Gelly Merrick (executed alongside Cuffe at Tyburn) who acted as Essex's steward for as long as twenty-two years. Instead, Cuffe's status as scholar is singled out – and Wotton implies that it is unmerited ('the habit of a Scholler ... the semblance of integrity'). But in fact Cuffe was no ordinary secretary. As a young man at Oxford, he was part of a set united by a passion for Tacitus, including the Frenchman Jean Hotman (son of François Hotman), Thomas Savile (the younger brother of Henry who would go on to translate Tacitus into English) and, by correspondence, William Camden in London.<sup>23</sup> An outstanding Hellenist, and fellow of Trinity, then Merton College, Cuffe was appointed Regius Professor of Greek at Oxford in 1590; he assisted Raphael Columbanus in his edition of Longus' pastoral *Daphne and Chloe*,<sup>24</sup> translated Gelasius' commentary *De rebus gestis in sancto concilio Niceno* from Greek into Latin,<sup>25</sup> contributed Greek verses to Camden's *Britannia*, and became a member of the Academia della Crusca during a six-month visit to Florence in 1597–98. His own *The Differences of the Ages of Mans Life*, written in 1600, went through three posthumous editions.<sup>26</sup> And it was precisely this internationally-recognized scholarly acumen for which Essex recruited Cuffe to his already impressive secretarial pool, which included Thomas Smith, Edward Reynoldes, Henry Wotton and Edward Jones. Paul Hammer has argued that Essex was building a team to compete with the secretariat of the Cecils in order to 'establish himself as the natural successor to Burghley as

Elizabeth's leading councillor', with particular attention to diplomacy and foreign intelligence gathering, both labour-intensive paperwork tasks. Unlike Burghley, however, Hammer maintains, Essex 'had great faith in the practical value of academic learning', and deliberately drew together a highly qualified academic team.<sup>27</sup> In Cuffe's case, this meant matching his £40 per annum Oxford salary.<sup>28</sup> As Cuffe himself put it on the scaffold, 'learninge ... should haue [its] priviledge' as a valorized activity through which rivals such as Cecil and Essex could forward their cases to be the queen's most trusted servant. But at the same time, 'schollers ... must yet in England die like doggs & be hanged'. Quite how this contradiction operated can be seen in the accounts of Henry Cuffe's trial.

### **'A plott not acted, and ... an act not plotted': Cuffe's defence**

The rhetoric of Cuffe's scaffold speech, 'plottinge a plott not acted ... actinge an act not plotted', was inspired directly by the defence he mounted during his trial, and pivoted on two equivocations: first, that on the day of the rebellion he did not take part, but instead stayed home at Essex House; and second, that although he advised Essex to rebellion, the advice and the act were different in nature.<sup>29</sup> On the first point he argued that he spent the day of the rebellion inside Essex House, 'locked up in my chamber amongst my books',<sup>30</sup> assuming that his physical absence from the scene of the rebellion and his bookishness would act as alibis against any accusation of involvement. Solicitor-General Fleming's answer was succinct: Cuffe was in Essex House, not 'by Force and Compulsion, but freely and voluntarily: There was a distribution in the Action, some were to make good the House, and others to enter the City; and the one part held correspondence with the other; and in Treasons there can be no Accessaries, all are Principals.'<sup>31</sup> On the second point, Cuffe argued that the consultation at Drury House was 'no more Treason than the Child in the Mother's Belly is a Child' (an intriguing analogy that was perhaps less controversial in 1601 than it is four hundred years later).

Cuffe was presumably playing on a crux as to the legal definition of treason. The English statute of treasons (25 Edw. 3, st. 5 c. 2) dated from 1351, and covered circumstances 'when a man doth compasse or imagine the death of our Lord the King'. As John Barrell has recently noted, these meanings of 'compasse' and 'imagine' – which 'seem both to mean "design", or "intend"' – are unique to this statute, and entered from the original Law French of the 1351 statute: 'quant home fait compasser ou

imaginer la mort nostre seignior le roy'.<sup>32</sup> To constitute a case of murder, Coke writes, there was required 'not a bare compassing or plotting of the death of a man, either by word, or writing'; it required 'an overt deed' (for example, an attempt at murder) 'to manifest the same. So if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted [lacked] an overt deed tending to the execution of his compassing.' However, 'in the Case of the [murder of the] King, if a man had compassed, or imagined the death of the King ... and had declared his compassing, or imagination by words or writing, this had been High Treason.'<sup>33</sup> Barrell suggests that since Coke 'made no comment at all' about the meaning of the words 'compass and imagine' in his legal writings, 'it may well be that when he was writing, in the early seventeenth century, the words were generally understood'.<sup>34</sup> However, Cuffe's challenge suggests that he felt (albeit erroneously, as it turned out), there might be a loophole here. Fleming countered that it

was a perfect Treason in itself, because the compassing the Queen's Destruction, which by Judgement of Law was concluded and implied in that Consultation, was Treason in the very Thought and Cogitation, so as that Thought be proved by an overt Act, tho' it had not been upon a list of Names and Articles in writing, much more being upon matter in Writing: and again, the going into the City was a pursuance and carrying on of the Enterprize against the Court, and not a desisting or departing from it.

The Lord Chief Justice concluded that 'If many do conspire to execute Treason against the Prince in one manner, and some of them do execute it in another matter, yet their Act (tho' differing in the Matter) is the Act of all of them who conspire, by reason of the general Malice of the Intent.'<sup>35</sup> Camden believed, 'These answers of the Iudges, and the confessions of *Essex*, *Neuill*, and *Danuers*, cut the throat of Cuffe's cause.'<sup>36</sup>

But Cuffe was not finished. He then attempted to prove his case by syllogism. Claiming that 'the matters objected against him were many, and forced against him with all force of wit', he desired, ostensibly 'for the help of his weak memory', to 'reduce all unto two heads: things plotted and things acted', prefiguring the terms of his memorable scaffold speech:

For the first, in them, Mr. Attorney [Edward Coke] thinks he hath concluded me in mood and figure, but my answer is, that if a man

may be excused of Treason by committing nothing, I am clear. Yet the number of matters heaped upon me, and the inferences and inforcements of the same used against me to make me odious, make me seem also as a monster of many heads in this business; but since by the law all accusations are to be believed, and facts weighed, as by evidence they are proved; and things are best proved being singled; I will beseech Mr. Attorney that we may insist upon some point certain, and not as in a stream have all things at once brought upon me with violence. For my being in Essex house the Sunday, I hope it shall be construed as in the case of others. Then of those who only had their being within the walls of that house, and no hand nor head in that action, were not Traitors; I hope that in favour and in charity you will accordingly judge of me, who spent all that day locked up in my chamber amongst my books, and never appeared unto any man till all was yielded up to my Lord-Admiral. To conclude me to be a Traitor, because I was in the house where treason was committed; by the same reason if a lion had been locked up in a grate, he had been in case of treason. But whereas your argument, Mr. Attorney, is this, That whosoever intends treason, and the same is afterwards acted by others, there the intender as well as the actor is a traitor; but I intended treason, and others acted it; *Ergo*, Mr. Attorney, it is not your *major* I deny, because my lords and judges have determined that; but I deny your *minor*; for if the thing intended was the going to the court, yet the thing acted was the going into London.<sup>37</sup>

Unable to fault Coke on the proper progression ('mood and figure') of his argument, Cuffe attempts to undermine one of his premisses ('his *minor*') admitting that while the thing intended was to go to Court, in fact the thing acted was 'the going into London'. Coke however is nimbler, pointing out that since intent of treason constitutes treason itself, Cuffe's argument 'upon his own confession concluded him a traitor', since 'it is confessed by Mr. Cuffe that he intended the taking of the Court, which in itself is treason'.<sup>38</sup>

In his scathing attack on the defendant, Coke plays with bitter irony on Cuffe's syllogistic reasoning:

Mr. Attorney said, that he [Cuffe] was the arrantest Traitor that ever came to that bar; he was Poly ... {sic} the very seducer of the earl; and since he was a scholar and a sophister, he would frame him a syllogism, and bade Cuffe deny what part he would. The syllogism was

this, 'Whosoever commits rebellion, intends the Queen's death; ... you committed rebellions, ergo, you intended the Queen's death.'<sup>39</sup>

The syllogistic nature of Cuffe's defence plays into the hands of the Attorney General; the syllogism, worked another way, leads to Cuffe's downfall, appropriately enough for 'a scholar and a sophister'. Coke too is berated for this flippant academic point-scoring by Anderson, Chief Justice in the Court of Common Pleas, who angrily 'cried aloud that both of them made foolish Syllogismes; sharply vrging the Statute of Treason made in the raigne of *Edward* the third'.<sup>40</sup> Anderson's sharp rejoinder takes us back to the 1351 statute of treasons and reminds us that even the committing of rebellion is irrelevant to the murder of the queen: it is simply the compassing or imagining of the royal death that is under investigation.

This attack on Cuffe's defence strategy (scholarly syllogism) and his status (scholar-sophister) is, I believe, best understood as a displacement of a direct assault on another contentious and vulnerable aspect of the man. Later in the proceedings, another ground for attack is found by Secretary Cecil:

Mr. Secretary said, that he must needs speak of a difference he found between noble and generous-minded men and others baser-born: from the earls and other the gentlemen of birth and of good house, all their confessions came freely and liberally from them without concealment or covering any thing with untruths. By Cuffe, and some others of baser sort, nothing would be confessed but what they were convicted of and shadowed with untruths so far as their wits could do it.<sup>41</sup>

Cuffe is singled out for his lack of 'birth and ... good house', an element that is brought out strongly in Bacon's 'official' account where Cuffe's lower-class birth carries the seed of his betrayal: 'a base fellow by birth, but a great scholler, and indeed a notable Traytour by the booke, being otherwise of a turbulent and mutinous spirit against all superiours' – that phrase 'by the booke' stressing not only Cuffe's meticulousness in conforming to the points of treachery, but also felicitously that his treachery occurred through his study of books.<sup>42</sup> As we have seen, Wotton wrote of Cuffe as 'a man of secret ambitious ends of his owne and of proportionate Counsell smoothed under the habit of a Scholler, and slubbered over with a certayne rude and Clownish fashion, that had the semblance of integrity'.<sup>43</sup> In fact, Cuffe's origins

may not have been so base,<sup>44</sup> but the combined authorities of Cecil, Bacon and Wotton have influenced biographers: to Robert Lacey, Cuffe is 'an ambitious man whose conspiratorial career was grafted strangely on to yeoman origins'.<sup>45</sup> The logic by which Cuffe lost his life, linking uncontextualized syllogistic logic, the profession of a scholar, and reputed base birth, has become naturalized to the point that Lacey's 'grafted strangely' seems superfluous: the nexus of ambition, conspiracy, scholarly profession and lowly origins is rendered self-evident.

### Applied reading: Cuffe, aphorism, and Tacitus

According to Sir Henry Neville, when Cuffe was attempting to make little of the potential danger and difficulty of the enterprise, alleging that 'the City of *London*, and many of the Aldermen were at the Earles deuotion, and ready to assist him at his becke', he repeated an aphorism from Lucan, rendered in Camden's account:

*Arma tenenti omnia dat, qui iusta negat.*  
Vnto a man that's armed and of great might,  
Hee addeth more, that doth deny him right.<sup>46</sup>

Or, as David Norbrook has rendered it, 'if he had no friends as a private individual, he would find many if he took up arms'. Isaac Casaubon identified these lines as 'fatal to Essex'.<sup>47</sup>

Lucan was by no means a text expected to stir up rebellion: indeed, as Norbrook notes, 'the *Pharsalia* was certainly not regarded as a seditious text', since it was a staple school text for advanced pupils. Lucan's republicanism could be explained away through a quasi-allegorical reading, Pompey representing 'legitimate authority, whether monarchical or otherwise', and Caesar a usurper. Moreover, the *Pharsalia's* 'passionate denunciation of civil strife permitted the conclusion that Rome was better under the peace of the Empire than the chaos of the civil war, even if Lucan himself had refused to draw such a conclusion'. Norbrook explains its seditious potential, however, by recourse to early modern modes of reading: 'Renaissance humanism tended to urge increasingly specific readings of texts in their historical contexts, and the more Pompey was seen as the representative of a specifically republican political form, the harder it became to use the poem to buttress monarchy. Attentive readers would not necessarily have come away with a simple choice between monarchical order and republican anarchy: the order imposed by the emperors is the order of death.'<sup>48</sup>

But how are we to interpret Cuffe's use of this aphorism? In the preface to his *The Differences of the Ages of Mans Life*, Cuffe quotes Heraclitus, who said that 'the greedy mettall mongers' in their search for the world's wealth find *paruum in magno*, 'a little pure substance in a great deale of vnprofitable earth'.<sup>49</sup> However, as Cuffe goes on,

Contrarily it fareth in the inquisition and pursute of *learning*, where we often finde with a little abstractiue speculation, *magnum in paruo*, much matter in few words, euery short golden sentence and particle thereof containing incredible store of most pure substance.

(A7<sup>v</sup>)

Just as cosmographers have reduced the world into small maps, learned artists have reduced the liberal sciences into small volumes. Conversely, just as gold can be beaten out into 'a maruellous amplitude; so the short *Aphorismes of Philosophie*, in the circuit of a small period, comprehend substance sufficient to fill whole volumes' (A8<sup>r</sup>). But Cuffe does not elucidate quite how an aphorism can 'comprehend substance sufficient to fill whole volumes'.

A more considered explanation can be found in the prefatory remarks 'to the reader' in Henry Savile's 1591 translation of Tacitus.<sup>50</sup> Although the initials 'A.B.' appear above this passage, it was widely believed that Essex himself was responsible for these sentiments,<sup>51</sup> and historians have been quick to identify Essex as a particular 'Tacitean patron' of 'a rationalized historiography' of the 1590s, citing his promixity to Taciteans such as Francis Bacon and Henry Savile, and his alleged patronage of John Hayward's Tacitean *First Part of the Life and raigne of King Henrie the IIII* (1599).<sup>52</sup> According to John Guy, Tacitus was read in the 1590s as an alternative to the traditional literature of 'counsel': Tacitus was 'the historian who thought the past too complex and recalcitrant to be reduced to straightforward moral lessons'; his Elizabethan followers' 'goal was to discover how men attained their ends within a framework freed from the providentialist bias of popular histories such as John Lydgate's *Fall of Princes* and William Baldwin's *Mirror for Magistrates*'.<sup>53</sup>

The mechanics of that goal-led reading can be found in A.B.'s prefatory letter. After asserting that 'There is no treasure so much enriches the minde of man as learning' and 'no learning so proper for the direction of the life of man as Historie', and furthermore that 'there is no historie (I speake onelie of profane) so well worth the reading as Tacitus', he goes on to explain why 'learning' is so important: 'for

without learning the conceyte is like a fruitfull soyle without tilling, the memorie like a storehouse without wares, the will like a shippe without a rudder.' A.B.'s point is that 'the conceyte', the precept itself, means nothing without its illustration:

For Historie, since we are easlier taught by example then by precept, what studie can profit vs so much, as that which giues vs patternes either to follow or to flye, of the best and worst men of all estates, cuntries, and times that euer were?

The importance of examples over precepts was an educational cliché found in works from Cicero to Ascham, but the point is stressed in these Tacitean histories. A.P. in the epistle to the reader of Hayward's *Henrie the IIIII*, for example, advises the reading of

not onely precepts, but liuely patterns, both for priuate directions and for affayres of state: whereby in shorte time young men may be instructed, and ould men more fullie furnished with experience then the longest age of man can affoorde ... for examples are of greater force to stir vnto vertue, then bare preceptes, insomuch as *Cicero* said that nothing could be taught well without example.<sup>54</sup>

The sententious aphorisms for which Tacitus is renowned – 'For Tacitus I may say without partiality, that hee hath written the most matter with best conceyt in fewest wordes of anie Historiographer ancient or moderne' – are only generative when illuminated by the knowledge of what they are exemplifying. Tacitus is not a text that should be read over once and the sententiae extracted into a commonplace book. Instead, A.B. insists that multiple readings are required: 'He is harde. *Difficilia quæ pulchra*: the second reading ouer will please thee more then the first, and the third then the second.'<sup>55</sup>

This reading, then, as advised by A.B. and I would argue by Cuffe, is not the simple extracting of commonplaces from history and literature that has been well documented by Mary Thomas Crane.<sup>56</sup> This is instead a reading that depends on the recontextualization of the apparently commonplace, the re-placing of a key phrase in a particular text to provide a specific knowledge of the function it plays. In the case of 'Arma tenenti / Omnia dat, qui iusta negat', that knowledge would involve identifying that the phrase comes from the first book of Lucan's *Civil Wars* during Caesar's (unrequired) rallying cry to his troops after Curio urges him to attack Pompey. The situation is then



clearly apropos to the potential uprising of Essex's followers, but more subtly the words are from the leader himself, and not from the smooth-tongued adviser Curio.

Cuffe's political counsel was based on his use of aphorism. The salient point about an aphorism is that it derives from a specific context and it can be applied to a specific context, but that in and of itself it is banal and – indeed – commonplace. This was the defence that Cuffe needed in order to deny his involvement in the uprising: 'I come adiudged to die for plottinge a plott not acted, and for actinge an act not plotted.' Lorna Hutson has adumbrated a pragmatic and specifically humanist 'reading for the plot' in 'discourses in which the plot solution emerged from the order of telling', 'plot' in this sense referring 'both to the conceptual organization of a scheme and to its effective communication or probability in discourse'.<sup>57</sup> Cuffe may have given advice, he may have 'plotted' in Hutson's sense, but he did not plot an act, only a plot. His defence refuses to admit the application of his advice as in any way connected to that advice.

In what looks like scholarly cannibalism, Cuffe allegedly made a final set of aphorisms, 'gathered out of the liffe and end of that most noble Robert Earle of Essex in the liffe tyme of Queen Eliza: not longe before his death by his Secretary Mr Cuffe', preserved in BL Harley MS 1327, which deals with the standard topics of court survival: princes' favourites, the will of princes, the jealousy of princes, and so on.<sup>58</sup> The aphorisms are prefaced by a brief explanation of their purpose which itself brings the genre back to its historical roots – the sayings of Hippocrates:

Phisicians hold, that all most all the Aphorismes of hipocrates if they be vnderstood without reservation, in any case are in their generallitye false; I know pollitique bodyes, are as often sicke, as natural. And both of them subiect to irregular diseases; Neither you can any certaine remedy be prescribe but *that* sometymes, such as in some cases, haue cured the Malladye, haue ben at other tymes worse then *the* disease. – Wherefore I must like the composers of Allamanackes tell you That these were made for the Meridian of the Court of England, / And at such a tyme.<sup>59</sup>

The point of the aphorism is not its sententiousness but its application: at most times and places, 'in their generallitye', aphorisms mean nothing; it is only at a specific temporal and geographical point that their medicine will be beneficial.<sup>60</sup> It was this claim that Ben Jonson was

to parody in *The New Crie* (1616): 'They are the almanacks / For twelve years yet to come, what each state lacks, / They carry in their pockets Tacitus.'<sup>61</sup> With a logic reminiscent of his disastrous court defence, in strictly defining the import of his aphorisms, Cuffe strengthens the case for his guilt in the one particular place and time that matters – 'the Meridian of the Court of England / And at such a tyme'.

### Conclusion: 'for favour's sake unto learning'

The texts examined here – Cuffe's defence, his scaffold speech, his final set of aphorisms – all attempt to extricate Cuffe from a charge of treason, in an attempt to save his own life. But they all also deal, in various ways, with the question of the attribution of authorship, responsibility and blame in reading and writing, demonstrating vividly how these processes cannot be abstracted from the complex and often ill-defined social transactions and relationships, and the historical circumstances that gave rise to them. Cuffe in his trial defence attempts to use syllogism to separate out intent from action, inseparable in cases of treason where thought *is* treason. In his use of aphorisms, however, he attempts to contain their application to a particular time and place – his specificity in the latter undermining his claims of non-specificity in the former.

In his memorable scaffold speech, Henry Cuffe made an insightful distinction: although 'learninge & valoure should haue their priviledge', 'schollers & martialists ... must yet in England die like doggs & be hanged'. Cuffe draws a clear line between the useful *abstract* attributes of learning and valour, and those men, like himself, who were defined by their learning and valour – scholars and martialists who practised these skills to earn a living: indeed, Cuffe was financially secure by the time of his downfall.<sup>62</sup> Learning, as both he and his master Essex recognized, was a dangerously two-edged practice: held in high esteem at Court, it was simultaneously vulnerable to suspicions of high-level plotting. Cuffe knew well enough when it was dangerous to be seen to have had a hand in a certain piece of writing; Essex's sudden volte-face demonstrates that despite his public and extravagant use of scholarship, he understood the value of being able to disengage himself from its consequences.

The world in which Henry Cuffe moved was a world that was well aware of the dangers of being attributed with the authorship of any given document. The tactics regularly employed by patrons and scholars to obscure the provenance and transmission of their texts, however,

were ultimately of use only to those whose scholarly transactions left no visible trace. Men such as Cuffe, on salary precisely to undertake those duties, could not convincingly deny their masters' accusations. It was only the Francis Bacons of the world, the floating scholars who remained 'friends' rather than 'followers' who could obscure their traces. For Henry Cuffe, however, this was not an option: scholarship was not only his meal-ticket but also his *raison d'être*. Even in his last moments in court, when it was clear that his textual skills had led to his end, he attempted to use that learning to gain a last favour:

I desire the law may be satisfied with my life, without torturing or quartering of my flesh, and the rather *for favour's sake unto learning*, though I have neither place nor great birth to speak for that.<sup>63</sup>

Cuffe was taken at his word, but the uncharacteristic looseness of his request held him a hostage to fortune: according to one eyewitness, he and Essex's steward Sir Gelly Merrick 'died verie Christianlie / and weare suffred to hange, longe after death / before they weere quartered.'<sup>64</sup> The law was satisfied with his life: the quartering could wait until he was dead, for favour's sake unto learning.

## Notes

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1. E. Coke, *The Third Part of the Institutes Of the Laws of England* (W. Lee and D. Pakeman, 1644), B3<sup>v</sup>.
2. 'Hugh {sic} Cuffs speech at this Execucion: Secretary to the Lord of Essex', Joseph Hall's commonplace book, Folger Shakespeare Library, Washington DC [FSL] MS V.a.339, fol. 207<sup>r</sup>; for other versions, see Walter Bilmor's commonplace book, British Library, London [BL] Harley MS 1327, fol. 55<sup>r-v</sup>; William Cole's commonplace book, BL Additional MS 5845, fol. 178<sup>r</sup>. For a longer version of the scaffold proceedings see Public Record Office [PRO] State Papers (SP) 12/279, art. 25; FSL MS G.b.4, 1-5; printed in T.B. Howell (ed.), *A Complete Collection of State trials, and proceedings for high treason and other crimes and misdemeanours from the earliest period to the year 1783*, 21 vols (T.C. Hansard, 1816), vol 1, 1414.
3. On Cuffe see Paul Hammer's entry for the *New Dictionary of National Biography*; I am grateful to Dr Hammer for letting me read his article in manuscript. See also *Dictionary of National Biography* s.v. Henry Cuffe; A.L.

- Rowse, 'The Tragic Career of Henry Cuffe', in *Court and Country: Studies in Tudor Social History* (Harvester Press, 1987), 211–41.
4. See Mervyn James, 'At a Crossroads of the Political Culture: the Essex Revolt, 1601', in *Society, Politics and Culture: Studies in Early Modern England* (Cambridge University Press, 1985), 416–65.
  5. For the classic statement, which inspired my pursuit of Henry Cuffe, see Lisa Jardine and Anthony Grafton, "'Studied for action": how Gabriel Harvey read his Livy', *Past and Present* 129 (1990), 30–78.
  6. W. Sherman, *John Dee: the Politics of Reading and Writing in the Renaissance* (University of Massachusetts Press, 1995).
  7. Paul Hammer, 'The Uses of Scholarship: the Secretariat of Robert Devereux, Second Earl of Essex, c. 1585–1601', *English Historical Review* 104 (1994), 26–51; idem., 'The Earl of Essex, Fulke Greville, and the Employment of Scholars', *Studies in Philology* 91 (1994), 167–80; idem., *The Polarisation of Elizabethan Politics: the Political Career of Robert Devereux, 2nd Earl of Essex, 1585–1597* (Cambridge University Press, 1999).
  8. See Jonathan Goldberg, *Writing Matter: from the Hands of the English Renaissance* (Stanford University Press, 1990); Richard Rambuss, *Spenser's Secret Career* (Cambridge University Press, 1993); Lisa Jardine and William Sherman, 'Pragmatic Readers: Knowledge Transactions and Scholarly Services in Late Elizabethan England', in *Religion, Culture and Society in Early Modern Britain: Essays in Honour of Patrick Collinson* (Cambridge University Press, 1994), 102–24; Alan Stewart, 'The Early Modern Closet Discovered', *Representations* 50 (1995), 76–100.
  9. R. Lacey, *Robert Earl of Essex: an Elizabethan Icarus* (Weidenfeld and Nicolson, 1971), 109, 270.
  10. G.B. Harrison, *The Life and Death of Robert Devereux Earl of Essex* (Cassell, 1937), 259.
  11. Rowse, 'The Tragic Career of Henry Cuffe', 212, 218.
  12. W. Barlow, *A Sermon preached at Paules Crosse, on the first Sunday in Lent: Martij 1. 1600. With a short discourse of the late Earle of Essex, his confession, and penitence, before and at the time of his death* (Matthew Law, 1601); *The Arraignment, Tryal and Condemnation of Robert Earl of Essex, and Henry Earl of Southampton* (Tho. Buffet, Sam. Heyrick and Matth. Gillyflower, 1679). In the latter Cuffe is mentioned on the title page (as one of those executed) but not in the text.
  13. F. Osborne, *Advice to a Son*, 5th edition (Thomas Robin, 1656), 132.
  14. James, 'At a Crossroads', 417.
  15. 'An abstract out of the Earle of Essex confession vnder his owne hand', BL Cotton MS Titus C.vii, fol. 69<sup>r-v</sup>. See also PRO SP 12/278/104; *A Declaration*, Q3<sup>4-v</sup>.
  16. BL Cotton MS Titus C.vii, fol. 69<sup>r</sup>.
  17. Enclosure in Thomas Arundell to Sir Robert Cecil, 18 February 1600/01, n.p. Bodleian Library, Oxford, Ashmole MS 1729, fol. 190<sup>r</sup>.
  18. *Aristotles Politiques or discourses of government* (Adam Islip, 1598).
  19. [F. Bacon], *A Declaration of the Practises & Treasons attempted and committed by Robert late Earle of Essex and his Complices* (Robert Barker, 1601), D2<sup>v</sup>. For Essex's confession see Q3<sup>r-v</sup>; the Cotton manuscript source quoted above is slightly fuller than this printed version.

20. BL Harley MS 293 fols 132–52; Harley MS 4287; Harley MS 4685 fol. 19; Harley MS 6377; Harley MS 6854 fols 130–76; Sloane MS 1641 fol. 289; Additional MS 22, 591 fols 306–11. The first printed edition is Henry Wotton, *A Parallel betweene Robert late Earle of Essex, and George late Duke of Buckingham* (1641).
21. Thus on B4<sup>r</sup>; as the catchword on B3<sup>v</sup> it reads ‘smothered’. Although the *OED* gives ‘smoother’ as an obsolete form of ‘smother’, it also gives ‘smoother’ as a noun derived from ‘smooth’ meaning ‘One who uses smooth or flattering language; a flatterer’ (in Cotgrave). The ambiguity is nicely placed here.
22. Wotton, *A Parallel*, B3<sup>v</sup>–B4<sup>r</sup>.
23. See F.J. Levy, ‘The Making of Camden’s *Britannia*’, *Bibliothèque d’Humanisme et Renaissance* 26 (1964), 84–5; Levy, *Tudor Historical Thought* (The Huntington Library, 1967), 48, 251; for Hotman, see François and Jean Hotman, *Epistolæ* (Georgius Gallet, 1700), 270–1, 277–8, 281–2, 285–7, 298, 311, 318, 321–2, 324, 326–8.
24. Longus, *Pastoralium, de Daphnide et Chloë*, ed. Raphael Columbanus (apud Philippum Iunctam, 1598): ‘Qua in re operam mihi suam ingratam illud quidem nauarunt viri omnium literatissimi atque officiosissimi, Henricus Cuffius Anglus, ac Marcellus Adrianus Florentinus’ (¶2<sup>v</sup>).
25. BL Cotton MS Nero D.x, fols 1–100.
26. H. Cuffe, *The Differences of the Ages of Mans Life* (Martin Cleare, 1607).
27. Hammer, ‘The Uses of Scholarship’, 30.
28. Hammer, ‘Essex, Greville, and the Employment of Scholars’, 175 n. 40 cites PRO C66/1400 m.29 for Cuffe’s Oxford salary; FSL MS G.b.4, fol. 55<sup>r</sup>, for his Essex salary.
29. The outline of Cuffe’s defence was promptly propagated by Bacon’s *A Declaration*, K<sup>v</sup>–K2<sup>r</sup>, but the following analysis is based on several later printed sources: William Camden, *The Historie of the Most Renowned and Victorious Princesse Elizabeth, Late Queene of England* (Benjamin Fisher, 1630), Book 4, 169–71, 186–94; Francis Hargrave (ed.), *A Complete Collection of State-Trials, and Proceedings for High-Treason, and other Crimes and Misdemeanours*, 11 vols, 4th edition (T. Wright for various, 1776–1781), vol. 1, cols. 209–12; Howell, *A Complete Collection*.
30. Howell, *A Complete Collection*, vol. 1, 1445.
31. Hargrave, *A Complete Collection*, 210.
32. J. Barrell, *Imagining the King’s Death: Figurative Treason, Fantasies of Regicide 1793–1796* (Oxford University Press, 2000), 29–30 and *passim*. Barrell argues that by the 1790s the terms ‘compasse and imagine’ were vague and insecure.
33. Coke, *The Third Part of the Institutes*, C<sup>r</sup>.
34. Barrell, *Imagining the King’s Death*, 30.
35. Hargrave, *A Complete Collection*, 210.
36. Camden, *The Historie*, Book 4, 192.
37. Howell, *A Complete Collection*, vol. 1, 1445.
38. Howell, *A Complete Collection*, vol. 1, 1445.
39. Howell, *A Complete Collection*, vol. 1, 1444. The unfinished word is presumably some form of ‘polypragmon’, which is picked up later in the speech when Cuffe is referred to as ‘the *polypragma*, this fellow, the cunning coiner of all plots’.

40. Camden, *The Historie*, Book 4, 192.
41. Howell, *A Complete Collection*, vol. 1: 1444.
42. Bacon, *A Declaration*, D2<sup>v</sup>.
43. Wotton, *A Parallel*, B3<sup>v</sup>.
44. There is evidence to suggest, as A.L. Rowse does, that his father, Robert Cuffe of Donyat, was 'an armigerous Somerset yeoman'. Rowse, 'The Tragic Career of Henry Cuffe', 215.
45. Lacey, *Robert Earl of Essex*, 109.
46. Camden, *The Historie*, Book 4, 392. In Howell's account of the Neville episode, Cuffe argues: 'Oh, sir things are altered since I saw you last, and ere long you shall see a change: my lord is like to come in favour again, and using one other verse, concluded with this *Arma ferenti ominia* [sic] *dat, qui iusta negat*' (Howell, *A Complete Collection*, vol. 1, 1445), suggesting that Cuffe's argumentation caused two verses, and possibly two different texts, to generate his argument. The format of his argument and the use of 'concluded' suggest intriguing consistencies with the syllogistic defence mounted by Cuffe during his trial, but the evidence is too thin here to do more than note the possibility. The phrase is from Lucan, *Civil Wars*, 1: 183–4.
47. D. Norbrook, 'Lucan, Thomas May, and the Creation of a Republican Literary Culture', in Kevin Sharpe and Peter Lake (eds), *Culture and Politics in Early Stuart England* (Macmillan, 1994), 51; Bodleian Casaubon MS 28 fol. 127<sup>r</sup>, cit. Jardine and Grafton, "'Studied for action'", 75 n. 144. Although Norbrook notes that 'The exact passage at issue is not clear from Casaubon's account' (333 n. 16), Camden's quotation fits the bill nicely.
48. Norbrook, 'Lucan, May and Republican Literary Culture', 50, 51.
49. Cuffe, *The Differences of the Ages of Mans Life*, A7<sup>r-v</sup>. Further references in the text are to this 1607 edition.
50. *The End of Nero and Beginning of Galba ...* trans. Henry Savile (Richard Wright, 1591), ¶3<sup>r-v</sup>.
51. William Drummond relates in his 'Conversations' with Ben Jonson: 'Essex wrotte that Epistle or preface before the translation of y<sup>e</sup> last part of Tacitus which is A.B.' 'Conversations with Drummond', *Ben Jonson*, ed. C. H. Herford and Percy Simpson, 11 vols (Clarendon Press, 1925–1952), vol. 1, 142. Edmund Bolton, in his *Hypercritica* (1618?) quotes 'the late Earl of Essex under the letters A.B. (for Fames [sic] gives it him) in an Epistle before the translated Tacitus of his Friend Sr Henry Savil.' Edmund Bolton, *Hypercritica* in *Nicolai Triveti annalium continuatio ...* ed. Antony Hall (e theatro Sheldoniano, 1722), 242.
52. See S.L. Goldberg, 'Sir John Hayward, "Politic" Historian', *Review of English Studies* n.s. 6 (1955), 233–44; Edwin B. Benjamin, 'Sir John Hayward and Tacitus', *Review of English Studies* n.s. 8 (1957), 275–6; Levy, *Tudor Historical Thought*, 250–68; Peter Burke, 'Tacitism', in T.A. Dorey (ed.) *Tacitus* (Routledge and Kegan Paul, 1969), 149–71; James, 'At a Crossroads', 418–21.
53. J. Guy, *Tudor England* (Oxford University Press, 1988), 414–15.
54. J. Hayward, *The First Part of the Life and raigne of King Henrie the IIII* (John Wolfe, 1599), A3<sup>r</sup>, A3<sup>v</sup>.
55. *The End of Nero*, ¶3<sup>r-v</sup>.
56. M.T. Crane, *Framing Authority: Sayings, Self, and Society in Sixteenth-Century England* (Princeton University Press, 1993).

57. L. Hutson, 'Fortunate Travelers: Reading for the Plot in Sixteenth-Century England', *Representations* 41 (1993), 86, 88.
58. BL Harley MS 1327, fols 58<sup>r</sup>–60<sup>v</sup>. The status of this document is difficult to gauge. The initial twenty aphorisms are followed by a series of references – some aphoristic, some not – to classical and contemporary parallels, beginning with Tacitus' Sejanus. However, the contemporary sources include a phrase annotated 'Tho fitzherbt in his booke of pollicy & religion in his Epist. to Edw. his Sonne', a letter not written until 31 October 1605, over four years after Cuffe's execution. (See Thomas Fitzherbert, *The First Part of a Treatise Concerning Policy and Religion*, 2nd edition ([Douai], 1615), a4<sup>v</sup>). One possibility is that the twenty aphorisms are Cuffe's, the remainder of the comments a later addition.
59. BL Harley MS 1327, fol. 58<sup>r</sup>.
60. This reading is in opposition to Burke's portrayal of aphorisms: 'Men believed that these maxims could be "unlocked", or released from their context, without loss of value'. Burke, 'Tacitism', 167–8, 162.
61. Ben Jonson, *The New Crie*, quoted in Benjamin, 'Sir John Hayward and Tacitus', 276.
62. Rowse, 'The Tragic Career of Henry Cuffe', 215. Cuffe's will, written in the Tower, contains some £2110 worth of bequests. Hatfield House, Salisbury MS 83/1.
63. Howell, *A Complete Collection*, vol. 1, col. 1450; my emphasis.
64. FSL MS G.b.4, 5.

# 4

## ‘Unmanly Indignities’: Adultery, Evidence and Judgement in Heywood’s *A Woman Killed with Kindness*

*Subha Mukherji*

In August 1596, the Vice Chancellor’s room at Queens’ College, Cambridge, took on the unexpected character of a ‘bawdy court’.<sup>1</sup> Bridget, wife of John Edmunds, a Cambridge University employee, was brought to the Vice Chancellor’s court on a charge of adultery with William Covile of Queens’ College. Over the next month, neighbours, colleagues and household servants deposed; after a brief period of protesting innocence, Bridget confessed and turned witness for the prosecution along with her husband; John sued for a judicial separation.

This essay is a reading of Thomas Heywood’s *A Woman Killed with Kindness* (1603), in the light of contemporary perceptions of adultery and practices of investigating and proving it within the household and in court. I use the Edmunds case as my point of entry into this study, because it provides remarkable analogies with, and suggestive insights into, the process that Heywood dramatizes. Ultimately, the focus on sexual misdemeanour and its specifically nuanced punishment becomes, for Heywood’s play, a way of defining its own generic affiliations and investments; civility becomes at once a function of class sensibility and of genre. Meanwhile, distinctly early modern notions of privacy and publicity are shown to be at play in the dramatic as well as the legal material.

### **A Cambridge scandal**

At a fairly early stage in the V.C. Court proceedings, John Edmunds volunteered his services to prove the case against his wife. Among the



various evidences presented by him are a set of love letters between Covile and Bridget. These letters become some of the most curious exhibits in court, 'openlie redd then and there', leading to Covile's admission that they were indeed written 'with his owne hande'.<sup>2</sup> But most interesting for us are the remarkable material traces they preserve of the process of construction of evidence. The marginal comments and annotations at the bottom of the letters, written in a distinct hand from the letters themselves, were inscribed by Edmunds himself. Two of these letters he intercepted, and the third he procured from his wife. And then he annotated them.

The annotations consist of a series of details and definitions that are made with an evidentiary exercise in view. John is anxious to have his dates and facts straight. Careful cross-checking is in evidence. Equally carefully, he marks all the statements that might possibly be cited legally as admissions of adultery. Where Covile frets, in the third letter (Figure 5), that 'the greatest prooffe he hath is the things I gave you', and asks them back, the evidentiary import of these gifts is attested by John Edmunds' triumphant note: 'confess that he gave her dyvers things'. Where Covile writes that he dares not write since her husband says she tells him everything, John scribbles: 'He durst not write. Knavery. This care of concealing is half a confession.'<sup>3</sup>

The annotations suggest that John Edmunds kept returning to the letters in order to prepare them for presentation in court. The impression of deliberate memorial reconstruction is supported by the paleographical evidence, the indecision over his noting down of the time of conveyance of the third letter and, most interestingly, the fact that the second letter (Figure 4) was clearly torn up into seven even strips, but subsequently glued back together and annotated. The material form of these documents, thus, is itself 'evidence' – a visible and eloquent sign – of the process of the construction of proof, by which an essentially private act, or its product, is made an object of public display. These 'exhibits' also tell the story of how an injured husband in an adultery case sets about to collect and prepare, indeed, almost produce evidence with a vindictive meticulousness when he takes on legal agency. Yet the calculated conversion of these private letters into legal documents is shot through with more spontaneous expressions of moral condemnation and outrage. Alongside quasi-legal notations on details that may aid his case, John pens declamations such as 'Lye' or 'Impossible'. In the first letter (Figure 3), he sarcastically writes, 'wisely done William' where Covile protests he has 'honored all bridges for [her] sake'.

66

my Tomye. I app' over long of fowle  
 of my selfe. But and I have labur sold  
 I will be more often to yo<sup>r</sup> service  
 went of for yo<sup>r</sup> sake I wrote  
 I have honored all bondes  
 for my wife. I hope it shall  
 vnder foydaye next at night  
 if you mean to suppe to you  
 to stand we do yo<sup>r</sup> sweet selfe  
 in a dreame appeared to me in  
 your byndes of Licia. I hope  
 often you in I hope it shall  
 as sure onely in respect of yo<sup>r</sup>  
 now it is Saturday. I hope  
 at wishing. I hope it shall  
 ed me of yo<sup>r</sup> selfe. I am very  
 wednesday. we go to Licia  
 of yo<sup>r</sup> selfe. I mean to deliver  
 a token from yo<sup>r</sup> to yo<sup>r</sup> God  
 wife my selfe for my sake. I  
 never break. But I hope  
 yo<sup>r</sup>. Myne foyre loving sweet  
 honest verities. constant true  
 renounce I desire to me. I hope  
 all yo<sup>r</sup> words farewell a  
 you send you send I hope  
 you send me to good wyse Simpson.  
 my letter is written in great haste  
 of therfor I think you cannot read it.  
 pardon me. wishing. Oct. 26. 1594.

your own onely

Wm Covile

*Wife's 2nd with*

*Licia.*

*26 day was Friday.*

*66*

*Wife my selfe by 20.*

*confess:*

*This letter was written upon a Sunday if 26 Oct 1594  
 & then was it a good Sabbath day's work.  
 This was intended to be sent in Oxenford allydaye & there  
 kept a year & ten months before it was gotten to me.  
 I saw it 27 August 1596. of Mr Dampford.*

Figure 3 Letter from William Covile to Bridget Edmunds 1

5

67<sup>n</sup>

I have of much freind upon me I love more for  
 the suffering of your undervalued contyngent  
 upon for all the contyngent you have done  
 me; I am grieved that I know not how  
 to ease you yet comfort yo<sup>r</sup> self sweet in  
 the cleare of yo<sup>r</sup> confyrmation of let that  
 in yo<sup>r</sup> greatest exyctmente unless yo<sup>r</sup> want  
 yo<sup>r</sup> want that me word of be careful to  
 yo<sup>r</sup> self in your bad tyme of great want  
 of religion; I can assure yo<sup>r</sup> of  
 comfort yo<sup>r</sup> self that yo<sup>r</sup> shall want  
 gods assistance in yo<sup>r</sup> most trouble now  
 anye to me that exceed my small abilitye  
 to doe because I know not what yo<sup>r</sup> want  
 in your daye I wrote to yo<sup>r</sup> husband about  
 the matter yo<sup>r</sup> know of of myne I found  
 him as yo<sup>r</sup> yo<sup>r</sup> shall have me as  
 yo<sup>r</sup> desire; but I am loth to trouble yo<sup>r</sup>  
 in such a measure of wrong punishment  
 is a martyrdom; of prayer devotlye  
 for that is more I fear me upon any  
 of yo<sup>r</sup> enemyes can doe; if yo<sup>r</sup> can  
 let me know how yo<sup>r</sup> doe; I would yo<sup>r</sup>  
 shoulde regard yo<sup>r</sup> eye; fare well  
 doe me the favor as from yo<sup>r</sup> self once  
 to praye for my self;  
 yo<sup>r</sup> true freind:

*Handwritten marginal notes:*  
 I have of much freind upon me  
 by the kinde of  
 I can self a sub  
 imfortun...  
 in yo<sup>r</sup> daye I wrote  
 yo<sup>r</sup> husband about  
 the matter yo<sup>r</sup> know  
 of of myne I found  
 him as yo<sup>r</sup> yo<sup>r</sup> shall  
 have me as yo<sup>r</sup> desire;  
 but I am loth to  
 trouble yo<sup>r</sup> in such  
 a measure of wrong  
 punishment is a  
 martyrdom; of prayer  
 devotlye for that  
 is more I fear me  
 upon any of yo<sup>r</sup>  
 enemyes can doe;  
 if yo<sup>r</sup> can let me  
 know how yo<sup>r</sup> doe;  
 I would yo<sup>r</sup> shoulde  
 regard yo<sup>r</sup> eye;  
 fare well doe me  
 the favor as from  
 yo<sup>r</sup> self once to  
 praye for my self;  
 yo<sup>r</sup> true freind:

Figure 4 Letter from William Covile to Bridget Edmunds 2

6.

68

*confession*  
*reads that 52 asks*  
*the 3d wife things.*  
*62*  
*So don't ask words*  
*ambury. this case*  
*of consulting in*  
*half a confession*  
*front on side*  
*rem-confess*  
*confess the mist*
 I hope yo<sup>a</sup> are resolved of one w<sup>o</sup>ut anye doubt<sup>ing</sup>  
 you & I must be both wife: I had some speech  
 to yo<sup>r</sup> husband this daye it is reported fro him  
 that the greatest proofe he hath is the things  
 that I gave yo<sup>r</sup> C; therefore I did saye I did  
 not give yo<sup>r</sup> a thre C; with that I thought  
 I dur give anye thing that I have you  
 might demand; I durst not wryte; he sayeth  
 yo<sup>r</sup> tell him all yo<sup>r</sup> know; trust none especially  
 yo<sup>r</sup> saye & Simons wiff; I wish yo<sup>r</sup> to send the  
 ring to the whyte Stone for my mynd sake C;  
 to all speed I have will send to yo<sup>r</sup> husband C;  
 he discrediteth yo<sup>r</sup> abroad & maketh me think  
 that yo<sup>r</sup> are dishonest; yo<sup>r</sup> are not so carefull;  
 as you might be to expect me to showe kindnes  
 in such a dangerous tyme when they have layd  
 a plot to expell me; Let me hear fro you  
 saye litle C; hope well hereafter; but I will  
 write no letter unless the pastor speak to you  
 I would all that ever yo<sup>r</sup> had of myn wear burnt  
 so that it wear not to be shewn; what I can do  
 I will doe. what I cannot I wish: be you  
 myse. I am true C; so be myse. C; I  
 praye god bles you; & I will speak to you  
 before I paye yo<sup>r</sup> husband;

*It is better was sent by widow Truller, who taking a straight charge not to deliver it, and by  
 it went to the widdow Gault, came into myns entry about the ~~1600~~ of June; C; gave it to  
 my wife*

*copy:*

Figure 5 Letter from William Covile to Bridget Edmunds 3

Turning now to the contents of the letters, one can trace the process by which adultery is registered within a close community, and how that impinges on the consciousness of the parties. The relaxed, pleasantly detailed and loving tone of the first letter – ‘whylst others are eating of oysters I am wrytinge ... Kisse mye Cuff ... I never breathe but I think of you’ – is clouded over in the second by a consciousness of risk and persecution. The third letter is uneasy in tone, cautious, even impatient – ‘You are not so careful as you might be, to expect me to show kyndnes in such a dangerous tyme when they have layd a plot to expell me.’ He wishes his love-tokens to her ‘wear burnt so that it wear not to be shown’.

All this becomes much more visible in the court records. ‘Common rumour and popular gossip in the parish’ are a legal factor from the outset.<sup>4</sup> One of John’s witnesses is his maid Elizabeth Atkyn who had not only lain on occasions ‘at the beddes foote’ in Bridget’s room, but ‘carried at diverse tymes diverse letters from her sayd mistris unto ... Covyle, & from ... Covile unto [her]’.<sup>5</sup> Other witnesses include Elizabeth Baker, an ex-servant, and the fourteen-year-old John Fletcher who ran errands for Covile and Bridget. Forty of their love letters were ‘sent secreatly ... by myne owne servantes’, Edmunds alleged. The servants mediated between the male workplace on the one hand, and the parish and the home on the other. Within the house, servants provided the link between the lady’s chamber and the master’s study.

This alerts us to the distinction between communal vigilance and the closer surveillance within the home, and gives us an impression of the domestic relations and spaces constituting the Edmunds household. The interior figures prominently in the testimonies. One day Atkins was in the kitchen when she heard ‘Mr. Covill and her said Mistris ... struglinge together [in the hall], whereupon she ... came forth of the said Kitchen into the entrie that leadeth into the saide Hall’.<sup>6</sup> All this, while John Edmunds was ‘in his studye’. Atkins, the mobile spirit of the household, conveyed the information to her master with alacrity, having first observed the aftermath of the ‘acte’ in the yard where Covile had gone out to ‘coole him selfe’.

Both the centrality of the ‘act’ or ‘fact’ of adultery, and the importance of the act of seeing, come across in the court-room drama. In affirmation of her ‘private’ report to John Edmunds, Atkins says that ‘she had *seene* ... Mr. Covyle & hir Mistris ... at two severall tymes ... committing adultery’ (*italics mine*).<sup>7</sup>

After hearing the suggestive scuffle, She ... did looke into the saide Hall, ... the dore ... being open, and did then see the said Mr. Covyll and hir

said Mistris ... naughte together ... in a Chayre ... by the fyre, her ... Mistris ... sittinge in the ... Chayre, and Mr. Covyll haveinge his gown one, and she sawe hir Mistris hir heade then hange over the ... Chayre, and her hands aboute Mr. Covills middle, and did then and there here [i.e. hear] the said Mr. Covill blusteringe and blowinge verie muche, and afterwards did see him in the yarde ... verie redd in his face.<sup>8</sup>

The testimonies, as well as the assumed basis of the court's reading of them, are an interpretation of certain images. They also indicate that it did not strike people to lock chamber doors on certain vital occasions.<sup>9</sup> Yet, a great deal of 'private' interaction went on in the 'hall', a space that was social in relation to the bedchamber and the study, but 'interior' in relation to the outside world, though separated by, and accessible through, an 'entry' and an unlocked door.

These testimonies further communicate a sense of a complex and comprehensive experience of interior space that is translated into theatre by many of the contemporary plays dealing with adultery, or murder associated with adultery. They allow a reconstruction of distinctly early modern notions of privacy within the home and in the parish, and their relationship with sexual litigation. I will now discuss Heywood's *A Woman Killed with Kindness* which, among other concerns, places adultery in a context of domestic economy and communal relations.<sup>10</sup>

Drama, however, extends the problematic relation between 'private' and legal space by exploring the relation of these spaces to theatrical space. This is part of the play's self-conscious treatment of the limits of theatrical representation, resembling and dramatizing the problems of evidentiary representation. The Edmunds case throws light on this connection by revealing some of the actual situations of witnessing and informing that bring about the legal exposure of adultery.

### ***A Woman Killed with Kindness: the study or the store-house***

The initial confrontation between husband and wife following Master Frankford's discovery of Anne's adultery is halted by Frankford's self-announced withdrawal into his study for deliberation:

I will do nothing rashly.  
I will retire awhile into my study,  
And thou shalt hear my sentence presently.

(xii, 130–2)

The activities associated with the study define its character as the gentleman's private chamber, a place of solitary retirement. Contemporary meanings of the word 'study' included 'reverie or abstraction', 'thought or meditation directed to the accomplishment of a purpose; studied or deliberate effort or contrivance', mental labour, reading, learning or reflection (*OED*). These, in turn, related to the use of the word to denote a room in a gentleman's house. The common associations surrounding this specifically male solitariness derived from the humanist notion of a man's need for spiritual withdrawal from the affairs of Court, the society and the household. Montaigne's famous '*arrière boutique*' was, by extension, a mental space, 'a store-house'

[reserved] ... for our selves ...; altogether ours, and wholly free, wherein we may hoard up and establish our true libertie, and principall retreat and solitarinesse, wherein we must go alone to our selves, take our ordinarie entertainment, and so privately, that no acquaintance or communication of any strange thinge may therein find place: there to discourse, to meditate and laugh as, without wife, without children, and goods, without traine, or servants; ... .<sup>11</sup>

Having chosen 'treasures ... that may be freed from injurie', a man should 'hide them in a place where no one can enter, and which cannot be betrayed but by our selves'. Montaigne's 'treasures' are intangible possessions immune from loss or theft so long as the self is secure; his image of sequestration remains poised between the spatial and the mental.

When we first meet Frankford alone (scene iv), after his brief appearance as bridegroom in the crowded opening scene, the stage direction describes him as 'in a study'. Even if we accept that the primary purpose of the stage direction is to indicate Frankford's abstraction, the scene evokes elements of the iconography of the study, introduced as it is after four populated scenes, as a solitary space where the master of the house soliloquizes reflectively. The other sense of studying, that of 'studied or deliberate effort', implicit in the later, more spatial, use of the word, reinforces the present scene's evocation of a private location. It also reveals how the play defines space not simply in terms of physical allocations, but through the organization of conceptual relations between various household activities. The configuration of the space in which Frankford delivers his soliloquy changes immediately when Wendoll, Anne and Nick enter.

However, the treasures here inventoried by Frankford, albeit in the metaphorical form of ruminating upon them, are different from the 'riches' stored in Montaigne's *'arrière boutique'*:

How happy am I amongst other men  
That in my mean estate embrace content.  
I am a gentleman, and by my birth  
Companion with a king; a king's no more.  
I am possessed of many fair revenues,  
Touching my mind, I am studied in all arts;  
The riches of my thoughts and of my time  
Have been a good proficient. But the chief  
Of all the sweet felicities on earth,  
I have a fair, a chaste, and loving wife,  
Perfection all, all truth, all ornament.  
If man on earth may truly happy be,  
Of these at once possessed, sure I am he.

(iv, 1–14)

Frankford's solitary contentment becomes a bourgeois appropriation of the humanist notion of man's mental cabinet as a site of abstraction from his material and public life. His contemplation of his own status as a gentleman extends beyond his possessions to include less material riches – his learning and his companionate marriage – thereby redefining the very terms of his gentility. In the wedding scene, not only Anne's 'birth' but 'her education', and the 'equality' and 'sympathy' of this union of two 'scholars' is repeatedly noted.<sup>12</sup> The private space created by this soliloquy is where Frankford experiences and consolidates his sense of class.<sup>13</sup> This subjectivity, at once social and private, is what determines Frankford's judicial behaviour when it finds itself violated by adultery. The study becomes the site not only of his solitary stock-taking, but also of his later retreat to arrive at a 'sentence' on this violation.

The relation of John Edmunds's study and his workplace to his household and to his preparation of evidence provides a suggestive real-life comparison. John is in his study when his wife and her lover have their 'sweetest sporte' in the hall.<sup>14</sup> The maid hears them from the kitchen and goes out into the 'entry' to spy on them. The physical and the hierarchical position of the study within the Edmunds household, then, is defined in two ways:<sup>15</sup> first, in terms of its spatial relations with hall, kitchen and entry, involving the factors of relative visibility and audibility; second, as a function of the householder's relations with the



other inmates and their activities which, in turn, are associated with different parts of the house. The privateness of the study must be perceived as both a segregation from, and an implication in, the governance of the household. This generates the paradox whereby a gentleman's seclusion, while making space for his wife's adultery, also provides the space from which to exercise his judicial authority in punishing this domestic misdemeanour. The systematic preparation of the evidence of the letters is an activity associated with a man's studies in the wider senses of the word, though whether Edmunds actually filed and reworked the letters in his study can only be speculated on.

The sense of privacy in these texts is constituted by the notion of secrecy. The confidentiality of John Edmunds's collection of evidence and the moments of suspense generated in Frankford's house when he withdraws into his study, come together to throw light on the peculiarly early modern experience of privacy that forms an important context to the drama of discovery in *A Woman Killed*. The connection of secrecy (itself a concept inextricable from a consciousness of the public) with private space is suggestively expressed in Angel Day's description of the gentleman's closet: 'Wee do call the most secret place in the house appropriate unto our owne private studies ... a Closet.'<sup>16</sup> The husband's 'closet' in Middleton and Rowley's *The Changeling* (1621) contains the books and objects of his secret study. Alsemero himself explicitly states the covertness associated with this room when he hands over its key to his friend:

That key will lead thee to a pretty secret,  
By a Chaldean taught me, and I've made  
My study upon some; ...

(IV. ii, 111–13)

The inwardness of Montaigne's store-house becomes, in these texts, a prudent and worldly secretiveness that is essential to the management of domestic economy.<sup>17</sup>

The husband's proprietorial secrecy has its complement in the wife's or the adulterer's experience of privacy. Evidence operates at the interface between the two, and household servants mediating these two realms of secrecy have an important role in its production. This complex 'oeconomy' is dramatized in *A Woman Killed* where adultery is not only discovered through, but itself makes visible the dynamic conjunction of spaces, people and relations constituting domesticity in the early modern household.<sup>18</sup>

## Oeconomy and privacy

From the very beginning, the topography of the Frankford house is divided and distinguished. While the wedding party make merry in the parlour, the bride and groom withdraw into the bed-chamber (i, 75). The servants, meanwhile, 'have a crash in the yard' (ii, 4–5). As Jenkin supervises the clearing away (scene viii), specific associations of rooms are defined in terms of certain occupations and inmates: 'My master and guests have supped already ... Here now spread for the servingmen in the hall ... One spread the carpet in the parlour ... More lights in the hall there!' (viii, 1–3, 13–16). Nick, meanwhile, waits in an undesignated space between hall and parlour; hence Frankford's surprise at finding him on inappropriate territory: 'what make you here? Why are not you / At supper in the hall there with your fellows' (23–4). Nick answers that he has been awaiting his master's 'rising from the board to speak to him'. Frankford: 'Be brief then, gentle Nicklas / My wife and guests attend me in the parlour' (26–7).

The relation between the need to define private space in this representation of a genteel household, and the by now undisputed absence of privacy, as *we* understand it, in early modern England, needs to be comprehended in terms of contemporary architectural trends. Recent studies concur in detecting a distinct tendency towards a sharper definition and division of interior space for specific purposes through the Tudor and Stuart periods.<sup>19</sup> While much of this work concentrates on noble households and manor houses, Colin Platt has shown how pervasive these trends were across the social spectrum.<sup>20</sup> Household inventories confirm the impression of steady increase in the number of purpose-specific rooms at various social levels.<sup>21</sup>

Yet this trend coincided with an increased number of corridors and stairways offering multiple access to the same space. Although some historians of private life have linked the emergence of stairways and corridors, along with more specialized rooms, with the 'new concept of privacy',<sup>22</sup> it is precisely these common spaces that could often compromise privacy. In the Edmunds house, entry and staircase provide convenient vantage points for servants and visitors to observe Bridget and Covile. Architecture itself reflected a situation where a growing sense of privacy was inextricable from a matrix of public interest and accountability.

In the Frankford household, too, the acts of watching and overhearing are grounded in oeconomic relations. The scene of temptation, which begins with Anne soliciting Wendoll, on behalf of her husband, to

'command / Even as himself ... keep his table, use his servants', ends with Wendoll's implicit takeover of Frankford's wife and bed (vi, 67–165). The impropriety of this substitution is anticipated by Jenkin's jokes in the sequence prefacing this action. A servant is the first to register the dislocations resulting from an outsider's installation in a hermetic household. In the first of several scenes of overhearing, Jenkin's asides provide an ironic commentary on Wendoll's compunctious soliloquy in scene vi (35 ff.). When Wendoll notices him and asks, 'What, Jenkin? Where's your mistress?', Jenkin answers, with no apparent connection, 'Is your worship married?' A puzzled Wendoll demands, 'Why dost thou ask?' Jenkin's answer is loaded: 'Because you are my master, and if I do have a mistress, I would be glad, like a good servant, to do my duty to her.' The definition of the master–servant relationship in a household is posited on a harmonious relationship between husband and wife; once that goes askew, the surrounding nexus of subsidiary relations is thrown into confusion. When Wendoll asks to be served dinner at Anne's 'private chamber' (xi, 90–2), the servants wonder if the 'new master' is '[playing] the knave with [the] old' (xii, 10–11).

The substitution that Jenkin registers in a casual, jokey way, and the others gossip about, is attacked by Nick, when Frankford invites Wendoll to command his men and his resources:

I do not like this fellow by no means:  
 I never see him but my heart still earns.  
 Zounds, I could fight with him, yet know not why.  
 The Devil and he are all one in my eye.

(iv, 85–6)

When Sisly asks him to help Wendoll 'off with his boots', Nick's resentment is expressed with passion:

If I pluck off his boots, I'll eat the spurs,  
 And they shall stick fast in my throat like burrs.

(iv, 97–8)

One recalls John Fletcher's services for his mistress and the surrogate lord of the house as Bridget and Covile played at cards and held court in John's absence, at the same time as he kept a faintly resentful eye on them, ready to furnish detailed evidence in court.<sup>23</sup> Servants are not neutral observers and reporters any more than evidence is an independent and depersonalized legal operation. When Nick reports Anne's

infidelity to Frankford in *A Woman Killed*, he implicates himself conspicuously in the domestic situation the impropriety of which he discloses:

You knew me, sir, before you knew my mistress ...  
'Sblood sir, I love you better than you love your wife.  
I'll make it good ...  
There's not room for Wendoll and me too  
Both in one house. O master, master,  
That Wendoll is a villain.

(viii, 34–5, 43–4, 51–3)

Even as Wendoll assures Anne of his secrecy, Nick, unnoticed by them, swears to his own project of secret observation. The word 'close', used by both, captures the ironically complementary nature of a situation in which confidentiality is an attribute both of personal privacy and the gaze that threatens it. To persuade Anne, Wendoll stresses,

I will be secret, lady, close as night,  
And not the light of one small glorious star  
Shall shine here in my forehead or bewray  
That act of night.

(vi, 146–9)

Unheard, Nick immediately responds,

I'll henceforth turn a spy,  
And watch them in their close conveyances.  
...  
I'll have an eye  
In all their gestures

(vi, 174–80)

'Close' suggests both the sense of enclosure – including the secondary association of concealment – and the alternative meaning of 'proximity'. Its particular uses in this scene underline the connection between the two senses, and define the atmosphere that engenders evidence.

The scenic structure of this episode sharpens the focus on viewing established by Nick's presence. The scene dramatizes the act of seeing itself, and anticipates its more complex representation in the scene of

Frankford's discovery. In the meantime, Nick's 'eye' becomes the principal evidentiary agent. His opportune discovery is recounted in entirely ocular terms: 'O I have seen such vile and notorious tricks / Ready to make my eyes dart from my head' (viii, 19–20). Frankford persists that his 'eyes may be deceived' (86), but as a remedy sets about to organize his own scene of viewing. This is conceptualized, however, as a drama of knowing: 'Till I know all, I'll nothing seem to know' (115). Nick's secrecy is harnessed, henceforth, to the secrecy of the suspicious husband seeking confirmation: 'be secret then / For I know nothing' (94–5). The covertness, the deliberation and the visual action that are employed to the cognitive end of evidentiary practice have already coalesced in this exchange.

### Staging evidence

The preparation for the grand disclosure is elaborately planned: duplicate keys must be moulded in wax and a letter must be brought in, as if to call Frankford away to business. Frankford's methodical construction of evidence 'by degrees' (viii, 218) is a variation on the husband's careful and remarkably deliberate material construction of proof in the Edmunds case. Frankford stages a situation in which he can catch them in the act:

And when they think they securely play,  
They are nearest to danger.

(viii, 223–4)

Incidents of organized spying are symptomatic of the deliberation behind such activity in early modern English communities, as attested by court records – the precise reason why they were perceived as 'spying'. As Martin Ingram puts it, 'spying cases did not represent normal, spontaneous, neighbourly behaviour but carefully planned, *legally purposeful* activity'.<sup>24</sup>

The project of discovery is set afoot in the dead of night, in silence and secrecy. The 'scene' that Frankford and Nick's journey through the house seeks to uncover has to be approached with Frankford's 'dark lantern' – a lantern, that is, with an inbuilt arrangement to conceal its own light (viii, 20), an appropriate instrument for the covertness that is associated with the legal process through which illumination is reached.

At the threshold of his own house, Frankford imaginatively anticipates his movement through it as he goes over the keys one by one:

This is the key that opes my outward gate;  
This is the hall door; this my withdrawing chamber.  
But this, that door that's bawd unto my shame,  
Fountain and spring of all my bleeding thoughts,  
Where the most hallowed order and true knot  
Of nuptial sanctity hath been profaned.  
It leads to my polluted bed-chamber,  
Once my terrestrial heaven, now my earth's hell,  
The place where sins in all their ripeness dwell.  
But I forgot myself; now to my gate.

(xiii, 8–17)

Frankford's rhetorical journey charts a movement towards discovery. The intricate network of gates and doors and chambers traversed in the discovery scene becomes a sinister realization of the 'labyrinth of sin', the 'maze' that Anne felt herself engulfed in as Wendoll seduced her (vi, 159–60). Significantly, Anne's expression of bewilderment was met by Wendoll's triumphant metaphor of entry:

The path to pleasure, and the gate to bliss,  
Which on your lips I knock at with a kiss.

(vi, 161–2)

Frankford, standing with the keys of his own house in his hands, embodies the paradox of the cuckolded householder's situation. Adultery, in early modern England, was at once a personal and private misfortune, and a violation of ownership and usurpation of property. At the same time, his position is one of peculiar alienation, for the contents of his locked cabin are his wife and her lover, not what he has pleasurably hoarded but a store that has been emptied out. He has to enter from outside to penetrate an inner sanctum already occupied. His situation, thus, defines both his authority and his displacement from his bed and board. The key becomes a token of proprietorial access and of exclusion.

As he proceeds into the interior of his house, he takes not only Nick but also the theatre audience with him. The theatrical implication of this inward journey is underlined by Nick's comment as they

negotiate the gate: 'It must ope with far less noise than Cripplegate, or your plot's dashed' (xiii, 18–19). Cripplegate was the very gate through which the audience passed to come to the Red Bull where, it seems, *A Woman Killed* was most often performed.<sup>25</sup> The analogy with playgoing not only points up the fictional element in the construction of proof, but also the difference between the evidentiary 'plot' within the play, and the function of the dramatic plot in this scene. The former is aimed at anagnorisis, even if Frankford is almost convinced of the sight that awaits him, but the latter is concerned with *exposure*, for the audience already knows what Frankford is uncertain of. What lies beyond his 'last door' is framed as a 'spectacle' as Frankford pauses:

O keep my eyes, you heavens, before I enter,  
 From any sight that may transfix my soul.  
 Or if there be so black a spectacle,  
 O strike mine eyes stark blind;

(xiii, 27–34)

As he 'enters', however, he exits from the stage space. Immediately after his second 'entry' into the bedroom come dramatic exits from the inner chamber – 'Enter Wendoll, running ... Frankford after him'. The scene of adultery – the centre of the action – remains invisible to the audience. Even Nick has to stop short of the bedroom door. His role, like the playgoer's, is to watch Frankford enter and await his response to what he has seen. The scene stages evidentiary action rather than evidence, the act of viewing rather than the spectacle. The door that blocks theatrical visibility is an appropriate symbol for the play's pre-occupation, here, with both what cannot be shown, and the staged and constructed nature of seeing itself.

Fletcher's deposition on behalf of his erstwhile master in the Edmunds case illustrates the relationship between the terms of theatrical and legal representation. Asked whether he saw his mistress and Covill 'lye together', Fletcher says he did not, but that one night, when his master was out and his mistress was 'almost in bedd', he saw Covile 'goe upp thither to hir'.<sup>26</sup> The candle in the room was put out by Covile, whereupon Fletcher was asked by his mistress to light it again. But he could not get into the room as Covill had shut the door 'against ... him':

... and in the shutting of yt he did see ... Covills white band and a peece of his ... gowne did hange oute at the ... chamber doare ... All

which he saith he might and did easilie see and decerne by suche lighte as came thorough two windows there, from the candle lighte either in the hall or kitchen of the same howse.<sup>27</sup>

The closed chamber door at which Fletcher's eyes had to stop is emblematic of the limits of evidentiary vision in sexual litigation. The conjunction of darkness and candle light filtering in through holes and corners, reminiscent of Frankford's 'dark lantern', captures the distinctive combination of invisibility and spectatorship that characterizes the evidentiary experience. But when Fletcher narrates this episode in court, the details of the closed door and the bits of garment caught in it become the metonymic tokens which imaginatively evoke in a legal space what the door's opacity conceals. Frankford, the informed husband, unlike Fletcher, the curious servant, can go into the room to witness the 'black ... spectacle' (xiii, 29). But the use of stage space to mark the contrast between his vantage point and that of Nick and the audience dramatizes the representational limits of the theatre, analogous to those of the courtroom.

However, the play is not merely staging the limits of its own medium. By focusing on the impossibility of showing certain things on stage, it is making a more positive theatrical point about the motives of dramatic as well as legal representation, and about contemporary connotations of particular spaces and actions. The unseen bed-chamber is foregrounded as the end point of Frankford's inward journey. It contains the ultimate ocular proof that will enable him to '[place] his action' (xiii, 39), and the final 'scene' in the drama of disclosure that the audience cross Cripplegate to watch. Thus, the very denial of the bed-chamber's actual presentation on stage reinforces the sense of its climactic importance and the related notion of its sanctity and inaccessibility. Such facts as servants' pallets often being placed next to the beds, historians have suggested, prove the inappropriateness of applying notions of privacy to the bed and its associated activities in the early modern period.<sup>28</sup> But, given this sharing of private spaces, Heywood's theatrical segregation of the bed-chamber is all the more pointed. It dramatizes an intangible, but nonetheless real feeling for privacy that could be experienced in spite of, and perhaps even because of the physical limits to it.<sup>29</sup> Significantly, beds were among the most commonly used large properties in the Red Bull, whose repertory contains at least seventeen scenes showing beds.<sup>30</sup>

While the bed-chamber itself remains invisible in the play, it is represented through a sudden appearance of people in garments associated with the intimacy of the bed. Wendoll is said to emerge from the



bedroom 'running over the stage in a nightgown'. Anne comes out 'in her smock, nightgown and night attire' (xiii, 78). The breach of propriety involved in such exposure is registered by the servants: Jenkin exclaims, 'O Lord, mistress, how came this to pass? My master is run away in his shirt, and never so much as called me to bring his clothes after him' (148–50). As Frankford goes for Wendoll 'with his sword drawn', 'the maid in her smock stays his hand' (68), and the servants enter the stage 'as newly come out of bed' (145). Bed-clothes, here, stand for an order of privacy that is defined through the possession and use of certain household objects, not merely through the increasing differentiation of space. Sisly's quip, earlier, as she carries the keys up to her mistress – 'I am neither pillow nor bolster, but I know more than both' (xii, 26–7) – touches on the association of some of these articles with the notion of sexual knowledge and secrecy. It is this privacy that is violated and made visible as the members of a household gather in a common space before one another and before an audience, in their night-clothes.

The necessary murkiness of evidence collection in Heywood's play, however, is neatly absorbed into the ensuing drama of judgement and pardon which restores the gentility that has defined Frankford from his first soliloquy. The dirty business of ferreting out adultery is relegated to a single dark night of what Milton calls 'unmanly indignities', in which master and servant have to act in collusion.<sup>31</sup>

### Judgement and mercy

When Frankford retires to his study to prepare the 'sentence', leaving Anne standing in her nightgown before the rest, she clinches the indignity of the exposure in conflating guilt and shame in such a situation:

See what guilt is: here stand I in this place,  
Ashamed to look my servants in the face.

(xiii, 151–2)

Immediately after, Frankford emerges and delivers the prelude to his verdict:

My words are registered in heaven already;  
... I'll not martyr thee,  
Nor mark thee for a strumpet, but with usage  
Of more humility torment thy soul,  
And kill thee, even with kindness.

(xiii, 153–7)

The cruder evidentiary exercise associated with the judicial process is disclaimed, as the language invokes a higher order of justice. This recalls and smooths over the more frank coexistence of legal and divine notions of judgement at the moment of discovery, when Nick is impatient for his master to clinch the 'case' by entering the room and catching them in the act (xiii, 36–9), and Frankford desists from a violent action at the thought of damning 'two precious souls / Bought with my Saviour's blood' by sending them 'laden / With all their scarlet sins upon their backs' (xiii, 45–9). It also recalls the combination of a calculating evidentiary concern and a providential imagination simultaneously registered in John Edmunds's annotations of his wife's love letters.

Frankford's 'sentence' defines its own refinement by contrast with more extreme and grosser forms of punishment – 'I'll not ... mark thee for a strumpet.' The self-conscious decency of his 'usage / Of more humility' is recapitulated and underlined at the play's conclusion in Sir Francis's comment that Frankford's penalty would have been less effective, had he 'with threats and usage bad / Punished her sin' (xvii, 134–5). The repudiation of the implied vulgarity of 'usage bad' is configured in terms of a more Christian, more 'kind' judgement – 'a mild sentence' (xiii, 172). What Frankford decrees is, in effect, a separation from bed and board (159–81), the usual verdict of church courts in cases of proved adultery, when one of the parties sought 'divorce' on that ground. The commonest penalty for adultery was, in fact, public penance in a sheet.<sup>32</sup> But the generosity of Frankford's sentence is defined against Anne's imagination of severer punishments, expressed in her first, instinctive, fearful response to the exposure, and her plea for kindness:

... mark not my face  
Nor hack me with your sword, but let me go  
Perfect and undeformed to my tomb.

(xiii, 99–101)

Later, while she waits for her sentence, she expects, even craves a greater, and cruder, penalty than that which she would receive from ecclesiastical authorities:

I would have this hand cut off, these my breasts seared,  
Be racked, strappadoed, put to any torment.

(xiii, 136–7)

In part, this should be seen in the context of the debate over punitive attitudes to adultery that culminated with the Puritans' triumph in the act of 1650, but which began as early as the mid-sixteenth century.<sup>33</sup> Parliament's efforts to make adultery a criminal offence started with the penal bill of 1549. From 1584, the Puritans began to urge the parliament to make adultery a felony, and by 1624 the death penalty had been proposed. Anne's visualization of her defacement and death carries resonances of the Puritan attitude, and recalls Wendoll's half-humorous remark on her insistent talk of the soul's sin even as she succumbed to temptation: 'Fie, fie, you talk too like a puritan' (xi, 109). Nor was the fitness of the death penalty – or, more specifically, the rightful killing of the adulterous wife by the husband – an exclusively Puritan notion: its provenance in England was older and wider. Not only the Mosaic law but also humanists such as Erasmus and More had criticized the leniency of church courts, and endorsed the legitimacy of murdering a wife caught in the act.<sup>34</sup> This body of opinions provides the background to Nick's exasperation (xiii, 35–40, 50–1, 67–8) and Sir Francis's surprise at Frankford's 'too mild ... spirit':

... Had it been my case  
 Their souls at once had from their breasts been freed.  
 Death to such deeds of shame is the due meed.

(xvii, 20–2)

What may also lie behind Anne's lurid punitive images were the well-established municipal practices of whipping, striping, stocking and carting for sexual offences, at the initiative of local magistrates, justices of the peace and constables, on the ground that fornication was a breach of the peace.<sup>35</sup>

Interestingly, violent physical punishments such as 'breaking on the wheel' as well as husbands hacking unfaithful wives were part of a generic tradition as well. The Italian tales of adultery, man's revenge and God's judgement, the sources for so many contemporary English plays about adultery, abound with such excesses. In Painter's novella, *Of a Lady of Thurin*, one of the source stories of *A Woman Killed*, the lady, 'taken in adulterie', is punished by her husband by being shut up and starved in a chamber with her hanged lover's corpse.<sup>36</sup> With a pointed difference, Heywood makes Frankford let Wendoll off with the thought that his own conscience pangs 'will be revenge enough', thanking the maid for staying his 'bloody sacrifice' 'like an angel's hand' (xiii, 69–76). The 'bloody revenge' formula is consciously evoked and then rejected: 'Pray, pray, lest I live to see / Thee Judas-like hanged

on an elder-tree' (77–8). Protestant judgement books such as Thomas Beard's *The Theatre of God's Judgements* (1597) and John Reynolds's *The Triumphs of God's Revenge* (1621) constituted a related genre, as populist and vivid as the sensationalist tales of passion, and working similarly by illustrating their moral point through a series of 'histories'.

Anne's apprehension and expectation of physical defacement and death, then, allude to a literary tradition at the same time as they suggest Puritan opinions and disciplinary practices.<sup>37</sup> Significantly, Heywood's own compendium of examples, *The Generall History of Women*, written in the format of Reynolds's *Triumphs* and Beard's *Theatre*, sets itself apart from these in its express distaste of violent private revenge for adultery: 'much is that inhumane rashnesse to be avoided, by which men have undertook to be their own justifiers, and have mingled the pollution of their beds, with the blood of the delinquents'.<sup>38</sup>

Frankford's stance, then, is not just the personal predilection of a character and his choice of 'mild' rather than Puritan measures, but also a means through which Heywood's essentially English play defines its generic distinction from the more extreme, crude and Italianate treatments of the subject. This, in turn, is an attribute of the 'domesticity' of his play, home-bred in both a national and a social sense. The enclosing of the process of justice within the household is an aspect of this comprehensive domestication. Both the interrogation (xiii, 108) and the adjudication (158) are conducted in Frankford's house. It is not as though actual law is never evoked so that the play itself becomes the legal arena. The judicial machinery is perceptibly present (iii, 92 ff.; iv, 6–7; v, 1–14), but placed separately in the sub-plot. This civilized containment of adultery and of the process of justice indicates the link of Frankford's 'kindness' with respectability and family prestige. Compare the testimony of Mr. Swinnerton at the trial of Sir Edward Moseley for the alleged rape of his wife. When asked why he had delayed bringing the case to court and attempted private negotiation instead, he said, 'if he could satisfy me, that my Wife was consenting to it, I had rather wave the Prosecution, than bring my Wife and myself upon the stage; and this was my intent'.<sup>39</sup>

### Kindness to kinship

The impression of a class salvaging its self-image through a refinement even in punishment and penitence is consolidated in the final scene where an entire fraternity of gentlemen surround Anne's deathbed. But the viewers of this spectacle are in a sense all insiders, bound together in a complicated network of obligations, tied by investments in the 'kindness' of kindreds. The kinships forged in the sub-plot are

reasserted in the last hour of reunion, pardon and death. It is Anne's brother, Sir Francis, who articulates this:

O Master Frankford, all the near alliance  
 I lose by her shall be supplied in thee.  
 You are my brother by the nearest way;  
 Her kindred hath fallen off, but yours doth stay.  
(xvii, 101–4)

The elegiac tone of the speeches over Anne's body is itself a genteel note, markedly different from the derangement and distraction at the end of so many Jacobean tragedies of adultery and revenge, and is almost self-congratulatory:

... Brothers and gentlemen,  
 All we that can plead interest in her grief,  
 Bestow upon her body funeral tears.  
 Brother, had you with threats and usage bad  
 Punished her sin, the grief of her offence  
 Had not with such true sorrow touched her heart.  
(xvii, 130–5)

The 'grace and humanity' in Frankford to which Anne appeals is drawn into a highly wrought, hyperbolic scene of pardon that effectively completes the ascent of the action from the level of unmanly indignity. Frankford's restoration of the status of a wife and a mother to Anne (115–16), likewise, clinches his ultimate deviation from Anne's more Puritan expectations, as expressed at the moment of discovery:

... To call you husband!  
 O me most wretched, I have lost that name;  
 I am no more your wife.  
(xiii, 81–4)

The 'new [marriage]' reconciling the estranged pair at the end was a possibility allowed by the canonical divorce 'from bed and board', but not by extreme Protestant views of the finality of the breach caused by adultery.<sup>40</sup> Nor is Frankford the sole determinant of the play's closing ambience. The frail, self-starved, repentant adulteress languishing in her chamber is herself a figure of refinement, noticeably unlike the lady of Thurin in Painter's story, cruelly starved by her husband.

However, the less exalted basis of the impeccable resolution is not as perfectly blended into the 'grace' and 'kindness' of the scenes of judgement and pardon in Heywood's generic vision, as in the characters' perception. Even at the moment of genuine regret and self-awareness, Frankford reinstates his dignity through display as he bestows the most opulent monuments on Anne's grave

... this funeral epitaph,  
Which on her marble tomb shall be engraved.  
In golden letters shall these words be filled:  
Here lies one whom her husband's kindness killed.  
(xvii, 137–40)

Funeral monuments and tombstones were among the most expressive symbols of family honour and class prestige in the period.<sup>41</sup> So they are peculiarly suited to communicating the compound of sentimentality and bourgeois respectability that characterizes Frankford's milieu; the appropriate final expression of a sensibility that conflated 'fear of shame, regard of honour / The blemish of [his] house' and '[his] dear love', during Anne's interrogation (xiii, 118–19).

The proprietorial basis of Frankford's magnanimity and civility is emphasized earlier, in the judgement itself:

Go, make thee ready in thy best attire,  
Take with thee all thy gowns, all thy apparel;  
...  
Choose thee a bed and hangings for a chamber;  
And get thee to my manor seven mile off,  
Where live. 'Tis thine; I freely give it thee.  
My tenants by shall furnish thee with wains  
...  
Choose which of my servants thou likest best,  
And they are thine to attend thee.  
(xiii, 159–72)

This 'sentence' points up the fragility of the woman's experience of privacy in relation to her husband's property.<sup>42</sup> Clothing, bed and hangings – the very items associated in the play with intimate use, and with a private, even secret existence – are marked out, here, as Frankford's, though referred to as '[her] stuff'. For Anne, the privacy that certain possessions make possible is precarious, because her proprietorship is

virtual. For Frankford, the act of judgement resolves the ambiguity of his evidence-collection, which involved a strange combination of ownership and alienation, the householder himself having to assume the role of a trespasser. That alienation is now foisted on to Anne, while Frankford's reassertion of his right over her property undermines the physical separation. Even the place of her banishment is one of *his* numerous manors (xvi, 8–10). The judgement, indeed, is no less an inventory than Frankford's soliloquy in the study – only a more explicitly material one. It purports to 'freely give' to Anne the material elements of a privacy which it actually takes away from her. Paradoxically, her theatrical presence is henceforth consigned to her bed-chamber. But the bed, now finally presented as a central property for the first time (xvii, 38), is associated with starvation, death and open penitence, rather than being the site of erotic pleasure or sexual transgression. Anne's response in self-starvation is, at one level, a reclaiming of the dignity denied her by the inequality of the magnanimous verdict. Her body is the only private possession she is left with, and through its control, she can 'redeem her honour' (xiii, 135), and resist being assimilated into Frankford's objects of bounty, both material and intangible – manor-houses, beds and servants, as well as disproportionate and self-conscious lenity:

He cannot be so base as to forgive me,  
Nor I so base as to accept his pardon.

(xiii, 140–1)

Frankford's 'usage / Of more humility' carries resonances of a humiliation that can result from a calculated denial of the dignity of justice. It is precisely this humbling that Anne resists by her spirited self-abnegation.

The full significance of 'kindness', thus, is part of the play's complex vision of the genteelness of its action. At once denoting an act of equity and a criterion of gentility, 'kindness' encapsulates the range of experience and attitudes that adjudication of adultery brings together in a bourgeois domestic set-up. The fact of adultery, after all, challenges both senses of the word. In *A Woman Killed*, kindness, understood in this double sense, is what reunites the processes of evidence and of judgement in both moral and generic terms, albeit in an uneasy and self-aware union. What also straddles discovery and justice is spectatorship; but voyeuristic gaze and evidentiary disclosure give over, on the one hand, to the penitent adulteress's self-presentation as a pitiful spectacle, and on the other, to a spectacle of judgement and pardon.

Though the real-life adultery case against Bridget Edmunds lacks such a neat and self-conscious ending, it helps us understand historically the domestication of justice in a play like *A Woman Killed*, dealing with adultery as a private wrong, privately judged. It enacts the operations of justice within a bourgeois middle-class home in the early stages of investigation, and reveals the containment of justice within the close-knit academic community at the end. While Covile is said to have been let off with a warning after compurgation by Fellows of various Cambridge colleges,<sup>43</sup> the records do not offer space to Bridget for self-presentation, beyond telling us that she was subjected to public penance. Nor is she traceable among the surviving parish records, while Covile died, full of respectability, as the Prebendary of Lincoln, and John Edmunds as a successful Cambridge businessman.

## Notes

1. Cambridge University Library, V.C. Court I. 3, 109<sup>v</sup>. Sexual litigation in post-Reformation England usually came under the jurisdiction of ecclesiastical courts, which, for this association, were also known as 'bawdy courts'. On the function of church courts in early modern England, see R. Houlbrooke, *Church Courts and the People during the English Reformation 1520–1570* (Oxford University Press, 1979); M. Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge University Press, 1987). V.C. Court III. 5, item 63 provides the circumstances of the Edmunds case being tried there instead. I am grateful to Elisabeth Leedham-Green for drawing my attention to this set of records.
2. I refer here to V.C. Court III. 5, items 66, 67a and 68 respectively. All images are reproduced by permission of the Syndics of the Cambridge University Library.
3. Cambridge University Library, V.C. Court III. 5, item 68.
4. *Ibid.*, item 61.
5. *Ibid.*, item 72.
6. Cambridge University Library, V.C. Court I. 3, 112<sup>v</sup>.
7. *Ibid.*, 111.
8. *Ibid.*, 112<sup>v</sup>.
9. See the Edmunds's servant John Fletcher's deposition cited below, and CUL, V.C. Court I.3, 120–120<sup>v</sup>. See also V.C. Court I.3, 113, where John Edmunds senior deposes about how he knocked on his son's door before pushing the door open to go in and find his daughter-in-law Bridget 'barelegged, without anie hosen on', at play with Covile.
10. All references are to T. Heywood, *A Woman Killed with Kindness*, 2nd edition, ed. B. Scobie (A. & C. Black, 1991).
11. Michel de Montaigne, *Essays*, trans. J. Florio, 3 vols (Dent, 1910), vol. I, 254–5.
12. Heywood, *A Woman Killed with Kindness*, i, 12–24, 55–72.



13. On the need to extend gentlemanly civility beyond wealth and heredity to include certain cultural values and sensibilities, see A. Bryson, 'The Rhetoric of Status: Gesture, Demeanour and the Image of the Gentleman in Sixteenth- and Seventeenth-Century England', in L. Gent and N. Llewellyn (eds), *Renaissance Bodies: the Human Figure in English Culture c. 1540–1660* (Reaktion, 1990), and A. Bryson, *From Courtesy to Civility: Changing Codes of Conduct in Early Modern England* (Oxford University Press, 1998).
14. Cambridge University Library, V.C. Court I. 3, 116.
15. On spatial hierarchy in the early modern English house, developing from the increasing differentiation of domestic spaces, see L.C. Orlin, "'The Causes and Reasons of All Artificial Things" in the Elizabethan Domestic Environment', *Medieval and Renaissance Drama in England* 7 (1994), 19–75.
16. A. Day, *English Secretorie, or, Methode of writing epistles and letters* (R. Jones, 1592), Book II, 109. For a related argument to mine, see A. Stewart, 'The Early Modern Closet Discovered', *Representations* 50 (Spring 1995), 76–100, though his primary focus is not on the surveillance of the feminine.
17. Advice tracts for the landed classes throughout the first half of the seventeenth century abounded in instructions to maintain privacy as part of a proper maintenance of position, authority and domestic order. The advice of Richard, Earl of Charlbury, to his son to 'withdraw [himself] into [his] closett or some private part of [his] chamber' is given in this overall context (Huntington Library; Ellesmere Papers, EL 34/b/2 16, 165). See L. Pollock's brief survey of the informal circulation of such literature among elite circles: 'Living on the Stage of the World: the Concept of Privacy in Early Modern England', in A. Wilson (ed.), *Rethinking Social History: English Society 1570–1920 and its Interpretation* (Manchester University Press, 1993), 78–96.
18. I use 'oeconomy' to denote the complex structure of household governance, including financial relations, marital interaction, spatial organization and the supervision of servants. For the early modern deployment of this concept and its derivation from Aristotle and Xenophon, see L. Hutson, *The Usurer's Daughter: Male Friendship and Fictions of Women in Sixteenth-Century England* (Routledge, 1994), 30–41, and Orlin, "'The Causes and Reasons'", 11–12.
19. See C. Platt, *The Great Rebuilding of Tudor and Stuart England: Revolutions in Architectural Taste* (UCL Press, 1994); A.T. Friedman, *House and Household in Elizabethan England: Wollaton Hall and the Willoughby Family* (Chicago University Press, 1989); Orlin, "'The Causes and Reasons'".
20. Platt, *The Great Rebuilding*, esp. ch. 1.
21. V. Skipp, *Crisis and Development: an Ecological Case-Study of the Forest of Arden 1570–1674* (Cambridge University Press, 1978), 62–3. See W. Harrison, *The Description of England by William Harrison*, ed. Georges Edelen (Chicago University Press, 1968), Book I, ch. 5, on the fluidity of class boundaries between the first three of Harrison's 'four degrees of people'. See also K. Wrightson's analysis of Harrison in *English Society 1580–1680* (Hutchinson, 1982), ch. 1.
22. See Pollock, 'Living on the Stage', 79.
23. Cambridge University Library, V.C. Court I. 3, 119<sup>v</sup>–120<sup>v</sup>.
24. Ingram, *Church Courts, Sex and Marriage*, 245.

25. Heywood, *A Woman Killed with Kindness*, 65, n. 18; R.W. Van Fossen's edition (Manchester University Press, 1961), repr. 1970, 72, n. 18; A. Gurr, *The Shakespearean Stage, 1574–1642* (Cambridge University Press, 1980), 222. Van Fossen assumes that Cripplegate had a reputation for creaking loudly when opened (72, n. 18).
26. CUL, V.C. Court I.3, 120.
27. *Ibid.*, 120v.
28. See, for example, Orlin, "'The Causes and Reasons'", 185. For older, classic statements of this position, see L. Stone, *The Family, Sex and Marriage in England, 1500–1800* (Weidenfeld and Nicolson, 1977), and P. Ariès and G. Duby (eds), *A History of Private Life*, 5 vols (Belknap, 1987–91), vol. 3. Jurgens Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Polity, 1992) and N. Elias, *The Civilizing Process* (Oxford University Press, 1986) share Stone's developmental chronology. For a critique, see C. Calhoun (ed.), *Habermas and the Public Sphere* (MIT Press, 1992). On the historiography of gender roles and separate spheres, and the need for a more nuanced approach to what 'privacy' or 'publicity' meant to historical subjects, see Amanda Vickery, 'Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History', *The Historical Journal* (1993) 384–414; see also her *The Gentleman's Daughter: Women's Lives in Georgian England* (Yale University Press, 1998).
29. See Pollock, 'Living on the Stage', for a similar argument for the existence of a concept of privacy, not to be confused with the material form that it took or lacked, though she focuses on the specific, politicized circumstances of the élite household.
30. See G.F. Reynolds, *Staging of Elizabethan Plays at the Red Bull Theatre, 1605–1625* (Oxford University Press, 1940), 65–70, and Gurr, *The Shakespearean Stage*, 171, 175.
31. J. Milton, *The Doctrine and Discipline of Divorce* (1643), in D.M. Wolfe (ed.), *Complete Prose of John Milton* (Yale, 1953–82), vol. II (1959), ed. E. Sirluck, 337. It is in connection with the difficulties of proving adultery, much discussed in the wake of the severe penal act of 1650, that Milton regrets the undignified means of investigation necessitated by the stringent evidentiary requirements of the act. (Cf. *Ibid.*, 347, on the 'uncomely exigencies' that Henry VIII was reduced to, and the 'obscene evidence' required, to prove that Anne of Cleves had been 'carnally known by Prince Arthur'.) On the Act of 1650, and the proposals for amending it so as to admit 'reasonable presumption' rather than certain evidence as a ground for conviction, see K. Thomas, 'Puritans and Adultery: the Act of 1650 Reconsidered', in D. Pennington and K. Thomas (eds), *Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill* (Oxford University Press, 1978), 278–80. Note that Milton argues for the jurisdiction of divorce as being rightfully a 'domestic prerogative', and most properly belonging to the husband, in *The Doctrine and Discipline of Divorce*, ch. XXI: see *Complete Prose*, vol. II, 343–4. This is suggestive of the thin borderline between the Reformation notion of companionate marriage and the dubious private justice that Heywood brings into scrutiny.

32. See F.G. Emmison, *Elizabethan Life: Morals and the Church Courts* (Essex Record Office, 1973), 281–91; Houlbrooke, *Church Courts and the People*, 46, 70; H. Hall, 'Some Elizabethan Penances in the Diocese of Ely', *Transactions of the Royal Historical Society*, third series, 1 (1907) 263–77.
33. See Thomas, 'Puritans and Adultery', for a seminal discussion of this background of ideas and legislation.
34. Thomas, 'Puritans and Adultery', 269; and P.D.L. Avis, 'Moses and the Magistrate: a Study in the Rise of Protestant Legalism', *Journal of Ecclesiastical History* 26 (1972), 149–72. For Heywood's list of harsh penalties in ancient civilizations, see *The Generall History of Women* (W.H., 1657), 605–6.
35. Thomas, 'Puritans and Adultery', 265–6. See also R.B. Bond, "'Dark Deeds Darkly Answered": Thomas Becon's Homily against Whoredom and Adultery, its Context, and its Affiliations with Three Shakespearean Plays', *Sixteenth Century Journal* 16 (1985), 191–200 on the disparity between the lurid visualizations of punishment in homilies against adultery (such as Thomas Becon's, 1547) and the relatively moderate and non-violent penitentiary procedure (penance in a sheet) in early modern England.
36. W. Painter, *The Palace of Pleasure: Elizabethan Versions of Italian and French Novels ... Done Into English by William Painter*, ed. J. Jacobs, 3 vols (Dover, 1966), vol. 1, Novella 43.
37. Popular compendia of stories of passion and violence translated from Italian tales, such as J. Reynolds's *The Triumphs of God's Revenge* (1621) are full of hideously appropriate penalties for offenders. These fed into the existent literary stereotype of Italy, vociferously reiterated by the likes of Roger Ascham and Fynes Moryson; see Painter, *The Palace of Pleasure*, xix; Moryson, *Shakespeare's Europe*, introd. C. Hughes (Sherratt & Hughes, 1903), 160. Cf. the related, and equally sensationalist, genre of Protestant judgement books, for example, Thomas Beard's *The Theatre of Gods judgements* (A. Islip, 1597). Interestingly, Italian tales seem to have determined perceptions of social and amorous behaviour in the Edmunds case. One of the grounds on which Bridget objects to George Mountain as a witness is that '[he] read lectures to [her] of bawdry <viz: the pallace of pleasure as she termeth it' (Cambridge University Library, V.C. Court III.5, item 69). Whether this was Pettie's *Pettie Pallace of Pettie his Pleasure* (1576), or Painter's collection, these amorous stories come up, and are disputed, in the trial. Mountain protests that he read out 'Bocchas in Frenche', where 'there was noe bawdry at all' – referring, presumably, to the *Decameron*, of which several pre-1596 French editions were available in the Cambridge libraries. Bridget, however, persists 'that she meanethe ... an englishe booke ... the Palace of pleasure' (*Ibid.*, I, 3, 117).
38. See Heywood, *The Generall History of Women*, 248–9; but note the qualification: 'Neither is this discourse aimed to perswade men to too much remissenne in winking at ... the adulterie of their wives ... Disgracefull it was in Philip ... of Macedon, who having conquered divers nations ... could not govern one wife at home.' Frankford's response, ostensibly, is positioned between these two extremes, and hinges on the link between moderation and governance that was assumed in so many of the conduct books of the period.
39. *Harleian Miscellany*, 8 vols (T. Osborne, 1744–53), vol. III, 476 ff.

40. See L. Dibdin and C. Healy, *English Church Law and Divorce* (1912); Houlbrooke, *Church Courts and the People*, 67–75; Ingram, *Church Courts, Sex and Marriage*, 171–8; and J.H. Baker, *An Introduction to English Legal History*, 3rd edition (Butterworths, 1990), 559–64.
41. See N. Llewellyn, 'The Royal Body: Monuments to the Dead, For the Living', in L. Gent and N. Llewellyn (eds), *Renaissance Bodies; the Art of Death: Visual Culture in the English Death Ritual c.1500–c.1800* (1991); and 'Honour in Life, Death and in the Memory: Funeral Monuments in Early Modern England', *Transactions of the Royal Historical Society* 6 (1996), 179–200.
42. Revealingly, Heywood's company paid out less for the play itself than for Anne's dress – 'vellvet & satten for the womon gowne of blacke vellvet': see W.W. Greg (ed.), *Henslowe's Diary*, 2 vols (Bullen, 1904–8), vol. 1, 119<sup>v</sup>–120<sup>v</sup>.
43. Cambridge University Library, V.C. Court I. 3, 111, 114<sup>v</sup>.

# 5

## ‘She has that in her belly will dry up your ink’: Femininity as Challenge in the ‘Equitable Drama’ of John Webster

*Ina Habermann*

Theatre in early modern England has for some time been recognized as a crucial form of cultural exchange. It not only expresses but also inquires into and mediates between different types of social performativity, thus cutting across the boundaries of institutional discourses. This essay will focus on the dialogue between theatre and the law, emphasizing both the historical and structural dimensions of this exchange. The notion of equity – painstaking inquiry and fair judgement in consideration of the particular circumstances of a case – emerges as a privileged point of contact between the court and the stage.<sup>1</sup> While equity appears as a crucial and contentious subject of contemporary legal debate, drama deals in the particular and unusual, and seeks to interrogate the ethics and the complexity of social interaction. The most complex cases in a patriarchal society often involve women, and John Webster perhaps more than any other contemporary playwright used the stage to explore the relation between women and the law. I will argue that his is a type of forensic drama which foregrounds equity by placing the issues of female characters at the centre of the action – as the law interrogates femininity, femininity interrogates the law. *The Devil’s Law Case* (1619) offers a dramatization of equity in which the disruptive potential of female sexuality is overcome in favour of social cohesion. *The White Devil* (1612) presents a much more disturbing scenario, exploring both the notion of revenge and the dramatic genre of revenge tragedy. As passion reigns on stage without let or hindrance, the practice of equity is relegated to the audience. Equally, in *The Duchess of Malfi* (1614), equity is overruled by a

prerogative jurisdiction which confuses judgement based on conscience with the self-interest of the mighty. In each case, Webster's equitable drama presents femininity as the touchstone of the law. Once the law is considered as applied politics, this approach emerges as highly political. 'Webster's repeated dramatization of the judgement situation', as Dena Goldberg argues, 'reflects his concern with legal practice and legal philosophy as key manifestations of the realities of political power.'<sup>2</sup> *The Duchess of Malfi* finally sublimates the legal context in order to foreground an ethical dimension. The play explores the relation between equity and a Christian charity with female connotations, transforming the audience's disposition for critical judgement into the tragic emotion of pity.

## [I]

Historically, the Inns of Court played a prominent role in the development of drama in early modern England. Theatrical activities at the inns included professional and ecclesiastical revels as well as masques and dramatized pleading exercises like moots and boltings. Learning the law, recreation through art, competition for advancement and the celebration of the institution all took place in a theatrical framework.<sup>3</sup> At this point, an absolute differentiation between dramatic entertainment and forensic inquiry had not yet taken place. Howard Harvey explains, with regard to the Basoche, the society of the law clerks of Paris, how heavily early modern lawyers were involved with the theatre. The law clerks'

interest in the theatre was a natural one, for they participated daily in the natural drama of the courtroom[.] ... [W]e find the law clerks, in 1442, invited by the Confrères de la Passion to assist them with the comic interludes provided between the *journées* of their mystery plays. From that moment the Basochiens seem to have arrogated to themselves the more or less exclusive privilege of staging comic plays in Paris ... When real cases were lacking, the clerks probably tried fictitious ones, as law student groups do to this day. These imaginary lawsuits, as well as the real ones, must have given the law clerks good training in the art of dramatic composition, since the preparation and trial of a case in the courtroom is essentially a dramatic art. In addition to these serious exercises, the Court of the Basoche began early to prepare burlesque lawsuits, called *causes grasses* because they were given at carnival time, lawsuits which provided special opportunities for practice in the writing and playing of farce comedy.<sup>4</sup>

When an institutionalized and professional theatre emerged in the latter part of the sixteenth century, many dramatists had legal training and/or were involved with the law at various levels, and lawyers formed an important group within London audiences, especially in the indoor theatres. Once the professional differentiation between the legal sphere and the theatre became more pronounced in the early modern period, lawyers sought to discount the theatrical element in their professional activity while actors and defenders of the theatre clung to the idea of their usefulness to society and their continuing role in moral education. Not surprisingly, this is also the time when writers began to seek for themselves a status as authors of literature, and professional dramatists and other writers published their work in print. In a historical moment around 1600, professional differentiation was far advanced, but the old connections and shared roots were still visible. Deliberative and forensic inquiry based on rhetoric was still at the centre of both legal and theatrical action, which goes some way towards explaining the structural affinity between theatre and the law. In his book *The Tudor Play of Mind*, Joel Altman draws attention to this connection which in fact goes back to classical times. He refers to Cicero, who observed with regard to forensic oratory

that it was not enough to examine the particular question in any case – whether so-and-so did such-and-such, or should do such-and-such – but that it was necessary to seek the universal consideration behind the particular instance in order to understand its significance. Correlatively, by considering *all* the particulars of an act – the full set of circumstances – one could discover a new way of seeing the case which might drastically alter one's judgement of its nature, and result in the establishment of virtually a 'new kind of law'. Such was judgment in equity. These doctrines, constituting the more philosophic tradition in the transmission of rhetoric, informed the practice of judicial and deliberative oratory in the succeeding centuries.<sup>5</sup>

Emerging Tudor drama, as Altman argues, was essentially rhetorical, and playwrights did not 'realize the potential for complex understanding that is inherent in mimesis'.<sup>6</sup> Towards the end of the century, however, they increasingly did, even as their faith in discursive reasoning began to wane. Events had to play themselves out.

John Webster is a central figure in this development. A member of the Middle Temple, he tapped into the extensive theatrical tradition of

the Inns of Court on which he based his approach to drama. In a chapter on the Middle Temple as a literary centre, M.C. Bradbrook discusses Webster's earliest phase of theatrical activity, his connections with Thomas Overbury and John Ford as well as his collaboration with John Marston. She also gives an overview of the satiric exchange of the *Ho!*-plays and the involvement in occasional revels, a good example of which is preserved in the script of the revels at Gray's Inn in 1594, the *Gesta Grayorum*. Bradbrook concludes that what Webster

acquired from the Inns was a taste for pageantry, a preference for indoor staging, a knowledge of the value of trial scenes, practice in verbal satire and perhaps some insight into the psychology of violence. Above all, he acquired a friend and mentor in the person of John Marston, whose style was to shape his own greatest works.<sup>7</sup>

Considering the emerging culture of empiricism in the aftermath of humanism and the unprecedented importance accorded to experience in the early modern period, it is not accidental that the ancient concept of equity gained new importance in the juridical sphere. Always a feature of prerogative and ecclesiastical law and implicit in every judge's discretion, it formally entered the common law in the shape of the 'action on the case' – a legal action which proceeds from the particularities of a conflict rather than trying to build a case by fitting events to a generalized rule or 'writ'. Webster apparently recognized the inherent theatricality of equity and made it central to his approach to theatre. In his plays, he employs a forensic hermeneutics, creating an equitable drama concerned both with the particularities of a case and with the *action* of it, with the way events play themselves out. While the legal connection is particularly prominent in Webster's plays, I suggest that to a certain extent, all contemporary drama can be regarded as equitable. Plays may contain special questions or hypotheses in the tradition of rhetorical deliberation, but they focus on individual stories, placing them in a broader moral and ethical framework. Moreover, rather than supplying a simple illustration of a problem, theatre gives the audience 'images to think with',<sup>8</sup> which enables an exchange that is dynamic and ultimately unpredictable. The interrogative gestures of equitable drama differ from didactic or homiletic precepts in that they are less determined and depend to a large extent on performative interpretation and the audience's disposition. So there is a double focus, both on the theatrical power of spectacle and on active reception, quite in accordance



with the Sidneian aesthetic of lively presentation, or *energeia*, and the resulting stimulation of critical judgement.

Equitable drama develops the particularities of a case as opposed to legal precepts, and within a patriarchal framework, the most particular cases are often those involving women. As an added bonus, they supply a juicy story for an (all-male) stage play. 'Hard cases make bad law', as lawyers have it, but they do make good drama. Webster deliberately places women's cases at the centre of his work, which distinguishes his approach from that of other dramatists working within the same paradigm. In doing this, I suggest, he stages femininity as a challenge to the law. In early modern England, women's recourse to secular law was much more restricted than that of men, especially if they were married. They feature most prominently in the church courts as well as in secular equity courts such as the Chancery and the Court of Requests.<sup>9</sup> The reason for this is that their involvement in family affairs, their interest in the family property and their influence was often much greater in practice than legal theory allowed. Countless individual grievances, agendas and situations prompted women to search for legal loopholes and alternative solutions or to appeal to authorities on the basis of pity rather than right. Additionally, a large part of legal actions was, and is, concerned with property issues, and women's most valuable property was the body, vulnerable to attack due to the almost exclusively sexual definition of women's honour which blurs the boundary between the material and the personal. Consequently, sexual intrigue and slander were prominent both in the courts – particularly in the church courts which had the official jurisdiction in sexual matters – and in forensic drama. Since such issues had to be staged with 'context', which seemed to dictate a general inquiry into the 'nature of woman', theatre came to play an important role in the popular controversy over women. A particularly striking character in this context is the woman wrongly accused of sexual incontinence, the 'slandered heroine'.<sup>10</sup>

## [II]

Most of Webster's plays feature women whose sexual honour is called into question. *The Devil's Law Case*, *Appius and Virginia*, a tragedy probably written with Heywood in 1622 for boy actors, and *A Cure for a Cuckold*, a city comedy written with Rowley in 1624, offer more or less twisted but fairly conventional slander plots, while the major tragedies – *The White Devil* and *The Duchess of Malfi* – aspire to a higher level of

complexity. In these plays, the female protagonists' guilt is a matter of debate. It is interesting in itself that criticism has often adopted the role of jury and focused on whether Vittoria did actually commit adultery, whether she knew about the murder plots and whether the Duchess was legally married to Antonio on the basis of their clandestine contract *per verba de praesenti*. Such points might indeed have been vital in a contemporary trial under the common law, because if an accusation turned out to be correct, this would usually clear the accuser of the charge of slander. But Webster, more in accordance with the ecclesiastical remedy modelled on the Roman concept of *iniuria*, focuses on malicious intent as the crucial element of slanderous accusations.<sup>11</sup> This aspect is important due to the different gist of the action in these two jurisdictions. The common law mainly considered material aspects while ecclesiastical law (like the secular equity courts) considered the person. Women could therefore bring an action for slander at the common law if they could prove that they had suffered some material loss through the slander, for example the loss of an advantageous marriage. *Iniuria* on the other hand is a broader, more equitable concept because it is concerned with the reputation of the slandered person as well as the conscience of the accuser. Webster's application of this concept leads away from an exclusive focus on the guilt of the accused and opens up a wider context of social interactions and their meanings. The depravity of mighty men and their henchmen is then seen to mitigate the female protagonists' arguable guilt, and female sexuality and procreativity emerge as central issues. Their bodies are the basis on which women try to negotiate their place in the social fabric while the men of the family, brothers in particular, seek to control and exploit them. Patriarchal ruthlessness in this respect exceeds any manoeuvring on the part of the female characters by far. Webster shows their struggles to 'choose their own mates',<sup>12</sup> and explores the consequences for the fashioning of female subjectivity.

In *The Devil's Law Case*,<sup>13</sup> the merchant Romelio tries to arrange a marriage for his sister Jolenta that is advantageous to him. Later, he wants to saddle her with his child by the nun Angiolella, whom he has made pregnant. Every turn of the crazy plot prompts him to suggest some new outrage to his bewildered sister, who wishes to marry her prodigal lover, the nobleman Contarino. The mother, Leonora, seeks to outwit her scheming son by accusing herself of adultery, thus making Romelio a bastard and excluding him from the family inheritance in revenge for his supposed murder of Contarino, whom she also loves. She knows that her agency is based on her role in the dynastic

context, and the transmission of family property depends on her sexual behaviour. 'I will employ thee / In such a subtle combination', she tells her servant Winifred, 'Which will require, to make the practice fit, / Four devils, five advocates, to one woman's wit' (III.3. 392–5). Leonora creates a peculiar variation of the 'slandered heroine': pretending to listen to the promptings of her conscience, she slanders herself in order to slander her son. Between them, the women come up with a tissue of lies dependent on their privileged access to the sphere of female intimacy, which induces the law clerk Sanitonella to remark to the registrar: 'Take her into your office, sir; she has that in her belly / Will dry up your ink, I can tell you' (IV.1. 1–2). Female sexuality is pitted against institutionalized masculinity.

The honourable advocate Ariosto, who claims that 'Bad suits, and not the law, bred the law's shame' (IV.1. 67) refuses Leonora's suit, but the unscrupulous lawyer Contiluppo agrees to plead her case, and they are already on winning street when it turns out that the judge, the Spanish civil lawyer Crispiano in disguise, is the very man named as Romelio's father. He refutes the charge and steps down from the bench, asking Ariosto to perform the office of judge. The law clerk's comment 'Is he a judge? We must then look for all conscience, and no law' (IV.2. 449–50) serves to inform the audience that Ariosto is a practitioner of equity. As Leonora's cunning plan backfires, Romelio is faced with a new charge: Contarino's rival and friend Ercole accuses him of having murdered Contarino. Since no proof is available, Ariosto disregards the requirements of a criminal trial for murder and rules that the issue must be decided in combat between Romelio and Ercole. This legal, if rather archaic, form of duel associates proceedings with those of the High Court of Chivalry where the central issue is the honour of the parties.<sup>14</sup> Contrary to the earlier, illegal duel fought between Contarino and Ercole when they tried to take justice into their own hands, the combat constitutes a trial by ordeal. In accordance with the logic of equity, the ordeal marks the limits of juridical inquiry. The rhetorical flourishes of forensic oratory are one thing, but finding the facts of a case and including all necessary contexts is a tricky task. Legal proceedings are perpetually thwarted by the characters' imaginative plotting and the improbable interventions of coincidence. In acknowledgement of this, Ariosto leaves events to play themselves out, deferring to a higher justice. He thus becomes the advocate of the playwright, as it were, since the stage, in league with higher justice, emerges as the better court where the characters' histrionics can be dealt with in a properly theatrical framework. The

play's closure, like a *charivari*, enables public shaming and penance and ultimately serves to bring the stray sheep back into the fold.<sup>15</sup> Here Webster appears to contradict the contemporary view of theatre highlighted by Dennis Kezar, the 'view of theatre as mistrial'.<sup>16</sup> In the opinion of detractors of the theatre like Stephen Gosson, the theatre misrepresents, and thereby slanders, history as the playwright panders to the audience's taste for sensational stories. Shakespeare, as Kezar argues in readings of *Troilus and Cressida* and *Julius Caesar*,

recognizes the terms of the theatrical economy in which he operates: while the theater is open, no case is closed; when the jury is 'the common eyes', a moment can transform plaintiff into defendant, text into pretext, the carefully wrought self into an appropriated other; when the price of admission buys the audience something as insubstantial as a play, the theater compensates by procuring all that it represents as the interpretive property of this audience.<sup>17</sup>

This is equally true of Webster. After all, who is to decide whether the theatre misrepresents the issues it takes up? In addition, Kezar points to a particular indebtedness of law to theatre which is due to its capacity for dissemination: '[T]heatrical representation, with its potential for limitless reproduction, can contribute to the process whereby an individual legal case lives in history as a constantly relevant and applicable precedent.'<sup>18</sup>

A dramatic interrogation of the limits of law reveals the particular difficulty of coping with female agency in a masculine framework. Women do not behave as prescribed in the conduct book, and there can be no duel to clear up the issue of paternity raised by Leonora. 'I take it / There cannot be more lawful proof i'th' world / Than the oath of the mother' (IV.2. 165–7), as Contilupo argues – but an oath is no proof. Under pressure, Romelio takes recourse to misogynist ranting, which would not have helped him, had not Crispiano been present to contradict Leonora. As regards juridical proceedings, however, it is painfully clear that the truth has come to light by a ludicrous coincidence rather than by forensic hermeneutics.<sup>19</sup> *The Devil's Law Case* suggests that the law is structurally unable to alleviate anxieties caused by femininity. Conversely, the theatre's capacity to present characters and events from various perspectives makes it a much more subtle instrument. In the absence of irrefutable evidence, forensic inquiry establishes a person's truthfulness according to surface phenomena, and the fact that neither words nor body signs are ultimately

reliable is an inherent flaw in the system. The theatre, on the other hand, continually negotiates the relationship between interiority and outward display and thus manages to reveal its dialectic character. This is particularly relevant for women whose words and bodies are subject to suspicion in a patriarchal framework. *The Devil's Law Case* draws attention to this in a moment of heightened theatricality at the end of the play. Jolenta, disguised in the black habit of a nun and with blackened face, comes in with Angiolella, the pregnant nun, who is wearing her white habit. Jolenta delivers a rhymed speech which concludes with the following words:

Never mind the outward skin,  
 But the jewel that's within;  
 And though I want the crimson blood,  
 Angels boast my sisterhood.  
 Which of us now judge you whiter:  
 Her whose credit proves the lighter,  
 Or this black and ebon hue  
 That, unstained, keeps fresh and true?  
 For I proclaim't without control,  
 There's no true beauty but i'th' soul.

(V.6. 40–9)

This scene immediately following the chivalric duel between Ercole and Romelio has a medieval, if not Gothic flavour, which I take to be a distancing and defamiliarizing device encouraging a fresh look at contemporary practice. Introducing a complex symbolism, the nun's habits both express and resist early modern women's special association with religion and the injunction to chastity. More specifically, they symbolize a Catholicism represented as inhuman and exacting. On a semiotic level, the habits function as simulacra, which is underlined by the colour symbolism of white and black, darkness and light. As simulacra, the habits appear preposterous due to an alleged but invalid relation between signs and referents. There is no intrinsic connection between the white habit as a material object, beauty as a physical quality, and the purity of soul as a spiritual state. The same applies to the skin, thus exploding the ancient philosophical principle of *kalokagathia* which equates beauty with nobility. Through this iconography, *The Devil's Law Case* establishes a dialectic of theatrical opulence and Protestant iconoclasm which finally privileges interiority, both for men and for women.

Concerned with the state of the soul, Ariosto practices equity in order to relieve the consciences of all concerned. His judgement, which concludes the play, is in the spirit of an arbitration geared towards restoring harmony and peace within the community – a form of closure which might well suggest itself to John Webster the citizen, who had purchased his Freedom of the City as a member of the Merchant Taylors in 1615. This emphasis on self-help serves to explain the abundant ridicule of lawyers in Jacobean drama, especially in the city comedy. Like all social events, the staging of a play necessitates closure while legal practitioners, thriving on conflict, seek to perpetuate it. This aversion to conflict also supplies the official reason, voiced independently from an awareness of the ‘double standard’, why it is frowned upon when women take recourse to the law. ‘When women go to law, the devil is full of business’, runs the subtitle of Webster’s fashionable tragicomedy, but Leonora’s self-assertion is not punished; she rather gets what she wanted all along. As the culprits are ordered to ‘maintain against the Turk / Six galleys’ (V.6. 82–3), the community asserts itself and deflects the disruptive potential of femininity towards an outward enemy who, not being party to the Christian consensus of charity, is not entitled to equity.

Webster’s most famous woman on trial is Vittoria Corombona, the female protagonist of *The White Devil*. The importance of ‘The Arraignment of Vittoria’ as the centre piece of the play has often been acknowledged. Christina Luckyj states that the trial ‘not only clearly divides the play into two parts to be contrasted and compared, but also distills the play’s essence’.<sup>20</sup> Vittoria, accused of adultery with the Duke of Bracciano and of plotting her husband’s death, is subjected to an unfair, inquisitorial trial by a typical Websterian arch-villain, the Cardinal Monticelso. He means to maximize her public shame, but she talks back, not letting him get away with misogynist commonplaces and insinuations. In Kathryn Finin-Farber’s excellent analysis of this trial scene, she states that ‘*The White Devil* locates confusion exactly where we would expect to find clarity – at the home of justice.’<sup>21</sup> The battle between Vittoria and the Cardinal is also a battle over language and meaning; it becomes clear that neither ‘plain speech’ nor bodily signs signify in a stable way or secure access to ‘the truth’, but that the truth is a function of power. Vittoria’s ‘resisting rhetoric does, finally, undermine the process itself by exposing Monticelso’s profound partiality’.<sup>22</sup> But although she manages to suggest that ‘law is a forced penetration rather than a penetrating force that discerns truth’,<sup>23</sup> she is ultimately unable ‘to shift the focus from the female body whose very presence in a legal setting always already renders her promiscuous’.<sup>24</sup>

When Vittoria interrupts the lawyer's plea, she does so not only to force him to switch from Latin to the vernacular, but in order to change the direction of proceedings. She claims that 'amongst this auditory / Which come to hear my cause, the half or more / May be ignorant in't [Latin]' (III.2. 15–17). A synonym of 'case' on one level, 'cause' becomes a resonant word in this context. The *OED* lists various meanings including 'agent', 'object of action', 'purpose' or 'end', the 'side of a question or controversy which is espoused', or 'a movement which calls forth the efforts of its supporters', the latter with special reference to the Puritan 'cause'. Through her deployment of the word, Vittoria introduces a rich semantic field where her female sexuality appears at once at the source of the issue and as its target, or even *telos*, and by asking the audience to espouse her cause, she exchanges the position of defendant for that of plaintiff in a slander trial. In order to gain the pity and support of the audience – both on-stage, represented by the ambassadors, and off-stage in the theatre – she fashions herself as a 'slandered heroine', emphasizing her own helplessness and the injustice of proceedings. Historically, this was a course women could, and would, take within the English legal system and indeed, this is a culturally intelligible strategy, as the exchange between the ambassadors makes clear: the French Ambassador's aside 'She hath lived ill' is countered by the English ambassador's 'True, but the Cardinal's too bitter' (III.2. 107–8). This comment introduces the notion of equity, marking it at the same time as a particularly English feature. The ambassador clearly expects a fair inquiry and equitable judgement. After all, it could be argued, there is no evidence that Vittoria has connived in the murder of her husband, and concerning her adultery, there are mitigating circumstances, like the impotence of her ill-suited husband. By being able to 'play her audience', Vittoria gains a moral victory; her trial appears as a travesty of justice since the judgement, or condemnation, is arbitrary in nature and has clearly preceded the 'trial'. However, I take this as evidence of Webster's nationalist and anti-Catholic stance rather than as a general deconstruction of the law, as Finin-Farber suggests. The legal proceedings in *The White Devil* are flawed because they lack the right kind of equity. Since the English chancellors before the Reformation were clerical men, the portrait of the Cardinal could also be read as an oblique criticism of the Court of Chancery and its prerogative jurisdiction in the vein of John Selden's critique that '[e]quity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot.'<sup>25</sup>

Such absolutist high-handedness and whim have given equity a bad name, as Webster demonstrates, and drama helps to bring equity into its own again.

*The White Devil* suggests that Vittoria and the Duke of Bracciano are matched very well and that their passion redeems them to a certain point. With the exception of Isabella, they are the least reprehensible characters. Both Vittoria and Isabella are misused as pawns in the aristocratic marriage poker and ruthlessly commodified by their brothers. Vittoria's grievances and her guilt are weighed against each other, and the balance appears to be in her favour, which is confirmed by the conventional device of making the manner of her death the touchstone of her character. Here she passes with flying colours. Guilt comes in different degrees in this play, but there is no innocence, and death pays all debts. Lovers and revengers alike have transgressed the social order and those who, by virtue of their position, should provide a check on individual violence, are the worst offenders. Vittoria's trial signals the breakdown of law and order, replaced by the dynamics of the revenge plot. The play serves as an anatomy of violence and offers an interrogative gesture inviting the audience to deliberate and judge. Wherever the audience choose to place their sympathies, *The White Devil* remains a muddle, and indeed it wanted, as Webster indignantly put it in his preface to the printed edition, 'a full and understanding auditory' ('To the Reader', 3). The reason for this, however, is not Webster's inability to write a good play, as critics have suggested, but his attempt to dramatize the complexities of lived experience. Though the closing couplet voices a moral, there is no evidence of simple didacticism: 'Let guilty men remember their black deeds / Do lean on crutches made of slender reeds' (V.6. 300–1). Most prominent in these exhausted words is not the vision of a higher justice, but the image of the crutch.

Although Webster makes room in his plays for issues of generation and class within a stratified society, their potential for disruption is determined by the state of gender relations. Vittoria and her brother Flamineo are both upwardly mobile, but their mobility is centred on Vittoria's sexualized body. It is quite logical, therefore, that this body should be at the centre of legal debate. *The White Devil* is a radical play since it interrogates a social value system and reveals its gendered nature. Femininity in a patriarchal framework is often found at both extremes of an ethical spectrum where it serves simultaneously as the source of evil and the epitome of sublime goodness, expressed in the whore/saint dichotomy. In Webster's action of this particular case, however, Vittoria's passion appears altogether more human and



natural than Isabella's chastity and lawful maternity. As femininity is differentiated and individualized, it ceases to function as an ethical category and leaves the needle of the compass to waver, as it were, deprived of its North Pole.

Following *The White Devil*, Webster reworked some of his material in another tragedy, *The Duchess of Malfi*, which was instantly successful when it was acted by the King's Men at the Blackfriars. In the character of the Duchess, Webster merges the characters of Vittoria and Isabella. She is a true 'slandered heroine' strongly reminiscent of Shakespeare's Desdemona. Like her, she is depicted as sanguine and passionate, she marries secretly against the will of her family, she marries for love and against prudence, disregarding impediments of social standing as Desdemona had disregarded those of 'race', she is wrongly accused of sexual incontinence, and she meekly accepts her death by strangling, even regaining consciousness briefly, like her predecessor, to wrench some more tears from the audience's eyes.<sup>26</sup> Arguably, Webster's fame rests principally on the creation of this character. Contemporaries associated it with a bold assertion of authorship, which testifies to its importance in the context of the dramatist's work as a whole.<sup>27</sup> When *The Duchess of Malfi* was published in 1623, the year of Shakespeare's First Folio, several friends wrote commendatory verses, among them Thomas Middleton:

for every worthy man  
Is his own marble, and his merit can  
Cut him to any figure and express  
More art than Death's cathedral palaces,  
Where royal ashes keep their court. Thy note  
Be ever plainness, 'tis the richest coat:  
Thy epitaph only the title be –  
Write, 'Duchess', that will fetch a tear for thee,  
For who e'er saw this duchess live, and die,  
That could get off under a bleeding eye?

In *The Duchess of Malfi*, Webster follows a strategy similar to Shakespeare's in *Othello*. Initially, their heroines' behaviour doesn't conform to that expected of virtuous women, which makes them interesting as characters, but in the course of the play, they are exculpated because, whatever their faults, they are accused of something they have not done and they suffer at the hands of severely misguided or downright evil men.<sup>28</sup> Their sinister surroundings make them shine forth all the

more brightly as the naturalized image of the goodness and beauty of 'true femininity'. Contrary to most other plays Webster had a hand in, legal issues are in the background, and *The Duchess of Malfi* contains no trial scene. I would argue, however, that the scene in front of the Shrine of Our Lady of Loreto functions, although obliquely, in just this manner, by presenting a travesty of a trial more preposterous than 'The Arraignment of Vittoria'. In the dumb show, the Cardinal lays down the symbols of clerical authority and prepares himself for battle. His martial appearance, in combination with his family ties to the Duchess, disqualifies him for the office of judge. As he divests himself of the trappings of holiness, the Duchess is associated with the Virgin Mary. With her child in her arms, the Virgin is the incarnation of charity, scorned by unbelievers. Without hearing the accused, the Cardinal proceeds to punishment. The audience on stage, consisting of pilgrims, suggest objections to the proceedings that might, and probably should, be echoed by the audience in the theatre.

FIRST PILGRIM Here's a strange turn of state: who would have thought  
So great a lady would have matched herself  
Unto so mean a person? Yet the Cardinal  
Bears himself much too cruel.

SECOND PILGRIM They are banished.

FIRST PILGRIM But I would ask what power hath this state  
Of Ancona to determine of a free prince?

SECOND PILGRIM They are a free state, sir, and her brother showed  
How that the Pope, forhearing of her looseness,  
Hath seized into th' protection of the church  
The dukedom which she held as dowager.

FIRST PILGRIM But by what justice?

SECOND PILGRIM Sure I think by none,  
Only her brother's instigation.

(III.4. 24–35)

The conversation of the pilgrims, recalling that of the ambassadors in *The White Devil*, concludes with an expression of pity for Antonio: 'Fortune makes this conclusion general: / All things do help th' unhappy man to fall' (III.4. 43–4). The image of the unhappy fall suggests the religious notion of *felix culpa*, which would sanction Antonio's fault by subsuming it into a higher justice. In the case of the Duchess, equity is liberated from the context of legalism and transformed into the tragic emotion of pity. In ecclesiastical usage, equity is

an expression of a higher law of human goodness or Christian charity (*misericordia*) and hence akin to pity. The last word the Duchess ever utters, 'mercy' (IV.2. 345), which signifies both a plea and an absolution, makes her a mouthpiece of this connection.<sup>29</sup> This time, a sanctified feminine principle is pitted against a patriarchal institution, a Catholic church run by ruffians in robes. Far from discarding the legal context, however, Webster sublimates it; he returns to it on a more abstract level, recalling the legal foundations of ancient philosophy and their Christian permutations.

The medium of dramatic poetry is well suited to explore the relation between equity and hermeneutics. Kathy Eden, drawing on Plutarch's Platonism, emphasizes the role of 'poetry as a propaedeutic to philosophy'.<sup>30</sup> Those unaccustomed to the dazzling light of truth must be accommodated to it by the reflected light of poetry. 'And poetry not only mitigates the pain that accompanies the harshness and unemotional sameness of the truth, but it fully exploits the pleasure that comes from variety.'<sup>31</sup> As Ferdinand, the Duchess's twin brother, looks on his strangled sister, he says: 'Cover her face: mine eyes dazzle: she died young' (IV.2. 266). 'Dazzle' is a significant word here, especially in conjunction with the strong imagery of light and darkness which pervades the play. After all the pageantry, the wax effigies, dances of madmen, severed limbs and the like, Ferdinand looks straight into the sun of truth, and it turns his mind. According to neo-Platonic thinking in the early modern period, human nature was poised by the creator between the divine and the animalistic, with leeway in both directions. While the Duchess aspires to the former, Ferdinand espouses the latter, contrary to the usual gender hierarchy. Interestingly, in his moment of mortification, his thoughts go back to the laws, the rules and rituals that he had spurned but that ought to regulate human relations:

Was I her judge?  
 Did any ceremonial form of law  
 Doom her to not-being? Did a complete jury  
 Deliver her conviction up i'th' court?  
 Where shalt thou find this judgement registered  
 Unless in hell? ...  
 The wolf shall find her grave, and scrape it up;  
 Not to devour the corpse, but to discover  
 The horrid murder.

(IV.2. 291–6, 301–3)

Ferdinand's lycanthropy appears as a perverted form of forensic hermeneutics: he will be the wolf that brings the truth to light, which is the violation of his feminine better half. The ending offers a vindication of the 'slandered heroine'; she, whom 'the common rabble' called a 'strumpet' (III.1. 25–6), rightly insisted that her 'reputation' was 'safe' (III.2. 118–19). The closing couplet says amen to this: 'Integrity of life is fame's best friend, / Which nobly, beyond death, shall crown the end' (V.5. 119–20).

### [III]

In Webster's plays, the theatre becomes a forum for the display of the gendered nature of law. By foregrounding both women's issues and femininity as a concept, equitable drama tests the limits of the law, but it also serves to interrogate femininity. Taking part in the popular controversy over women, equitable drama shows that neither a generalized attack nor an equally generalized defence will serve the purpose, but that the emphasis must be on 'character' in the sense of individual responsibility and style as represented by the 'actor' of the 'case' on stage. Semantic slippages and punning lead from 'actions *on* the case' – the legal remedy – to 'actions *of* the case' – playing out the events, with a pun on sexual intercourse (case suggesting the female genitalia). Such punning abounds as the legal language is undermined and destabilized by the materiality of the gendered body which the stage action not only keeps in view but turns into a spectacle. In Webster's equitable drama, the law is 'bedevilled' by femininity as long as it neglects the 'action' of the 'case' and the idiosyncracies of the 'issue'.

I have argued so far that spectacle is a powerful heuristic device, but it is also a two-edged sword. Equitable drama as a medium is profoundly self-reflexive; it both celebrates theatricality and explores its limits which appear time and again in the many delusions, rituals and pretences, in characters' play-acting, in the ambiguity of body signs and, quite literally this time, in the omnipresence of darkness. Spectacle is largely concerned with surfaces, but Ferdinand is a wolf hairy 'on the inside' (V.2. 18).<sup>32</sup> As Andrea Henderson puts it,

Unlike the bourgeois characters, who take it for granted that they must continually monitor themselves in order to keep track of who they really are, Ferdinand mistakenly believes he can understand himself simply by watching the shows he produces around him ... By the fifth act, however, it is clear that Ferdinand's tendency

toward self-projection rather than self-reflection has rendered him incapable of understanding his own motives and desires, of seeing behind his own masks.<sup>33</sup>

The Duchess is more acutely aware of her situation; 'she both recognises the theatricality of her life and she experiences it not as pleasurable self-extension but as painful self-concealment'.<sup>34</sup> For Henderson, this makes *The Duchess of Malfi* a transitional play that endorses bourgeois notions of privacy which find their aesthetic expression in the private reading experience. Christina Luckij presents a related argument with respect to *The White Devil*. She suggests that female characters display a heightened sense of theatricality and that 'anxieties about performance, especially as it constitutes gender identity, are in fact self-consciously articulated' in the play. The trial scene 'contests the intelligibility of performance', and '[p]aradoxically, Vittoria's antitheatricality helps her stage herself successfully'.<sup>35</sup> Thus, theatricality itself is seen to be gendered: the strong sense of it in women points to the bodily definition of their subjectivity based on their sexual performance. On stage, this is expressed and enhanced by an element of specifically theatrical equivocation: femininity performed by a boy actor.<sup>36</sup> Here, the boy actor convention may be seen to gloss over the paradox of a femininity that is at the same time particularly theatrical and completely naturalized.

To conclude, female sexuality and its shadow in a patriarchal society, the sexual slander of women, is a central concern of Webster's equitable drama, and women – by 'virtue' of their femininity – are shown to be always already on trial. Female characters seek to personalize the general atmosphere of condemnation and to challenge their accusers, like Vittoria, or to beat men with their own weapons, like Leonora. But Webster's women find that they have to take on the whole system, which is impossible without allies from outside the oligarchy of clerical and aristocratic rulers. In *The Devil's Law Case*, the espousal of citizens' values enables the community to realize the salutary effects of equity while the want of it spells disaster in *The White Devil*. *The Duchess of Malfi* finally puts gender relations, rather than women, on trial. These relations are in flux and assume a tragic character as aristocratic values clash with those of an emerging bourgeoisie. The Duchess is depicted as the epitome of desirable bourgeois womanhood: beautiful and virtuous, she desires marriage, she is devoted to her husband and displays a preference for privacy, she has a fruitful body and a loving care for her children. Bourgeois or aristocratic, once femininity is fetishized

by patriarchal men, it becomes their nemesis. Ferdinand feels cuckolded by the Duchess; he is not her husband, but since he is her twin brother, they are 'one flesh' in a different sense. 'That body of hers', he informs Bosola, 'While that my blood ran pure in't, was more worth / Than that which thou wouldst comfort, called a soul' (IV.1. 121–3). Once the Duchess is dead, he tries to throttle his own shadow. His dying words finally testify to the inescapable connection between them: 'My sister! O my sister! There's the cause on't: / Whether we fall by ambition, blood, or lust / Like diamonds, we are cut with our own dust' (V.5. 70–2). The fear of cuckoldry marks the fault-line of masculine power and highlights the interdependence of the sexes suppressed by the laws of patriarchy. Such laws, to quote Montaigne, 'are often made by fooles; more often by men, who in hatred of equality, have want of equity'.<sup>37</sup> Webster's equitable drama shows how the *notion* of 'whore' prevents the cuckold's cure.

## Notes

1. I use the notion of equity, or *epieikeia*, in the Aristotelian sense that was prominent in the early modern legal debate. Equity is needed to supplement law, which must necessarily be general and therefore cannot include individual circumstances. As such, equity creates a justice that goes beyond the letter of the law, and it should be applied in every branch of jurisdiction. Due to the influence of Thomas Aquinas, the canon law notion of equity is associated with the Christian concept of charity, or *misericordia*. Both concepts are related to, but not identical with the discretion of the judge within prerogative jurisdiction, especially the Court of Chancery. In later times, equity principally came to denote a technical aspect of the Chancery jurisdiction. On this aspect see W. Ashburner, *Principles of Equity* (Butterworth, 1902). On the legal history of equity see P. Vinogradoff, *Outlines of Historical Jurisprudence* (Oxford University Press, 1922); M. Hamburger, *Morals and Law: the Growth of Aristotle's Legal Theory* (Yale University Press, 1951); C. St. Germain, *Doctor and Student*, eds T.F.T. Plucknett and J.L. Barton (Selden Society, 1974); J.H. Baker, *The Reports of Sir John Spelman* (Selden Society, 1978). On equity in the context of literature see the excellent overview by T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press, 1997); K. Eden, *Hermeneutics and the Rhetorical Tradition* (Yale University Press, 1997).
2. D. Goldberg, *Between Worlds: a Study of the Plays of John Webster* (Wilfrid Laurier University Press, 1987), 11.
3. For theatrical activities at the Inns of Court see A. Wigfall Green, *The Inns of Court and Early English Drama* (Benjamin Blom, 1965) (1st edition 1931); P.J. Finkelpearl, *John Marston of the Middle Temple. An Elizabethan Dramatist and his Social Setting* (Harvard University Press, 1969); J.H. Baker, *Readings and Moots at the Inns of Court in the Fifteenth Century*, vol. II: Moots and Reader's Cases (Selden Society, 1990). The prominence of court-room drama in

modern cinema testifies to the affinity of public entertainment and legal procedure.

4. H.G. Harvey, *The Theatre of the Basoche: the Contribution of the Law Societies to French Mediaeval Comedy* (Harvard University Press, 1941), 12, 14, 19. My thinking in this matter was greatly helped by Stephanie Lysyk's paper, 'Basoche Theatricality: Theatre and Law in Early Modern France', given at the Renaissance, Law and Literature conference held at Oxford in July 1998, convened by the editors of the present volume.
5. J.B. Altman, *The Tudor Play of Mind: Rhetorical Inquiry and the Development of Elizabethan Drama* (University of California Press, 1978), 390.
6. *Ibid.*
7. Muriel C. Bradbrook, *John Webster: Citizen and Dramatist* (Weidenfeld and Nicolson, 1980), 45–6.
8. See M. Heinemann, 'Political Drama', in A.R. Braunmuller and M. Hattaway (eds), *The Cambridge Companion to English Renaissance Drama* (Cambridge University Press, 1990) 177.
9. On women and the law in early modern England see M. Cioni, *Women and Law in Elizabethan England with Particular Reference to the Court of Chancery* (Garland, 1985); M.J. Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge University Press, 1987); L. Boose, 'Scolding Brides and Bridling Scolds: Taming the Woman's Unruly Member', *Shakespeare Quarterly* 42:2 (1991), 179–213; A.L. Erickson, *Women and Property in Early Modern England* (Routledge, 1993); F.E. Dolan, *Dangerous Familiars: Representations of Domestic Crime in England* (Cornell University Press, 1994); J. Kermode and G. Walker (eds), *Women, Crime and the Courts in Early Modern England* (UCL Press, 1994); L. Gowing, *Domestic Dangers. Women, Words, and Sex in Early Modern London* (Clarendon Press, 1996); T. Stretton, *Women Waging Law in Elizabethan England* (Cambridge University Press, 1998).
10. On the importance of the 'slandered heroine' for early modern constructions of femininity see my *Staging Slander and Gender in Early Modern England* (Ashgate, 2003).
11. On the legal history of defamation see for example J.H. Baker, *An Introduction to English Legal History*, 3rd edition (Butterworths, 1990); R.H. Helmholz (ed.), *Select Cases on Defamation to 1600*, Publications of the Selden Society 10 (Selden Society, 1985); the same author's *Roman Canon Law in Reformation England* (Cambridge University Press, 1990); Gowing, *Domestic Dangers*.
12. Goldberg, *Between Worlds*, 16.
13. For a discussion of this play see A. Kusunoki, 'A Study of *The Devil's Law-Case*: with Special Reference to the Controversy over Women', *Shakespeare Studies*, The Shakespeare Society of Japan, 21 (1982–3), 1–33. Kusunoki draws attention to powerful women's involvement in law cases of the Jacobean period. Quotations from Webster's plays will be taken from the following edition: René Weis (ed.), *The Duchess of Malfi and Other Plays* (Oxford University Press, 1996).
14. On Webster's source for this see D. Carnegie, 'Selden's *Duello* as a Source for Webster's *The Devil's Law Case*', *Notes & Queries* 46 [244:2] (1999), 260–2. Carnegie refers to John Selden's 'antiquarian handbook' *The Duello, or Single*

- Combat* (1610). For a discussion of alternative theatrical jurisdictions related to the chivalric code of honour see P. Goodrich, *Law in the Courts of Love. Literature and Other Minor Jurisprudences* (Routledge, 1996).
15. Since public shaming and penance are the modes of correction applied by the church courts, it could be argued that the play makes a case for ecclesiastical jurisdiction. I rather take Webster's drama to suggest that such ritual forms of conflict settlement within the community are part of an English folk tradition which the church courts appropriated and which are 'given back' to the people by way of the theatre. At the same time, English Protestantism clearly forms the moral and ethical basis for social cohesion, which is expressed by the quest for, and the possibility of redemption.
  16. D. Kezar, *Guilty Creatures: Renaissance Poetry and the Ethics of Authorship* (Oxford University Press, 2001), 88. The antitheatrical text Kezar mainly draws on in this context is Stephen Gosson's *Playes Confuted in Five Actions* (1590?); see also his *The School of Abuse* (1579).
  17. Kezar, *Guilty Creatures*, 105.
  18. *Ibid.*, 122.
  19. In our day, forensic inquiry is helped by science. The increasing importance of ocular proof in the early modern period marks the beginning of a very slow process towards a modern criminology based on semiotics.
  20. C. Luckyj, *A Winter's Snake: Dramatic Form in the Tragedies of John Webster* (The University of Georgia Press, 1989), 114.
  21. K.R. Finin-Farber, 'Framing (the) Woman: *The White Devil* and the Deployment of Law', *Renaissance Drama* 25 (1994), 221. As regards language, Finin-Farber draws on Patricia Parker's seminal study *Literary Fat Ladies: Rhetoric, Gender, Property* (Methuen, 1987). See also G. Greene, 'Women on Trial in Shakespeare and Webster: "The Mettle of (Their) Sex"', *Topic: A Journal of the Liberal Arts* 36 (1982), 5–19.
  22. *Ibid.*, 231.
  23. *Ibid.*, 235.
  24. *Ibid.*, 233.
  25. Quoted from C. Bowen, *The Lion and the Throne* (Little, Brown, 1957), 360.
  26. For similarities between these characters see also Bradbrook, *John Webster*, 158; E.C. Bartels, 'Strategies of Submission: Desdemona, the Duchess, and the Assertion of Desire', *Studies in English Literature* 36 (1996), 417–33.
  27. For the relationship between authorship and femininity see L. Hutson, *The Usurer's Daughter: Male Friendship and Fictions of Women in Sixteenth-Century England* (Routledge, 1994).
  28. The analogy may be extended to the other women characters: Julia and Bianca as women of loose morals whose promiscuous, lustful behaviour serves to contrast with the heroine's purer passion, as well as Cariola and Emilia, devoted servants who increasingly play the virago as their mistresses sink into noble passivity.
  29. For an excellent discussion of the metaphysical dimension of the play see M.C. Bradbrook, 'Fate and Chance in *The Duchess of Malfi*', in N. Rabkin (ed.), *Twentieth Century Interpretations of 'The Duchess of Malfi'* (Prentice Hall, 1968), 27–40.
  30. Eden, *Hermeneutics and the Rhetorical Tradition*, 34. Eden refers to Plutarch's essay *De audiendis poetis* (*Moralia* 14D–37B).



31. Ibid.
32. The relationship between inwardness and public display is discussed in K. Eisaman Maus, *Inwardness and Theater in the English Renaissance* (University of Chicago Press, 1995).
33. A. Henderson, 'Death on Stage, Death of the Stage: the Antitheatricality of *The Duchess of Malfi*', in Dympna Callaghan (ed.), *The Duchess of Malfi*, New Casebooks (Macmillan, 2000), 64. The essay was first published in *Theatre Journal* 42 (1990), 194–207.
34. Henderson, 'Death on Stage', 67.
35. C. Luckyj, 'Gender, Rhetoric, and Performance in John Webster's *The White Devil*', in Viviana Comensoli and Anne Russell (eds), *Enacting Gender on the English Renaissance Stage* (University of Illinois Press, 1999), 219, 229.
36. On the subject of boy actors in Webster's tragedies see L.L. Behling, "'S/he scandles our proceedings": the Anxiety of Alternative Sexualities in *The White Devil* and *The Duchess of Malfi*', *English Language Notes* 33:4 (1996), 24–43.
37. M. de Montaigne, 'On Experience' (orig. 1588), *The Essayes of Michael Lord of Montaigne* (1603), transl. John Florio, vol. 3 (Dent n.d.), 331.

# 6

## Renaissance Tool Abuse and the Legal History of the Sudden<sup>1</sup>

Luke Wilson

*cur non, ait, utimur istis?*

(Ovid, *Metamorphoses*, 12: 259)

The past decade has seen an increasingly programmatic critical interest in Renaissance objects as such, a development explained in the introduction to the recent collection *Subject and Object in Renaissance Culture* as both a dialectical response to several decades' preoccupation with subjects and as an outgrowth of a concern with material culture. The editors also attempt to offer an alternative to traditional histories of the relation between subject and object,<sup>2</sup> and yet despite a searching account of the early modern history of objects the reorientation promised through a displacement of the subject ends up conceptually constrained in familiar ways, especially in a recourse to the principle of mutual causation, in which subjects and objects are inevitably seen to constitute one another. Perhaps the problem lies in the editors' implicit assumption that all things are objects, that is, inescapably involved with subjects; perhaps the displacement of the subject requires the acknowledgment of things as things. In any case, in an attempt to think about the relation between object and thing, and about how things may become objects and objects things, I want to consider here a special class of objects – tools – and a special case of use – misuse – in early modern legal and literary texts. Bill Brown has recently suggested that we can conceptualize things as both 'the amorphousness out of which objects are materialized by the (ap)perceiving subject, the anterior physicality of the physical world emerging, perhaps, as an aftereffect of the mutual constitution of subject and object, a retroprojection' and 'as what is excessive in objects, as what exceeds their mere utilization as objects – their force as a sensuous presence or as a metaphysical

presence, the magic by which objects become values, fetishes, idols, and totems'.<sup>3</sup> Tools and their misuse, I suggest, can illustrate both the crisis in use upon which such 'retroprojection' may be founded and the excesses that manifest the magic of the thing. The aim of this chapter, however, is more limited: to consider, in early modern literature and law, how tools behave, conceptually and phenomenologically, when they are misused.

Like other forms of material life, tools shape and are shaped by those who make and use them; they encode and facilitate habits of behaviour and modes of conduct; and they transmit information about the social practices (and practitioners) with which they are associated. All artefacts, and for that matter many objects that are not artefacts, thus mediate between persons and environments. But to call something a tool is to mean something more specific. Tools are tools because they are typically *used* in a sense in which objects and things that are not tools are not, and this sense of use means that tools have a special relation to human agency. In human labour, they embody instrumental agency by tangibly transmitting or transforming purposes – and, more narrowly, intentions – into material effects. But they are also themselves artefacts, human praxis congealed in material form, and contain in themselves as a structural imprint the instrumental logic of the use for which they were fabricated. If tool use is traditionally taken as the defining capability of human beings it is because the tool is unique in the way it articulates its user's relation to the world, and especially to the temporal shapes of human labour.

Unique in the sense in which they are used, tools are also unique in being capable of misuse, of being used in a way that disregards the purpose for which they were fashioned but takes advantage of some feature of their design. Early modern examples are to follow shortly; a familiar late modern example is the paperclip, adapted to some ad hoc use not included in its job description: it may be employed as a screwdriver, to dig wax out of your ear, and so on. This practice may be called *use-against-design*, or, in order better to stress its character as a violation of features of design and of norms of usage, *tool abuse*.<sup>4</sup> Obviously, the ability to use a tool at all requires practical understanding and a set of mechanical aptitudes; but the concern here is with the kind of intelligence involved in *misuse*, an intelligence fundamental to the ancient Greek quality of *μητις* or cunning. Odysseus, the classical exemplar of *mētis*, displays this quality in the cave of Polyphemus when he uses what he has at hand, a staff of olive wood (or, in other versions of the tale, the spit on which Polyphemus roasted Odysseus'

men), to put out the cyclop's eye. 'What he has at hand': *métis* is closely related to a tactical cunning that enables one to make do, when at a disadvantage, with the available resources. The strategist operates with access to a place in which to store his plunder as well as his equipment, so that his tool supply is likely to be extensive and his individual tools well suited to his purposes. The tactician, on the other hand, is always 'in the field', his resources only what he can carry with him or take up on the spur of the moment.<sup>5</sup> In versions of the first murder that combine Genesis 4:8 with Judges 15:15–19, Cain operates tactically, and practises tool abuse, when he kills his brother with the jawbone of an ass.<sup>6</sup>

Perhaps the best Renaissance literary example of tool abuse occurs in Book II of Sidney's *Old Arcadia*, when during a celebration of the prince's birthday the lower orders fall to airing their grievances and the party ends in a drunken call to arms.

But as rage hath (besides his wickedness) that folly that, the more it seeks to hurt, the less it considers how to be able to hurt, they never weighed how to arm themselves, but took up everything for a weapon that fury offered to their hands: some swords and bills; there were other took pitchforks and rakes, converting husbandry to soldiery. Some caught hold of spits, things serviceable for the lives of men, to be instruments of their deaths; and there wanted not such which held the same pots wherein they had drunk to the duke's health to use them (as they could) to his mischief.<sup>7</sup>

In the eyes of their elite opponents, this misuse marks the people's improvidence and foolishness, and because the tools thus misused belong to trades and practices considered base, it also underscores their inferior social status. The disadvantages thus announced are fatal for many of them; their opponents not only possess greater physical courage and skill but also are equipped with weapons designed especially for killing people, and it is only because his party is so overwhelmingly outnumbered that Pyrocles must resort to rhetoric to disarm the rebellion. And yet, 'converting husbandry to soldiery' involves a significant kind of mental operation, a resourcefulness and even cleverness; and the derision of Sidney's elite narrator may hedge against an awareness that farm implements, especially for those who knew how to handle them, could be used all too effectively as weapons.

The episode in Sidney has important literary predecessors, as we shall see. But homicidal tool abuse occurred all the time in sixteenth-

century England, especially in cases of unpremeditated homicide, where the killer is unlikely to have chosen a purpose-specific weapon beforehand. Fortunately for such killers, many tools can be adapted to this kind of task. If you have your sword with you, a tool designed specifically to cut and kill people, so much the better. If you don't, you can always use a knife designed for slicing bread or meat, or an agricultural implement, or a stick, or even a stone. Such killings are common in the assize records for the Home Circuit under Elizabeth and James, which briefly document the presentation and disposition of criminal cases before the itinerant justices of assize in the several counties adjacent to London (Essex, Hertfordshire, Kent, Middlesex, Surrey and Sussex).<sup>8</sup> Crimes against property are by far the most common charge on which persons were presented, but homicides too are frequent, and many of these appear to have been improvisational, often resulting in a charge of manslaughter rather than premeditated murder. These were accomplished through a variety of means. In Kent during Elizabeth's reign, in addition to the most common weapons – knives, swords and big sticks – we find mention, among many others, of a brushing-bill (*CAR Kent Elizabeth I* no. 28), an axe (nos 174, 1420), a 'great piked staff' (nos 192, 1424), a 'bromestrygg' (broomstick?) (no. 560), a 'wooden wedge beetle' (no. 2815), a shovel (nos 2866, 1991), a pair of shearing shears (nos 2926, 1421), a fire-pan (no. 2987), a coulter (no. 825), a boar-spear (no. 859; against which the victim tried to defend himself with a gathering-hook), a meat-knife (no. 862), an oar (no. 877), a horsecomb (no. 993), a chisel (nos 1026, 1056), a broth containing ratsbane (nos 1200, 1855), a walking-staff (no. 1236), a 'holme waster' (no. 1353), a hedging-bill (nos 1354, 1409, 2214), a swingle (no. 1396), a mattock (no. 1534), a cart-staff (no. 1803), a sheep-hook (no. 1960), a weed-hook (no. 2098), a 'homewoodd gambrill' (no. 2114), a loaded birding-piece (nos 2241, 3008), a plough-goad (no. 2288) and so on.

These killers, it is true, did not need infinite cunning to adapt the tools they used in the ways they did; it probably takes more wit to use a stick with bubblegum on the end to retrieve coins from a sewer grate. But neither are these apparently improvisational killings thoughtless, or lacking in practical intelligence, even if, often happening in the heat of the moment, they may seem so. It takes a certain cunning invention to envision uses for tools that don't coincide with the purposes manufactured into them. This use-against-design necessitates that the purpose of the tool and the task one has in hand be brought into a fairly complex relationship of comparison: what is it about what this

tool does and what I want to do that are similar? What accidental or non-essential features of this tool will turn out to serve my purposes? What liabilities may be involved in its misuse?

This process of deliberation and selection must usually have happened very quickly in the events the assize records document. Precipitancy, in fact, must often have been an important feature of events involving tool abuse. The more time you have to plan a homicide, the more precise, all things being equal, will be the fit between the tool and the job of killing you're asking it to do. And conversely, the more extemporaneous the killing the more tension there is likely to be between the use to which the instrument is put and the purpose for which it was designed. Tool abuse, then, probably occurred especially in homicides that happened suddenly, and the idea of the sudden has in fact a history in early modern criminal law, one that is closely related to the rise of manslaughter as a category of homicide intermediate between (felony) murder on the one hand, and exculpable forms such as accidental homicide or 'misadventure' and homicide in self-defence, on the other.<sup>9</sup> The distinction between murder and manslaughter was significant because in a series of statutes enacted in 1496, 1512 and 1531, those convicted of killing with malice aforethought were denied benefit of clergy.<sup>10</sup> It has been shown that pardons in the second half of the fourteenth century distinguished between premeditated homicides (those that were described as *praemeditatus*, *precogitatus* or *excogitatus*) and those done *impetuose* (violently or impetuously).<sup>11</sup> This latter adverb seems to have appeared at this time in pardons and not elsewhere because of a concern to facilitate clemency by denying premeditation and offering a mitigatory alternative; the distinction between premeditated and impetuous slayings was not made in indictments or appeals before 1390.<sup>12</sup> The term manslaughter did not itself appear in the law books until over a century later, in the *Boke of Justyces of the Peas* (1506), where it was identified with 'chance medley':<sup>13</sup> 'And manslaughter is where two men or mo mete and by chauce medely they fall at affray so that one of them sleeth an other [and] is but felonie [i.e., not murder] ...'<sup>14</sup> Here the term manslaughter no longer represents generally those homicides that are not murder, but has come to designate a specific class of killings. 'Chance-medley', a term that here means roughly 'sudden, chance encounter' seems to have been used interchangeably with 'chaud melle', apparently an affray in hot blood.<sup>15</sup> Bellamy, citing a charge to a grand jury during the reign of Henry IV, suggests that in the early fifteenth century killing 'par chaud melle' was equivalent to

the homicides committed *impetuose* in the 1360s, and that it amounted to manslaughter (felony homicide below the degree of murder).<sup>16</sup>

The term chance-medley thus came to describe, in English, homicides represented in Latin formulas like *ex casu subito* (suddenly by chance) and *impetuose*, and during the sixteenth century this description was more and more closely attached to the once more general term manslaughter, of which one essential component was the suddenness with which it occurred, a suddenness compounded of the unexpected and unplanned, the rapidly emergent, and the hot-blooded or impetuous. The category emerged, however, to articulate the way in which *voluntary* (and felonious) killings might nevertheless fall short of murder, and the voluntary nature of the crime remained essential to this restricted meaning of manslaughter. Certainly well before the end of the sixteenth century, manslaughter had come to designate 'a deliberate killing done in the course of a sudden encounter'.<sup>17</sup>

The legal significance of suddenness began to be articulated in law reports as early as Plowden's *Commentaries* (1571–79). In Salisbury's case (1553; 1 Plowden 97–101) the accused, a servant, joined his master and others in attacking a man named Ellis, who died as a result. Salisbury's master had lain in wait for Ellis, and was therefore judged guilty of murder (early definitions of murder had required that it involve an actual lying in wait). But Salisbury joined the fray at the last moment, having been unaware of any plan of ambush. The difficulty was in disentangling Salisbury's culpability from his master's. In instructing the jury the court said:

Si John Vane Salisbury navoit malice prepense, mes sodeynment prist part ove eux que avoyent malice prepense, ceo est manslaughter en luy et nemy murder, pur ceo qe il navoit malice prepense.<sup>18</sup>

Here the language of suddenness constitutes the essential mark that distinguishes manslaughter from murder as a homicide deliberate yet unpremeditated. And thereafter the word 'sudden' begins to appear frequently in reports of homicide cases and in the guides that interpreted the law for justices of the peace. Crompton's definition, first published in 1584, was repeated, with insignificant variations, in numerous later accounts: 'Manslaughter est, ou deux combatte ensemble sur le suddeine, sans malice precedent, et lun tue lauter, la il avera Clergie.'<sup>19</sup> Scots law even evolved a substantive form: 'suddenty'. As we have seen, the Latin of mid-fourteenth-century pardons and King's Bench indictments of the 1530s coded lesser felony homicides as done *ex casu*

*subito* or *impetuose*. But there is little sign that before Plowden the concept of the sudden played the kind of definitional role it does in the following.<sup>20</sup>

Deux fall out sur le sudden in le ville, & ilz par agreement alont in camps *maintenant*, & la lun tue lauter, ceo est murder, car la fuit malice precedent ... mes sils combate sur le sudden sans malice precedent, & pause un petite in lour combate, & donques maintenant ilz ale en les campes, & la lun tue lauter, ceo est que manslaughter, pur ceo que tout est fait in un continuyng fury, come semble.<sup>21</sup>

The difference between murder and manslaughter lies not in the time that passes but in how that time is structured; the same pace appears to be implied in the repetition of 'maintenant', but in one this pace is punctuated by an agreement to adjourn the fight to the field, while in the other it is not and the suddenness of the initial encounter carries through to the killing. This continuing suddenness is conceptualized as a temporal duration that is brief but internally coherent and continuous, a phenomenological space in which 'tout est fait in un continuyng fury'.<sup>22</sup>

The description of a crime as occurring suddenly could reduce it from murder to manslaughter, but it could also produce an opposite, aggravating effect. Michael Dalton's *The Countrey Iustice* (1618) defines manslaughter as a killing 'upon the soden, and by meere chance, without any malice precedent'; but Dalton also cites Coke's report of Mackalley's case (1612) to argue that 'if one suddenly, and without any shew of quarrell, or offence offered, shall draw his weapon, and therewith kill another', here malice prepense is implied, and the crime is murder.<sup>23</sup> In the first case the suddenness of the encounter argues for a lack of malice prepense, while in the latter case it argues for its presence. The difference is explained by the fact that in the second scenario, but not the first, there is a mutual engagement or 'sudden affray'. Depending on its context, then, 'sudden', conveys two distinguishable meanings. Where one suddenly kills another without provocation, suddenness appears empty of social content; it describes a totally unexplained event; 'suddenly' might be paraphrased as 'inexplicably' or 'for no apparent cause'. Such suddenness implies a depth of hidden, premeditated malice, an absent cause, something beneath the surface that needs accounting. Where two 'suddenly' fight, in contrast, suddenness is full of manifest social



meaning (typically in the form of contributory culpability); it explains the event rather than marking its inexplicability; it establishes its own context, in which cause is manifest or at least easily inferred according to familiar, conventional scenarios that import intelligible states of mind. In a killing 'upon the soden, and by meere chance', chance immediately restores the intelligibility of motives it appears to place out of reach: it denotes not randomness or thoughtlessness but the sense that things could have been different: no secret and premeditated malice drove the event forward. At the same time, this version of suddenness describes a distinct species of agency, a temporally compressed form of deliberation.

In the assize records, cases of use-against-design do not always fit the pattern of the sudden affray, in which two or more close in sudden combat ending in the death of one of them.<sup>24</sup> But these cases do usually have in common with sudden affrays both a sense of implied contributory culpability (the event is embedded in forms of practice through which causation is exculpatorily distributed) and the implication of a deliberation of distinctly compressed temporal reach. The suddenness of the encounter is conceptualized, in other words, in such a way as to insist upon deliberative agency while mitigating the offence by manifesting its cause as immediate. But whereas mitigation in sudden affray cases usually depends on a description of the affray as erupting out of but clearly departing from some social encounter, in cases of use-against-design the relation between the offence and its temporal context is characterized as much by continuity as by interruption. This is especially true in one of the recurring homicidal scenarios in the Home Circuit records, that in which the killing occurred in the workplace and during working hours. If in homicide law as a general rule suddenness emerges as a rupture in the temporal flow of peaceable and ordered social coexistence, for the person who kills during working hours the sudden interrupts, while it works itself into, the temporal rhythms of labour itself. For fairly obvious reasons, these killings are especially likely to involve the misuse of tools.

Typical is the case of John Blakebone, found guilty of killing Edmund Creme with a brushing bill (a blade designed to cut brush) after 'malicious words' spoken while the two worked in a garden – presumably cutting brush – at Biddenden in Kent (*CAR Kent Elizabeth I* no. 28). We infer from the choice of weapon the suddenness of the killing; but it is the suddenness that induces the killer to engage in an act of use-against-design. Similarly David Powell, whose occupation is given in the record as 'mariner', on 22 April 1577 struck and killed Peter

Squyer with an oar (20*d.*) while the latter was working on a tilt-boat at Gravesend (*CAR Kent Elizabeth I* no. 877).<sup>25</sup> Or, again, on the night of 31 March 1579 Thomas Hayte, labourer, 'entered the stable of George Clarke, gent ... and attacked Thomas Bromefield, one of Clarke's servants, who was "dressing" horses there. In self-defence Bromefield struck Hayte on the head with a horsecomb (2*d.*), inflicting injuries from which he died on 7 Apr' (*CAR Kent Elizabeth I* no. 993). Or consider the case of Richard Wissenden of Rainham, butcher, who in 1594 killed Susan Wissenden using a "'homewoodd gambrill'" (1/2*d.*) – that is, a cambrell, the hooked stick butchers used to hang meat (*CAR Kent Elizabeth I* no. 2114).<sup>26</sup>

All of these cases resulted in manslaughter convictions (except that of Bromefield, who was held to have killed in self-defence), and all suggest a combination of the deliberate and the sudden.<sup>27</sup> These killers, while acting suddenly in a continual fury of hot blood, were nevertheless able to commensurate the structure of an available tool to the task at hand. In this particular class of deliberate yet sudden homicide, moreover, where the suddenness of the killing involves the abrupt intrusion of killing time into work time, the link between the two is embodied in the instrument used to kill; and the tension between that use and the (usually agricultural or mechanical) use for which the instrument was designed and manufactured marks the structural relation between the two temporal frames. Almost paradoxically, the more seamlessly work time and killing time are articulated the more sudden the intrusion of the latter is. At Benenden in Kent, on 4 April 1593, the jury at a coroner's inquest on the body of twelve-year-old Mary Gybson, servant of Catherine Frencham, found that

On 24 Mar. Mary was helping her mistress to kill a piglet for the family dinner. Catherine killed the piglet with a knife (1/2*d.*) and instructed Mary to catch the animal's blood in a jug. Mary accidentally dropped the jug, spilling the blood on the ground, and Catherine, angry at her clumsiness, struck at her with the hand in which she was holding the knife. By misfortune, it stabbed Mary in the side of the head, inflicting a wound from which she died that night.

(*CAR Kent Elizabeth I* no. 2099)

In this account of the event, suddenness asserts itself as the temporal shape of an event at once worked into and irrupting out of surrounding temporal rhythms, here again those of labour: Frencham's stabbing of Gybson is both continuous with and an interruption of the business

of killing and butchering the piglet. One may read through the record's exculpatory language of 'misfortune' and infer that the jury had evidence of a deliberate act of tool abuse and chose to conceal it. But 'misfortune' and sudden deliberation almost coincide in any case. In the moment just before tool abuse happens the tool suddenly looks like a thing rather than an object; the user is for a moment immobilized by its blank obduracy. As Brown puts it, 'We begin to confront the thingness of objects when they stop working for us: when the drill breaks, when the car stalls, when the windows get filthy, when their flow within the circuits of production and distribution, consumption and exhibition, has been arrested, however momentarily.'<sup>28</sup> In the act itself, though, the tool is rediscovered as an object, but as an object with a different and heightened relation to use. It is as if overcoming the thingness of the tool involves a compensatory exaggeration of the tool's instrumentality. This is what happens in the conceptualization of the event of Gybson's death in the record. The tool ends up doing the work, and that work is severed, 'by misfortune', from Frencham's agency. Catherine strikes with her hand, but the knife inflicts the wound. The constraint essential to tool abuse – how can I force *this* tool to perform *that* function – merges here into a compulsion of which Catherine is the object rather than the subject. In short, use slides so effortlessly into misuse that the tool itself, rather than Catherine, misbehaves.

The strangely neat coordination of killing time and working time in the last example must have been frequent in homicides among the labouring classes in a primarily agrarian society; finding time to kill someone, during the day at least, would often have involved taking time out from work, and all relevant economies dictate that the nature of the work should determine the instrument of the killing. The idea of the sudden also emerges, however, in precisely the incommensuration of killing and working time, as in another 1593 Kent coroner's inquest, at Saltwood, 25 June, on the body of Brian Perrett, aged 13 years, in which the coroner's jury found

that about noon on 15 June, Alice wife of Thomas Dade sent Perrett to weed wheat in 'le eighte acres' field. About one o'clock she went to the field to see how the work was progressing, and found Perrett lying asleep. She shouted at him and, intending only to chastise the boy, struck him with the weed-hook (*1d.*). It hit him on the head, causing a wound from which he died on 22 June.

(*CAR Kent Elizabeth I* no. 2098)

One has to wonder what significance is to be attached to the times indicated in the record. If Dade sent Perrett to work just at lunch time, his behaviour might have been within normal practice.<sup>29</sup> On the other hand, by 1:00 p.m. he should probably have been back at work. Dade, at least, seems to have thought so, and used the unemployed weed-hook to make her point, as if to give Brian a lesson not only in how to use a weed-hook, but also in *when* to use it. Here again suddenness inheres in the imaginative translation of work time into killing time – and work tools into killing tools – in what remains a staple narrative device, especially in slapstick comedy, as when, in the typical *Three Stooges* routine, Moe shows Curly new ways to use a hammer.

Again, however, tool abuse serves as the foundation for a secondary transaction, producing, as in the case of Frencham, an exculpatory gap between striking (performed by Dade) and hitting (performed by the weed-hook). Tools can behave unpredictably when they are abused. The legal history of appropriate and inappropriate methods and instruments of chastisement rests on precisely this unpredictability, though there unpredictability aggravates rather than excuses. Here, in contrast, the form in which the cases of Frencham and Dade appear in the assize records – as inquisitions post-mortem that have not been converted into indictments – suggests that in neither case was trial considered appropriate.<sup>30</sup> The exculpatory details provided in the inquisitions similarly imply that the coroner's jury did not want to see the case go to trial; and evidently the grand jury at assize agreed. Here suddenness, as encoded structurally in the time and place of the killings and in the tool abuse involved, together with the displacement of instrumental agency that abuse enabled, evidently worked exculpatory.<sup>31</sup>

The two foregoing examples illustrate how the paradoxically seamless structure of the sudden occurrence, the way in which it both interrupts and integrates itself into the flow of practice, is understood both to elicit a special form of practical intelligence and to introduce an element of uncertainty and instability. Both these conditions are produced, I suggest, by the structurally embedded resistance of the tool to misuse, and they usher the tool abuser into a fairly complex sense of temporal situatedness. By interrupting the habitual routines of conduct that facilitate appropriate and conventional tool use, this resistance makes a novel demand on the user's agency and produces an abruptly enlivened sense of what he or she is doing and how; the tool momentarily reverts from object to thing before being reinvested with a new and exaggerated objectivity. When a tool is used in a way that is both conventional and consistent with the tool's structure, the relation

between tool and user is generally asymptomatic. But when you do either something that isn't conventionally done with that tool, or something for which its design makes it unsuited, a conflict arises that may be defined both conventionally (you feel you shouldn't be doing *that* with *this* tool; for example, you should not beat your child with the flat of a sword) and functionally (you recognize that doing *that* with *this* doesn't work very well). The abuser's new sense of what he or she is doing includes acknowledgment of a newly complicated relation to the tool, and, it would seem, a partial ceding of instrumental agency.<sup>32</sup>

In these terms the contradiction between design and purpose that constrains potential uses-against-design may be described as a friction between the abuser's purposes and the tool's purposes, invested in it during its manufacture – as though the tool is trying to do one thing, and you are trying to make it do another. The hammer wants, is trying, was born, to hammer nails; it does not want to kill people; its design rebels against misuse, often enough ineffectually, though it may be (for example) that the nail-puller opposite its striking surface injures the user on the back swing: the revenge of the tool. If the tool's resistance can be acute – as it might be if you tried to kill someone with a rubber spatula – it can also be insignificant. A bread knife offers virtually no resistance to being used to slit someone's throat, since it can't readily distinguish between that use and the slicing of bread; its design is not so purpose-specific that the difference will register as misuse.<sup>33</sup>

It should be stressed that to identify this fantasy of the animated tool in early modern legal discourse is not necessarily anachronistic. Early English law often elsewhere conceptualizes tools fetishistically, especially but not exclusively in the institution of the deodand; legal histories of thing-liability have not yet fully explored this territory.<sup>34</sup> Nor have such studies been brought into relation to literary and cultural histories of animated things – objects, artefacts, body parts, statues and so on.<sup>35</sup> Tarquin's apostrophes to his falchion and torch in Shakespeare's *Rape of Lucrece*, which express his sense that the instrumental agency they seem to represent is closely bound up with his own agency in the rape, could probably be linked to similar instances where tools are used to articulate problems of instrumentality and liability in a legal context. Equally, however, such problems in the relation between person and object arise where use-against-design works to figure social conflict, as in the passage from Sidney with which I began. I turn now to this distinct literary topos, which I think best articulates the literary implications of use-against-design and the emergence of the sudden.

While most homicides in the assize records were committed with instruments designed to kill people, the tools most likely to be misused for homicidal purposes were those used by artisans and labourers. During the medieval period, especially, tools of this kind encoded and emblemized the social inferiority of the user. Such social coding probably declined along with the agrarian, status-oriented system of feudal tenure in the eleventh century as it gave way to other social and economic modes of organization; but a medieval iconography that represented the feudal peasant with and through the tools he used in his labour remained influential well into the modern period.<sup>36</sup> Late medieval and early modern literary representations of the lower social orders as a threat to their social superiors often attributed to those who earn their livelihood with tools social identities articulated, reductively and coercively, through those tools, as in Coridon's nightmare in Alexander Barclay's *Eclogues*:

Me thought the scolyons / lyke fendes of there lokes  
Came some w<sup>t</sup> whytles / some other w<sup>t</sup> flesh hokes  
Me thought that they stode echone about me thycke  
With knyues redy for to slea me quicke.<sup>37</sup>

Depictions of peasant rebellions, moreover, often represent the rebels' attempts to escape such prescriptive identification as restricted to and by the tool in precisely the same way, the implication being that the peasant who in rebellion brandishes a plough goad does so not only *because* he has no other weapon at hand, but also *in order to* escape being a ploughman whose identity is reduced, by metonymy, to the tools he uses to make a living. The lesson taught by such fictions – think of Jack Cade and his followers in *1 Henry VI*, or Thomas Mosby, a tailor, who uses his pressing iron as a murder weapon in *Arden of Faversham* – is that in the end abuse is only use, that the abuse of a tool to escape the condition of metonymic reduction is necessarily self-defeating.

In the passage from Sidney quoted at the outset, the phrase 'converting husbandry to soldiery', which invokes and reverses Isaiah's prophecy that 'in the last daies' the people of Judah and Jerusalem 'shal breake their swordes also into mattockes, & their speares into scithes' (Isaiah 2:2, 2:4), establishes as conceptually central the principle of conversions of use and practice.<sup>38</sup> But Sidney goes further and identifies four means by which the peasants arm themselves: some seize on use-appropriate tools (swords and bills); others agricultural

implements (pitchforks and rakes); others indoor, domestic tools (spits); and still others drinking pots. The close resemblance between this list and the range of instruments mentioned in the assize records points to a powerful logic of misuse that underlies widely disparate practices and discourses in the Renaissance. In what follows I explore the social meaning of this underlying affinity.

Of course, Sidney had more immediate sources, among them probably chronicle histories of English rebellions, especially Holinshed's accounts of the uprisings in 1381, 1450 and 1549. Holinshed's description of the latter, especially as it occurred in Norfolk, may have coloured Sidney's representation of the peasants' complaints in the *New Arcadia*, which seems carefully designed to place some distance between Sidney and an instance of civil disobedience he had probably meant in the *Old Arcadia* as an allegory of his opposition to the queen's match with Alençon.<sup>39</sup> And in one of Holinshed's two versions of the origin of the 1381 rebellion, the first act of violence is also an act of use-against-design. Hearing that a poll tax collector was mistreating his daughter, one John Tyler 'came running home with his lathing staffe in his hand' with which he 'raught him such a rap on the pate, that his braines flue out, and so presentlie he died'.<sup>40</sup>

The primary source for the misuse topos in the *Arcadia*, however, is probably not historical either. Edward Berry notes that Sidney's account of the rebellion in the *New Arcadia* closely resembles, instead, the battle of the Lapiths and Centaurs at the wedding of Pirithous and Hippodame in Ovid's *Metamorphoses*. Both battles are described with comically exaggerated violence, both arise as a result of drunkenness at a celebratory feast, both pit civilized men against bestial adversaries, and in both the hero is a figure of ambiguous gender (Caeneus in Ovid, Pyrocles in Sidney).<sup>41</sup> More to the point here, in Ovid both Centaurs and Lapiths practise egregious tool abuse, using as deadly weapons 'an antique mixing-vat' (*antiquus crater*), 'wine-cups and brittle flasks ... deep rounded basins, utensils once meant for use of feasting, but now for war and slaughter', a 'chandelier thick-hung with glittering lamps', 'the leg of a table of maple-wood', 'the huge altar, fire and all', 'the antlers of a stag hung on a tall pine tree as a votive offering', 'a threshold stone', an 'acorn-laden oak' and an 'old pine' both torn from the earth, and a 'crow-bar'.<sup>42</sup> While some aspects of Sidney's representation of the rebellion derive from English sources, the debt to Ovid seems both more direct and more important stylistically. The phrase 'utensils once meant for use of feasting, but now for war and slaughter' (*res epulis quondam, tum bello et caedibus aptae*), seems likely to have

prompted Sidney's 'Some caught hold of spits, things serviceable for the lives of men, to be instruments of their deaths ...'<sup>43</sup> Similarly, Sidney's mention of a 'lever' used as a weapon by the butcher in the *New Arcadia* probably echoes the 'crow-bar' (*vecte*) in Ovid.<sup>44</sup> Finally, Sidney himself directs the reader to the source, since the much-discussed 'poor painter' whose hands Pyrocles cuts off is present during the conflict because he is painting the battle of the Centaurs and Lapiths, and needs models for wounds.<sup>45</sup>

The classical topos acquires, however, a new set of social and aesthetic values in being translated from Augustan Rome to Tudor England. Although Berrong suggests the battle in Ovid was 'a *locus classicus* for the triumph of passion and the animal over reason and the human', and although Ovid may sometimes have been moralized in these terms during the Renaissance, the text itself does not clearly support such a reading.<sup>46</sup> If the Centaurs start the fight by snatching the bride, it is Theseus who first resorts to tool abuse, smashing Eurytus the Centaur's brains out with the *antiquus crater* (12: 236); both sides shamelessly employ use-inappropriate tools, and neither is clearly distinguished by its method of combat. In Sidney, in contrast, use-against-design is entirely class-dependent. True, Dorus strikes dead the first rebel he encounters with his sheep hook (an instrument whose Christian significance endows it with ambiguous meaning); but he immediately exchanges this weapon for his fallen opponent's 'bill' (OA 126) or 'two-hand sword' (NA 281). Neither version of *Arcadia* especially emphasizes use-against-design in the fighting itself. It is not mentioned in the *Old*, and in the *New Arcadia* only the rebels practise it – the butcher with his 'lever', the miller with his 'pitchfork' (NA 281) – and we hear of no injuries thus inflicted.

Moreover, different social measures distinguish between use and abuse in the two texts. In *Metamorphoses* misuse involves primarily instruments associated with the proper functioning of the household, beginning with artefacts normally used in eating and drinking, or in religious observance. There is a noticeable descent in the sophistication of the instruments employed, from artefact to natural object, until by the end the weapons of choice (apparently because everything else has already been used) are sticks, stones, tree trunks and finally the mountains of earth under which the Centaurs bury Caeneus; the turn from artefact to natural object, as if accompanying a movement from indoors to out that symbolically obliterates the distinction, is marked by the tearing up and abuse of the 'threshold stone' (*limin*; 12: 281). The rhetorical strategy governing the tool abuse topos, and the aesthetic thrill it produces,



consist in Ovid in its corrosive effect on the distinctions between artificial and natural, indoors and out, culture and nature.

Sidney's account and Ovid's converge in the misuse of drinking cups in what we have seen is Sidney's clearest debt to his model. But rather than heading up the list of abused instruments it is placed last.<sup>47</sup> And where Ovid's instruments are all associated with proper (and, within the frame of the narrative, socially undifferentiated) domestic practice, Sidney's are primarily the implements of the farmer and artisan, which as we have seen closely resemble those the assize records tell us English men and women used to kill one other. In Ovid, no social stigma attaches to tool abuse; it may articulate comically the erosion of the difference between the human and the natural, but it does not encode discriminations within the former category. Sidney employs the use-against-design topos to make precisely these discriminations through a new understanding of the relation between misuse and aesthetic design, moving from the least abusive and most effective 'conversion' of instruments to the most abusive and least effective: from swords and bills to drinking pots. The social meaning attaching to tool abuse here is inversely related to its aesthetic or rhetorical value, for the more acutely faulty (abusive, ineffective, and worthy of contempt) the conversion is, the greater the literary pleasure it affords. The more egregious the tool abuse, the better the poetry; the worse the one works, the better the other. The resistance of the tool becomes itself the principle of rhetorical surrender, and this contrast in turn produces a second. We have postulated in the assize records an inverse ratio between premeditation and abuse: generally speaking, the more planned a homicide is, the more suited the murder weapon will be to the job at hand (the less it will be abused). But the passage from Sidney suggests that literary representations of homicide may oppose to this inverse ratio a direct one. The example of the pots used to drink the king's health and then deployed as weapons to threaten his rule does show premeditation and abuse, on the part of the peasants, to be inversely proportional; but its rhetorical placement, at the end of a series of increasingly abusive comparisons as the ultimate member of that series, reveals it as the most plotted, the most premeditated, part of the paragraph, the ultimate and most effective expression of the governing strategy, which is to mock the Arcadian commons' lack of intelligence, skill and courage by associating pleasure with abuse. Thus the literary representation of tool abuse – here in Sidney at least – finds its specifically literary quality on its reversal of the model of agency and temporality found in the legal idea of the sudden and in

the use-against-design to which it is related. Sidney had, of course, native examples of the topos, like that of Barclay; but these did not supply him with the relation between pleasure and abuse that his handling of use-against-design shows so clearly. Nor did Ovid. Barclay's nightmare stands somewhere behind the nervous triumph of aesthetic pleasure in Sidney, but Sidney is able to move beyond both Barclay and Ovid because he is able to turn the legal and everyday relation between abuse and extemporaneity to literary account. He does so by constructing the literary as the mirror image of its referential object, literary precisely to the extent that it performs a structural reversal of what it represents. And this is simultaneously to make referentiality, that through which literature is liable for and responsible to what it portrays, the index of literature's own self-sufficiency, its own jurisdictional authority.

This display of apparent mastery suggests that what Sidney in the *Apology* calls 'fore-conceit', the mental picture of the work of poesy in advance of its execution, is closer to premeditated murder than to the tool abuser's hasty anticipation of a homicidal scenario. But to accept this correspondence is simply to acquiesce in the passage's manifest ideological thrust and to repudiate tool *use* as such and the 'peasant' culture of manual labour with which it is conflated. The need for such repudiation is perhaps just part of what it means to be an aristocrat, especially one as insecure of his position as Sidney was (he wrote the *Arcadia* while in humiliating rustication under the queen's displeasure). But it may be, too, that tool abuse and its temporal model of purposive action – that of a suddenness that is at once deliberate, improvisational and subject to displacements of agency – resonated too intimately with Sidney's experience of his own literary practice. And if so, a further purpose of the passage is to disengage from the model of peasant action Sidney's abuse of what he sees as an aristocratic tool, the pen, in merely literary labour. It is thus striking that the 'poor painter', whose function as an emblem of literary representation seems inescapable, first makes his appearance in the revised text as if to personate not simply the artist but the artist as a reviser. Greenblatt and Berry agree that the painter represents (whether for political reasons, as Greenblatt has it, or because he represents an inferior aesthetic, as Berry would prefer) a rejected model of practice.<sup>48</sup> Though perhaps less obviously plausible, Berrong's suggestion that the painter personifies Sidney's sense of his own risk or vulnerability in having set out in detail, in the *New Arcadia*, the grievances of the commons, has the virtue of emphasizing that disavowal may imply identification. The painter emerges in

the *New Arcadia* to mark almost explicitly the literary model – the passage in Ovid – that Sidney had relied on the first time around and that he seems to have returned to in revising, particularly in interpolating some grotesquely comic violence that closely resembles several lines in Ovid. The fate of the painter, however, does not mean that, in revising, Sidney either severed or cemented his connection to his source, but rather that revision's recursive engagement with the source amplifies the differences in the similarity, and in particular underscores the politicization of the use-against-design topos.

If much of the work of the revisions here is to revisit the sources and rethink departures from them, this is done in the context of changes to the narrative that foreground the tension between compositional premeditation and the need to revise locally. For just as Sidney elsewhere in the revised text converts accident into design, as when the wild animals that attack Basilius' daughters and their suitors randomly in the *Old Arcadia* are set on by Cecropia in the *New Arcadia*, he converts a rebellion fuelled by nothing more than a dissatisfaction originating among the commons themselves to one fomented covertly by Cecropia's agent Clinias (NA 288). And yet Sidney seems deliberately to preserve his original account of the rebellion together with this new line of causation; even though he has converted an objective account of the rebellion's origins into a story told by Clinias, he notes, as if to avoid casting retrospective doubt on his own earlier narrative, that although he acts in his own and Cecropia's interests Clinias gives an accurate account of the rebellion (NA 290). The distinction between these two accounts of the rebellion occupies the same conceptual space as the distinction between the versions of the sudden we have identified as operating in the law: in one, that which happens suddenly imports its own explanation, does not require and will not bear further investigation (the wild beasts attack in the *Old Arcadia* because that is what wild beasts do, just as men get into brawls and kill each other extemporaneously); in the other, the suddenness is what calls for explanation; it's the tip of the iceberg; it speaks of the deep plotting and premeditation it conceals. The relation between the hidden and the patent becomes more complicated, however, if we accept the argument, first proposed by Zeeveld, that in revising, Sidney meant to eliminate the possibility that the *Old Arcadia* could be read as criticizing the queen for considering marriage with Alençon.<sup>49</sup> Rather than as in the *Old Arcadia* effectually fomenting the rebellion himself – in making it the coded expression of his own dissatisfaction with the queen – Sidney in the revised version attributes this function to Clinias and

through him to Cecropia. The effect of this shift is at once to conceal (at least from Basilius and his party) the true causes of things, and to make his own intentions more patent and less inquireable.

This layering of the manifest and the occult, the sudden and the premeditated, describes as well the relation between authorial fore-conceit – Sidney’s sense that he is bound, productively, by his own plan, especially as that plan is set forth in the oracle – and a compositional extemporaneity, associated with revision, that makes it possible to displace premeditation, and even literary agency, in a way that exculpates the author.<sup>50</sup> The legal and the literary are linked here in their interest in the relation between extemporaneity and premeditation, for in each an intermediate category, combining elements of either extreme, is a new focus of interest and possibility; the literary articulates in its own terms the law’s unarticulated reliance on the notion of use-against-design in constructing this category. In the law the idea of the sudden helps give a language to the grey area of culpability newly marked out in the emerging law of manslaughter, between absolute fault (and death) and absolute faultlessness (and exemption from punishment). In Sidney the tool abuse topos and the sense of the sudden for which it stands similarly begins to articulate the ways in which liability will come into play in defining the emerging category of the author. If for reasons of social distinction Sidney attempts to dissociate his own literary practice from an improvisational misuse of tools, such misuse simultaneously provides a conceptual and figurative resource enabling him to register the conditions of liability that bind his own practice.

## Notes

1. Earlier versions of this essay were presented at the Group for Early Modern Cultural Studies in 1998 and 1999, and at the University of Michigan in 2002. I thank these audiences, especially Michael Schoenfeldt and Eric Rabkin, for their objections, suggestions and comments. Thanks also to the Folger Shakespeare Library, where I completed the essay during a fellowship; and to Sandra Macpherson, Gail Kern Paster and James Phelan for reading and commenting on the essay in draft.
2. M. de Grazia, M. Quilligan and P. Stallybrass (eds), *Subject and Object in Renaissance Culture* (Cambridge University Press, 1996), 1–13.
3. B. Brown, ‘Thing Theory’, *Critical Inquiry* 28.1 (Autumn 2001), 5.
4. For a long time I thought *tool abuse* was my coinage; it turns out, however, that the expression is in common use among tool manufacturers.
5. See M. de Certeau, *The Practice of Everyday Life*, trans. S. Rendall (University of California Press, 1984).

6. The best-known example of this combination is in act V of *Hamlet*. See W.W. Skeat, 'Cain's Jaw-Bone', *Notes & Queries* ser. 6 (1830), 2. 143; R.R., 'As if it were Cain's Jaw-Bone', *Notes & Queries*, ser. 6 (1830), 2. 162. Such abuse occurs, of course, in relation to a divine rather than human toolmaker.
7. P. Sidney, *The Countess of Pembroke's Arcadia (The Old Arcadia)* (henceforth OA), ed. J. Robertson (Oxford University Press, 1973), 128. The passage is almost identical in the *The Countess of Pembroke's Arcadia (The New Arcadia)* (henceforth NA), ed. V. Skretkovicz (Oxford University Press, 1987), 292.
8. J.S. Cockburn (ed.), *Calendar of Assize Records*, 11 vols (HMSO, 1975–85). All translations from the Latin are Cockburn's. Words and phrases in quotation marks are in English in the calendars. Hereafter cited parenthetically by the abbreviation CAR followed by the volume title (county and reign) and number of the entry.
9. Although the hypothesis is plausible, and I think correct, that premeditation was generally lacking where tool abuse was present, the assize records are not sufficiently reliable or informative to support a strictly statistical claim. Since most men routinely carried knives, use of such weapons cannot in itself be an indicator of premeditation. Tool abuse therefore implies extemporaneity more strongly than extemporaneity implies tool abuse. A potential exception, important to literary representations of homicide but unlikely to be statistically significant, is the premeditated use of a nominally inappropriate weapon to end a killing with particular meaning. See note 32.
10. J.H. Baker (ed.), *The Reports of Sir John Spelman*, vol. 2 (94 Selden Society, 1978), 305.
11. J. G. Bellamy, *The Criminal Trial in Later Medieval England: Felony before the Courts from Edward I to the Sixteenth Century* (Sutton, 1998), 58, 61. There is disagreement about the precise meaning of the Latin terms in question. With Bellamy compare J.M. Kaye, 'The Early History of Murder and Manslaughter. Part II', *Law Quarterly Review* 83 (1967), 374–5. See also Baker, *Reports of Sir John Spelman*, 304.
12. Bellamy, *The Criminal Trial in Later Medieval England*, 61.
13. Bellamy, *The Criminal Trial in Later Medieval England*, 64, who notes however that Gower spoke of 'moerdre and manslaughter' around 1390.
14. *Boke of Justyces of the Peas* (1506), sig. A6.
15. J.H. Baker, *Manual of Law French*, 2nd edn (Scolar Press, 1990), s.v. chance medle, defines the term as 'sudden quarrel or fight' and notes that the corresponding Latin was 'ex subito casu'. Compare the phrase 'ex casu subito vocato chauncemelle' in a 1530 King's Bench case (Baker, *Reports of Sir John Spelman*, 305). According to Baker, *chaud melle*, *chance medle*, and *chaumedle* all meant the same thing. But *chaud* usually meant hot in a figurative sense, as in *chaudes paroles*, a heated verbal exchange (*Manual* s.v. *chaud*). Despite the manifest mixing of heat and chance this range of variants shows, the *OED* makes no mention of a connection to *chaud* and offers the explanation that the phrase implies mixed or 'meddled' chance, that is, chance and intent mixed, adding that some have misread it as 'fortuitous meddling' (implying *pure* chance). This view is supported by J. Cowell's *Interpreter* (1607) (s.v. Chawnce medley; sig. O1<sup>v</sup>) but conclusively contradicted by other sources. Chance-medley was a hot or hasty mixing not of negligence and accident but of two combatants.

16. Bellamy, *The Criminal Trial in Later Medieval England*, 63.
17. Kaye, 'The Early History of Murder and Manslaughter', 584.
18. [If John Vane Salisbury did not have premeditated malice, but suddenly took part with those who had premeditated malice, this is manslaughter in him and not murder, because he did not have premeditated malice.] E. Plowden, *Les Comentaries* (1579), fol. 100b. See Kaye's analysis, which may exaggerate the novelty of the legal reasoning ('The Early History of Murder and Manslaughter', 585).
19. [Manslaughter is where two fight together suddenly, without precedent malice, and the one kills the other, there he will have [benefit of] clergy.] R. Crompton, *Loffice et auctoritie de Justices de peace* (1584), sig. C4; fol. 20. Compare the very similar definitions of manslaughter in M. Dalton, *The Countrey Justice* (1618), 217; and F. Pulton, *De pace regis et regni* (1609), fol. 123<sup>v</sup>.
20. Thus the first edition of Fitzherbert's *Loffice et auctoryte de Justyces de peas* (1538), in which all homicides are discussed under the single heading of murder, only mentions manslaughter in passing, 'come chose fait feloniousment par chance medley' (sig. C5); later he offers as the difference between murder and manslaughter that 'lun est de malice avaut purpence, et lauter nient, mes par chance' (sig. C5<sup>v</sup>). There is no more sense here than in the 1506 *Boke of Justyces* that the defining characteristic of manslaughter is its suddenness; Fitzherbert seems to be thinking of chance-medley more in terms of chance than of *chaud*.
21. [Two fall out suddenly in the town, and forthwith they repair to the fields by agreement, and the one kills the other, this is murder, because there was precedent malice ... but if they fight suddenly without precedent malice, and pause briefly in their combat, and then forthwith take the field, and the one kills the other, this is only manslaughter, because all is done, it seems, in a continuing fury.] Crompton, *Loffice*, fol. 18b–19.
22. Compare fol. 20a (sig. C4<sup>v</sup>): 'tout fuit fait in un continuyng fury'. A similar notion is articulated in terms of 'hot blood' in an example added to the 1587 edition of Crompton (fol. 22b, sig. C6<sup>v</sup>).
23. Dalton, *The Countrey Justice* (1618), 214, 209. Coke does not mention suddenness, saying only that 'si un tua auter sans ascun provocation & sauns ascun malice prerence quo poet estre prove, le Ley adiudge ceo murdre et implye malice' (*La Neuf<sup>me</sup> Part des Reports* (London, 1615), 67). Dalton is inferring the suddenness of the crime from the absence of evidence of prior planning or immediate provocation. Similarly in Crompton, *Loffice* (1584) suddenness under certain circumstances is understood to imply malice premeditated; see generally his account of murder (fol. 16–19b, sig. B8–C3<sup>v</sup>).
24. But see, for example, *CAR Kent Elizabeth I* no. 859, mentioned above.
25. It is possible that Powell's addition, 'mariner', is fictitious, shaped to conform to the circumstances in which the crime is represented to have occurred; since the indictment was required to specify the occupation of the accused, it would have been invented if unavailable. On fictitious names and additions, see Cockburn, *CAR Introduction*, 77–9. On the difficulty of extracting facts from the assize records see also Cockburn, 'Early-Modern Assize Records as Historical Evidence', *Journal of the Society of Archivists* 5 (1975), 215–31.

26. The addition 'butcher' may be fictitious; see previous note. A fictitious addition is especially likely here since when Wissenden was indicted at the next assizes in February 1589 as an accessory to grand larceny he was identified as a 'labourer' (no. 2211). If the addition is fictitious, it is striking that in deciding that Wissenden was a 'butcher' the clerk who drew up the indictment took his cue from the instrument used in the crime. If the instrument doesn't suit the crime, the perpetrator may nevertheless be made to suit the instrument. Who would be more likely than a butcher to misuse a cambrell to kill someone? It is perhaps possible that simply calling Wissenden a butcher, whether or not it was true, had a mitigating effect, since formally it points in the direction of the sudden.
27. John Blakebone was indicted for and found guilty of felonious killing (manslaughter), but allowed clergy. David Powell was indicted for murder but convicted of homicide (manslaughter), though, apparently because he could not read and therefore could not receive benefit of clergy, he was condemned to hang. Richard Wissenden was charged with manslaughter ('felonious killing'), found guilty, and allowed clergy.
28. Brown, 'Thing Theory', 4.
29. Well before the sixteenth century 'noon' had come to designate the hour at which workers stopped to eat or rest. See J. Le Goff, *Time, Work and Culture in the Middle Ages*, trans. A. Goldhammer (University of Chicago Press, 1980), 44–5.
30. Cases where the entry consists of a coroner's inquest not converted into an indictment would normally be annotated with the disposition of the case, which was usually termed an accidental killing or 'death by misadventure'. See for example *CAR Hertfordshire James I* nos 124, 300, 471, 472.
31. Misuse could also help exculpate in cases judged self-defence, where in repelling an assailant a killer had to make do with whatever weapon was in immediate reach (*CAR Hertfordshire Elizabeth I* no. 331); and it may have contributed to the persuasiveness of accounts of the crime in indictments where one charged with murder was convicted of (clergyable) homicide (*CAR Hertfordshire James I* no. 890, *CAR Kent Elizabeth I* no. 877, mentioned above). There are also those cases where the killer seems to have gone out of his way to practise use-against-design when more direct means were obviously available, as if to mark the brutality of the crime in the violence of the misuse. At the Hertford assizes in March 1598, for example, John Winchester was indicted for murdering John Briscoe by 'forcing a sheathed knife down his throat' while he lay in bed in his house (*CAR Hertfordshire Elizabeth I* no. 871). Use-against-design did not, of course, mitigate here; he confessed and was to hang.
32. This transaction may be illuminated, in another idiom, through a recent account of how early modern gloves become fetish objects in being unpaired from their mates; pairing, writes Derrida, 'inhibits, at least, if it does not prevent, the "fetishizing" movement; it rivets things to use, to "normal" use' and can thus function to 'exclude the question of a certain uselessness, or of a so-called perverse usage'; to insist on pairing two objects is to 'bind them to the law of normal usage'. Quoted in P. Stallybrass and A.R. Jones, 'Fetishizing the Glove in Renaissance Europe', *Critical Inquiry* 28.1 (Autumn 2001), 120. The dis-pairing of the tool from its 'normal

usage' initiates, similarly, its movement toward the condition of the fetish as a thing mysteriously in excess of its status as a purely instrumental object, a thing with a will of its own.

33. It may be objected that this is not abuse of the tool or of the purpose for which it was designed, but of the norms that govern its usage: if everyone chastised his wife with a weed-hook or cut wheat with a gambrel these actions would not constitute abuse. It is true that such abuse would be invisible to the observer, and that convention and design both govern the decision to pick up one tool rather than another. But it would still be harder to cut wheat with a gambrel than with a scythe, and this would be because a gambrel is not designed to cut wheat and cannot do so efficiently. If a person thought his gambrel was designed to cut wheat, and he used it for that purpose, he would not recognize that his difficulties arose because he was struggling against the design of the tool; but he would be. The distinction between use and abuse is never purely a matter of mechanics, but mechanics are always involved.
34. See especially G. MacCormack, 'On Thing Liability (*Sachhaftung*) in Early Law', *Irish Jurist* 19 (1994), 328. The deodand first appeared during the period following the Norman invasion; it is first referred to in Bracton (mid-thirteenth century). For its later history see especially T. Sutton, 'The Deodand and Responsibility for Death', *Legal History* 18.3 (December 1997), 44–55. See also the references cited in L. Wilson, *Theaters of Intention: Drama and the Law in Early Modern England* (Stanford University Press, 2000), 175–6, 303 n.24.
35. For the statue as an artefact that moves, for example, see K. Gross, *The Dream of the Moving Statue* (Cornell University Press, 1992), and, on body parts invested with agency, D. Hillman and C. Mazzio (eds), *The Body in Parts: Fantasies of Corporeality in Early Modern Europe* (Routledge, 1997), esp. xix.
36. There were complications, especially as a result of the contrary iconographies of an apostolic Christianity that inverted the stigma of implements whose biblical resonances qualified them as quasi-populist emblems: sheep hooks, ploughshares, and so on. Langland's *Piers Plowman*, in whose title character there seems to be an allusion to Luke 9:62 ('No man having put his hand to the plow, and looking backe, is fit for the kingdome of God'), is the most obvious medieval example. At least in the Judeo-Christian scriptural tradition pastoral implements were ennobled from the start, but with the Reformation calls for a return to apostolic religious practice brought with them a more thematic inversion of signification. Thus for example Calvin, in Thomas Norton's 1562 translation of the *Institutes*, paraphrasing Bernard, distinguishes between secular lordship and the ministry: 'Therefore how much soeuer we thinke of our selues, let vs remembre y<sup>e</sup> there is a ministerie layd vpon us, not a Lordship geuen vs. Learne that thou hast need of a wedehoke, not of a scepter, that thou mayst do the worke of a Prophete.' J. Calvin, *The Institution of Christian Religion* (1562), IV.xi.11 (fol. 404). This is the context that instructs us to detect an irony in Polixenes' metonymic condemnation of his son's choice of a mate – 'thou art too base / To be acknowledged: thou a sceptre's heir, / That thus affects a sheep hook!' (*The Winter's Tale* IV.4.419–21) – where the language of social



distinction is all too enmeshed in a Christian ethic of service, all too double-edged and ready to reflect unfavourably on the father – even if, as it will turn out, the sheep hook is really a sceptre's heir herself. The principle that tool abuse marked social inferiority is differently inflected yet again in the allegorical figure of Talus, in Book 5 of Spenser's *Faerie Queene*, who wields a flail of the agricultural rather than martial variety: a 'strange weapon, never wont in warre' (V.4.44); 'strange' encoding the abuse involved in weaponizing an instrument normally used for threshing grain. Talus is typically deployed against undifferentiated crowds usually identified as of inferior social status; yet his flail marks him as the appropriate instrument to handle those too base for Artegall's sword.

37. A. Barclay, *Eclogues* (c. 1515), sig. M4. A whittle is a carving or butcher's knife; a fleshhook is 'a hook for removing meat from the pot' (*OED*).
38. Text from the Geneva Bible (1560). The biblical allusion may be more superficial than substantial, for the present conversion is of use rather than design (though perhaps a sword need only be deformed moderately, like the bent paperclip, rather than melted down and recast, to turn it into a mattock or scythe; compare the more familiar rendering of the verse in the King James Bible).
39. J.L. Sutton, Jr, 'A Historical Source for the Rebellion of the Commons in Sidney's *Arcadia*', *English Language Notes* 23.4 (June 1986), 6–11. The strategy behind the revision was first proposed by W.G. Zeeveld, 'The Uprising of the Commons in Sidney's *Arcadia*', *Modern Language Notes* 43 (1933), 209–17.
40. R. Holinshed, *The Third Volume of Chronicles* (2nd edn; 1587), sig. Rr3. ('A Lathing Staff of Iron, in the form of a Cross, to stay the cross Laths while they are nailed to the long Laths, and also to clinch the Nails' (*OED*)). Although this account is not in itself implausible, it seems to be unique to Holinshed and is so characteristic of his treatment of the rebels throughout as at once dangerous and comical that it has the feel of a myth of origin. Holinshed's narratives of rebellion rarely otherwise emphasize use-against-design; and certainly, at least once a rebellion was under way, rebellious commoners cannot often have been so ill-equipped as Sidney's account suggests.
41. E. Berry, 'Sidney's "Poor" Painter: Nationalism and Social Class', in V. Newey and A. Thompson (eds), *Literature and Nationalism* (Liverpool University Press, 1991), 7–8.
42. Ovid, *Metamorphoses*, ed. and trans. F.J. Miller, 2 vols (Harvard University Press, 1939), vol. 2, 12:210–536.
43. Ovid, *Metamorphoses*, vol. 2, 12: 244; OA 128. In *The Greek Romances in Elizabethan Prose Fiction* (Columbia University Press, 1912), S.L. Wolff notes that the passage also bears a fairly close resemblance to Heliodorus' *Æthiopian Historie* as translated by Thomas Underdown (1569), 1.1.9–10.
44. NA 281, 555 (note to 281.32).
45. For Berry, 'Sidney's "Poor" Painter', the painter represents a mistaken doctrine of imitation, which 'reduces the poet to a mere copyist', 6. Sidney cuts off the painter's hands in order to pre-empt an inferior version of the battle with his own, which absorbs rather than simply copying the episode in Ovid.
46. R.M. Berrong, 'Changing Depictions of Popular Revolt in Sixteenth-Century England: the Case of Sidney's Two *Arcadias*', *Journal of Medieval and Renaissance Studies* 19 (1989), 21.

47. Note that Golding's translation (1567) gives special emphasis to this form of misuse:

Theyr first encounter was with cuppes and cannes throwen overthwart,  
And brittle tankerds, and with boawles, panes, dishes, potts, and trayes,  
Things serving late for meate and drinke, and then for bloody frayes.

Ovid, *Metamorphoses*, trans. A. Golding, ed. J.F. Nims (Macmillan, 1965), 12: 271–3. This rendering multiplies the variety of domestic implements beyond the warrant of the Latin text, suggesting that Golding is responding to some special resonance attaching to tool abuse in the Renaissance.
48. S. Greenblatt, 'Murdering Peasants: Status, Genre, and the Representation of Rebellion', *Representations* 1.1 (February 1983) 17–18; Berry, 'Sidney's "Poor" Painter', 8–9.
49. Zeeveld, 'The Uprising of the Commons in Sidney's *Arcadia*', 212–17.
50. On the relation between fore-conceit and the oracle, see M. McCanles, 'Oracular Prediction and the Fore-Conceit of Sidney's *Arcadia*', *ELH* 50 (1983), 233–44.

# 7

## Taking Liberties: George Wither's *A Satyre, Libel and the Law*

Michelle O'Callaghan

For now, these guilty Times so captious be  
That such, as loue in speaking to be free;  
May for their freedome, to their cost be shent,  
How harmlesse er'e they be, in their intent:  
And such as of their future peace haue care,  
Vnto the *Times* a little seruile are.

(George Wither, *Wither's Motto*, 1621, A6<sup>r</sup>)

By the time he wrote this passage, George Wither already had a reputation as a prison poet. Wither had spent over five months in the Marshalsea in 1614 over his satire *Abuses Stript, and Whipt* (1613), and when *Wither's Motto* itself fell victim to 'these guilty Times', he once again found himself in prison. In fact, throughout his lengthy and prolific literary career, which began in 1612 and ended with his death in 1667, Wither was arrested six times and imprisoned on at least four occasions for his writings.<sup>1</sup> Given this extensive experience and his reputation as an oppositional poet, Wither is an ideal candidate for a study of early Stuart censorship, and not surprisingly he has a prominent place in Cyndia Susan Clegg's recent study *Press Censorship in Jacobean England*. Clegg takes to task a Whig model of censorship for its oversimplifying account of a repressive state determined to silence all dissent. Instead, she draws attention to the varied, and sometimes competing, interests informing censorship practices to argue that instances of press censorship were isolated events determined by local interests rather than a wider ideology. Clegg bases her conclusions about a culture of censorship primarily on evidence of press control.<sup>2</sup> Yet, it was only in the case of Wither's use of George Wood's illegal press to print his unlicensed work, *The schollers purgatory* (1624), that we can be

certain that his prosecution operated directly through mechanisms of press control, such as the licensing system. More often, censorship operated through other mechanisms, such as the 1620 royal proclamation, 'Against excesse of Lavish and Licentious Speech of Matters of State', and on at least two occasions, through defamation laws.<sup>3</sup> Defamation laws in the late sixteenth and early seventeenth century were increasingly being used to control a burgeoning market for political libels and satires. This marketplace was not primarily print-based, but instead was largely dependent on oral and manuscript cultures. Moreover, laws of defamation in the early seventeenth century did not clearly distinguish between spoken, manuscript or printed libels.<sup>4</sup> This suggests that we need to be wary of isolating instances of censorship relating to printed books from actions taken against the spoken word and texts in manuscript, and further, that it is therefore misleading to rely on a print-based model of censorship, whereby censorship becomes a synonym for press control. Sheila Lambert and others have argued that press control had more to do with economics and the regulation of the book trade than with an ideologically coherent programme of censorship.<sup>5</sup> This does seem to be the situation if one narrowly focuses on the licensing system and press regulation, but rather than providing evidence for arguing ideologically motivated censorship out of existence, it suggests that we need to look at other mechanisms used by the government and their representatives to control public opinion. To this end, this chapter will use Wither's prosecution in 1614 as a case study for understanding how censorship operated in this particular instance, and to draw conclusions about the nature of political consciousness in this period. Wither was a popular satirist, both *Abuses Stript, and Whipt* and *Wither's Motto* rapidly went into numerous editions, and his satires are highly responsive to a popular political culture.

But at this day the offence of writing provoking letters is much increased by his late majesty's [James I] edicts and proclamations published to suppress all provocations of quarrels, although the words or writings tend in strictness of law to be libellous. I could spend much time in the discourse of the libels of these days, but *Sir Edward Coke* hath shortly and pithily set down the diversities, who (I think) in his time was as well exercised in that case, as all the attornies that ever were before him.<sup>6</sup>

William Hudson, an early seventeenth-century lawyer, noted the new and tighter measures introduced under James I to combat libels in his

'A Treatise of the Court of the Star Chamber', and gave credit to the man largely responsible for these innovations, Sir Edward Coke, although Hudson was also moved to remark on the severity with which Coke had prosecuted libel cases in the Star Chamber.<sup>7</sup> The 1605 case *Attorney General V. Pickering*, brought by the Crown against Lewis Pickering over a posthumous libel against Queen Elizabeth and the Archbishop of Canterbury and reported by Coke as *de libellis famosis*, built a number of key innovations into an earlier form of criminal libel, *scandalum magnatum*. Truth was no longer a defence in such cases, '[i]t is not material whether the libel be true, or whether the party against whom it is made, be of good or ill fame'; it was punishable even in cases where the subject of the libel was 'dead at the time of the making of the libel'; and the definition of publication was extended to include private letters, pictures, signs and performances.<sup>8</sup> Judges in the case argued that such changes were necessitated by the current vogue for libelling, and the increasing ingenuity of libellers.<sup>9</sup> Bywater, an associate of Pickering's, had copied the libel in Pickering's private study and then paid a group of colliers 'to sing a *Dirige* [round] aboute the Archebishop's herse'.<sup>10</sup> These modes of political expression, which included the written and spoken word, and also popular rituals and performances, were not a new phenomenon but had a long history. So why were they such a cause for concern in this period that they necessitated changes in the laws of criminal libel?

The vogue for political libels and satires in the early seventeenth century testifies to a changing political culture and the emergence of 'an active public opinion', in the words of Pauline Croft, that was confident enough to question the policies and morality of the Jacobean court.<sup>11</sup> Political libels applied general vices to an individual, a peer or minister of the realm, often in order to challenge their fitness for public office. Such libels drew heavily on a formulaic rhetoric of court corruption, for example, often equating political, moral and sexual immorality, that drew much of its political bite from the way that it fed into wider discoursing on affairs of state. As Linda Levy Peck has convincingly argued, a language of court corruption provided a formula for articulating opposition in early Stuart England due to the way in which it connected corrupt practices with the health of the commonwealth, and so looked forward to a thoroughgoing reform of the body politic.<sup>12</sup> Libels similarly related the individual instance of corruption to wider social or political ills to produce an oppositional language capable of holding the government to account. Although there was a theoretical distinction between a libel, which defamed

individual officials, and broader anti-government sentiment, in popular usage of the term 'libel' the two were often conflated; a confusion encouraged, as Philip Hamburger points out, by the 'fact that prosecutions for libel of magistrates were designed to protect the government by shielding the governors'.<sup>13</sup>

Not all contemporaries were comfortable with the changes to the laws of criminal libel. Hudson, for example, expressed unease about Coke's innovations, particularly the way that truth could no longer be used in defence of words spoken.<sup>14</sup> He was not alone in his concerns. A decade after the Pickering case, George Wither, a student at the Inns of Court, was sent to the Marshalsea, apparently for libellous passages published in his *Abuses Stript, and Whipt*. He defended himself against the charge in his *A Satyre: dedicated to his most excellent Majestie* (1614). This highly self-conscious satire is a defence of the genre itself against a perceived erosion of its traditional rights to provide a social and moral corrective defensible on the grounds of truth. Taking his own case as a worrying precedent, Wither explores the way that libel laws have turned the writing of satires into a criminal act. At the same time, Wither was concerned with the way abuses of the law limit the ability of the faithful to speak freely. This, in turn, led him to develop a model of censorship that has its basis in a dissenting tradition and champions an ideal of free speech against an arbitrary and corrupt authority. Wither derives his martyrological model of censorship from Foxe's *Acts and Monuments* which placed the printing presses of Britain and Europe in the front line of the battle between Protestantism and popery: 'How many presses there be in the world, so many block-houses there be against the high castle of St. Angelo, so that either the pope must abolish knowledge and printing or printing must at length root him out.'<sup>15</sup> Attempts to silence the godly by limiting their ability to use print to publish their cause becomes part of a wider conspiracy against Protestant reform. This martyrological model was not without a legal dimension. The accounts in Foxe's *Acts and Monuments*, as John Knott has noticed, frequently take the form of court-room dramas in which the faithful pit their knowledge of the law, both secular and biblical, against that of their accusers to challenge the charges that have been levelled at them.<sup>16</sup>

There is very little official documentation relating to Wither's prosecution. We do not know, for example, the precise crime that he was charged with or the details of his case. There exists a warrant, dated 20 March 1614, addressed to the 'keeper of the Marshalsea, to receive

into his custody and safe keeping the person of George Withers', issued by the Privy Council.<sup>17</sup> Although no official record of an examination survives, we do have ample testimony from Wither himself. Impelled by the injunction on the faithful to testify to the truth, Wither returns to his arrest again and again in texts produced in 1614 and 1615. The beast fable that appears in his *The Shepherds Hunting* (1615) sets in play a popish conspiracy in which powerful crypto-Catholics at court, wolves in sheep's clothing, are troubled by his 1613 satire, *Abuses Stript, and Whipt*, and successfully plot to bring his name into disrepute with '[s]ome of our greatest Shepherds', whereupon 'they storm'd, and call'd me to a tryall, / Where Innocence preuails not, nor denyall'.<sup>18</sup> It does seem the case that Wither was brought before the Privy Council on a charge of criminal libel for inventing and publishing 'false news, or tales' about a magnate or great officer of the realm.<sup>19</sup> There is no evidence that he was tried before the Star Chamber, but this may not be unusual since in cases of *scandalum magnatum* the Privy Council had the power to act as a court and prosecute the crime.<sup>20</sup> The 'great man' obliquely gestured to in *A Satyre*, whose 'Power and Might, / In spight of Innocence, can smother Right' (B6<sup>r</sup>), was probably Henry Howard, earl of Northampton. He was the first signatory to the warrant for Wither's arrest which was issued from Northampton House, on the Strand, where meetings of the Privy Council were held during the earl's final illness; he died there on 15 June 1614.<sup>21</sup>

Some critics have been perplexed as to why *Abuses Stript, and Whipt* caused such offence when, as Wither protested, much of the satire is general moralizing about conventional vices.<sup>22</sup> Wither's protests should not, however, be taken at face value. Generality is the standard defence of satire against the accusation of libel, and satire had become particularly defensive in the 1590s when the boundaries between satire and libel were similarly being redrawn. Wither has affinities with the 1590s satirists. Like them, he prefers the free spoken and irreverent Juvenal to the moderate and decorous Horace, possibly because Juvenal had come to be associated with freedom of expression, in its many forms, while Horace was more firmly identified with the establishment. The oppositional status of the 1590s satires themselves was ensured through a very public act of official censorship in 1599 when satires and epigrams were banned and publically burnt by order of the Archbishop of Canterbury and the Bishop of London. Wither's revival of the free-spoken Juvenal, at a time when Ben Jonson was making Horace fashionable at Court, arguably self-consciously allies his satire with those satires suppressed by the 1599 Bishop's Ban. Tellingly,

*A Satyre* opens with an apt quote from Juvenal's first satire: "'Tis a hard thing not to write Satyres, now' (A6<sup>v</sup>). By 1614, if not before, the writing of satires for Wither was inextricably linked with a culture of censorship, and his defence that his satire is general is finely attuned to such a culture. John Marston set the standard for this type of defence in his *Scourge of Villanie* (1598):

Yet I feare me, I shall be much, much, iniured by two sorts of readers: the one being ignorant, not knowing the nature of a Satyre, (which is vnder fained priuate names, to note generall vices,) will needes wrest each fayned name to a priuate vnfained person. The other too subtile, bearing a priuate malice to some greater personage then hee dare in his owne person seem to maligne, will striue by a forced application of my generall reproofes to broach his priuate hatred.<sup>23</sup>

Marston skilfully problematized the relationship between his intention in writing his satires and their reception, and thereby offered subsequent writers an evasive rhetorical strategy that encourages at the same time that it censures a libellous reading, and playfully blurs the line between satire and libel while setting out various criteria that distinguish the two forms.<sup>24</sup> Writers who use this formula typically take great care in fashioning 'bad' readers and identifying 'bad' reading practices. These readers are roundly criticized for mistaking the author's intention, and applying the satire to specific individuals either out of ignorance or malice. Yet the satirist protests too much and, in doing so, gives the impression that it is not only possible but also pleasurable to read the satire in this way. Such defences of satire are therefore highly responsive to a burgeoning readership for political libels, while keeping a close eye on legal measures introduced to police this market.

Wither, in fact, is quite open in his *A Satyre* about the precise aspect of *Abuses* that did cause offence. He identifies a specific '*foe*' who has accused him of libelling a peer or officer of state out of personal malice. This reader

doth mis-conster  
That which I haue enstil'd a *Man-like Monster*,  
To meane some priuate person in the State,  
Whose worth I sought to wrong out of my hate.

(B5<sup>r</sup>)





satire is typically aggressively anti-Spanish and anti-Catholic, hostile to the *Cecilium Regnum*, and the dominance of 'unworthy' men, such as the earl of Northampton, on the Privy Council.<sup>26</sup> Not surprisingly, Wither uses a beast fable in *The Shepherds Hunting* to give a conspiratorial account of his arrest that overtly asks the reader for an intentional reading, to bring a certain ideological perspective to their reading of the text and to recognize aspects of the Jacobean court.

And there are a number of passages, particularly in the essays on vanity and presumption, where Wither dramatically changes register and interrupts his moralizing about general vices to provide specific contemporary examples. The essay on presumption, for example, includes a lengthy passage which discovers an 'vndermining hand / That studies for the ruine of the Land' by cynically promoting 'a truce with *Spaine*', and urges the king to release 'Martiallists that long haue bin disgrac't' to counter his influence and 'Goe call a Parlament and there deuise / An act to haue them whipt now' (S5'). This is the section that is thought to have angered Northampton, the head of a court faction that was committed to peace with Spain, who then had Wither arrested.<sup>27</sup> It was, however, a rather delayed reaction. *Abuses Stript, and Whipt* first appeared in early 1613 and Wither was not arrested until over a year later. His arrest coincided with preparations for a new parliament and David Norbrook has convincingly argued that Northampton, who was investigating ways of managing the new parliament and was concerned that it would provide a platform for whipping up public opinion against Spain, felt it necessary to act against Wither and silence those who might incite anti-Spanish sentiment.<sup>28</sup> Wither remained in the Marshalsea until after the dissolution of the fractious 1614 'addled' parliament.

Wither's own account of why he was arrested, in a new passage incorporated into the 1615 edition of *Abuses*, however, takes a different angle which focuses not so much on the actions of an individual, but instead on the public reception of his satires. The 'bad' reader from *A Satyre* now has company; Wither attributes his downfall to a specific type of readership that takes his satire for a libel: 'heere's the reason they my labour like, / *They thinke I meane him they suppose I strike*'.<sup>29</sup> *Abuses* was highly popular and went into eight editions between 1613 and 1617, five of those in the first year. There was even a pirated edition that came to the attention of the authorities on 20 February 1614, a month before Wither's imprisonment.<sup>30</sup> Pritchard comments that he 'may have suffered as much from the enthusiasm of admirers who persisted in reading personal satire on Northampton into *Abuses* and thus gave the work a

dangerous reputation'.<sup>31</sup> It may have been the case that *Abuses* became part of a defamation campaign against Northampton, irrespective of Wither's own intentions. Yet, Wither's attitude towards libels, as I have suggested, was far from straightforward. He had an early fascination with libelling campaigns, and was eager to explore their implications for his own satiric style. There is a reference in his satiric essay on vanity in *Abuses* to the posthumous libelling campaign against Robert Cecil, earl of Salisbury. Wither muses that Salisbury is now unable to save his reputation, since 'In spight of all his Greatnes, 'tis well knowne / That store of Rimes, and Libels, now are sowne / In his disgrace' (L2<sup>r</sup>). It is this current defamation campaign against Salisbury that provides the immediate context for Wither's account of the differences between libels and satires. Addressing courtiers, he warns

Yet doe not thinke I meane to blaze your shame,  
In scattered Libels, that shall want a name.  
No, I hate that: Ile tell the illes you doe,  
And put my name for witsse therevnto.

(L2<sup>r-v</sup>)

This is a sophisticated version of the conventional contrast between intention and reception found in defences of satires. Wither is particularly alert to issues of publication. Libels are to be distinguished from satires because they are unauthored and 'scattered', whereas satires are authored and, by implication, printed, published through legitimate channels. This new inflection to the conventional distinction between satire and libel authorizes a particular kind of satire that gets its bite from a dissenting use of print to speak the truth boldly, to uncover actions within the commonwealth, even the inner sanctum of Court, and through a moralizing satire that anatomizes, 'blazes' vices, to criticize those who have fallen away from the Protestant cause.

Why did Wither risk touching on issues that were politically sensitive? Both *Prince Henries Obsequies* and *Abuses Stript, and Whipt*, for example, warn that prominent courtiers were shielding recusants and call for a thoroughgoing purge at Court. It may therefore be surprising, given their belligerent tone, that both received ecclesiastical authorization. Ecclesiastical authorization, however, may not be such a clear indicator of government approval. As Clegg points out, it is distorting to conflate the actions of the High Commission, responsible for ecclesiastical licensing, with an 'official' government agenda. From 1611, the Archbishop of Canterbury, George Abbot, and the Bishop of London,

John King, effectively controlled ecclesiastical licensing, which meant that the system was often, although not always, sympathetic to Calvinist viewpoints.<sup>32</sup> Both *Prince Henries Obsequies* and *Abuses Stript, and Whipt* were licensed by John Taverner, secretary to the Bishop of London, and the individual largely responsible for licensing literary works.<sup>33</sup> In December 1612, he began working alongside Richard Mocket, Archbishop Abbot's chaplain, authorizing the elegies mourning Prince Henry. As a body of writing, these elegies are distinguished by their sympathies with political Protestantism, a cause closely identified with Prince Henry.<sup>34</sup> In *A Satyre*, Wither acknowledged the protection of Princess Elizabeth when 'once I stood accus'd of this before', moreover she had 'vouchsaf't her word to cleare / Me from all dangers (if there any were)' (F1). Princess Elizabeth briefly took over her brother's political and religious mantle after his death and before her departure to Bohemia following her marriage to Frederick, Elector Palatine. Her protection of the faithful may have extended to the households of John King and George Abbot where the belligerently anti-Spanish and anti-papist tone of Wither's satire may have found favour. As Clegg points out, 'It was in Abbot's own interest to turn a blind eye to political and religious perspectives he approved that might not fully have pleased the king.'<sup>35</sup> Or, one might add, Northampton, James's chief minister and frequent opponent of Abbot on the Privy Council. Certainly, there is a sense that Wither in 1612 and 1613 felt that he was in some way licensed to challenge openly the behaviour of prominent courtiers that did not conform to standards set by political Protestantism. It may even be the case that he added new sections to *Abuses* following the favour his bold speaking in *Prince Henries Obsequies* had attracted, thus giving a very contemporary political flavour to his otherwise generalizing satire.

Wither may have been willing to take risks, but he also had a very clear sense of the legal implications of writing satires that were seen to touch on an individual's reputation and, in particular, the way that *scandalum magnatum* could be used by courtiers to defend themselves against men like Wither 'blazing their shame'. He concludes the section that meditates on the Salisbury libelling campaign with considerable bravado, challenging courtiers that see themselves in his satire to fetch

... me *ad Magistratum*,  
 And laying to me *Scandalum Magnatum*,  
 Which though you proue note, rather yet then faile

You were best hang, or clap me into iale  
 To stay my tongue; so much you may doe to mee,  
 And that's the worst I know that you can doe to me.

(L2<sup>v</sup>)

This passage gives the impression that it is satirizing a contemporary practice. Between 1612 and 1614, Northampton brought a number of cases of *scandalum magnatum* before the Star Chamber. One of these cases led to significant modifications of the laws of criminal defamation. More generally, the way that Northampton vigorously prosecuted these cases excited comment amongst contemporaries because it was perceived to be both counterproductive and an autocratic abuse of the laws of criminal libel.

In November 1612, Northampton brought a case against Thomas Gooderick, Sir Richard Cox, Henry Vernon, Henry Minors, Thomas Lake and James Ingram. This case, according to Linda Levy Peck, provides evidence of an organized libelling campaign against Northampton to prevent him from becoming Lord Treasurer.<sup>36</sup> Late 1612 was certainly a turbulent time at Court: Prince Henry's court was in the process of being dissolved, and there was much jostling for office and a flood of rumours speculating on candidates.<sup>37</sup> Yet these attacks on Northampton were not just about his fitness for office, but fed into a wider discoursing on court corruption and rumours of a Papist conspiracy to overthrow the Protestant religion. Gooderick was accused of publishing 'divers false and horrible scandals' about Northampton: that 'more Jesuits, Papists, &c. have come into England, since the earl of Northampton was guardian of the Cinque-ports, than before'; that Northampton had written to Cardinal Bellarmine indicating that his denunciation of Father Garnet and the Gunpowder plotters was only written to placate the king and the people; and that the Archbishop of Canterbury had made this known to the king with the intent that Northampton should not be made Lord Treasurer following Salisbury's death. This last aspect of the rumour had caused Abbot and Northampton to 'fall out at counsaile table'.<sup>38</sup> One of the reasons why libels against officers of state were seen to be so dangerous was that they undermined the state by bringing ministers into conflict 'whereof great peril and mischief might come to all the realm'.<sup>39</sup> The Gooderick libel had already sown discord between Northampton and Abbot, and had potential to damage Northampton's relationship with the king.

Of particular interest in this case was the question of publication and authorship. Gooderick was discovered because he had related the

rumours to Dewsbury who had then told Northampton. Gooderick defended himself against the charge claiming he was not author of the rumour but had heard it from Cox; Cox in his defence said that he had heard it from Vernon; Vernon claimed that he had heard it from Nichols; Nichols identified Ingram; and finally Ingram claimed to have heard it from two English fugitives at Leghorn. The judges were concerned to trace the libels to a verifiable source, an author who could then answer the charges. Words only become actionable in the case of libel when they are seen to proceed from one individual, are applied to another, and published before a third person.<sup>40</sup> This is partly symptomatic of a culture based on personal honour in which the name is vested in the person. The Gooderick case resulted in the ruling that if an individual published a rumour without identifying the author then either he was answerable or he should be imprisoned until he gave the name of the author.<sup>41</sup> These clarifications of the law in relation to issues of authorship and publication responded to the expansion of the market for rumour and libel which greatly increased the danger of unaccountable words circulating in public domain. *De libellis famosis*, for example, had extended the parameters of libels from words to include rhymes, songs, pictures and public performances, such as putting up horns at a gate.<sup>42</sup> Coke argued that these changes to the law were necessary because libels were secret and therefore posed a particular danger to the very basis of the Renaissance state:

he who kills a man with his sword in a fight is a great offender, but he is a greater offender who poisons another; for in the one case he, who is openly assaulted, may defend himself, and knows his adversary, and may endeavour to prevent it: but poisoning may be done so secretly that none can defend himself against it; *for which means the offence is the more dangerous, because the offender cannot easily be known ...*

(5 Co. Rep. 125b)

The issue would appear to turn on a point of chivalry. Coke may draw his metaphors from a culture, in Clegg's words, 'grounded in personal honour',<sup>43</sup> but it was a culture undergoing profound changes. Poisoning is adopted as a metaphor to describe a new phenomenon in the sphere of publication and displays Coke's deep concern with the new threat posed by secret, unaccountable words to public order. If as Pauline Croft argues, libels played a central role in the formation of

public opinion in the early seventeenth century, then 'secret', authorless and unaccountable words spoke of a public opinion that could not be subject to control.<sup>44</sup> George Chapman, when attempting to counter the defamation campaign against the earl and countess of Somerset, chose to characterize vulgar opinion as a '*Chymaera* tost from streete to streete', a dangerously ephemeral, mobile and peripatetic form which cannot be isolated to one individual or group accountable for their words.<sup>45</sup>

Northampton's efforts to silence detractors often proved ineffective or counterproductive. The judges did not always decide in Northampton's favour, as was the situation in the Sir Stephen Proctor case, so that the law itself could operate to limit the activities of institutions or individuals that wanted to use it as an instrument for the control of public opinion. Moreover, despite clarifications and changes, *scandalum magnatum* proved to be a particularly ineffective tool in the face of defamation campaigns. The trials themselves provided a forum in which accusations were published abroad, and through this channel were made available to a wider audience for discussion and speculation, as is evident in Chamberlain's ruminations on these cases. Others began to challenge Northampton's use of *scandalum magnatum* to prevent what they saw as their godly duty to discover abuses that were detrimental to the health of the commonwealth, often working within the remit of the law to do so. Around the time of the Gooderick trial, Northampton moved quickly to silence Bailey, a former chaplain to Prince Henry, who had preached a sermon at St Martin's, soon after the prince's funeral, stating that Henry had told him just before his death 'that Religion lay a bleeding'. Bailey then went on to indict crypto-Catholics at court. When Bailey was called before the Privy Council to justify his words, Chamberlain reported that he did so with 'a very great audience' and 'so soundly' that he succeeded in making the matter more plain, and offered to 'bring his authors for what he had saide'.<sup>46</sup> Bailey, in this last instance, appears to be at pains to demonstrate that his words are lawful, that they are not secret and authorless libels, or 'horrible and false lies',<sup>47</sup> but words spoken honourably and in truth that he will gladly be accountable for before a court of law. Other preachers inspired by his example 'begin to speake freely' on the same matter, and to work strategically with the law, to 'make themselves understood though they kepe within compasse'.<sup>48</sup>

Rumours about Northampton's Catholicism and its influence on him as an officer of state continued throughout 1613 and into 1614. Henry Wotton wrote to Sir Edmund Bacon in May 1613 of a case

Northampton had brought against Sir Peter Buck for a letter he had written 'containing this news "that some of the Lords had kneeled down to the King for a toleration in religion", besides some particular aspersion in the said letter of my Lord Privy Seal, whom likewise of late a preacher or two have disquieted'.<sup>49</sup> The next year, in February 1614, Northampton brought a case against Sir Stephen Proctor before the Star Chamber. Proctor had suggested that Northampton and Wotton had suppressed evidence and discredited witnesses in the case of two Yorkshire knights suspected of involvement in the Gunpowder plot. Much to Northampton's annoyance, the judges in the case could not agree on Proctor's guilt but were evenly divided. How do we read Northampton's actions? Are these cases to be understood, as Clegg has argued, as acts of personal censorship, designed to serve Northampton's own personal agenda and 'to protect personal interests', and not part of a more 'pervasive practice'?<sup>50</sup> Northampton certainly did not see his own personal interests as separate from those of the Crown, and his prosecution of these cases, as contemporaries suggested, did have wider political and ideological ramifications. Northampton was the earliest and foremost proponent of absolutist theories of kingship at the Jacobean court. He believed that the king had a moral and practical obligation to abide by laws of the land, but was not subject to these laws and so could act outside the law in cases of necessity. This heightened sense of the royal prerogative had its corollary in his vigorous defence of the traditional role of the nobility and fierce protection of their prerogatives.<sup>51</sup> Moreover, *scandalum magnatum* itself was an extension of the royal prerogative and part of the rhetoric of the divine right of kings.<sup>52</sup> Hence, when the court failed to reach a decision in the Sir Stephen Proctor case, Northampton insisted 'that he neded not to have ben so nice', that it was his prerogative as a magnate to have passed judgement, 'having precedents of some great persons that have given sentence in causes that concerned themselves'.<sup>53</sup> Here, he seems to be voicing the belief that ministers of the Crown, alongside the king, could imprison subjects without trial in name of the Privy Council.<sup>54</sup> And it is indicative of Northampton's own sense of his relationship to the law as a member of the nobility and privy councillor. His understanding of censorship therefore could be more accurately described as absolutist rather than personal, and has close affinities to James I's belief that censorship was an aspect of his royal prerogative.<sup>55</sup>

Contemporaries saw Northampton's use of *scandalum magnatum* to silence rumours as unprecedented, even arbitrary, in that it served his own private purposes, and was therefore not in keeping with the origi-



nal intention of the law to preserve public order. This suggests that 'personal censorship' could be seen as a corruption of the law, due to the way that it privileged personal interests over the wider interests of the commonwealth. *Scandalum magnatum* relies on an identification between the personal honour of the individual, albeit a great officer of state, and the public interests of the commonwealth. Libels of magistrates had a special status under the law because such offences had a direct impact on the state, in that they could result in a breach of the peace and more dangerously, in the words of Coke, the 'scandal of Government: for what greater scandal of Government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the king to govern his subjects under him?'<sup>56</sup> Yet, contemporaries when expressing their concerns about the way that Northampton was using *scandalum magnatum* appear to make a distinction between the personal interests of the individual and the wider interests of the state. A similar distinction also began to inform complaints about court corruption which increased markedly during the early seventeenth century. Specific policies and practices of the Jacobean court that were not legally corrupt were nonetheless fiercely criticized by contemporaries – as Peck argues, the 'boundaries between legitimate and corrupt transactions were redrawn'.<sup>57</sup> One of the consequence of this was that the behaviour of individual ministers became a legitimate area for public scrutiny, no longer covered by secrets of state. Chamberlain, when reviewing Northampton's prosecution of Gooderick, does not seem to be concerned with the threat that the libels posed to public order, in sharp contrast to Coke, and rather sees it solely as a matter of individual reputation divorced from the interests of state: 'howsoever these fines be executed or no (as most men beleve they will not, but that only yt was don *in terrorem*) yet the precedent is thought straunge, and the Lord hath got no great advantage, but only this, that men must learne not to speake of the great ones *ni en bien ni en mal*'.<sup>58</sup> The suggestion that Northampton is behaving autocratically is also conveyed by Wotton in his account of Northampton's prosecution of the case he brought before the Star Chamber in May 1613, that 'he hath been moved, besides his own nature and (as some think also) besides his wisdom, to call these things into public discourse, *quæ spreta exolescunt*, if ancient grave sentences do not deceive us'. Wotton's rumination that Northampton may have done more damage to his reputation by having libels published in the courts is accompanied by a tag from Tacitus, '*quæ spreta exolescunt*' (things contemned are soon things forgotten), that probably derives from the story of the despotic prosecution of the

historian Cremutius Cordus under Tiberius for eulogizing the republican heroes, Brutus and Cassius.<sup>59</sup> For Wotton's contemporaries this episode had come to represent, in the words of Blair Worden, 'the extinction of ... "freedom of speech"' and, moreover, had a particular association with Northampton. Northampton had brought Jonson before the Privy Council on a charge of treason over his *Sejanus his Fall* (1605) which has at its centre the trial of Cremutius Cordus.<sup>60</sup> Wotton's recourse to Tacitus in this context is highly suggestive, and, while not overtly expressing republican sympathies, it does place Northampton's behaviour at the centre of an anatomized and amoral political world, in which the behaviour of those in power is motivated by fear, jealousy, and self-interest rather than notions of public good.<sup>61</sup>

Since Wither was not brought to trial, his *A Satyre* becomes his defence and so the printed text becomes the means of enacting a trial that did not take place in public. This use of the printed text has a precedent in a Protestant martyrological tradition. Since the absence of a trial threatened to deprive the martyr of an important forum in which they could publicly bear witness to the truth, the 'imagined speeches' printed in Foxe's *Acts and Monuments*, as Knott points out, enabled the martyr to develop 'the kind of sustained argument that his examiners would not allow him'.<sup>62</sup> *A Satyre: dedicated to his most excellent majestie*, as its full title indicates, is a petition to James I. Its very loose discursive structure mimics the patterns of speech so that the reader becomes the audience at a trial which is now being staged in print. *A Satyre* opens with a defence of his use of the printed text to present such a petition to the king, which modulates into a defence of his right to write satires. The majority of the text sets out the argument that he has been wrongfully accused out of malice, and therefore will have satiric revenge on his accusers, and proclaims his innocence and defends his bold speaking. *A Satyre* has many of the elements of the Foxean drama of martyrdom, as described by Knott, such as a 'heroic resistance to hostile authorities', and the 'determination to witness the truth regardless of consequences'.<sup>63</sup> That said, *A Satyre* is also a significant variation on the martyrological tradition in that Wither is not defending himself against accusations of heresy but against a charge of criminal libel. Wither therefore places a greater emphasis on public language and turns his arrest into a battle over the public sphere.

The centrality of libel, in both its literary and legal aspects, to the poem's defence of satire demonstrates the way the form's generic parameters in this period were being shaped by libelling campaigns and the legal procedures initiated to deal with them. As I have noted previously,

Wither's defence of satire often has unmistakable echoes of the satires suppressed by the 1599 Bishop's Ban. This was similarly a period when satire and libels came into close proximity, and writers sought to redraw the generic boundaries in order, paradoxically, both to exploit this proximity and to insist on a greater distance in relation to legal definitions of libel. The responsiveness of these defences of satire to the law may, in part, be the result of the proximity of legal and literary cultures in this period due to the cultural role of the Inns of Court. The Inns were one of the main centres where political libels and satires were produced and circulated in the late sixteenth and early seventeenth centuries.<sup>64</sup> This cultural proximity also functions at the discursive level: the arguments deployed in literary defences of satire clearly echo the types of legal defences available in cases of criminal libel and private slander. A defendant in a private action for slander could introduce 'excusing facts', which made the words spoken less blameworthy, and included pleas of self-defence and human frailty, and the argument that the words were spoken with good reason and not malice and so it was the plaintiff who was acting maliciously.<sup>65</sup> Wither, the Inns of Court student, similarly pleads for mitigating circumstances in his own case. The petition concludes on a relatively humble note with Wither drawing attention to his human frailty and asking the king for compassion if he has unwittingly offended on the grounds of his youth, ignorance and innocent love of truth and honesty. He also devotes considerable attention to the argument that his satire was not malicious but corrective in most laudible humanist sense. This has the effect of turning attention from the 'guilt' of the accused satirist to the 'guilt' of the satirized accusers to imply that it is they and not he who are acting maliciously. Key to Wither's defence is the truth of his satires. *De libellis famosis* had turned this type of bold speaking into a criminal act because, unlike *scandalum magnatum*, it no longer recognized the rights of the accused to defend themselves on the grounds of the truth of their accusations. From Wither's perspective, the current state of libel laws meant that satires risked being prosecuted as libels, and so legitimate criticism of those in power could no longer be voiced, while satirists were being deprived of legitimate means to defend themselves against hostile criticism. If, as he argues, someone recognized themselves in one of his satiric portrayals of vice then why should the satirist and not the vicious be prosecuted?

Wither places a great deal of pressure on the discourses that constitute *A Satyre* by asking the text to perform two seemingly opposed tasks. The poem is both a petition to the king that recognizes the

absolute truth of royal justice, and a satiric complaint that the law in this case is unjust, arbitrary and corrupt. Early in the text, the law is invoked in its absolute form: royal justice 'being framed in *Reasons* mould' (B2<sup>r</sup>) is dictated by the laws of nature and hence immutable. This formulation may be appropriate when appealing to the king to show clemency, but Wither will need a different understanding of the law in order to demonstrate how it has failed in his case. He therefore introduces a concept of equity to show why the law both is 'framed in *Reasons* mould' and is not above question, pointing out that the king's 'owne lawes ... / Cannot be fram'd so well to your intent, / But some there be will erre from what you meant' (D2<sup>v</sup>). Equity relies on the premise that common law is immutable and therefore provides a means of avoiding the full effect of the law in special circumstances. According to Plowden, the law had two parts: the body, the letter of the law, and the soul, the sense and reason of the law. Equity was introduced to settle cases where the letter of the law appeared to be at odds with its soul. The implication is that since the written word cannot fully capture the original intent of the lawmaker then the law cannot be absolute and individual circumstances must be taken into account.<sup>66</sup> This distinction between the letter and the spirit of the law facilitated an opposition between arbitrary rule and individual conscience. Such an opposition is dramatized in *A Satyre*, although it is mediated through a dissenting tradition. Wither is one of the faithful unjustly brought to trial by a malicious 'great man' who has taken advantage of the disparity between the strict letter of the law and the spirit of the law (the king's own intent) to persecute the godly.

*A Satyre* continually slides between complaint and panegyric and, as a result, the tone of Wither's defence is highly unsettling. Wither equivocates on the question of his guilt, partly to use this as an opportunity to ask for and praise James's clemency, 'Nay, though my fault were Reall, I belieue / Thou are so Royall, that thou wouldst forgiue' (B1<sup>r</sup>). At the same time, the appeal to the king's favour is conditioned by the impulse to appeal to wider public opinion. Wither's praise for James's mercy comes at the end of a verse paragraph that seemed to be heading in a rather different direction:

But why should I thy favour here distrust,  
That haue a *cause* so knowne, and knowne so iust?  
Which not alone my inward comfort doubles,  
But all suppose me wrong'd that heare my troubles.

(B1<sup>r</sup>)

The partial chiasmus in the second line brings together and harmonizes two meanings of 'knowne': the first refers to familiarity and gestures to a wider public awareness, and the second to a certainty of the truth of his cause. The result of this collocation is a positive model of public opinion. Such a balanced and orderly public is given the authority to act as a judge in his case. While uncertainty attends the question of the king's 'fauour' and forgiveness, the public that sympathizes with Wither's 'troubles' is a source of 'inward comfort'. There is the strong implication that James should look on Wither's cause with the same favour and certainty of its truth as this public, the 'all' who 'suppose me wrong'd that heare my troubles'. It would seem that public opinion is a more reliable authority than the king's questionable favour. A similar uncertainty informs construction of the implied reader. The full title of *A Satyre* indicates that it is the king who is the primary reader implied by Wither's petition, and yet the opening lines suggest otherwise:

What once the *Poet* said, I may auow,  
 'Tis a hard thing not to write *Satyrs*, now.  
 Since, what we speake (abuse raigns so in all)  
 Spight of our hearts, will be *Satyricall*.

The 'I' in the opening lines opens out to encompass 'we' and 'our'. Wither's own personal experience is not only situated within a broader community, but is *shared* by this community which is then invited to sympathize with his belief that '*Tis a hard thing not to write Satyrs, now*'. Once again, Wither appears to be appealing to a wider public that is encouraged to engage with and debate the issues that his case raises, and to come to a similar conclusion about its cause and remedy.

Although Wither's writing is centred on the 'I', it is always located within a larger social situation. His style could be described as metonymic in the sense that Jane Hedley has used the term to describe early modern lyric poetry which is implicated in history and social life. Metonymy, as Jakobson defines it, is 'set towards context' and 'enlists the contiguity-relation to situate the explicitly designated object in a larger context or field of objects'.<sup>67</sup> Throughout *A Satyre*, and Wither's other texts, spatial, temporal, and social deixis is used to give the impression that the 'I' is acting in and experiencing situations that are happening during the time that the text is being composed. The reliance on the first person active voice and the predominant use of the present tense function to anchor the written word in the present

moment and to give the impression that it approximates the spoken word uttered in an actual social situation. Another effect of this is to close the gap between the persona and the person, so that the 'I' of the poem is to be taken as the actual George Wither.<sup>68</sup> The printed text becomes the space where Wither speaks his mind. This means that the 'I' of the poem is a relatively stable origin of thought and action, and so the author therefore can be held responsible and accountable for his words. As such, Wither exerts considerable effort to make the question of intent central to the defence of satire. At the same time, *A Satyre* polarizes intention and reception so that the author is accountable for his words but not their reception, since intent solely resides with the author and can only be disclosed by him. The onus is thus on the authorities not to judge the matter of the satire but to discover the original intent of the author.

Although Wither insisted on these type of distinctions, he was also aware that the line dividing libel and satire was notoriously and, in many ways, productively unstable. The satirists of the 1590s had denied that they were engaged in the malicious trade of libel making, while seeming to delight in the libellous potential of their satires. Wither's attitude towards libels and their sphere of circulation is similarly strategically inconsistent. He does seem to be genuinely troubled by the way that words and texts enter a domain where the relationship between words and authorial intention is highly unstable, and argued that he could not be held accountable for words that were no longer his own but had been translated into anonymous rumour and libel; and yet at other times he encouraged the kind of 'libellous' readings that he elsewhere censured. Libels were also at the centre of an 'unofficial' popular political culture that held many attractions for Wither and, yet, like Coke, he held that the anonymity of libel was a poisonous abuse of public language. Wither's ambivalence towards libels ultimately derives from his investment in a mode of public debate that takes place in print, hence in 'open view' (B5'). The anonymity of libels removes the author from the text, and therefore would disable the type of print-based public sphere populated by citizen authors that underpins Wither's writings.

Wither's experience of censorship in 1614 was formative to his understanding of the role of the printed text. Wither was not merely a passive 'political pawn', in Clegg's words, used by Northampton to sound a warning to potential troublemakers, rather he used his own situation to contest the way that the law was being used and, in the process, instigated and shaped debates amongst his fellow poets, such

as William Browne and Christopher Brooke, about what could and could not be said in the public domain.<sup>69</sup> The complaints put forward by Wither and his contemporaries against acts of 'personal' censorship were part of a wider rhetoric of court corruption that became more insistent in the decades following the 1620s and provided a language for understanding and imagining political conflict. Both Wither and the authorities were responding to an increasingly diverse and complex political culture and, in very different ways, sought to shape public opinion. The debates that Wither initiated about censorship in 1614 demonstrate the way that censorship, in its many forms, was central to an emergent political consciousness.

## Notes

1. J. Milton French, 'George Wither in Prison', *PMLA* 45 (1930), 959–66.
2. C.S. Clegg, *Press Censorship in Jacobean England* (Cambridge University Press, 2001).
3. Interestingly, in this case Wither was arrested but probably not imprisoned; instead it was the printer, George Wood, who bore the brunt of the prosecution. In the case of *Wither's Motto*, the authorities did question those involved about the regularity of its licensing, and printers and booksellers were duly fined, but at Wither's examination they tried to discover if he had written it in contravention of the 1620 proclamation, and, in particular, if he was guilty of a libel. See Michelle O'Callaghan, *The 'Shepherds Nation': Jacobean Spenserians and Early Stuart Political Culture, 1612–1625* (Clarendon Press, 2000), 185.
4. A. Fox, *Oral and Literate Culture in England, 1500–1700* (Clarendon Press, 2000), 299–405.
5. S. Lambert, 'The Printers and the Government, 1604–1637', in Robin Myers and Michael Harris (eds), *Aspects of Printing from 1600* (Oxford Polytechnic Press, 1987), 1–29.
6. W. Hudson, 'A Treatise of the Court of Star Chamber', in Francis Hargrave (ed.), *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England*, 2 vols (1792), vol. 1, 103
7. *Ibid.*, vol. 1, 101.
8. *Case de libellis famosis* (1605), 5 Co. Rep. 125. See also Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review* 37 (1985), 691–705.
9. J. Hawarde, *Les Reports del Cases in Camera Stellata*, ed. W.P. Bailden (1894), 230.
10. *Ibid.*, 223.
11. P. Croft, 'The Reputation of Robert Cecil: Libels, Political Opinion, and Popular Awareness in the Early Seventeenth Century', *Transactions of the Royal Historical Society* 1 (1991), 68–9.
12. L.L. Peck, *Court Patronage and Corruption in Early Stuart England* (Unwin Hyman, 1990), 203, 207–8.

13. Hamburger, 'The Development of the Law', 696.
14. Hudson, 'A Treatise', 104; Roger B. Manning, 'The Origins of the Doctrine of Sedition', *Albion* 12 (1980), 116–20.
15. Quoted in Elizabeth Eisenstein, *The Printing Press as an Agent of Change: Communication and Cultural Transformations in Early Modern Europe*, 2 vols (Cambridge University Press, 1979), vol. 1, 306.
16. J. Knott, *Discourses of Martyrdom in English Literature, 1563–1694* (Cambridge University Press, 1993), 18–20.
17. *Acts of the Privy Council of England, 1613–14* (1921), 391.
18. G. Wither, *The Shepherds Hunting* (1615), D6<sup>v</sup>.
19. T. Starkie, *A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions* (1830), 176.
20. Manning, 'The Origins of the Doctrine of Sedition', 111.
21. L.L. Peck, *Northampton: Patronage and Policy at the Court of James I* (Allen & Unwin, 1982), 207–8. It may have been Northampton's illness that prevented him from prosecuting Wither before the Star Chamber and opting instead for the Privy Council.
22. Clegg's argument that 'Wither offers the satirist's conventional defense that his satire is general, but while most satirists used this ruse to protect themselves from accusations of libel, Wither's satire actually is general' (*Press Censorship in Jacobean England*, 113) concurs with that of Allan Pritchard in 'Abuses Stript and Whipt and Wither's Imprisonment', *Review of English Studies* 14 (1963), 338.
23. John Marston, *The Scourge of Villanie* (1598), in *The Poems of John Marston*, ed. Arnold Davenport (Liverpool University Press, 1961), 176.
24. See Clegg's discussion of the 1590s satires in *Press Censorship in Elizabethan England* (Cambridge University Press, 1998), 210–12.
25. See Croft, 'The Reputation of Robert Cecil', 46–8, 56–7.
26. See, for example, Michael Drayton's *The Owle* (1604), and Richard Niccols's *The Begger's Ape*, first published in 1627 but probably composed in the first decade of James's reign.
27. D. Norbrook, *Poetry and Politics in the English Renaissance* (Routledge & Kegan Paul, 1984), 10; Pritchard, 'Abuses Stript and Whipt', 345
28. Norbrook, *Poetry and Politics in the English Renaissance*, 10.
29. *Abuses Stript, and Whipt* (London, 1615), 45. See also Pritchard, 'Abuses Stript and Whipt', 345.
30. *Records of the Stationers' Company, 1602 to 1640*, ed. William A. Jackson (Bibliographical Society, 1957), 73; William A. Jackson, 'Counterfeit Printing in Jacobean Times', *The Library* 15 (1934–35), 364–6.
31. Pritchard, 'Abuses Stript and Whipt', 345.
32. Clegg, *Press Censorship in Jacobean England*, 57–63.
33. E. Arber, *A Transcript of the Registers of the Company of Stationers of London*, 5 vols (1876), vol. 3, 232a, 233b.
34. Dennis Kay, *Melodious Tears: the English Funeral Elegy from Spenser to Milton* (Clarendon Press, 1990), 127–36.
35. Clegg, *Press Censorship in Jacobean England*, 67.
36. Peck, *Northampton*, 82.
37. 26 Nov. 1612, *The Letters of John Chamberlain*, ed. N.E. McClure, 2 vols (American Philosophical Society, 1939), vol. 1, 394; Peck, *Northampton*, 81–2.



38. *A Complete Collection of State Trials*, ed. T.B. Howell, 21 vols (Hansard, 1816), vol. 2, 861–3; McClure (ed.), *Letters of Chamberlain*, vol. 2, 394.
39. Starkie, *A Treatise*, 176.
40. *Ibid.*, 180.
41. Howell, *A Complete Collection*, vol. 2, 864–5.
42. Hudson, 'A Treatise', 100–1.
43. Clegg, *Press Censorship in Jacobean England*, 117.
44. Croft, 'The Reputation of Robert Cecil', 63–9.
45. *A Free and offenceless iustification of a lately publisht and most maliciously mis-interpreted Poeme: Entitvled Andromeda liberata*, in *The Poems of George Chapman*, ed. Phyllis Brooks Bartlett (Oxford University Press, 1941), 330.
46. 17 Dec. 1612, McClure (ed.), *Letters of Chamberlain*, vol. 1, 396.
47. Starkie, *A Treatise*, 176.
48. 17 Dec. 1612, McClure (ed.), *Letters of Chamberlain*, vol. 1, 396.
49. *The Life and Letters of Sir Henry Wotton*, ed. Logan Pearsall Smith, 2 vols (Clarendon Press, 1907), vol. 2, 22–3.
50. Clegg, *Press Censorship in Jacobean England*, 114–16, 122–3.
51. L.L. Peck, 'The Mentality of a Jacobean Grandee', in Linda Levy Peck (ed.), *The Mental World of the Jacobean Court* (Cambridge University Press, 1991), 149–51, 156–7, 163–64; J.P. Sommerville, 'English and European Political Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism', *Journal of British Studies* 35 (1996), 175–89.
52. J.H. Baker, *An Introduction to English Legal History*, 3rd edition (Butterworths, 1990), 538; Peck, *Northampton*, 83.
53. 17 Feb. 1614, McClure (ed.), *Letters of Chamberlain*, vol. 1, 509.
54. Baker, *An Introduction to English Legal History*, 538–9.
55. Clegg, *Press Censorship in Jacobean England*, 90–1.
56. 5 Co. Rep. 125b.
57. Peck, *Court Patronage and Corruption*, 5, 10–11.
58. 17 Dec. 1612, McClure (ed.), *Letters of Chamberlain*, vol. 1, 396.
59. 7 May 1613, L. Pearsall Smith (ed.), *Letters of Wotton*, vol. 2, 23 (this is also the source given by Wotton's editor); John Jackson trans., Tacitus, *The Annals*, 5 vols (Harvard University Press; Heinemann, 1920), vol. 4, 59–63.
60. I am grateful to Lorna Hutson for pointing out this connection. Blair Worden, 'Ben Jonson among the Historians', in Kevin Sharpe and Peter Lake (eds), *Culture and Politics in Early Stuart England*, (Macmillan, 1994), 78–9.
61. M. Smuts, 'Court-Centred Politics and the Uses of Roman Historians, c. 1590–1630', in *ibid.*, 25–7; J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975), 351–2.
62. Knott, *Discourses of Martyrdom in English Literature*, 20.
63. *Ibid.*, 8.
64. A. Marotti, *Manuscript, Print, and the English Renaissance Lyric* (Cornell University Press, 1995), 94.
65. R.H. Helmholz and Thomas A. Green, *Juries, Libels, and Justice: the Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander* (William Andrews Clark Memorial Library, University of California, 1984), 11–16.

66. Baker, *An Introduction to English Legal History*, 240.
67. J. Hedley, *Power in Verse: Metaphor and Metonymy in the Renaissance Lyric* (Pennsylvania State University Press, 1988), 4–10, 19.
68. For a discussion of Wither's literary style in terms of its insistence 'on the authority of individual experience and perception', see Thomas O. Calhoun, 'George Wither: Origins and Consequences of a Loose Poetics', *Texas Studies in Language and Literature* 16 (1974), 263–79.
69. Clegg, *Press Censorship in Jacobean England*, 115–16; O'Callaghan, *The 'Shepherds Nation'*, 27–31.

# 8

## Freedom of Speech, Libel and the Law in Early Stuart England

*David Colclough*

### News, scandal and the law in 1621 and beyond

1621 was a busy year for newsletter-writers. As soon as parliament assembled, investigations began into the abuse of patents and monopolies and other fiscal misdemeanours, and by the end of March the list of offenders included Francis Bacon, the Lord Chancellor himself. Around the country people wanted to be kept informed, and to share opinion as well as information: scurrilous verses attacking and satirizing Bacon and his fellow subjects of scandal were eagerly disseminated within and beyond London. Yet the circulation of such outspoken material could be dangerous both to its authors and its recipients. Samuel Albyn, writing on 28 March (probably to John Rawson), had a strong sense of his vulnerability: recounting King James's speech to the assembled Houses of Parliament he observed that

[the king] seemed very grasius to the Lord Chanselor and I was in a place whear a very wise gentleman offered 20 Angles to 10 that he would continue his place. He shewed Reasons which yf you ware at shope or at an alle house I should perhaps tell you but for my eares not wright you at this tyme.<sup>1</sup>

Noting that the 'wise gentleman' was in a minority and that 'in the generall oppinion [Bacon] is thought to bee utterly lost and Ruinated for ever', Albyn ended his letter with an apology for not sending any of the more satirical reactions to recent events – but this time not for fear of punishment: 'I would have written you the Coppies of Certayn Lybles against Sir francis michell who is yet in the towre, Sir francis

bacon who is in his sty, at york House and Sir gills mompesson who is I know not wheer but I am sleepi and Cannot.'<sup>2</sup>

Libel and political news are side by side in Albyn's mind, then (even if one ultimately wins out on the page); and their proximity in this period has been recognized in recent scholarship.<sup>3</sup> Yet I want to argue here that much of this scholarship has been mistaken – or partial – in the way in which it has interpreted the place of libellous verse, and the laws surrounding libel and defamation, in the political culture of the early seventeenth century. Historians such as Thomas Cogswell have argued forcefully for the importance of libellous verse to our understanding of political debate, yet the study of such verse has, I argue, too often accepted the perspective of those who tried to restrict and control it, and lost sight of the perspective of those who composed it.<sup>4</sup> Discussions of libels and of the intentions and effects of libel law have a substantial stake in the debate over the nature and extent of a civic or political consciousness in early modern England, although it is not always made explicit. This debate has its roots in the arguments between revisionist historians who argued that the period was one of ideological consensus, and the so-called post-revisionists who made the case for the existence of serious ideological conflict and engagement in political controversy.<sup>5</sup>

In this chapter I will take issue with what I see as the three currently dominant arguments about libels and libel law. These are, first, that libels were dangerous acts of individual free expression that were almost always quashed by a repressive state. Albyn's hesitancy in his letter supports this position, as do the dreadful images of a few other cases, both historical and literary – John Stubbs's loss of his right hand for publishing the *Gaping Gulf*; the cropping of Prynne's ears; Malfont's tongue nailed to a tree in *The Faerie Queene*.<sup>6</sup> M. Lindsay Kaplan has argued that the paradigms offered by slander legislation were so pervasive as to condition both 'state' and 'popular' understanding of transgressive language.<sup>7</sup> However, I will show that this reading is based on a misunderstanding of the law of slander and an anachronistic notion of freedom of speech. The second argument is that libels were local and immediate – often *ad hominem* – responses to events that can tell us little more than what the political temperature was in a certain brief period. On the face of it this is unexceptionable. Yet I want to show here that far from being the flimsy straws that tell you how the wind is blowing, the power of libels was long-lasting, and their application more various than has usually been allowed.<sup>8</sup> Since libels are so often personal attacks, it has recently been argued that they eroded a 'civility

of trust' that served to knit early modern society together.<sup>9</sup> According to this third argument, determinedly pursued by Debora Shuger, libel law and censorship were necessary protections against (usually untrue and certainly politically irrelevant) slights on the honour of public persons. Working on the assumption that if you throw enough mud then some will stick, libel-writers refused to adhere to the rules of decorous political debate and chose to play dirty. Shuger is certainly right to note the insulting nature of libels, and their disregard for truth. It is also true that many of the cases of defamation and slander prosecuted show that an attempt had been made to injure reputation. However, on the one hand, J.H. Baker has shown that common law actions on the case for words, which covered slander (and the scope of the offence as it was conceived from the first judgement, in 1517) relate most clearly to temporal loss rather than to loss of fame or credit;<sup>10</sup> and on the other, Sheila Lambert emphasizes that cases of *scandalum magnatum*, or the slandering of a magistrate, brought in the prerogative court of Star Chamber, were most often brought not by the Crown, protecting its officers, but by private individuals.<sup>11</sup>

More important still, I suggest, is that these positions all fail to take account of the justifications for libelling, and the place of the libel in the possibilities for political comment and analysis open to the population of early Stuart England. Only by considering these aspects of libelling can we properly understand the complex relations between freedom of speech, libel and the law.

Rather than being primarily individual attacks on persons, libels were part of a far more widespread attempt to offer counsel to the king and his government. In the sixteenth and seventeenth centuries freedom of speech was not considered a right to be claimed by all members of society, or even a few, on abstract moral grounds. Rather it was a vital component of the counselling process, and thus arguments concerning it took place where the right, or duty, to counsel was claimed. That right or duty was always seen as something only accessible to a limited number of people, and the most significant debates concerning free speech consequently took place in parliament, where a very limited privilege was requested and exercised, with members of the House of Commons even making the distinction between things said when parliament was in session and those said when they were 'private persons'. It is only when their temerity in trying to counsel the king was noticed by occurring in a manner or a place deemed to be inappropriate that such persons were punished.

It is these various unofficial attempts to counsel the king that will be my focus here. This means that examining the context in which many libels are placed by their transcribers (in precisely the kind of newsletter that Albyn was writing in March 1621, or in a miscellany of news in prose and verse) becomes extremely important, since it often shows how parliamentary proceedings and scandalous comment were considered to be contiguous, or similar in the purposes to which they could be put by their readers. My contention in this chapter will be that the court of Star Chamber is less important to the subject of freedom of speech and the law than is the High Court of Parliament. I shall also suggest that the act of libelling was in a continuous, but tense, relationship with the discussions and acts of counsel that took place in parliament. And John Stubbs will make an appearance, but not to make our flesh creep with the bleeding stump that is his version of a martyr's crown; rather, I will show how in the early years of James's reign Stubbs's book, and the way in which it was construed, was still an object of urgent deliberation among men who were trying to work out how to have truly political debate in a monarchy.

### **Counsel v. pasquil?**

A belief in counsel as a central and indispensable component of the political process was current throughout the sixteenth and early seventeenth centuries. The questions of who among the subjects (or citizens) of the realm should be allowed to offer counsel, to whom, and in what form, were continually under debate, since the only officially (that is, royally) sanctioned forum for advice was the Privy Council. Alternative fora were hard to come by, but many MPs argued that guiding the king was one of parliament's primary functions.

In order to fulfil their duty as counsellors, MPs needed to be certain that they could speak frankly without risk of punishment. Freedom of speech had first been requested as a parliamentary privilege by Sir Thomas More in 1523; since then it was, along with the other privileges, requested by the Speaker and granted as a matter of course at the beginning of each parliament.<sup>12</sup> Many MPs would argue that this request was the formalization of time-honoured accepted practice, while the Crown often took a different attitude. Under Elizabeth, the nature and extent of parliamentary free speech had been raised most famously by Peter Wentworth in 1572;<sup>13</sup> while throughout the reigns of James I and Charles I there was fierce debate on the question of whether such privileges originated in the grace of the monarch, as James and Charles thought, or were

ancient rights of parliament, as asserted by the Commons.<sup>14</sup> Replying to the redrafted Commons petition of 11 December 1621, James wrote of the privilege of free speech that ‘we cannot allow of the style, calling it “your ancient and undoubted right and privilege”, but could rather have wished that you had said that your privileges were derived from the grace and permission of our ancestors and us’.<sup>15</sup>

A key year for these debates was 1621.<sup>16</sup> At the beginning of the session several MPs still remembered very clearly the way in which the previous ‘addled’ parliament of 1614 had ended, with the committal of John Hoskyns, Christopher Neville, Walter Chute and Charles Cornwallis to the Tower; more recently James had issued a proclamation ‘against excesse of Lavish and Licentious Speech of matters of State’ (24 December 1620). On the first day of parliament, Monday 5 February 1620/1, Sir Edward Giles ‘moved for a petition to the king for freedom of speech, and that those that spake extravagant in the House might be punished by the House and not after Parliament, in regard of the late proclamation’.<sup>17</sup> Reporting these speeches to his correspondent, Sir Martin Stuteville, the Cambridge newsletter-writer Revd Joseph Mead gives us some more details of Giles’s speech; the MP, he explained, ‘should likewise say that, though the privilege of the House for liberty of speech was not questionable; yet former experience had taught them to think a more special security needful’.<sup>18</sup>

In concentrating on the Commons’ defence of what they saw as their privilege to *speak*, we should not pass over Giles’s request for a privilege to *punish*, so ‘that those that spake extravagant in the House might be punished by the House’ rather than by the king or any other court. As well as the recording (and excision) of the Commons’ Protestation, the 1621 parliament saw several such punishments. In the first case, an MP was expelled for giving what sounds almost like a draft of part of James’s speech at the end of the session. Mead describes the scene, as petitions for banishing Catholics were being discussed:

at last stands up one Shepherd, of Lincoln’s Inn, a lawyer it is said, who began to speak to this purpose: My masters, I hear much spoken at every hand against the Papists ... but never a word spoken against the Puritans ...&c. But his speech, it seems, was so distasteful to the house, that he was turned over the bar, and thrown out of the house.<sup>19</sup>

Later in the year, the House went further, punishing a non-member, Floyd, for insulting the King and Queen of Bohemia (James’s son-in-law

and daughter, and the focus of militant Protestant hope in England). Both of these cases seem like attempts by the Commons to restrict liberty of speech both inside and outside Westminster to the expression of views that the majority of MPs found to their own liking; it just happens that in one of them the Commons and the king saw eye to eye. In 1621 the Commons pursued this path doggedly, and reinforced its position by reviving a set of judicial powers that had long lain dormant, and which I shall discuss in more detail below.

At the same time as they assert the existence of a parliamentary right to free speech, then, MPs' speeches tend to be concerned to stress the limited nature of the privilege. Judged on their own statements, there was no question either that a member of the House should be able to say what they like and get away with it, or that anyone outside the House should have a right to free speech as we tend to understand it. MPs largely wanted to make sure that it was they who set the boundaries for expression and not the king. How did libelling fit into this contest over the definition and extent of the right to counsel frankly?

Often the same individuals who were attempting to press for the right – or duty – of the House of Commons to advise the king were also penning acid attacks on the ministers who they felt were leading him astray. In the writings of the time, these salacious verses are referred to as 'pasquils', and that description can lead us to some insights concerning their nature and their use. The term refers to the custom of affixing anonymous satires of public figures to a classical statue that was re-erected in Rome in 1501.<sup>20</sup> The statue was known as Pasquino, hence the extension of the terms 'pasquinade' or 'pasquil' to the satires themselves. Replies to these 'pasquinades' were then attached to another statue dubbed Marforio. The term and the form of the pasquil were mediated for an English audience by Sir Thomas Elyot, who published his *Pasqvil the playne* in 1533 – a book he described as 'a mery treatise, wherein plainnes and flateri do come in trial'.<sup>21</sup> Elyot makes a direct association between the practice of pasquilling and the humanist debate over the proper responsibilities of a counsellor to his prince, a debate that his text does not just discuss detachedly but in which it is deeply implicated. In writing *Pasqvil*, Elyot, who opposed Henry VIII's attempt to divorce Katharine of Aragon, tried to persuade the king's counsellors that they could best serve their master not by flattering and acceding to his whims but by decorously admonishing him. 'Pasquil' thus becomes the name of an honest and frank-speaking counsellor, concerned to ensure the welfare of the country before his own advancement or his prince's comfort. More broadly, Elyot's works offer



a fine example of the links between pasquilling and counselling: as well as writing *Pasquil the playne*, in *The Boke named the Governour* he laid down an education programme for an entire generation of perfect counsellors.

Incidences of the public posting of pasquils and libels abound: texts were placed in the hand of Queen Elizabeth's statue at Westminster, on the coffin of Archbishop Whitgift and on the epigrammatist John Owen's monument in St Paul's;<sup>22</sup> 'let fall in the gallery at Whitehall' (in the case of the Catholic tract *Balaams Asse*);<sup>23</sup> or (after the committal of Eliot, Selden and the five members to the Tower in 1629) deposited in 'the Dean of Paul's [John Donne] his yard before his house'.<sup>24</sup> The practice's potential for propaganda and deceit is explored in Act I, scene 3 of *Julius Caesar* (c. 1599), where Cassius asks Cinna to lay a series of papers where Brutus will come across them. Brutus is the one who listens to anonymous counsel which is in fact flattery disguised as popular sentiment, while Caesar foolishly turns a deaf ear to the frank advice of Artemidorus.<sup>25</sup>

The dangers of using libelling as an unofficial means of counsel were pointed up by Sir Edward Coke in his celebrated report *de libellis famosis*, based on the case of *Attorney General v. Pickering* in 1605 – a case to which I will return.<sup>26</sup> Libel, Coke declared, should not be used even to indicate real injustice or corruption,

for in a settled state of government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise.<sup>27</sup>

But this 'ordinary course of law' was not, of course, open to the 'party grieved' if that party was conceived as the people at large, except through the presentation of grievances in parliament. If it was felt that this course was failing (and James appeared to regard the presentation of grievances as a distraction from the Commons' main task of voting him subsidies), then an extraordinary course might be pursued, and libels often make claims – implicit and explicit – to be speaking for a wider community. In a letter probably to Sir Henry Goodyer written in July 1612, John Donne makes the point that libelling is sometimes necessary (with notable caution):

I dare say to you, where I am not easily misinterpreted, that there may be cases, where one may do his Countrey good service, by

libelling against a live man. For, where a man is either too great, or his Vices too generall, to be brought under a judiciary accusation, there is no way, but this extraordinary accusing, which we call Libelling.<sup>28</sup>

Francis Bacon, in his *History of the Reign of Henry VII* (1622), likewise associated libels with the restriction of other redress and of free speech more generally. The *History* is very much concerned with the problems of counsel, and Bacon describes the atmosphere of paranoia that followed the impeachment of Stanley for uttering seditious words qualified with a conditional clause. His punishment, writes Bacon,

was matter of great terror amongst all the King's servants and subjects; insomuch as no man almost thought himself secure, and men durst scarce commune or talk one with another, but there was a general diffidence everywhere; which nevertheless made the King rather more absolute than more safe. For bleeding inwards and shut vapours strangle soonest, and oppress most.

Hereupon presently came forth swarms and vollies of libels (which are the gusts of liberty of speech restrained, and the females of sedition), containing bitter invectives and slanders against the King and some of the council.<sup>29</sup>

Members in the Commons themselves identified the link between libelling and the attempt to counsel or the desire for redress, and saw the need to discuss the problems it could cause: in the 1610 session the presentation of libels was considered as part of the long-running work on grievances. They were recognized as an unofficial way of protesting against apparent injustice, or pointing out corruption, but cautious members saw that they could undermine the work the House was undertaking on presenting a limited list of his subjects' grievances to the king.<sup>30</sup> On the other hand, to attempt to suppress them or punish the supposed authors could, if the authors were MPs, be seen as an assault on parliamentary freedom of speech.

The nature of these parliamentary debates, and the widespread and sophisticated use of the language of counsel should also alert us to the dangers of reductionist readings of libellous verse that claim it is of limited interest because it merely deals in political commonplaces or, as Richard Cust puts it, in 'popular stereotypes, such as the good lord or evil counsellor'.<sup>31</sup> These 'stereotypes' are not popular just because they are hoary and familiar. Rather, like all commonplaces, they both

draw on and contribute to a vital and fruitful language, in which an argument can take place about the qualities that would make a 'good lord or evil counsellor'.

### Defining libel: Coke, Pickering and Bywater in 1605

The landmark case of *Attorney General v. Pickering* in 1605 plays a crucial part in the connection between counselling and libelling. In his report on the case, Coke resolved several points, of which one of the most important was – as has been recognized – the identification of a libel against a magistrate with a criticism of the monarch who appointed him. He explained why this was necessary in the following terms:

if [a libel] be against a magistrate, or other publick person, it is a greater offence [than if against a private man]: for it concerns not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? and greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.<sup>32</sup>

On the face of it, Coke's statement supports Debora Shuger's argument that libels were intended to undermine authority by the foul means of insinuation and association. If we consider it from the position of would-be frank counsellors, however, its significance is rather different. Coke's report seriously diminished their ability to present themselves as loyal servants of the Crown through the extreme medium of libelling its servants or calling for their removal. The case and the report are not just important for the restating and redefinition of libel law: the occasion and the nature of the case, and Coke's motives in his restating, are equally worthy of note.

The case against Lewis Pickering was for libelling Queen Elizabeth and Archbishop Whitgift by placing a scandalous poem on the latter's hearse; but Pickering was only prosecuted after he was implicated by Thomas Bywater.<sup>33</sup> Bywater was a Cambridge graduate who after ordination had failed to be preferred to any living and became an itinerant preacher; he 'preached such schismatical doctrines as he was suspended from preaching',<sup>34</sup> but he had served as chaplain to Lord Hunsdon and tutor to Lord Sheffield's children.<sup>35</sup> In February 1605, he

presented a tract to the king as he was out hunting at Ware; his rooms were subsequently searched, and a copy of the libel on Whitgift found. Coke examined Bywater, and ascribed his actions and puritan attitudes to the disaffection of one passed over for preferment, but also raised the more threatening possibility of a puritan conspiracy, saying that 'it was plotted by Biwater & his complices that in there sermons & praiers they showlde stirre the people to a desyre of reformacyon, w<sup>ch</sup> is not tolerable in a monarchie but in a Democracie'.<sup>36</sup>

Pickering's libel, as the object of a Star Chamber prosecution and the origin of Coke's report, has thus far been studied at the expense of Bywater's tract. I want here to redress the balance, and consider the latter as it appears in a manuscript miscellany copied well after Bywater's rash delivery of his work. For Bywater has not only effectively been sidelined in historical accounts of these events: after being examined by Coke and Cecil he was sent to the Tower of London and, after sending a series of increasingly desperate pleas for mercy to Cecil and the Privy Council, he disappears from the historical record.<sup>37</sup> Although presented in a single copy directly to the king, Bywater's book was called 'a very Paschall fitte for Rome' by Coke and 'the most saucy and dangerous thing that ever I saw' by James Montagu.<sup>38</sup> Taking a closer look at his tract can help us to see quite how broad the definition of a libel or pasquil could be, as well as demonstrating the enduring interest and use of such texts by politically-engaged individuals.

### **Reading libels in Shropshire, 1618–27**

Recent work on what Harold Love has called 'scribal publication' has begun to give the manuscript culture of the late sixteenth and early seventeenth centuries the degree of attention due to such a central part of the cultures of reading and writing in that period.<sup>39</sup> Libels, as well as parliamentary reports and the kind of news that Samuel Albyn was supplying in the 1620s, were copied into manuscript miscellanies around the country, forming a network of readers with a wide range of possible social or ideological connections.<sup>40</sup> In turn, the compiling of a miscellany (which could often be a shared project and involve the exchange of materials) offered a means of creating textual – and ideological – cohesion for groups of like-minded individuals who had few other opportunities for exchanging texts and ideas. They could both create and define political groupings, and even generate in the accumulation of apparently heterogeneous writings a notion of what a political discourse might look like.

In examining these miscellanies, it is vital to read them as collections rather than considering the libels they contain as more discrete items. Often individual texts have been extracted from them without any sense of their context – the nature of the collection as a whole, where the text is placed in it, or the identity or apparent biases of the compiler. Such a piecemeal approach panders to the reading of libels as local and responsive rather than continuous with knowledge of the proceedings and the language of parliament, and with a more general sense of civic engagement. If we instead consider the miscellany as a whole, both libels and parliamentary debates can be seen as signs of a wider concern about the counsel that was allowed to reach the king and the range of information that was allowed to reach his people.

At the end of the first decade of the seventeenth century, in Shropshire, the godly minister Robert Horn (1596–1640) was compiling a manuscript miscellany. The miscellany – now Bodleian Library MS Rawlinson B. 151 – is dominated by texts connected with matters of freedom of speech and counsel.<sup>41</sup> It contains the 1618 proclamation against popish and puritanical books; Sir Philip Sidney's letter to the queen, from 1579; the letter from Sir Charles Cornwallis to King James explaining his involvement in the inflammatory speeches of 1614; Scott's *Vox Populi* (1620) and one of only two extant copies of his *Sir Walter Raleigh's Ghost* (1626); the speech purportedly by Archbishop Abbot against the Spanish match; the letter from Thomas Alured to Buckingham on the same subject; records of proceedings in the parliaments of 1610, 1621, 1624, 1625, 1626 and 1628; and several poems by the notoriously outspoken John Hoskyns: his libel on Bacon's fall in 1621, 'Great Verulam is very lame', his verses to his son warning of the dangers of frank speech, and 'A Dreame', which portrays Hoskyns's wife pleading for her imprisoned husband.

The links between these texts show that the manuscript demands to be read as a collection, and that the juxtaposition of apparently disparate materials is in fact part of Horn's political agenda. Not only Horn's agenda, though: MS Rawl. B. 151 was a communal production, and contains tangible evidence of the way communities of readers were constituted through the circulation of texts. Both of the works by Thomas Scott were transcribed by Horn's younger neighbour in Shropshire, Herbert Jenks (he has signed them), who had graduated BA from Lincoln College, Oxford, in May 1620.<sup>42</sup> Given Jenks's links with Oxford and, later, the Inns of Court, this instance of text-sharing hints at a potentially extensive network of readers and writers with a range of geographical or institutional affiliations: we have to recognize that

the evidence we have for the nature and extent of such communities is only the tip of the iceberg.

Scott's pamphlets spoke explicitly to debates current in the 1620s – primarily the potential dangers of England's relations with Spain and James's reluctance to go to war. Horn was also interested in texts from the past, though, and in the ways that they could be used to interpret the present. As well as Sidney's letter to Queen Elizabeth advising against her marriage to the Duc d'Alençon, he copied extracts from Stubbs's *Gaping Gulf*, on the same subject. No mention is made of Stubbs's fate, nor is there any attempt to place the work in its historical context, beyond dating it at the beginning. Instead Horn has a marginal note, also at the beginning, which reads 'Against marrying w<sup>th</sup> Papists by Protestants': the text is thus fitted into a running commentary on the Spanish match and other dangerous possible inter-confessional unions. A 'libel' (Stubbs's pamphlet was often described thus) is revealed to have enduring political power, and its arguments (for Horn at least) to be ones of principle rather than personality – just as Stubbs himself argued. At the end of the extract, Horn shows that his book was designed to generate debate, urging us to look for the letter 'A' in the margin, where he has squeezed in a short exercise in arguing *in utramque partem*. Responding to Stubbs, he writes

Object. we finde the Jews often to match w<sup>th</sup> the Gentils as Boaz with Ruth, ruth. 4. 13, and the match allowed. – Answ. when the Lord gaue his law against such marriages, he specially excepted, if they wold renounce superstition, and embrace true religion, as Ruth did. Ruth. 1. 16. deut. 21. 12. 14. gen. 34. 15. 16. ps. 45. 10. 11.<sup>43</sup>

Writers like Stubbs, who were concerned to assert their status and fulfil their obligations as frank counsellors and who were rendered so vulnerable by Coke's conclusions in his report on libels, loom large in Horn's political miscellany. I want to return, finally, to Thomas Bywater's tract, another example of direct advice to the monarch that Horn transcribed some time after its delivery.<sup>44</sup> This seems to be the sole surviving copy of the tract, and we can only speculate as to how the text made its way from the manuscript delivered to James in 1605 and then read by members of the Privy Council, to Horn's miscellany in Shropshire in the early 1620s. Whatever the explanation, its appearance in Horn's manuscript highlights the vigour of the culture of scribal publication, and the way in which it fostered the dissemination and preservation of libellous texts over time and space.

The burden of Bywater's work is that the king, while he knows how best to govern and has shown this in his book *Basilikon Doron*,<sup>45</sup> is both forgetful of his own principles and led astray by bad counsel. Bywater, as his loyal and honest servant, is bound to remind him of where he is going wrong, and he does so by citing passages of Scripture alongside passages of *Basilikon Doron*, from his brief preface to the end of the tract. The text is headed with three quotations from the Book of Proverbs that set the tone for the work as a whole: 'righteous lips are the delight of kings: and the king loveth him that speaketh righteous things' (16:13); 'Lying lippes are abomination to the Lord: but they that deale truly are his delight' (12:22) and 'the tongue of the wise is health: & a faithful Messinger is preservation' (an amalgam of 12:18 and 25:13). Many of the sections of Bywater's tract insist upon the importance of the king having an open and communicative relationship with his people, and on the dangers of being led astray. His section on 'governing the court' is typically outspoken, and even refers to Psalm 101, where David resolves to 'cut off' 'whoso privily slandereth his neighbour':

look. Davids direction in ps. 101 throughout. Davids doctrine is your own, O king, pag. 60. 64. & 70. 72; of your book to your sonne. reade it I beseech you, and forget it not. I do but remember you of it, lest the people shold say: the king writes well, but he hath forgotten the writing. Let it never be said, you command a court contrary to your own practise, making your words & deeds so ill to agree together. looke Salomons order of his Men & court. 1 king. 10. 4. 5 &c. your βασιλ. pag. 99, 126.

(fol. 95)

I Kings 10:4–5 does not give a very clear idea of Solomon's court, but it is sufficient to provoke the Queen of Sheba into exclaiming in admiration, 'thy wisdom and prosperity exceeded the fame which I heard; Happy are thy men, happy are these thy servants, which stand continually before thee, and that hear thy wisdom' (I Kings 10:7–8).

In sections on 'favourites & folowers' and 'Councillours & their counceils' Bywater contrasts the pliability and insinuations of the flatterer with the sometimes harsh words of the counsellor, reminding James that the latter require deliberation rather than a hasty response:

flattering fault finders are but Zibas in court, false to one and false to another. 2 Sam. 16. 1. 2. 3. 4... . look. pro. 20. 18. & 15. 22. & 20. 5. & 14. 15. Councelours counsel pro and contra: therfor what they

say is to be weighed as in a balance; not lightly to be received, nor with like lightnes to be cast of. Ahitophels not to be trusted too farre, for they will prove false with the times: 2 Sam. 15. 31: but Daniels and Josephs are best counsellours for a king: dan. 6. 1. 4. gen. 41. ch. or, if not these, yet an Hushaj is better than an Ahitophel. 2 Sam. 15. 32. 33. 34. &. 17. 6. 7.

(fols 95–95<sup>v</sup>)

The list of biblical references treating the value of wise and mature counsel and the dangers of youthful or flattering counsellors is impressive, and Bywater begins to sound almost like a commonplace-book: indeed, the force of his argument is in part the result of this forest of citations.<sup>46</sup>

The need for the prince to be accessible was a recurrent topos in the literature of counsel, and James's increasing preference for reserved majesty elicited considerable criticism through the course of his reign. Bywater emphasizes the importance of direct counsel and casts the alternative – the pyramid of communication via ministers and courtiers – in effective confessional terms, as an example of Roman Catholic corruption: 'Be open and affable to every rank of honest & good persons', he advises, 'for intercession to Saints is idolatry. βασιλ. pag. 46. you know your own words'. Moreover, he explains, continuing the religious metaphor – and punning on the sense of 'angel' as a gold coin worth about ten shillings – such mediation is financially corrupt, 'because these Saints must have adoration, as well as intercession; and we must bring Angels vnto them in this devotion' (fol. 96).<sup>47</sup>

Bywater's tract demands further study, for which I do not have space here. The titles of its sections give a good idea of its scope, however:

- |  |   |
|--|---|
| 1. Of giving and bestowing honour;     | 11. of Leagues and peace                      |
| 2. Of justice & judgement in the king; | 12. of Popery and purity                      |
| 3. Of Judges and Justices;             | 13. of formality & ceremonies                 |
| 4. Of wicked ones in the lawe;         | 14. of reverence at the word & prayer         |
| 5. Of governing the Court;             | 15. of hearing Preachers                      |
| 6. of favourites & folowers;           | 16. of Swearing                               |
| 7. of provision for the house;         | 17. of Sport & pleasure                       |
| 8. of tax and subsidies;               | 18. of restraint of accesse to the kings face |
| 9. of Councillours & their counceils   | 19. of discipline, or church goverment        |
| 10. of nobles & great ones             | 20. of greevances of the people               |

(fols 95–96<sup>v</sup>)



Throughout his tract, Bywater presents himself in the common language of such texts as speaking for the community at large in the voice of a frank and friendly adviser. He ends by stressing that he is only fulfilling what he considers to be his responsibilities, writing 'thus I have plainly, as I cold, and faithfully I doubt not, discharged the duty of a good & Loyal Subject to the Lord my king, for the honour of the Lord my God, the good of my countrey, and peace of myne own soule' (fol. 96). For Horn, transcribing over 15 years later, the text was an example not just of godly writing but of frank counsel, to be employed, considered and redeployed in a deliberative context. He is less interested in Bywater's fate than in his presentation as a loyal but unhappy subject forced to speak out.

It is difficult to see either Bywater's tract or Horn's miscellany as attempts to undermine the 'civility of trust'. Bywater certainly exceeds his warrant as a preacher, especially a suspended one. But as Thomas Scott was fond of reminding his readers, 'necessitie supplie's the place of an ordinary calling'.<sup>48</sup> Bywater was drawing on a strong tradition of belief in prophetic outspokenness as licensed by God: according to this tradition, to remain silent was a far greater offence than to speak out. This does not mean that we should consider his tract as the acceptable face of libelling, and regard Pickering's libel as an insult too far. Rather, they exist on a continuum of political comment and analysis, and show the range of ways in which counsel might be delivered, depending partly on the degree of influence that an individual felt he possessed. And this is precisely how such texts were perceived by many contemporary readers – readers like Robert Horn – even if the king and his Privy Council thought otherwise.

The desire to counsel was the foundation of the notion of free speech in this period – not an abstract desire for freedom of expression, nor a local desire to smear the honour of individuals, but a desire rooted in the context of political debate as it took place in parliament and in the pages of manuscript miscellanies compiled around the country. This desire was behind the appeal in parliament to statutes legislating for regular assemblies and for the privilege of free speech. One of its means of justification was silenced in the 1605 case against Pickering, but it continued to form and inform the composition and transmission of the political libels of the period. As it developed in this period, the law of defamation disallowed freedom of speech arguments congruent with those I have described. To accept the terms of that law does a disservice to the range of arguments about frank counsel and its possibilities that took place inside and outside parliament. Libel, law

and the theory of counsel were vital components of a vigorous debate around the definition of the loyal subject or good counsellor taking place in early Stuart England, and by participating in such debate individuals in turn questioned the definition of free speech and remade their political language.

## Notes

I would like to thank Debora Shuger for a very detailed response to this essay at a late stage; I am also indebted to the editors for helpful comments on earlier drafts.

1. Samuel Albyn to [?John Rawson], BL MS Harley 383, fols 13–14, quoted in W. Notestein, F.H. Relf and H. Simpson (eds), *Commons Debates in 1621*, 7 vols (Yale University Press, 1935), vol. 7 (appendices), 591. Albyn is, of course, referring to the punishment of cropping of the ears.
2. *Ibid.*
3. See P. Croft, 'The Reputation of Robert Cecil: Libels, Political Opinion and Popular Awareness in the Early Seventeenth Century', *Transactions of the Royal Historical Society* 6:1 (1991), 43–69; A. Fox, 'Ballads, Libels and Popular Ridicule in Jacobean England', *Past & Present* 145 (November 1994), 47–83; M.L. Kaplan, *The Culture of Slander in Early Modern England* (Cambridge University Press, 1997); A. Bellany, "'Raylinge Rymes and Vaunting Verse": Libellous Politics in Early Stuart England, 1603–1628', in K. Sharpe and P. Lake (eds), *Culture and Politics in Early Stuart England* (Macmillan, 1994), 285–310; *idem*, 'A Poem on the Archbishop's Hearse: Puritanism, Libel, and Sedition after the Hampton Court Conference', *Journal of British Studies* 34 (1995), 137–64; *idem*, 'Libels in Action: Ritual, Subversion, and the English Literary Underground, 1603–1642', in T. Harris (ed.), *The Politics of the Excluded, c. 1500–1850* (Palgrave, 2001); *idem*, *The Politics of Court Scandal in Early Modern England: News Culture and the Overbury Affair, 1603–1666* (Cambridge University Press, 2002); A. McRae, 'The Literary Culture of Early Stuart Libelling', *Modern Philology* 97:3 (2000), 364–92. I am grateful to Andrew McRae for providing me with a copy of his article.
4. See T. Cogswell, 'Underground Verse and the Transformation of Early Stuart Political Culture', in S.D. Amussen and M. Kishlansky (eds), *Political Culture and Cultural Politics in Early Modern England* (Manchester University Press, 1995), 277–300, and works cited by Bellany.
5. For this debate, see as introductions K. Sharpe (ed.), *Faction and Parliament: Essays on Early Stuart History* (Clarendon Press, 1978); R. Cust and A. Hughes (eds), *Conflict in Early Stuart England: Studies in Religion and Politics 1603–1642* (Longman, 1989).
6. See E. Spenser, *The Faerie Queene*, ed. A.C. Hamilton (Longman, 1977), Book V, Canto IX, stanzas 25–6, 592.
7. Kaplan *The Culture of Slander in Early Modern England*.
8. John Selden's celebrated description: 'though some make slight of Libells, yet you may see by them how the wind sits ... More solid things doe not shew the Complexion of the times so well as Ballads and libells' (F. Pollock (ed.), *Table Talk of John Selden* (Quaritch, 1927), 72).

9. See D. Shuger, 'Civility and Censorship in Early Modern England', in R.C. Post (ed.), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Research Institute for the History of Art and the Humanities, 1998), 89–110. I am grateful to David Norbrook for bringing this article to my attention. Shuger pursued a parallel argument in 'Roman Catholicism, Roman Law, and the Regulation of Language in Early Modern England (c. 1558–1641)', a paper delivered at the West Coast Law and Literature Conference, University of Southern California, 13 May 2002.
10. J.H. Baker, 'Defamation', in *An Introduction to English Legal History*, 3rd edition (Butterworths, 1990), 495–508.
11. S. Lambert, 'State Control of the Press in Theory and Practice: the Role of the Stationers' Company before 1640', in R. Myers and M. Harris (eds), *Censorship and the Control of Print in England and France 1600–1900* (St Paul's Bibliographies, 1992), 9.
12. On the earlier history of the Speaker's request for freedom of speech, see J. S. Roskell, *The Commons and their Speakers in English Parliaments 1376–1523* (Manchester University Press, 1965), ch. 2.
13. For Wentworth's speech see T.E. Hartley (ed.), *Proceedings in the Parliaments of Elizabeth I*, 3 vols (Leicester University Press, 1981–1995), vol. I, 425–34.
14. See J.E. Neale, 'The Commons' Privilege of Free Speech in Parliament', in R.W. Seton-Watson (ed.), *Tudor Studies Presented by the Board of Studies in History in the University of London to Albert Frederick Pollard* (Longmans Green & Co., 1924), 257–86.
15. Quoted in J.P. Kenyon (ed.), *The Stuart Constitution: Documents and Commentary*, 2nd edition (Cambridge University Press, 1986), 27.
16. See C. Thompson, *The Debate on Freedom of Speech in the House of Commons in February 1621* (The Orchard Press, 1985).
17. Notestein et al. (eds), *Commons Debates in 1621*, vol.2, 17. Giles's motion was seconded by Sir Robert Phelips.
18. T. Birch (compiler), *The Court and Times of James the first illustrated by authentic and confidential letters from various public and private collections*, 2 vols (London, 1848), vol. 2, 224.
19. Birch, *The Court and Times of James the first*, vol. 2, 229.
20. On Pasquino and the Italian tradition, see R. and F. Silenzi, *Pasquino. Cinquecento pasquinate* (Bompiani, 1932); M. dell'Arco, *Pasquino e le pasquinate* (A. Martello, 1957); A. Reynolds, 'Cardinal Oliviero Carafa and the Early Cinquecento Tradition of the Feast of Pasquino', *Humanistica Lovaniensia* 34A (1985), 178–208; eadem, 'The Classical Continuum in Roman Humanism: the Festival of Pasquino, the *Robigalia*, and Satire', *Bibliothèque d'Humanisme et Renaissance* 49:2 (1987), 289–307.
21. T. Elyot, *Pasqvil the playne* (London, 1533), title page.
22. Bodleian Library MS Malone 23, fol. 32; Bellany, 'A Poem on the Archbishop's Hearse'; N.E. McClure (ed.), *The Letters of John Chamberlain*, 2 vols (American Philosophical Association, 1939), vol. 2, 518.
23. Thomas Larkin to Sir Thomas Puckering, 16 March 1618/19, in Birch, *The Court and Times of James the first*, vol. 2, 147.
24. Diary entry of Archbishop William Laud, 29 March 1629, W. Scott and J. Bliss (eds), *The works of the most reverend father in God, William Laud D.D.*

- (Oxford, 1847–60), vol. 3, 210, cited in H. Love, *Scribal Publication in Seventeenth-Century England* (Clarendon Press, 1993), 82.
25. I am grateful to Lucinda Platt for bringing this example to my attention.
  26. See Bellany's excellent analysis of this case in 'A Poem on the Archbishop's Hearse'.
  27. Sir E. Coke, 'The Case *de Libellis famosis*, or of Scandalous Libels', in *The Reports of Sir Edward Coke, in English*, 7 vols (London, 1776–7), 5: 126.
  28. J. Donne, *Letters to Severall Persons of Honour* (London, 1651), 90–1.
  29. F. Bacon, *The History of the Reign of King Henry VII*, ed. B. Vickers (Cambridge University Press, 1998), 115.
  30. On 27 March 1610 Edwin Sandys moved that the Committee for Privileges 'consider how to prevent the Preferring of Grievances, like Pasquils, and yet to preserve the Liberties of the House' (*Commons Journal*, I, 415).
  31. R. Cust, 'News and Politics in Early Seventeenth-Century England', in R. Cust and A. Hughes (eds), *The English Civil War* (Arnold, 1997), 233–60, 238–9.
  32. Coke, 'The Case *de Libellis famosis*, or of Scandalous Libels', 125.
  33. See Bellany, 'A Poem on the Archbishop's Hearse', 137–41.
  34. From Coke's 'Anatomy' of Bywater, *H.M.C. Salisbury (Cecil)*, vol. 16, 35.
  35. Bywater graduated BA from Christ's College, Cambridge, in 1592/3, and MA in 1596 (J. Peile (compiler), *Biographical Register of Christ's College, 1505–1905*, 2 vols (Cambridge University Press, 1910), vol. 1, 197). He was at Emmanuel College in 1601, where Lewis Pickering had been admitted in 1587 (S. Bendall, C. Brooke and P. Collinson, *A History of Emmanuel College* (The Boydell Press, 1999), 80). On Bywater's relations with Lord Hunsdon and Lord Sheffield, see *H.M.C. Salisbury (Cecil)*, vol. 16, 83, 108–9.
  36. W.P. Baildon (ed.), *Les Reports del Cases in Camera Stellata 1593 to 1609. From the Original MS of John Hawarde* (privately printed, 1894), 225.
  37. See *H.M.C. Salisbury (Cecil)*, vol. 17, 213, 320, 459.
  38. Baildon (ed.), *Les Reports*, 225; *H.M.C. Salisbury (Cecil)*, vol. 17, 65.
  39. Love, *Scribal Publication*. See also M. Hobbs, *Early Seventeenth-Century Verse Miscellany Manuscripts* (Scolar Press, 1992); A.F. Marotti, *Manuscript, Print, and the English Renaissance Lyric* (Cornell University Press, 1995); H.R. Woudhuysen, *Sir Philip Sidney and the Circulation of Manuscripts, 1558–1640* (Clarendon Press, 1996); P. Beal, *In Praise of Scribes: Manuscripts and their Makers in Seventeenth-Century England* (Clarendon Press, 1998).
  40. On the compilations of William Davenport, John Rous and Walter Yonge, see C. Holmes, 'The County Community in Stuart Historiography', in Cust and Hughes (eds), *The English Civil War*, 312–32; J. Morrill, 'William Davenport and the "Silent Majority" of Early Stuart England', *Journal of the Chester Archaeological Society* 58 (1974), 115–29; idem, *Revolt in the Provinces: the People of England and the Tragedies of War 1630–1648*, 2nd edition (Longman, 1999).
  41. See *Catalogi Codicum Manuscriptorum Bibliothecæ Bodleianæ* (Oxford, 1862), V (i), 502. On Horn see *DNB*, sub Horn, Robert; M. Faraday, *Ludlow 1085–1660. A Social, Economic and Political History* (Phillimore, 1991), 71; on Horn and the manuscript, see D. Colclough, '"The Muses Recreation": John Hoskyns and the Manuscript Culture of the Seventeenth Century', *Huntington Library Quarterly* 61:3 and 4 (1998), 386–9.

42. J. Foster (ed.), *Alumni Oxoniensis: the Members of the University of Oxford, 1500–1714*, 4 vols (Oxford and London, 1892), vol. 2, 807. Jenks was admitted to Lincoln's Inn on 25 June 1631, and was called to the Bar on 29 January 1639 (*The Records of the Honourable Society of Lincoln's Inn, volume I, Admissions from A.D. 1420 to A.D. 1799* (London, 1896), 214; W.P. Baildon (ed.), *The Records of the Honourable Society of Lincoln's Inn. The Black Books* (London, 1897), II, 350). I have found no trace of him between his graduation from Oxford and his admission to the Inn.
43. Bodl. MS Rawl. B. 151, fol. 17<sup>v</sup>. Subsequent references to this manuscript will appear parenthetically in the text.
44. Horn copied Bywater's tract on 11 and 12 March 1621 (fol. 96<sup>v</sup>).
45. First printed, in an edition of seven copies, in 1599; reprinted in 1603 in Edinburgh and London, and later in the *Workes* (London, 1616). See King James VI and I, *Political Writings*, ed. J.P. Sommerville (Cambridge University Press, 1994), xviii–xix, xxx.
46. Coke even referred to Bywater's book as 'the slanderous commonplaces', *H.M.C. Salisbury (Cecil)*, vol. 17, 114.
47. The pun was picked up on by the Earl of Devonshire: 'because Mr. Bywater teaches me that the saints of the Court must not only have adoration but intercession, though I cannot do it by angels who are perfect, yet I have sent you six suckling rabbits of Wansteed, which I am sure are innocent' (to Viscount Cranborne (Cecil); *H.M.C. Salisbury (Cecil)*, vol. 16, 430).
48. T. Scott, *Vox Dei* (n.p., n.d. [1624]), sig. D<sup>r</sup>.

# 9

## John Selden among the Quakers: Antifeminism and the Seventeenth-Century Tithes Controversy

Marcus Nevitt

### [I]

20 July 1659 witnessed a landmark event in the history of early modern women's writing when two nameless women presented a massive, collectively written text to the House of Commons. Despite the fact that the Commons would not accept the document, it appeared in print later that year as a 72-page pamphlet published by Mary Westwood entitled *These Several Papers Was sent to the Parliament The twentieth day of the fifth Moneth 1659 Being Above seven thousand of the Names of the Handmaids and Daughters of the Lord*. The text bearing this unwieldy, ungrammatical title was actually a densely printed collection of petitions by different groups of Quaker women from various parts of the country collated together as a single female response to 'the oppression of Tithes, in the names of many more of the said Handmaids and Daughters of the Lord, who witness against the oppression of Tithes'.<sup>1</sup> The tenor of *These Several Papers* differs from petition to petition but all are characterized by a shared concern to expose the material depredations and economic hardships (including imprisonment and property distraint) that Quaker women suffered as a result of the institution of tithe payment. The women of Lancashire, Northumberland and Cumberland, for instance, verbalize their resistance by invoking Old Testament modes of address and gender solidarity simultaneously:

We ... are the Seed of the Woman, which bruiseth the Serpent's head, to which the Promise is, Christ Jesus in the Male and the

Female, which is the Everlasting Priest, not after the Order of Aaron, which took Tithes ... but of the Tribe of Judah ... who is a Priest for ever ... And therefore can we set our hearts and hands against *Aaron's Order*, which is disannulled, and the Law changed.<sup>2</sup>

The women of Gloucestershire, by contrast, organize their protest by replacing biblical register with materialist critique as they address 'the Parliament of England' with arresting directness:

How do you who are the heads of the Nation expect we should pay your taxes, when you suffer the Priests to take away our goods, that do no worke for us, and they come and claime through a pretence Tythe from ... us for their preaching, that to us does not preach and will not suffer us to try their doctrine ... and if we do question it, six moneths in the house of correction, or five pounds fine: And if the Priest come and pretend 15/ Tythes they will take a hundred pounds.<sup>3</sup>

The signatories of Southwark sound a similar note but they locate their boldly interrogative appeal in a revolutionary historical context. When comparing the ravages of civil war with those experienced under prelacy, they remind their readers of 'our friends who have been for the Parliament ever since the beginning of the late Wars, [who] have suffered more by these plundering Priests, then by the plundering Cavaliers'.<sup>4</sup>

This remarkable, rhetorically diverse pamphlet is perhaps best viewed among those renewed appeals by sectarian groups for religious toleration following the restoration of the Rump Parliament on 5 May 1659. Before it was expelled by Cromwell in 1653, this parliament was favourably viewed by (and heavily composed of) sectarians, and its restoration at the end of the decade heralded a new optimism in the potential for a tolerationist, anti-tithe lobby to push through legislation forcing the abolition of tithes. It soon became apparent, however, that this optimism was misplaced. With a deluge of other petitions and issues to contend with, the Rump's idea of debating the subject of tithe legislation was simply to consolidate the former position of forced maintenance of a national ministry.<sup>5</sup> Thus was it that on 27 July, one week after the Quaker women's petitions were presented, that the House decreed 'that for the Encouragement of a Godly Preaching Learning Ministry throughout the Nation, the Payment of Tythes shall continue as now they are, until this Parliament shall find out some

other more equal and comfortable Maintenance, both for the Ministry and Satisfaction of the People'.<sup>6</sup> In a pattern all too familiar to students of early modern women, non-aristocratic women's voices and texts are thus ignored at the very moment they threaten to enter the political and legislative arena.

Even though the Quaker women's petitions were ultimately unsuccessful in changing the course of mid-seventeenth-century tithe law, *These Several Papers* nonetheless represents a crucial, defining text in both tithe historiography and the history of early modern women's writing. The pamphlet appeared at a time when tithe dispute had long been the 'raison d'être of the Quaker movement', and when Quakerism itself was affording an astonishing number of early modern women new opportunities of authorship.<sup>7</sup> Yet the fact remains that few Quaker women wrote extensively about tithes at a time when (in a wider cultural context) public resistance to them had become almost as pure a signifier of Quakerism as the physiological state from which the movement got its initially derogatory label. Thus, although countless Quaker women were composing pamphlets on the extent of female ministry, the relief of the poor, or the workings of God through the spirit at this time, and whilst women like Mary Braidley or Grace Barwick were briefly reminding their readers of the injustice of tithe payment throughout the 1650s, it is not until the appearance of *These Several Papers* in 1659 that we get anything like a sustained examination of the institution and history of tithes by women writers.<sup>8</sup> It will be the business of this chapter to position *These Several Papers* as a critical intervention in a broader context of seventeenth-century tithe dispute, a discursive arena which, ever since John Selden had penned his monumental *Historie of Tithes* in 1618, had been shaped by the mutually constitutive codes of masculinism and antifeminism.

### [II]

There can be little doubt that the immediate contemporaries of the authors of *These Several Papers* viewed tithe debate in the seventeenth century as a peculiarly male discursive practice. The number of treatises and pamphlets written on the subject itself betrays a near obsessive concern with finding and defining an appropriately masculine audience. Milton, for instance, had long contested the issue of forced maintenance of a national clergy, and lambasted what he perceived to be the concomitant clerical abuses. In *Lycidas* (1637) he had famously inveighed against conspicuously consuming, time-serving ministry as



'Blind mouths' who 'for their bellies' sake, / Creep and intrude, and climb into the fold'.<sup>9</sup> By 1659 his views on this subject had hardened, and in *Considerations Touching the Likeliest Means to Remove Hirelings Out of the Church*, he once again poured scorn upon the established clergy, those 'sharking ministers with a spiritual leprosie'.<sup>10</sup> This time however, his anti-clericalism is less elegiac, less directed to offset the true godliness of a recently deceased close friend, than polemical, aiming to excoriate the whole system of tithe payment as the prime corrupter of the clergy. The issue is of national political importance and a matter of national shame as the English remain 'the only people of all Protestants left undeliverd, from the oppressions of a Simonious decimating clergie'.<sup>11</sup> As Milton self-consciously positions himself in the public sphere, where tithes represent the greatest of politico-religious stakes, it is perhaps no surprise that he should style this discursive forum as an exclusively male one. Therefore in *Considerations* knowledge of and participation in tithe controversy become allied to his more general views on the nature of Christian education per se. Thus amid a discussion of the unjustness of the forced maintenance of ministers by all he digresses:

I offer it to the reason of any man, whether he think the knowledge of Christian religion harder than any other art or science to attain. I suppose that he will grant it far easier ... since it was preached as well to the shepherds of *Bethlehem* by angels, as to the eastern Wisemen by that starr ... Hence we may conclude, if men be not all thir life time under a teacher to learn Logic, natural Philosophie, Ethics or Mathematics, which are more difficult, that certainly it is not necessarie to the attainment of Christian knowledge that men should sit all their life long at the feet of a pulpited divine; while he, a lollard indeed over his elbow-cushion ... teaches them scarce half the principles of religion; and his sheep oft-times sit the while to as little purpose of benefiting as the sheep in their pues at *Smithfield* ... or if this comparison be too low, like those woemen, 1 Tim 3.7. *ever learning and never attaining*; yet not so much through their own fault, as through the unskilful and immethodical teaching of thir pastor, teaching here and there at random out of this or that text as his ease or fansie, and oft times his stealth guides him.<sup>12</sup>

Milton's inclusive rhetoric concerning the necessary reformation of Christian knowledge and the promotion of more egalitarian pedagogical practices closely aligns him with the Quakers at this point.<sup>13</sup> Equally

noteworthy is the fact that women are excluded from the readership of Milton's sole contribution to the pamphlet wars surrounding the payment of tithes. The 'man' of 'reason' to whom he addresses his digression is the descendent of the 'eastern Wisemen' of the Bible, and his ability to 'suppose' common knowledge with that enlightened male reader is the result of Epiphanic educative moments to which only men are permitted access. Whilst shepherds represent the lowest level to which Christian knowledge can penetrate in mankind, it is tellingly 'woemen' who symbolize those men whose ignorance places them beyond the reach of erudition. Despite the proviso that this effeminate unenlightenment is largely the result of 'immethodical teaching' and male clerical abuse, Milton is only willing to accord women a symbolic status which is marginally more positive than the irrationally ovine.

Milton is, of course, not alone in maintaining this masculinist position. All writers in seventeenth-century tithes controversy, be they Presbyterian or independent, orthodox or sectarian, repeatedly search out and engage a male readership for their work. Michael Beynon opens his post-Restoration, pro-tithe pamphlet by addressing his 'Learned Readers' as 'Sirs' and then proceeds to inform them of his own unfitness to participate in the current dispute:

You may be pleased to remit the severity of that Censure which the ignorant Rudeness of my Style and the Brevity and paucity of the Arguments I have made use of (far below the merits of the Cause I have taken upon me to defend) may possibly deserve; The One being the effect of an unlearned hand, and so naturally falling from my Pen, being yet in my Tyrocinium, and a Candidate both in the Arts and Laws, And the other in some sence necessary, I having to deal with such persons as must have Speedy Conveyances from their Sences to their Intellects.<sup>14</sup>

Notwithstanding the humility topoi and rhetorical self-abasement, Beynon still betrays a desire to be numbered amongst the ranks of 'Sirs' to whom he is addressing himself. Thus his intellectual development and emergence into the public sphere is conveyed in heavily martial terms whereby he can engage other quasi-chivalric authors in the controversy on his 'Tyrocinium', or first military campaign. The ground on which this particular conflict was fought was that of English statute law, and his specific adversary is the Quaker lawyer John Crook. The bulk of the pamphlet is therefore concerned with intricately tracing the justification of compulsory tithe payment in

English law, in particular contesting Crook's use of 15 Ric. 2, c. 6 to prove that pre-Reformation tithe payment was a form of voluntary contribution for poor relief.

Such scrutiny and contestation of English statutes was an essential aspect of tithe debate both for those who advocated and those who opposed the forced maintenance of a national ministry. At one level, this is no doubt due to the ambiguous nature of the legislation surrounding tithes following the passage of the Tithe Act in 1549. This legislation had not only failed to secure the Church the revenue it needed but had correspondingly (and paradoxically) made the recovery of tithes more difficult.<sup>15</sup> 18 Eliz. 1, c. 11, for example, was framed by parliament as an attempt to reform clerical abuses such as non-residence, but in doing so it sanctioned a parishioner's right to withhold the tithe if the bishop failed to penalize the offending clergyman.<sup>16</sup> Therefore whilst Presbyterians and more orthodox divines were insistently reminding their congregations from pamphlet and pulpit that tithes were a ministerial divine right sanctioned by *ius divinum*, there was legislation on the statute book which spoke of tithes as a form of voluntary payment for a service rendered.

If, then, conservatives and radicals alike were returning to the language and discourse of English statute to press their respective points in the arena of tithe debate, the corollary was that the controversy was masculinized. Denied the educative opportunities to study statute books at first hand, the vast majority of women, like those who penned *These Several Papers*, were accordingly excluded from debate of an issue which affected them materially. The 'sufferings' of Loveday Hamby, a Quaker woman from Cornwall, are by no means unusual in this regard. In 1658 she was 'imprisoned for several weeks at Bodmin' for refusing to pay a tithe of 13 shillings 4 pence on her geese and swine even though she had been forced to contribute a tithe '45s [shillings] for about 8s demanded' in 1657. Six years later she was once again in jail. This time, however, 'Cattle and Horses to the Value of 103s' were taken on a tithe of 18 shillings and 4 pence 'after which, the Bayliffs, pretending a writ of Rebellion, broke open five Doors, and having taken her ... with much Incivility kept her all Night in an Alehouse, [and] carried her the next Day to the Sheriff's prison'.<sup>17</sup> Even if the partisanship of such Quaker records is taken into account, the disparity between the number of women debating tithes in print and the number of women who resisted tithe payment (and were punished for their refusal to pay) is still striking. Ever since Quaker women's meetings were established in London between 1656 and 1657, female

Friends like Hambly had been recording their experience of governmental or ministerial persecution for offences such as the non-payment of tithes, the interruption of church services and the refusal to take oaths.<sup>18</sup> These accounts still survive in the manuscript *Great Book of Sufferings* in the Friends House Library in London, and in Joseph Besse's retrospective printed *Collection of the Sufferings of the People Called Quakers* (1753); both texts are replete with hundreds of instances of women having property distrained or being imprisoned for not paying tithes.<sup>19</sup>

Whilst it may account for the disparity between the material culture of women's suffering and the masculinized print culture of seventeenth-century tithe dispute, it will undoubtedly still seem strange to aver that erudition and legalistic expertise predominate in a discursive arena in which the Quakers featured so prominently. The movement was, after all, initially characterized by a conviction of the primacy of the spirit over the intellect and a fundamental belief in the egalitarian principle of the priesthood of *all* believers.<sup>20</sup> Yet as the historian W.C. Braithwaite has demonstrated in his discussion of post-Restoration Quakerism, the movement gradually incorporated both legalism and the need to complement the workings of the spirit with a new, disciplined intellectual rigour.<sup>21</sup> It is my contention that this process actually begins earlier than Braithwaite credits – it can in fact be glimpsed in nascent form in the Quaker involvement in the tithes controversy of the 1650s – and that a sense of the legalism and intellectualism of the tithes controversy can help provide a corrective to the view that Quakerism was a movement that unproblematically championed female participation in public sphere activity. Thus, perhaps the most influential and extensive text in the Quaker contribution to the tithe debate in the 1650s is Anthony Pearson's *The Great Case of Tythes Truly Stated, clearly opened, and fully resolved* (1657). Pearson (1628–1670), close friend of George Fox and Margaret Fell, was one of the most influential Quakers in the north of England whose main concern was the unjustness and illegality of the extreme punitive measures taken against Quakers who refused to pay tithes.<sup>22</sup> He was well educated, had legal training and in 1655 began a systematic visitation of all law courts and prisons to gather information about tithe payment and Quaker punishment. As a result of his extensive research he was granted an interview with Cromwell where he pressed for greater religious toleration, a less draconian governmental approach to ministerial maintenance, and the release of those Quakers who had been imprisoned for non-payment of tithes. When this met

with little success, he widened his scope to deliberate on tithe payment throughout history, eventually publishing *The Great Case of Tythes Truly Stated* in 1657. This proved to be immensely popular amongst Quakers and non-Quakers alike and new editions of the work were published every year until the Restoration, after which Pearson renounced Quakerism and was employed by Charles II's government in Scotland as an adviser on tithes and other agricultural 'customs'.<sup>23</sup> Further editions of *The Great Case of Tythes Truly Stated* appeared after the Restoration (it being especially popular among eighteenth-century Quakers keen to stress the reasoned and rational aspects of their religion) and by 1850 around ten editions were in print. The first edition of the pamphlet, which is replete with Latin, Greek and Hebraic references, opens with an epistle dedicatory which aims to provide a context of even-handed neutrality in the ensuing discussion, and lays claim to the impartiality of historical empiricism. Addressing himself to the exclusively male community of 'Country-men, Farmers, and Husbandmen of England' Pearson continues:

It is for your sake that this small Treatise is sent abroad, that in a matter wherein you are so much concerned, you might be truly informed: And because there are many differing opinions, and of late years have been great disputes concerning the right of Tythes, which makes the case seem difficult to be resolved, I have given you the substance of all that ever I could find written, or hear discoursed touching that point ... for more than two yeers last past I have made much enquiry into it;<sup>24</sup>

If the rhetorical and ideologically invested nature of the purportedly disinterested historiographical position is exposed by Pearson's own vehemently anti-tithe conclusion to the treatise ('let no man think it strange that any should refuse to pay tythes, but rather wonder any will do it'), the claim to exhaustive reading and research here is significant.<sup>25</sup> As the text moves from the practice of tithe payment in pre-Christian and early modern times, lingering over biblical texts, classical texts and a myriad of statutes and Renaissance law books, the reader is near overwhelmed amid a deluge of source citation and reference. However, as most of the contemporary learned readers of Pearson's tract would have been all too aware, there was one source text on the practice of tithe payment which the author, despite his promise to include 'all that I could ever find written' on the subject, had conspicuously failed to include. This text was John Selden's

massively influential *Historie of Tithes*, published in 1618 but continuously cited throughout the seventeenth-century tithes controversy. At a time when William Prynne could cite Selden as an authority from his pro-tithe, Presbyterian perspective and when, further along the politico-religious spectrum, Milton would also use the *Historie* as one of the main sources for his anti-tithe *Considerations* it seems wholly implausible that such a copiously referenced, meticulously compiled treatise on the history of tithes should not make one reference to Selden or the *Historie* at any point in its forty pages.<sup>26</sup> However, this air of implausibility dissipates as soon as one realizes that it is not so much a case of Pearson not reading Selden but simply of his wilfully neglecting to cite him. With closer scrutiny it becomes impossible to ignore that large sections of Pearson's treatise are actually wholesale, verbatim reproductions of Selden's *Historie*.<sup>27</sup> This is a point which Isaac Jackson, the Quaker editor of a number of eighteenth-century editions of Pearson's tract, noted in 1754 when he briefly remarked that Pearson's 'short History of Tithes ... [is] taken chiefly from the History of Tithes by the learned Antiquary *John Selden*'.<sup>28</sup> It is my argument that Pearson, the Quaker who offered the most acute, extended and frequently recondite critique of the tithing system in the period, is not only culpable of plagiarism but furthermore of complicity in the masculinization of the public arena of tithe debate. He deliberately, if silently, uses Selden's *Historie* to nullify the effects of *jure divino* appeals by his own opponents in the later 1650s. But, as the concluding section of this chapter aims to show, Selden's earlier writings on the subject of tithes presented Pearson with more than just a template for neutral, tirelessly scrupulous historical scholarship; it was also shot through with masculinist and antifeminist assumption.

### [III]

John Selden holds a privileged place in many discussions of early modern thought as one of the most learned men of his age.<sup>29</sup> Esteemed as a jurist, legal historian, philologist and antiquary he is perhaps, alongside Hartlib and Hobbes, one of the foremost representatives of the ideal of Renaissance polymathy. A prolific writer, whose output includes some twenty-seven titles, most of which were in Latin on topics as diverse as Anglo-Saxon history and Jewish marriage law, he is probably best remembered by modern day commentators for his *De Iure Naturali et Gentium iuxta disciplinam Ebraeorum* (1640), a work exploring the relationships between man, the natural law and

the nature of moral obligation. However, it was his *Historie of Tithes* that provoked most contemporary response. Published in 1618 as a sally in the controversy that had sprung up originally around tithe payment but had audible detonations in wider contests (such as those between the relative powers of church, canon and civil law and those of parliament, Erastianism and the common law), the *Historie* went through four editions in less than ten months after its first appearance.<sup>30</sup> It prompted a flurry of printed responses, as a result of which Selden was summoned before members of the High Commission and Privy Council and ordered to write a statement regretting the publication of the work. After James I had himself questioned Selden three times, the book was suppressed and its author bound from offering a printed response to any of his disputants.<sup>31</sup> The principal reason for this furore was not for anything manifestly heretical that Selden had published in his *Historie*, he nowhere, for instance, so much as hinted at Pearson's later, vehemently anti-tithe deductions. Instead his exhaustive philological and historical analyses of Jewish and Christian text, statute and legislation concerning tithes proved inflammatory since he demonstrated that throughout history they had been instituted as a result of historically specific custom and secular legislation. Selden outlined and defended his position in the preface to his tract:

And plainly he that talks of Tithes without reference to such *positiue Law*, makes the object of his discourse rather what he would haue should be, then any thing that indeed is at all. For what State is in all Christendom wherein Tithes are paid *de facto*, otherwise then according to Human Law *positiue*? That is, as subject to some Customes, to Statutes, to all ciuill disposition. If they bee in truth due *Iure Divino* (which Diuines must determine of) they remain equally so aswel [sic] after as before Human Laws made touching them.<sup>32</sup>

Few, however, were willing to concede Selden this point. William Sclater, outraged by Selden's impertinence at even probing the issue in such depth, went so far as to compare the book to 'some Gorgon's head, to affright him whosoever should cast an eye on it, retaining opinion of a Diuine law for Tything'.<sup>33</sup> Others claimed that the author's 'lips deserued to be sewed vp, and your mouth to bee coped, vntill you put in practice better manners'.<sup>34</sup> For a number of Selden's opponents the very existence of the *Historie* seemed to deny (albeit inferentially) that tithes were maintained by *jus divinum*.

If the seventeenth-century episcopal hierarchy were aghast at the potentially deleterious effects the *Historie* might have on their ability to claim the tithe by divine right, the exhaustive and expansive nature of Selden's approach to the issue of tithes granted his *Historie* a centrality in tithe historiography which still holds today. D.R. Woolf has recently asserted that 'as an account of its subject it has never been superseded, something which could not be said for any other work of history from the period'.<sup>35</sup> In the nineteenth century, Selden's authority was still being deferred to when William Esterby wrote the 1887 Yorke Prize Essay of Cambridge University. Esterby's own historical account of the English laws pertaining to tithes was glutted with references to Selden, to whose 'great work on the *Historie of Tithes* ... the Author is greatly indebted'.<sup>36</sup> Similarly, it is to the obvious detriment of the most recent published account of tithe payment and historiography in the early modern period that Selden should not figure once in its two hundred or so pages.<sup>37</sup> It is its sheer exhaustiveness, its unremitting, painstaking returns to original sources that make the *Historie* loom so large in tithe discussion. As it wades through documents pertaining to tithe payment from pre-Christian times to the medieval period, from Hebrew manuscript to English statute, the *Historie* can be wearying for the modern reader, yet it is this humanistic *copia* which Selden encouraged others to imitate, which Pearson sought to copy, and which most commentators on the tract praise.<sup>38</sup> Thus Ben Jonson could garland Selden's 'unweary'd paine Of Gathering' in a prefatory epistle to the latter's *Titles of Honour* whilst over three hundred years later F. Smith Fussner applauded the fact that:

He built his historical works in an almost Cyclopean fashion, with quotations piled upon quotations, most of them still in the languages in which he found them. History was the study of problems; and historical method was as scientific as Selden could make his procedures of verification and proof ... the very virtues of his scholarship worked against any fluency of style.<sup>39</sup>

This is perfectly in line with Selden's self-presentation in the *Historie* as an impartial, copiously documenting, even-handed common lawyer removed from the partisanship of the tithes controversy:

it is not written to proue that Tithes are not due by the Law of God; not written to proue that the Laitie may detaine them, not to proue that Lay hands may still enjoy Appropriations; in summe, not at all



against the Maintenance of the Clergie. Neither is it any thing else but it self, that is a meer Narration, and the *Historie of Tithes*.<sup>40</sup>

Numerous critics have highlighted that such claims for the *Historie's* pure narrativity or the 'scientific' neutrality of historical empiricism, are riddled with ideological investment. Hitherto, however, criticism of Selden's historical method has been restricted to an exposure of its complicity in promoting the cause of common law against the jurisdictions of canon and civil law or in tactics of suppressing the force and originality of Hebraic thought.<sup>41</sup> Yet few commentators have attended to the masculinist imperative behind Selden's exhaustive, humanistic historical approach.

It is interesting, therefore, that when the renowned biblical scholar John Lightfoot was writing his copiously referenced exegetical work on the Old Testament, he should refer in his Preface to the enormity of the philological task in hand by mapping out what he perceived to be the ideal approach to it in the following terms:

A task, as a better Judgement then mine own tells me, fitter for a Society of men, then for one man single; or as mine own heart dictates to me, fitter for the great Mr Selden, the Learnedst man upon the earth ... or to some such a man ... then for men of more ordinary reaches, parts and abilities: Least of all is it fit for me, the least of men and capacities, who am no thing ... And yet I have ventured upon this task, not hoping at all to doe it, as it was fit it should be done, but striving to doe it as well as I could, either for the benefit or at least for the provocation of others.<sup>42</sup>

The envisaged methodological stance, then, is both specifically Seldenian and exclusively masculine, and it is telling that the humility topos Lightfoot uses to pretend unworthiness among this 'Society of men' ('I am no thing') is an oft-deployed variety of the self-effacing rhetoric deployed by so many sectarian *women* writers to gain public sphere space.<sup>43</sup> More recently, Sir Eric Fletcher praised the historical method of the *Historie* and applauded the fact that:

John Selden's contribution was his complete mastery of legal authorities and his vast unrivalled knowledge of constitutional precedent. He supplied the munitions of attack from a peerless armoury of learning. He was not a Rupert, but an Ajax of debate, always ready to overwhelm an opponent with a mass of facts.<sup>44</sup>

It is not the supposed neutrality of Selden's *copia* which is celebrated so much as the virility of the act. Writing and amassing legal and historical evidence become as much the valorous, martial deeds of a seventeenth-century soldier as the day-to-day practice of the common lawyer, whilst erudition per se features as the necessary 'armoury' of that warrior-lawyer. This was exactly the sense that Selden himself was keen to foster in the readers of his *Historie*:

To supply therefore the want of a full and faithfull collection of the Historicall part, was the end and purpose why this was composed which might remaine as a furnisht Armorie for such as inquire about Ecclesiastique Reuenue, and preferring Truth before what dulling custom hath too deeply rooted in them.<sup>45</sup>

If this quest for 'Truth' in the matter of 'Ecclesiastique Reuenue' was a battle in which only learning could adequately defend the warring readers and writers, it should come as no surprise that the participants in this arena are exclusively male. Selden's own dedicatory Epistle makes clear that there was no room for any Britomarts in the pamphlet wars of tithe controversy. Thus he dedicates his work to his close friend the humanist, politician and antiquary Sir Robert Cotton, and reveals the processes by (and environment in) which it was possible to steel oneself in the 'Armorie' of learning.<sup>46</sup> Selden had:

Used that your inestimable Library (which lives in you) [which] assures a curious Diligence in search after the inmost, least known and most vsefull parts of Historical Truth both of Past and Present Ages. For such is that Truth which your Humanitie liberally dispenses; and such is that whereby conference is learned by you. Such indeed as it were, by your example, more sought after; so much head-long Error, so many ridiculous impostures would not be thrust upon the too credulous by those which stumble on in the Rode, but never with any care looke on each side or behind them that is those which keep their Vnderstandings alwaies in a weake Minoritie that euer wants the Autoritie and Admonition of a Tutor.<sup>47</sup>

The preparation for tithe debate is unmistakably paternalistic and thus it is Cotton himself who metes out 'Autoritie and Admonition' and in whose sole power it lies to correct the 'head-long Error' and 'ridiculous impostures' of the 'too credulous'. More significant however is the manner in which Selden's prime humanistic learning resource,

Cotton's 'inestimable library', is not only delimited by masculine parameters, but furthermore actually assumes male corporeality as it is transformed into and relocated 'in' Cotton himself.<sup>48</sup>

If Selden offered a masculinist perspective here, he presented a rabidly anti-feministic one elsewhere. His *Table Talk* is a collection of aphorisms and quotations from dinner table conversations collected and transcribed over a period of twenty years by his amanuensis Richard Milward, and is generally held to offer Selden at his most incisive and enjoyably readable.<sup>49</sup> This was a distinction Clarendon, a close friend of Selden, chose to dwell upon as he contrasts the drabness of the latter's written style with the vivacity of his dinner table conversation:

His style in all his writings seems harsh and sometimes obscure; which is not wholly to be imputed to the abstruse subjects of which he commonly treated, out of the paths trod by other men; but to a little undervaluing the beauty of a style, and too much propensity to the language of antiquity: but in his conversation he was the most clear discourser, and had the best faculty of making hard things easy and presenting them to the understanding of any man that hath been known.<sup>50</sup>

If his discourse is 'clear' and easily accessible it is only so in the exclusively male aristocratic context of the dinner table and drawing room in which Clarendon was such a ready, and warmly invited, listener. On one occasion Selden is reported as remarking that:

Men are not troubled to heare a man disprais'd, because they know, though hee bee naught, there is worth in others; but women are mightily troubled to heare any one of them spoken against, as if the sex itselve were guilty of some unworthines. Women & princes must both trust somebody, & they are happy or unhappy according to the desert of those into whose hands they fall. If a man knows how to manage the favour of a Lady, her honour is safe.<sup>51</sup>

Thus as aspersions are cast on the 'unworthiness' of the entire female sex, those few women who are both worthy and 'happy' can only ever be so knowing that their 'honour' is a matter of male 'manage[ment]', of homosocial circulation and exchange.<sup>52</sup> Crucially, when Selden discussed tithes at his dinner table not only was his dismissal of the protested ministerial divine right to them much less

guarded than the inferential conclusions he had drawn in his *Historie*, but he also referred to the barrage of pro-tithe arguments in highly gendered terms:

'Tis ridiculous to say, the Tythes are Gods parte & therefore the Clergie must have them; why so they are, if the Layman has them. 'Tis as if one of my Lady Kents maides should bee sweeping this roome, & another of them should come & take away the Broome & tell her for a reason why shee should part with it, 'Tis my Ladyes Broome: as if it were not my Lady's broom which of them soever had it.<sup>53</sup>

The irrefutable logic of Selden's imaginative comparison grants the aristocratic figure of Lady Kent a certain divinity. Yet the classist and misogynistic force of the remark works to nullify the impact of the arguments of his male opponents in the tithes controversy by attributing to them the peevish motivation and flawed logic of a scullery maid. Here, then, just as there is no place for irrationality in public polemical exchange, there is no place for women.

#### [IV]

Viewed alongside the wealth of recent literature which has hymned the opportunities for authorship and agency that Quakerism undoubtedly afforded non-aristocratic women throughout the 1650s, Anthony Pearson's appropriation of Selden's work on tithes thus comes to appear particularly problematic.<sup>54</sup> If more radical writers like Milton have frequently been brought into discursive alliance with the Quakers, it is unthinkable to cast juristic humanists like Selden in anything like the same mould. Despite the inference that many drew from his *Historie* (and his less guarded comments at the dinner table) that the clergy's claims to divine right to tithes were ridiculous, Selden himself was robust in distinguishing his position from that of any radical, anti-tithe lobby. As he was quick to inform King James in the wake of the furore provoked by his work, 'I was never so much towards the sectary ... I so revered the settled course of law and government, that out of my own brain I shall be never so bold as to tax it'.<sup>55</sup> But in their shared philological methodology both the influential Quaker and the Renaissance humanist were, I aver, instrumental in masculinizing seventeenth-century tithe debate. Accordingly, Pearson's appeals to a readership of 'Countrymen, Farmers and Husbandmen of England',

whilst certainly not invoking Selden's privileged, pan-European humanistic community, is less the inclusive, democratizing rallying cry that it initially appears. Therefore, the achievement of 7000 Quaker women in presenting and publishing their extensive deliberation on the institution of tithes less than two years after the appearance of Pearson's pamphlet ought not to be underestimated. The women themselves implicitly acknowledge this when they remind a Quaker readership already familiar with Pearson's work how 'strange' it is 'that women should appear in so publick a manner, in a matter of so great concernment as this of Tithes'.<sup>56</sup> Strangeness aside, the compelling arguments and 7000 signatory marks which comprise *These Several Papers* provide concrete evidence that radical praxis can and did take root in the most inhospitable of climes.

## Notes

1. *These Several Papers* (1659), title page. The pamphlet has been erroneously placed in the Wing Catalogue under the name of Mary Forster due to an appended epistle to the reader which bears her name.
2. *Ibid.*, 7.
3. *Ibid.*, 51.
4. *Ibid.*, 54.
5. The best narrative of these events is Ronald Hutton, *The Restoration: a Political History of England and Wales* (Oxford University Press, 1993), 42–8; Godfrey Davies, *The Restoration of Charles II, 1658–1660* (Huntington Library, 1955), 101–22.
6. *Commons Journals* 7 (1651–1659), 694.
7. B. Reay, 'Quaker Opposition to Tithes, 1652–1660', *Past & Present* 83 (1980), 105. The compilers of a recent biographical dictionary of women writers in early modern England devoted over one-third of their entries to Quaker women. By their own admission, their inclusion of more than 200 Quaker women writers is conservative; Maureen Bell et al., *A Biographical Dictionary of Women Writers, 1500–1800* (Harvester Wheatsheaf, 1993), 257, 295.
8. For Braidley's and Barwick's brief treatment of the institution of tithes see Christopher Taylor, *Certain Papers Which is the Word of the Lord as was moved from the Lord by his servants to several places* (1654), 5–6; Grace Barwick, *To all Present Rulers, whether Parliament, or Whomsoever of England* (1659), 2–3.
9. J. Milton, *Lycidas*, ll. 114–20 in John Carey (ed.), *John Milton: Complete Shorter Poems* (Longman, 1992), 248.
10. J. Milton, *Considerations Touching the Likeliest Means to Remove Hirelings Out of the Church*, in R.W. Ayers (ed.), *Complete Prose Works of John Milton* VII (Yale University Press, 1974), 297.
11. *Ibid.*, 275.
12. *Ibid.*, 302–3.
13. Milton's Quaker sympathies have been noted by other commentators on his later work. See, for instance, Thomas N. Corns, *John Milton: the Prose*

- Works* (Twayne, 1998), 108-15; David Loewenstein, 'The Kingdom Within: Radical Religious Culture and the Politics of *Paradise Regained*', *Literature and History* 3:2 (1994) 63-89; Steven Marx, 'The Prophet Disarmed: Milton and the Quakers', *SEL* 32 (1992), 111-28.
14. M. Beynon, *The Antitythe-Monger Confuted; Or Ministers Maintenance Defended and Vindicated* (1662), sig. A3<sup>r</sup>.
  15. On this issue see Christopher Hill, *Economic Problems of the Church from Archbishop Whitgift to the Long Parliament* (Oxford University Press, 1956), 84; Edith Bershadsky, 'Controlling the Terms of the Debate: John Selden and the Tithes Controversy', in G.J. Schochet, P.E. Tatspaugh and C. Brobeck (eds), *Law, Literature and the Settlement of Regimes* (Folger Inst., 1990), 191; Laura Brace, *The Idea of Property in Seventeenth-Century England: Tithes and the Individual* (Manchester University Press, 1998), 20.
  16. For a detailed discussion of this statute see Bershadsky, 'Controlling the Terms', 192.
  17. J. Besse, *A Collection of the Sufferings of People Called Quakers* (1753), 115, 117-18.
  18. On Quaker women's meetings see W. Beck and T.F. Ball, *The London Friends Meetings* (F.B. Kitto, 1896), 343-54; W.C. Braithwaite, *The Beginnings of Quakerism* (Cambridge University Press, 1955), 340-2; Beatrice Carré, 'Early Quaker Women in Lancaster and Lancashire', in Michael Mullet (ed.), *Early Lancaster Friends* (University of Lancaster, 1978), 45-7; Bonnelyn Young Kunze, *Margaret Fell and the Rise of Quakerism* (Macmillan, 1994), 143-57.
  19. Nonetheless, statistical analysis of the women in the *Great Book of Sufferings* proves difficult because of the inaccurate way in which the sufferings are dated and the technical problems of recording women's sufferings for tithes at a time when all distraints would have been recorded in the husband's name, even if he were absent when the distraint was made. See Carré, 'Early Quaker Women', 45.
  20. A succinct assessment of the relationship between sectarianism and education in the civil war can be found in Christopher Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (Penguin, 1991), 300-5. On the role of education in Quakerism more generally see D.G.B. Hubbard, 'Early Quaker Education, c. 1650-1750', unpublished MA thesis (University of London, 1939).
  21. W.C. Braithwaite, *The Second Period of Quakerism* (Cambridge University Press, 1961), 524-5.
  22. For Pearson see Amy E Wallis, 'Anthony Pearson (1626-1666)', *Journal of the Friends Historical Society* 51:2 (1966), 77-95.
  23. *Calendar of State Papers Domestic Series 1663-1664*, 191.
  24. A. Pearson, *The Great Case of Tythes Truly Stated* (London, 1657), sig. a2<sup>r</sup>.
  25. *Ibid.*, 37.
  26. W. Prynne, *Ten Considerable Quaeries Concerning Tithes, The Present Petitioners and Petitions for their total abolition, as Antichristian, Jewish, burdensome, oppressive to the godly, conscientious People of the Nations* (1659), 3. J.P. Rosenblatt makes perhaps an overstated case for Milton's use of Selden in the *Considerations* in his *Torah and Law in Paradise Lost* (Princeton University Press, 1994), 86.

27. For instance, Selden writes: 'Agreeing with him [Ambrose, Bishop of Milan] is Augustine in a whole Homily for the right of them; About Harvest hee made it. Then exhorts them *Decimae tribut a sunt egentium animarum redde ergo tribut a pauperibus; offer libamina sacerdotibus*; and admonishes, that, if they have no fruits of the earth, they should pay the Tithes of whatsoever they liue by ... And then vrging more Texts out of the old Testament touching Tithes and first fruits, and telling them, that the neglect of payment is the cause of sterility and blasting... These two great Bishops agree; and from the Law giuen to the Israelites', *The Historie of Tithes* (1618), 54–5. Whilst Pearson cites the same Augustinian sermon as a source text for the corresponding section of his own treatise, however, it is clear from the simple replication of certain phrases that he is working from Selden's account of the Augustinian sermon rather than the primary text itself. Thus, for example, Selden's translation and interpretation 'if they have no fruits of the earth, they should pay the Tithes of whatsoever they liue by' and 'the neglect of payment is the cause of sterility and blasting' feature unreferenced in *The Great Case* as Pearson's own words. See A. Pearson, *The Great Case of Tithes* (1657 edn), 5.
28. I. Jackson (ed.), *The Great Case of Tithes Truly Stated, Clearly Opened and Fully Resolved*. By Anthony Pearson, Formerly A Justice of the Peace in Westmoreland (1754), sig. A2<sup>v</sup>. The remark is also made in the 1756 Dublin edition of Pearson's pamphlet.
29. For details of Selden's life and work see Paul Christianson, *Discourse on History, Law and Governance in the Public Career of John Selden 1610–1635* (University of Toronto Press, 1996); Richard Tuck, *Natural Rights Theories, their Origin and Development* (Cambridge University Press, 1993), 82–100; A.L. Rowse, *Four Caroline Portraits: Thomas Hobbes, Henry Marten, Hugh Peters, John Selden* (Duckworth, 1993), 125–15; D.R. Woolf, *The Idea of History in Early Stuart England: Erudition, Ideology and the Light of Truth from the Accession of James I to the Civil War* (University of Toronto Press, 1990), 200–42; David Sandler Berkowitz, *John Selden's Formative Years: Politics and Society in Early Seventeenth-Century England* (Folger Shakespeare Library, 1988); Eric Fletcher, *John Selden 1584–1654: Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn* (Quaritch, 1969); F. Smith Fussner, *The Historical Revolution: English Historical Writing and Thought 1580–1640* (Routledge, 1962), 275–98.
30. For a survey of the wider implications of the tithes controversy in the early seventeenth century see Bershadsky, 'Controlling the Terms'; Eliane Glaser "'Uncircumcised Pens": Judaizing in Print Controversies of the Long Reformation', unpublished PhD thesis (University of London, 2000).
31. The main protagonists here, as outlined by William Prynne in his *Ten Considerable Quaeries* (sig. A3<sup>r</sup>), are Sir James Sempill, *Sacrilege Sacredly Handled* (1619); Richard Tillesley, *Animadversions upon M. Seldens History of Tithes* (1619); Richard Montague, *Diatribes Upon the First Part of the Late History of Tithes* (1621); William Sclater, *The Quaestion of Tithes Revised* (1623); Stephen Nettles, *An Answer to the Jewish Part of Mr Selden's History of Tithes* (1625). James's admonition that Selden should desist from countering his respondents in print did not, however, prevent him from refuting and vilifying them in manuscript. See his *An Admonition to the Reader of Sir James Sempil's Appendix and A Reply to Dr Tillesley's Animadversions upon the*

*History of Tythes* reproduced in David Wilkins (ed.), *Joannis Selden: jurisconsulti Opera omnia, tam edita quam inedita*, 3 vols (1726), vol. 3 part 2: 1349–86. The second edition of Tillesley's *Animadversions* (1621) reprinted the second of these intemperate responses in full.

32. Selden, *Historie*, sig. c2<sup>r</sup>–c2<sup>v</sup>.
33. Sclater, *The Quaestion of Tythes*, 197. A more dispassionate voice amongst Selden's other opponents was that of Sir James Sempill who maintained 'But seeing Mr Selden, both by his Title ... and by his Preface fully disclaimeth it to be written to prooue that Tithes are not due by the law of God, &c. I haue no reason to suspect, much lesse to account him as an aduersarie of my Position', *Sacrilege Sacredly Handled*, sig. S<sup>v</sup>.
34. Montague, *Diatribes*, 33.
35. Woolf, *The Idea of History*, 216.
36. W. Easterby, *The History of the Law of Tithes in England. Being the Yorke Prize Essay of the University of Cambridge for 1887* (Cambridge University Press, 1888), viii.
37. The work referred to here is Brace, *The Idea of Property in Seventeenth-Century England*.
38. See Selden's letter to Augustine Vincent in which he praises the latter's 'Industry in Reading, and curious Diligence in Obseruing not only the published authors which conduce to your purpose, but withall, the more abstruse parts of History, which ly either hid in private Manuscripts or in the Publique records of the Kingdome'; Augustine Vincent, *A Discoverie of Errours in the first Edition of the Catalogue of Nobility Published by Ralphe Brooke, Yorke Herald, 1619* (1622), sig. a<sup>r</sup>. Some of Selden's early seventeenth-century opponents, however, saw his humanistic, philological method as an elitist practice which prevented general deliberation on the topic. Richard Tillesley was 'afraid this History of Tythes hath afforded premisses to some, and to others great surmises of religious practice of sacrilege, whilst they see, and heare, but examine not manifold quotations of Scripture, hethen writers, Rabbines, Fathers, Councils, Imperiall Lawes, priuate Chartularies, and many uncouth and vnusuall marginall notes, whereby they hope, nay resolve their owne desires are unanswerably defended'. Accordingly, he decreed that Selden 'must not looke to lurke in the darknesse of unknown language, or private Chartularies or vnusuall by-named Bookes' and thought the tract contained 'more paines than trueth, more strange reading then strong reasoning; more quotations than proofes; more will ... then power'; Tillesley, *Animadversions*, sig. a<sup>v</sup>–a2<sup>r</sup>, b3<sup>v</sup>, 263.
39. B. Jonson, 'An Epistle to Master Selden', in Ian Donaldson (ed.), *Ben Jonson: Poems* (Oxford University Press, 1975), 153; F. Smith Fussner, *The Historical Revolution*, 276.
40. Selden, *The Historie of Tithes*, sig. a3<sup>v</sup>–a4<sup>r</sup>.
41. The best treatment of this material to date is to be found in Glaser, 'Uncircumcised Pens'.
42. J. Lightfoot, *The Harmony, Chronicle and Order of the Old Testament* (1647), sig. b3<sup>r</sup>.
43. For more sustained discussion of this particular trope of self-effacement see Hilary Hinds *God's Englishwomen: Seventeenth-Century Radical Sectarian Writing and Feminist Criticism* (Manchester University Press, 1996), 80–107.



44. Fletcher, *John Selden*, 7
45. Selden, *The Historie of Tithes*, sig. b2<sup>v</sup>.
46. The best full length study of Cotton to date is still Kevin Sharpe, *Sir Robert Cotton 1586–1631: History and Politics in Early Modern England* (Oxford University Press, 1979).
47. Selden, *The Historie of Tithes*, sig. a2<sup>r</sup>–a2<sup>v</sup>.
48. Selden was appointed custodian of the Cottonian library during the 1640s. On the importance of the library as a resource for scholars, courtiers and politicians from across Europe see C.J. Wright (ed.), *Sir Robert Cotton as Collector: Essays on an Early Stuart Courtier and his Legacy* (British Library, 1997); C.G.C. Tite, *The Panizzi Lectures: the Manuscript Library of Sir Robert Cotton* (British Library, 1994); Sharpe, *Sir Robert Cotton*, 48–83.
49. H. Paul, 'Except Bacon's Essays there is hardly so rich a treasure-house of worldly wisdom in the English language as Selden's *Table Talk*', cited in F. Pollock (ed.), *Table Talk of John Selden* (Quaritch, 1927), ix.
50. G. Huehns (ed.), *Clarendon: Selections from The History of the Rebellion and The Life of Himself* (Oxford University Press, 1978), 45–6.
51. Selden, *Table Talk*, 142.
52. Cf. *ibid.*, where Selden's view of clerical abuse is mediated via cuckoldry anxiety: 'The Clergie would have us beleive them against our owne reason: as the woman would have had her husband against his owne eyes; when he took her with another man; which yet she stoutly denied; what will you believe your eyes before your own sweet wife', p. ix. Whilst an earlier editor of *Table Talk* deplored the fact that such 'indecent references and expressions' 'disgraced' the book as they 'add nothing to the force of the passages in which they occur, and which Selden himself could hardly have wished should go down to posterity as specimens of his everyday talk', the editor of the most recent Selden Society edition does nothing to abate the masculinism surrounding Selden and his works. He consoles himself with the fact that 'There are perhaps half a dozen passages which a delicate taste might censure. But we have no reason to suppose that they were uttered in the presence of women, and they are purity itself when compared with the habitual converse of the preceding age'; see S.H. Reynolds (ed.), *The Table Talk of John Selden* (Oxford, 1892) and Pollock (ed.), *Table Talk*, ix.
53. Pollock (ed.), *Table Talk*, 128.
54. See, for instance, Thomas N. Corns and David Loewenstein (eds), *The Emergence of Quaker Writing: Dissenting Literature in Seventeenth-Century England* (Frank Cass, 1995); Phyllis Mack, *Visionary Women: Ecstatic Prophecy in Seventeenth-Century England* (University of California Press, 1992); Elaine Hobby, *Virtue of Necessity: English Women's Writing, 1649–1688* (Virago, 1988); Moira Ferguson (ed.), *First Feminists: British Women Writers 1578–1799* (Indiana University Press, 1985).
55. *Of the Purpose and End in writing the History of Tythes*, in Wilkins (ed.), *Opera Omnia*, vol. 3 part 2: 1455.
56. *These Several Papers*, 'To the Reader'.

# 10

## Martyrdom in a Merchant World: Law and Martyrdom in the Restoration Memoirs of Elizabeth Jekyll and Mary Love

*Sue Wiseman*

### Memory and narrative

‘Something is branded in, so that it stays in the memory’, a philosopher observes, ‘only that which *hurts* incessantly is remembered’.<sup>1</sup> In Restoration nonconformist political and religious memory martyrdom is the dominant figure for the ceaseless pain of the past, and its meanings in the present. Yet, for a memory to operate as a prompt to political action in the present it must be freed of some of its ties to the past – a branding *in* of memory involves, inevitably, a burning *out* of some details of the original event. Here I explore the legacy of an event from 1651, the treason trial and execution of the Presbyterian Christopher Love. My central texts are the narratives of two women, Elizabeth Jekyll and Mary Love. These texts, which I examine in some detail, seem to have had at least limited circulation after the Restoration. They offer a case study that we can use to consider, even re-evaluate, three interconnected issues: the place of the feminine voice in narrative produced by women in building Restoration nonconformist culture, the relationship between religious radicalism before and after the Restoration, and, more abstractly, the interconnection of law and narrative.

In the story I am discussing, the activity of the law tends to dramatize, mark time epochally, separate and judge, and narrative tends to offer memorialization that links past with present through processes of editing, forgetting and circulation. In the material discussed, peculiar operations of law and narrative are inextricably tangled. While, as Peter Goodrich has argued, law is a rhetorical genre which seeks to

'repress its moments of invention or fiction', its activities also mark the world epochally – particularly when, as here, they lead to an execution which sets in chain a set of meditations on the subject's (or the citizen's) relationship to the law.<sup>2</sup> Love's trial set in train a complex chain of memory and forgetting; this chapter approaches the question of literature and law by following the writings which respond to that particular event.

The process of political memorialization and amnesia which Elizabeth Jekyll and Mary Love's manuscripts facilitated was complicated and is here discussed in three stages: the 'event' (Christopher Love's trial and his Lilburnian claims to citizenship); the women's narratives; their Restoration editing and significance. At each stage the 'meanings' of the event are changed.

### **Testimony and citizenship: Lilburne, Love and John Jekyll's testimony**

The event which the narratives take as their starting point involved complicated, perhaps confused, political and religious allegiances. Christopher Love, the main actor in the treason trial which also embroiled Elizabeth Jekyll's husband, was a Presbyterian minister. But his trial itself involved an effort to recollect, or to make the law recollect, the 1649 trial of the Leveller John Lilburne. Love, accused of organizing to 'stir up a new and bloody war, and to raise insurrections, seditions, and rebellions within this Nation', was arraigned for treason under the republic. An Act of 14 May 1649 made 'the present Government' the offended party in treason, an Act of 12 August 1651, after Love's trial but before his execution, made his offence clearer by prohibiting correspondence with Charles Stuart.<sup>3</sup>

At his trial in 1649 Lilburne insisted on 'ancient rights' and asserted natural law inflected as the inalienable right of the individual to defend himself.<sup>4</sup> Lilburne adapted the language of martyrdom to assert his claims to citizenship.<sup>5</sup> In reading 'Lilburne' the reader inhabits the world of the apprentice and mercantile London, as a world bathed in the glow of martyrological typologies underpinned by the powerful pattern of Foxe's *Acts and Monuments*, and reinforced in the 1640s and 1650s by the Leveller claims to citizenship in *The Agreement of the People*.<sup>6</sup> Thus, Lilburne promised emotively that if deprived of 'The benefit of the Law and Liberties ... by my birth-right', he will nevertheless 'leave this Testimony behind me, That I died for the Laws and Liberties of this nation, and upon this score I stand, and if I perish I perish'.<sup>7</sup>

In Lilburne's defences and in the published narratives surrounding the trials, the doubleness in the law, shifting between the quasi-religious and the quotidian came to shape a particular concept of the citizen. Lilburne's accounts offer the citizen-as-martyr. Thus, linking himself to St Paul he argues, 'I crave but so much liberty from you as was given to Paul ... which was free Liberty of Speech to speak for himself' and so bound his trial to biblical precedent.<sup>8</sup>

The law, as Lilburne recognized, was on trial as much as he. Lilburne's trial, some nine months after the death of Charles, was the first fruit of a new legal system – a system without a king but, in the case of treason, enacting a transfer rather than a transformation of the powers to define and combat treason. In the trial we can see the new system of justice being tested by a totemic figure and, as was reported at the time, because of the open nature of the treason trial, before a huge audience who loved Lilburne.<sup>9</sup> The question of the place of the 'free-born Englishman' – that mobile but evocative concept – before the law of 'his' Commonwealth was implicitly at stake. Lilburne's call upon the rights of the free-born Englishman is a reminder of the true law betrayed by the court and an assertion of the natural right of self-defence.<sup>10</sup> For the substantial audience supporting Lilburne and those who read about the trial, Lilburne's defence was unforgettable as an occasion on which natural law was asserted and quotidian law, the law as he was experiencing it, was forced to compromise. When Lilburne was acquitted by the jury, bonfires were lit, a medal was struck, a day of thanksgiving was appointed.<sup>11</sup>

When accused of treason, Christopher Love took up Lilburne's tactics. His trial, too, was published 'at his own Request'.<sup>12</sup> The court thought he had learned the connection of liberty and publicity from Lilburne, indeed, the Attorney General accused him of attending Lilburne's trial because 'he thought his time might come'. The court was 'informed, that since he hath been in the Tower, Lilburne hath been his counsel'.<sup>13</sup> Certainly, Love modelled his claim to citizen-martyr status on Lilburne's. The opening sallies of his defence show clearly his self-conscious attempt to appropriate the position which Lilburne had been able to shape for enunciation of the grievances of the disenfranchised citizen.<sup>14</sup> Love argued that Lilburne had given 'the Narration of his doings and sufferings that he might not be misrepresented to the Court', asserting 'I insist on that liberty that Mr Lilburne had.'<sup>15</sup> A Lilburnian telling of a narrative of circumstances, a desire to read a 'paper', was a central plank in Love's attempt to shape the trial as a defence of rights. As Love said, 'I am to plead for my life, and I am

to use Scripture, Law, and any other lawfull means to save my life. *Paul* did plead in the *Roman Law*.<sup>16</sup> Perhaps Lilburne did school him in the Tower: Love, like Lilburne, reads a paper, reads from Coke's *Institutes*, claims to be like St Paul. As significantly, he uses the law in the same way as Lilburne to put in play patterns of martyrdom simultaneously with the claim to 'rights' enunciated from the position of the disenfranchised. As John Knott has argued, the discourses of martyrdom in the 1630s enabled those in prison to assimilate their experience to that of the martyrs in Foxe's book, a strategy with psychic dimensions in that it staved off despair as well as offering a 'pattern' for resistance.<sup>17</sup> Love's use of Lilburne's trial as a pattern offers an extension of such modelling which would have been understood by contemporaries. The drama was vivid, too, because of the newly made status of the law.

Lilburne himself drops out of our events at this point, but the ghost of this heroic yet defeated pleader for the national good before a cruel tribunal haunts the texts associated with Love. Love was no insignificant figure. Later remembered within nonconformist circles as one having both strong admirers and strong detractors, a sense of his own power within the City seems to have been behind his demand that his trial, held in Westminster, should be by a jury from his 'neighbourhood', 'of London'.<sup>18</sup> The world Love inhabited outside the courtroom is sometimes palpably present to the reader of the trial, visible in the tasks, desires and oppressions which some witnesses testifying about Love's engagement with royalists bring into the room with them.<sup>19</sup> Trial testimony derived from those around Love included those who felt keenly their subservient relationship to the minister in the narrow streets of the City, some miles away. One such was Elizabeth Jekyll's husband, John, of St Stephen Walbrook, a general dealer whose work took him to Bristol and Hull where, in the years of civil war, his wife's diary records his adventures. John Jekyll's meeting with Titus, the royalist agent, happened when he met William Drake who introduced them 'in a cheese-monger's house in Newgate-Market'.<sup>20</sup>

Jekyll's courtroom testimony and behaviour indicate fear of the law, but also terror of neighbourhood slander and damage to his reputation.<sup>21</sup> Jekyll's evidence against Love is marked by extreme anxiety about the oath and about the nature of bearing witness. On the second day of the trial Jekyll was called into the court:<sup>22</sup> Jekyll was unwilling to swear, and said he was 'a Prisoner, accused of the same offences' as Love. However, when told 'that the Court had fined him 500*l* for refusing to swear' he swore but did 'not swear in that manner as the other witnesses did, but only put his hand to his buttons. And when Mr Love

asked him if he was under an oath, he answered that he was as good as under an oath. But the Court not being satisfied with this answer, pressed him further; and then he did say he was sworn, and as under oath.<sup>23</sup> Days later, when it came to the summing up of his defence, Love referred back to the question of Jekyll's oath, asserting that 'Mr Jaquel himself, since he was sent away from the court, hath said he was not under an oath.'<sup>24</sup>

John Jekyll's 'oath' had clearly been under discussion outside the court and his vacillation leads us into the neighbourhood and citizen world beyond the court, one in which Love had power as a minister. Jekyll, himself accused of treason, as his wife recorded in her diary – in great 'danger being accused by the State for Treason against them' – may have bought his way out of trouble by testifying against Love.<sup>25</sup> His behaviour suggests the urgent anxieties of those caught up in the trial. Jekyll could not, at least in the theatre of the courtroom, make the claims of citizenship or martyrdom. Love could make the claims, as we have seen, but not successfully. Love's deliberate Lilburnianism wearied the court: when he asked to speak the Lord President told him, 'you have not spoken at any time yet, but you have hurt yourself more than anybody else hath; and yet your language is so liberal, that no man shall escape the lash of your tongue'.<sup>26</sup> On 5 July 1651, having confessed his crime, Love was sentenced to die. After the unexpected failure of petitions, he was executed on 22 August.<sup>27</sup> Love's last words were published, and his works were published by his executors.<sup>28</sup>

Love was much less successful than Lilburne in his attempt to put the issues of rights and citizenship at the core of his trial. Where Lilburne's own writing dominates understanding of his trial, the political 'meaning' of Love's martyrdom was brought into being not so much by his own attempts as by the efforts of others to memorialize his death – those of the ministers who were Love's executors, that of his wife Mary, in the testimony and published letter of John Jekyll, and in the diary of Elizabeth Jekyll. It is in two of these four imbricated testimonies, rather than in legal testimony, that I will trace the inter-relationships of citizenship, disenfranchisement, and the powerfully moving narrative of the subordinate.

The significance of Love's treason and trial grew and changed in the world beyond the court. With Love's death another story begins, but this story, like the interwoven quality of the trials of Lilburne and Love, reinforces the point that politics, like law, can be understood in part as 'a language and imagery of transmission'.<sup>29</sup> Love became a Presbyterian martyr. The words of memorializers, written by those less

able and equipped than Lilburne, drew attention to Love's, and the writer's, complex suffering and disenfranchisement before the law. The diary of Elizabeth Jekyll and the narrative of his own wife Mary Love make the event and its aftermath a case study in the circulation of narratives of citizenship.

Reshaped, with the emphasis shifted from law to the pain of the private citizen, Love's trial becomes a story of radical (yet obedient) suffering told in the female voice. The question of citizenship and rights, so consistently foregrounded by Lilburne, remained central to the story because of women's complex relationship to citizenship. Spiritually equal but politically indefinable, women held a poignantly imprecise relationship to natural law. Subordination, tempered with a claim to a wider-reaching political as well as spiritual authority made 'her' narratives (always themselves in an ambiguous relation to the public sphere) imaginative vehicles for the voicing of 'the gaps and absences in the citizen's story, ... the body of feelings and affects that people bring' to the making of political change.<sup>30</sup>

### **Mary Love and Elizabeth Jekyll: women tell tales of love**

For the Rump, Love's defeat and death was a more solid victory than that over Lilburne. It was a political triumph, ending clerical resistance to the rule of the republic.<sup>31</sup> But news of his execution, like that of Lilburne's acquittal, had continuing, and changing, effects marked in the ways he was memorialized; this section leaves behind the trial to examine the texts founded on it. The critically neglected accounts by the wives of Love and Jekyll show how the trial and therefore the republic came to be figured in nonconformist memory; they also suggest the place of feminine narration in that memory. Therefore each text and its editorial shaping is discussed in some detail.

Mary Love's narrative of her husband's life seems to have been fashioned later in the 1650s or in the 1660s, probably after she had remarried and moved away. 'The Life of Mr Christopher Love' responds to the claims, trial and execution of her husband but, except in digressions, avoids direct discussion of the causes of the trial itself, thereby avoiding discussion of royalist conspiracy amongst the Presbyterian ministers. This suggests that it was written, if not circulated, before the Restoration. In Mary Love's story the trial barely features, though knowledge of it and its injustice is the justification for the telling of Love's life, beginning with his upbringing in Cardiff and never, quite, reaching the end.

Using the model of an exemplary life, the narrative also invites us to read Love's behaviour in terms of the failure of secular figures of authority and their replacement by spiritual ones. Hearing no sermon before the age of 15, when 'one Mr Erbury' came to preach, Love, 'among others was taken with the novelty of it'; and 'although (as he would say him self) he went only to see a man in a Pulpit which hee never saw before, yet there God was pleased to meet with him'.<sup>32</sup> Coming home 'with an Hell in his Conscience', his struggle to pursue his faith began. Games and dicing became 'the very thoughts of them as Daggers in his Hart'.<sup>33</sup> Although Erbury's radical opinions would, at least later, make him an unlikely spiritual guide for the Presbyterian Love, he remained Love's chosen mentor. What could be seen as Love's search for a chosen, rather than a given, paternal authority eventually leads him to Oxford, then to London, where he meets the narrator.

As the time of his trial and death approaches, Love's martyrdom becomes a palpable textual presence. The narrator places Love 'with Joseph under all his Tryalls and temptations and suffrings'.<sup>34</sup> The reader's interpretation of Love's status could hardly be more clearly directed and his life is dramatically contrasted with the 'horrid slanders' of his enemies, whose 'blacke mouths' and 'tongues were set on fire by hell'.<sup>35</sup> The shaping of the narrative as martyrdom intensifies towards the end of the text, as the narrator explains Love's qualities. She defends him as 'a Moses for meekness and a Job for Patience'; 'of a humble self condemning spirit'.<sup>36</sup> Mary Love mediates the martyr's feminized humility and manly certainty. She also conveys Love's fear that he be 'misinterpreted' and carefully presses the reader to understand Love as a martyr-citizen with whom they might identify.<sup>37</sup> Mary Love's account makes political as well as affective points: the judges who condemn Love in effect condemn themselves in their misuse of the law. Seen in legal and political terms, the affectingness of the story fuses religious and political implications.

However, the martyred Love shares the focus of his text with the narrator. The narrative's bid for sympathy – Mary Love's comments, for example, that she has not 'the least revenge upon my spirit' – establishes the narrator as the reader's focus and reminds us that Love's death has continued significance for his survivors. The text's recursive movement between memory and a present of writing *after* the trial calls the reader's attention to the trial's effects – on Mary Love's husband, but also on her. The narrator's role in producing the martyrdom for the reader, inserting the significance of a past event into the reader's present, invites identification and empathy. That the text so



carefully places the narrator as subordinate to the martyrdom, yet as inhabiting a present shared with the reader was, I would suggest, significant in making the text suitable for circulation after the Restoration. Mary Love's story uses the figure of the narrator to bind together past and present and quietly, yet insistently, emphasizes the importance of these specific events for the reader.

If Mary Love's tale claims her husband as a martyr by a retelling of his exemplary life (with gaps and digressions), then Elizabeth Jekyll's text gives a more spiritually inflected, abstract and, in the early passages, intensely providential account of civil war and republic. However, like Love's though by a different means, Elizabeth Jekyll's writings from the 1640s and 1650s are shaped to use the female voice in which they are told to play upon the sentiments of a Restoration reader. Of the text's few commentators, David Underdown helpfully situates its production in the context of politicized reading in the civil war, and Elizabeth Clarke rightly describes it as 'spiritual and dogmatic'.<sup>38</sup> The emotional dynamic this text employs to give a spiritual account of political change from 1643 to 1653, its political implications and its complex provenance and compilation invite detailed discussion.

The manuscript opens:

I desire in the beginning of this booke to blesse god for unsought mercies that have done me good against my will, which are his Afflictions which I would nere have suffered to do me good if I could possible have helpt it.<sup>39</sup>

Since 1643 at least, Elizabeth Jekyll had been keeping an analytical record of God's providences, apparently something between commonplace book and a diary in which the spiritual and the political were interwoven.<sup>40</sup> However, the text has also been edited by a later hand, as is made clear by the inclusion of Alice Lisle's trial of 1685.<sup>41</sup> Although it is clear that Elizabeth Jekyll's words make up the text, omissions and editorial emendations cannot be checked. It seems more than likely – as I shall show – that the editor was making a self-consciously significant compilation of narratives of feminine suffering, culling the manuscript for politically poignant detail.

The opening framing (editorial, authorial, or both) invites the reader to interpret the text as a shaped set of fragments leading to a conclusion rather than an unshaped notebook. The textual shaping is continued in a 'definition of believing' and of 'conscience', where Jekyll

defines conscience as 'my hart and mind and Brain indued w<sup>th</sup> knowledge and grounded upon the word of God'.<sup>42</sup> As Patricia Crawford reminds us, questions of conscience moved between realms construed as private and public. Meditating on the state of the soul might subject highly public issues to a process of thought simultaneously highly analytical, structured, and open to the prompting of God; and so it proves in Jekyll's text.<sup>43</sup>

The rest of the manuscript mixes notes, meditations and narrative. Possibly registering roughly three political and spiritual phases, the manuscript opens by focusing on God's providences during the civil war as found in national and familial 'mercies and deliverances'. The first recorded as a 'deliverance' is of her husband in Bristol, July 1643. The king 'being there at that time' her husband 'was taken hold of by one of the Kings Souldiers', then betrayed by one who 'not long before was our very next neighbour, a Sugar Baker his name was – Worme, who pulld him by the Coate and asked him what he did there'.<sup>44</sup> Imprisoned and refused permission to write a note to a Bristol friend, 'the Mercy of God is seen' in the way his interrogators asked questions which he could answer truthfully without condemning himself – perhaps an anticipation of the trial.<sup>45</sup>

Much of Elizabeth Jekyll's meditation on political events and her canvassing of her conscience is, as here, mediated by her thoughts on her husband's activities in the world. Her narration emphasizes her self-consciously secondary position. Yet, as the opening passages about her knowledge of God's mercies make clear, the diary is not, exactly or solely, 'about' her husband but about her reaction to the political cataclysm that they are both involved in. To a greater degree than in Love's narrative the authorial consciousness is the focus of the reader's interpretation, for the meanings of the events described are related to Jekyll's salvation. Whilst 'Elizabeth' is a narrating presence rather than an actor in most of the events described (many of which are her husband's doings), these events register in relation to her own spiritual state; the narrator is both self-effacing and, in claims to sympathy and to articulate her relationship to God, the emotional focus of the text.

Jekyll's providential narrative technique welds together her husband's affairs, those of the nation, and her own – subordinate, but for the reader all-important – interpretative role in locating the workings of God's providence.<sup>46</sup> This technique produces a narrator ambiguously subaltern and marginal to events, yet also the focus of them. As the text (and events) unfold, the assumption that the Christian can rely on God's providence is undermined, a hiatus emerging between events

and their interpretability, and thus the narrator's state of being moves to the centre of the text.

While her husband, 'accused by the State for Treason', was testifying against Love apparently in order to keep his life, Elizabeth examined her conscience:

I have heard the slanders of many fear was on Every side while they took councell together Against mee they desired to take away my life, but I trusted in the Lord, I sayd thou art my god, my synnes are in thy hands, deliver thou me from the hands of my Enemies, and from them that persecute me, Make thy face to shine upon thy Servant, Oh save me for thy mercies sake.

Let me not be Ashamed O Lord for I have called upon thee be Ashamed, and let them be silent. Let the proud lips be silent that have spoken against thee,

O, how great is thy goodness, which thou hast laid up for them that fear thee, for them that trust in thee, before the Sons of men.<sup>47</sup>

Surviving the trial and the 'slander' associated with it and presumably the shame of her husband's conduct, Jekyll left a relatively abstract retrospective analysis.

How was the writer to interpret the events of the trial? Although, she reasons, 'the Lord doth not willingly Afflict nor greave his people', nevertheless 'Judgement is his' and his creatures were subject to the 'tryall of Grace'. 'Afflictions', Jekyll writes 'have a voice which we must harken to'.<sup>48</sup> But how is that voice to be interpreted? What particular sin is this 'physick of Afflictions' sent to punish?<sup>49</sup> Whilst God often makes punishment suit the sin, yet 'that is not an infallible rule For I knowe that sometimes that God afflicts to show his soverainety over the creature and for the tryall of Grace and the Excercise of faith, yet most commonly we shall find some sin in us to which our Affliction is suited'.<sup>50</sup> God's apparent sadism allows Jekyll to prove, once again, that she is amongst his chosen: for 'he bringeth into troubles that he may show his power in delivering out of troubles, he brings his people into straits that he may show them he alone can bring them to comfort'.<sup>51</sup>

Yet, the logic of God's demonstration of his power, and the subject's deliverance from peril only ultimately gives coherence to the experience as, retrospectively, she is able to find a cause. She writes, 'upon due Exammination I found my heart to[o] Much sett upon my Deare Husband who is most dear to me', a sin about which she decides to 'Avoyd particulars Lest my pen should do as my hart has done run beyond bounds'. Her excessive devotion to her husband, in the way

of the creature, she argues may have caused God to chastise her by punishing him:

I only say he is worthy of all Affections yt are lawfull to be given to a Creature, but hee was and is too much my failing I did I fear look upon him in a higher nature than creature should be and for that cause I persuade my self that God hath Afflicted me but God is wise and I Adore him for all his works of Wisdom.<sup>52</sup>

Thus, the trial holds a lesson on 'the vanity of the Creature', and 'that there is no more in the Creature than he can bring down'. 'I trust', she writes, that the experience has 'in some measure blunted the Edge of my desire to worldly comforts' so that she can 'comfortably resigne my Soul into his hands with understanding'. Only once a cause is located can self-condemnation give way to rejoicing, as she uses the language of the thirtieth psalm, 'I will Exalt thee O Lord for thou hast lifted me up and hast not made my foes to rejoyce over me. / O Lord my God I cryed unto the and thou hast healed me' concluding, 'Weeping may Endure for a night but Joy cometh in the morning.'<sup>53</sup> The textual shift from recording providence to attempting to articulate crisis brings the narrator to the fore as a victim of political circumstance and the empathetic centre of a reader's experience.

The third, or final, phase of the text is relatively fragmentary, but seems to offer some form of assessment of what has happened. Jekyll resolves her understanding of the trial:

Still I must speak of Gods multiplyd goodness for me and mine In his delivering my husband from great danger being accused by the State for Treason against them. God beyond my thought nay beyond my weak faith was pleased to give him a deliverance from all his and my fears, therefore while I live my lips shall preach the praises of my god which alone is Worthy to be feared and alone to be praised, he bringeth into troubles that he may show his power in delivering out of troubles, he brings his people into straits that he may show them he alone can bring them to comfort.<sup>54</sup>

This conclusion, however, also seems to involve a shift in her attitude to God's providence.<sup>55</sup> Although this passage may be notes on a sermon or an analysis of another text, it is the last piece of prose in the manuscript and may offer a shaping and conclusion. Repentance, we read 'Encreases and marks godly sorrow for sins past, brings to our remembrance the history of our life'.<sup>56</sup>

'Sanctification', she concludes is 'no less than for a man to be brought to an entire resignation of his will to the will of God.'<sup>57</sup> Working its way from faith in providence to resignation via political trial, Jekyll's understanding of the interrelationship of personal, national and godly history has changed substantially by the end of the text. Personal and political 'history' offer evidence not of God's providences to a chosen people, but of God's mercy despite 'horrid indignities', 'odious contempt', 'high provocation', and the firm situation of the language of majesty in the description of God suggests that, at the end of the text, she is thinking of the regicide: 'O poor England', she writes or copies, 'how low art thou brought by the pride of ignorant zealotes.'

The text ends with a list of the children born during the years in which she kept her book.<sup>58</sup> Whether copied verbatim or extracted, Jekyll's meditations trace a rethinking of the relationship between religion and politics. By 1653 she finds that submission and repentance rather than the interpretation of God's providences are the central duty of the Christian and implicitly her earlier providentialism is understood as the efflorescence of pride. Elizabeth Jekyll's trial is spiritual where her husband's is legal, but for the reader it is in this spiritual trial that the power of the event resides.

In the pages of Jekyll's diary an understanding of God's providence as guiding the political world, and herself and others as agents prompted by God to action in his divine drama, coexists with a growing sense of the dangers of spiritual pride and need for obedience to God. It is the coexistence of the two positions, as well as the sadness of her story and unwarranted suffering which offer the reader a drama of a subordinate suffering unfairly. These qualities made her text, like that of Mary Love, available for copying and circulation (whether merely within the family or beyond) as a martyrological prompt to political action. Such lives – of men and women – were significant in shaping Restoration nonconformist martyrologies; Samuel Clarke's compilation of martyrs included various pious women.<sup>59</sup> For the next generation the stories of Mary Love and Elizabeth Jekyll could be used as proof that dissent in religion (Love's Presbyterianism) could combine with loyalty to the Crown (Love's 'conspiracy'). Significantly enough in terms of memory and forgetfulness, it seems that this could happen even though John Jekyll and Christopher Love had been on opposite sides in the trial. Elizabeth Jekyll's diary and Mary Love's narrative could hardly fail to call to mind the struggles and defeats of royalist religious radicals, for in the 1660s the history of Love was, in some circles, as vivid a memory as Lilburne's.

Each woman takes up a position subordinate to a husband who is, himself, arraigned by the law which arguably should have been protecting him. In taking up the position of the wife of a disenfranchised yet loyal citizen, the narrators articulate the pain of political conflict in a voice which is all the more affecting for being politically disenfranchised. The narrative of disenfranchised citizenship taken up by Love from Lilburne is given a particular poignancy by narration in the marginal feminine voice, enabling the reader to locate the pain of political process in the private, affective sphere. Where Lilburne, arguably putting to work the familiarity of the vocabulary of citizenship from the large number of civic incorporations in England since the 1550s, addressed the question of citizenship explicitly and used its vocabulary relentlessly in the 1640s and 1650s, both these narratives address the question of citizenship by implication.<sup>60</sup> Each writer presents the trial as unjust and each tells the story from the position of one excluded from the explicit arraignment of the law. Citizenship is at stake *within* the narratives in two ways, first in terms of the liberties and rights of a (male) citizen under the republic as these two were denied them and, second, in being told in the voices of those excluded from such claims.

Such texts were hardly lacking in political implications. The emotional drama of Elizabeth Jekyll's diary – at least as we have it – offers a politicized spirituality, albeit a shifting one, easily read in politicized terms. Indeed, that Jekyll and Love's affecting stories had, or at least were thought likely to find, a politicized readership is indicated by the way both were editorially shaped and augmented after the Restoration. Both the surviving copies of Mary Love's speech include an introduction written after 1660 which gives a very full sense of how such narratives played a part in shaping political culture after the Restoration. Moreover, returning us to the context of the violent outcomes of political trials, in the same hand as Jekyll's text, in the same manuscript, can be found the scaffold speech of Alice Lisle, executed in Winchester marketplace on 2 September 1685 for harbouring refugees after the defeat of Monmouth at Sedgmoor.<sup>61</sup>

### **A politics of tears: feminine narrative and citizenship after the Restoration**

What is Alice Lisle's 'dying speech' from the Bloody Assizes of 1685 doing at the end of Elizabeth Jekyll's text? Why might a copyist have included it, and what connections are implied between the two stories? The Restoration crisis in nonconformity, and dissenters' complex

responses to being disenfranchised offer some answers to these questions. For the godly, who had prospered in the 1650s, 1660 seemed like a 'good time to die'. It spelled career disaster as they were thrown out of livings and brought to the gradual horrified realization that 'they would never again be a prominent part of a national church', a realization in part acknowledged in 1672 when many took up the opportunity to become licensed congregations.<sup>62</sup> The question of citizenship denied was central for the nonconformists, and loyalty to Protestantism was in increasing tension with loyalty to the Crown as the crisis about the succession deepened.

Alice Lisle's trial opened the notorious Bloody Assizes after the rebellion at Sedgmoor, where many were convicted on shaky evidence.<sup>63</sup> Lisle, the wife of the regicide John Lisle, called 'Lady' because her husband had been in Cromwell's House of Lords, returned to England after her husband was shot in Lausanne in August 1664. On 20 July 1685, two weeks after the battle of Sedgmoor, she was at her home, Moyles Court in Hampshire, when she received a request from the dissenting preacher John Hicks that he might shelter at her house. By 2 September, Hicks's visit was to have caused her death. He was found at Lisle's house by Colonel Penruddock, whose father had been sentenced to death by her husband. She was tried by special commission and Judge Jeffries sentenced her to death for harbouring a traitor. In 1689 her daughters, one of whom was married to Lord James Russell, the fifth son of William Russell first Duke of Bedford, had the attainder reversed by Act of Parliament.

The publication of Lisle's 'Dying Speech' (printed in 1685 and 1689) offers a story of Restoration revenge on civil war enemies.<sup>64</sup> If John Lisle had not killed Colonel Penruddock's father, it seems, Penruddock might not have waited, deliberately, for the refugees from Sedgmoor to enter her house. Lisle's story is also, like Elizabeth Jekyll's, one of feminine suffering and political injustice likely to prompt the reader's sympathy. Alice Lisle was old and infirm and as Robin Clifton indicates, the six hours needed to coach reluctant witnesses, Lisle's age, 'limited offence ... and social status' made her a ready figure for martyrdom.

By the time Lisle suffered and died, though, Elizabeth Jekyll was long dead. There is no living connection between Jekyll and Lisle, but it is possible that Jekyll's husband, John, would have seen reasons to put them together. John Jekyll's career from the Restoration to his death in 1690 offers a possible context for his wife's narrative, for he was active in political and nonconformist circles throughout the period. Indeed, he was not only alive during Lisle's trial, but still politically active.

At the age of 74, he was considered dangerous enough to be arrested himself, briefly, in connection with the Monmouth rebellion.<sup>65</sup>

In 1663, as the persecution of nonconformists (like Jekyll) was intensifying, *Love's Name Lives*, a sequence of letters and petitions first published by Mary Love in 1651, was republished. This text sits at the inception of the nonconformist Restoration strategy of asserting loyalty to the Crown (indeed invoking a past martyrdom for Charles II), while simultaneously urging the truth and needs of nonconformists in the present. The royalism of the Presbyterian protagonists in the Love drama, coupled with their religious conviction, offered a perfect combination; the publicizing of Love as a martyr for the royal cause implied that religious dissent should be understood within a framework of Protestant loyalty.<sup>66</sup> Besides the letters and petitions of Mary Love this text contains a startling letter from John Jekyll, described on the title page as 'one of the witnesses against him', begging forgiveness of Christopher Love.<sup>67</sup>

Here John Jekyll is (if problematically) associated with Love, and the reprinted pamphlet uses evidence from the 1650s to reinforce Love's status as a Presbyterian martyr. Through Charles II's return, Love, as a Presbyterian royalist conspirator, could assume the status of a true patriot. His example showed why the government was wrong to exclude Presbyterians from the new church settlement, but it also implicitly justified nonconformist resistance. The tension between obedience and treason in the nonconformist position was to intensify and culminate in the rebellion of 1685. The reprinting – suggesting that Love's trial was of interest beyond the circle of his close associates – is also evidence in support of Greaves's suggestion that the extent and nature of opposition to Charles II's government during the later 1660s and the mid-1670s has an imprecise relationship to religious groupings: Presbyterians and Baptists, for example, had complex relationships and at points worked together.<sup>68</sup>

While he may have mistaken his way in 1651, Jekyll stood firm throughout the Restoration, appearing in the state papers during periods of intense persecution of nonconformists or nonconformist activity and being imprisoned, questioned and discussed in a way that makes clear his continued political activity in and out of London. Jekyll was a member of Common Council in 1661–62, 1668–70 and 1681.<sup>69</sup> In 1676 Guy Carleton, Bishop of Bristol, gave his view of Jekyll to Sheldon – 'solicitor general for the fanatic party'.<sup>70</sup> By 1675 John Jekyll, still a force to be reckoned with, had been joined in public life by his son Thomas (his other son, not by Elizabeth, Joseph Jekyll went



on to become Master of the Rolls; it was to him, ironically enough, that the papers of John Thurloe – discovered in a false ceiling – were sent).<sup>71</sup> By 1685, then, Jekyll had been active in politics for at least forty years. He was aware not only of contemporary claims that Whigs were ‘true’ Protestants, ‘true’ patriots, ‘truly’ loyal and, therefore, right in contravening strictures against them, but also of the history of the sufferings of Presbyterians and others because of their claim to be true, though disenfranchised, citizens of England.

By 1685 the position of the true Protestant was to coincide with that of the rebel, made to do so by the various acts restricting their participation as subjects – the Corporation Act, Conventicle Act, Five Mile Act, and the Act of Uniformity. The response to these acts and to the reactivation of these policies in the later 1670s shaped the nature of various nonconformist groupings. The Presbyterian claim to recognition by monarch and church and the repeated unfairness of their treatment formed their consciousness of present and past. In circumstances of disenfranchisement, as N.H. Keeble has argued, the written word, collective reading, and circulation preserved nonconformist networks.<sup>72</sup> Love and Jekyll’s texts would have offered a version of the narrative of personal suffering particularly appealing to Presbyterians and it seems likely that both texts were circulated within Presbyterian circles.

Thus, the addition of Alice Lisle’s scaffold speech to Elizabeth Jekyll’s text seems to have prepared the journal for circulation by aligning it with the martyrdoms of 1685, and connecting it to subsequent martyrology. This martyrology was constructed in part immediately after Sedgmoor, but also later in the context of the Glorious Revolution of 1688.<sup>73</sup> Martyrologies were published in 1689, 1693 and 1705.<sup>74</sup> The politico-religious path traced within Jekyll’s text (from the political and religious providentialism of 1643–45 through the crisis of the regicide, to the terrible period of the treason trial in 1651) would have served what appears to have been John Jekyll’s agenda. In 1653 Elizabeth Jekyll’s text suggests obedience as well as providentialism, but also makes it clear that the government was cruel – a political ambivalence perfect for the atmosphere of 1685. Radicalism, innocence and martyrdom are, through the combination of the two texts, turned into an affecting history of misunderstood religious radicalism and make claims simultaneously to religious truth and political obedience at the moment of 1685. The manuscript seems to have been prepared to support the political positions of 1685, but would also have found an audience after the Glorious Revolution. Although we cannot be certain that Jekyll’s story was

circulated beyond the family, wider circulation seems very likely. For her story, especially once carefully joined to Lisle's, offers to a nonconformist reader a pointed examination of citizenship denied, martyrdom, religious self-examination and a story which, because told by an innocent and powerless protagonist, victim rather than agent of political change, allows the reader the pleasures and pains of meditating on the continuing significance of religious oppression in the present.

Mary Love's narrative, which exists in two copies, offers more precise information about circulation. It seems to have been prepared for publication and was certainly known, and used, in the shaping of nonconformist history and martyrology. John Quick, recognized as a builder of intellectual coherence in the nonconformist project, used Mary Love's memoir in making up his 'Iconaes Sacrae', part of which was a life of Christopher Love.<sup>75</sup> Thus, at least three known uses of the manuscript exist between Mary Love writing the text and 1700 – the two copies of the introductory material and Quick's quarrying of it.<sup>76</sup>

Each of the two known manuscripts of Mary Love's story is accompanied by prefatory material which gives a relatively detailed political context for the intended circulation. This material includes an address on behalf of Mary Love, though nowhere in her hand, inviting the 'Christian Reader' to kindly 'receive this unexpected Birth from a Woman, the Conception was long since (I may say) form'd tho I cannot say perfected'.<sup>77</sup> The discourse of maternity, whether deployed by Love herself, or, as seems more likely by 'T.H.' who is planning to circulate the text, establishes the text's feminine voice as its authenticating ground.<sup>78</sup> The reader is invited to respond by identifying with the experiences of the author:

I know not how far it may work upon thy on Bowells or affections (If thou pleases to look upon it while it weeps) Surely all mine were moved in the working of it; Yet the debt I owed unto the truth, the testimonie I owed unto Grace of God, and the memorie of his servant suffered me not to decline, either the sorrowes which by such a rehearsall were renewed in me or the Censure which for it and its imperfections may possibly light upon mee.<sup>79</sup>

The affective properties of the text are central to the reader's response which is invited as empathetic with the sufferings of Christopher (in martyrdom) and with Mary in rehearsing events to make the reader weep. But the reader is to weep for specific reasons. The narrative

might goe, and crye (when it comes abroad & is once understood) that none know better how to love their King even to the death than they who best know how to love their God and a good conscience, and this much I hope it will speak, & in time to be believed.<sup>80</sup>

The address frames the text, emphasizing the true 'good conscience' of the nonconformists who (like Love) know loyalty, 'even to the death'. Notably, the story of the past is oriented towards the future: 'this much I hope it will speak, & in time to be believed'. Linking the affective properties of the text to present and future politics, the introduction inflects the Presbyterians as loyal precisely *because* of their religious choices and claims the purpose is 'to provoke thee to love, Loyaltye and good works'.

However, that 'good works' might include various forms of resistance is made clear by the subsequent address by T.H., who links past and present, describing the story as, '(at least in the Tragical part thereof)' likely 'to make a most deepe and bitter wound bleede afresh'.<sup>81</sup> Knitting together past and present, familial and spiritual, Mary Love, T.H. tells us:

breaks not the bande of silence, but upon the impulse of a most just affection to preserve the Life of his memory who was both a Husband and a spirituall father, and lost his life in an enterprise adjudged then a capital crime; but now universally owned as a Duty.<sup>82</sup>

The political capital of Love's story for nonconformist claims to truth and loyalty is clear:

His [Love's] only transgression wherewith he was burdened, even to death, was Loyalty, discerning and practising that Duty so long agoe and so freely whereunto necessity hath now at the long runne made so many Prosslytes.

As T.H. can see, the Restoration, when Charles II seemed favourably disposed to acknowledge the loyalty of those who became dissenters, might have been a good moment to make public Love's story of exemplary loyalty and dissent. He writes 'I know not how the intention was frustrated of sending forth this narrative, about the time of his Ma.<sup>ties</sup> Restauration, When all harts and eyes' were absorbed by 'contemplation of the adorable Providence' who disposes human affairs. The Restoration itself, 'the greatest Revolucion', was brought about 'in such a manner that even they acknowledged causes of high Thankfullness in it, who as

to the matter were most averse or fearfull of it'. He ends, however, by noting that men must look to 'our God; that we provoke him not to use sharper expedients, to make severer experiments upon us'.<sup>83</sup>

Thus, discussion of when 'this little History' might have found publication leads to an ironic commentary on its relationship to the wider history of nonconformity, loyalty and radicalism – precisely the formation which is generating its editors renewed attempt at circulation. In sum, what the addition of Alice Lisle's speech does for Elizabeth Jekyll's text T.H.'s introduction does for Mary Love's. Under the politicized hand of their editors these 'tragically' memoirs are made to weave together politics and passion. Editorial shaping enables these women's memoirs to lodge sadness at the heart of political culture and to connect discourses on political rights, law and justice to empathetic reading – and perhaps political action. As T.H. exhorts his readers, 'Let us learne to improve our present opportunities.'<sup>84</sup>

## **Martyrs and memory in the Restoration**

The existence, adaptation, circulation and use of Love's and Jekyll's texts have implications for critical thinking on wider questions, most particularly the nature of political memory at the Restoration, of concepts of citizenship and women's relation to them, and connectedly, the place of texts by women in Restoration political culture.

The kind of political memory these carefully shaped manuscripts are calculated to provoke is complex. Memory, not solely 'a function of the thinking parts', involves both recollection and amnesia, and as Giorgio Agamben has argued, political transformations alter not only the world but the experience of time.<sup>85</sup> Memory is 'a reminder', though not necessarily of the event as it seemed at the moment.<sup>86</sup>

The claims Jekyll and Love made on their Restoration readers played on the interpenetration of remembering and forgetting to allow a narrative of disenfranchised nonconformity to be made from Love's trial – a trial which, from another point of view, looks very like royalist conspiracy under the republic.<sup>87</sup> The trial is the pretext of the women's texts, but in their remembering of the trial they establish a new set of concerns with martyrdom, politics and the position of the sufferer while the question of citizenship, so important to Lilburne as taken up by Love, becomes sublimated in the affective politics of the text.

As Melinda Zook notes, affective martyrologies shaped Protestant memories of the Bloody Assizes and, in the 1690s, the vividly misremembered accounts of Protestant martyrdoms were lodged at the heart of Whig

political culture. The texts that I have analysed participated in building a mode of reading which associated past and present sufferings, used feminine subjectivity to articulate, even figure, the powerless position of the disenfranchised citizen, and used that position to invite the reader's empathy with the sufferings of the martyr and the subordinate survivor suffering – like Mary Love, Elizabeth Jekyll, Alice Lisle – for politics without ever being fully included in a political arena.

What conclusions can these retellings of trials yield? The story I have traced suggests that women's ambiguous relationship to citizenship gave their voices a particular and politicized poignancy at the Restoration. Natalie Zemon Davies has pointed out that in early modern Europe citizenship was not a clear category for men or women and, as Constance Jordan reminds us, both in conduct books and in literature women were repeatedly used as examples of the political *subject* – the one who must be subject to legitimate political authority.<sup>88</sup> If we are attempting to trace the dynamics of women's relationships to the political world – as opposed to their exclusion from the category of politics – then these stories of a trial remembered and misremembered show the connectedness of narrative, memorialization and martyrdom to the political world. In their articulation of the misuse of the law in attacking its own citizens, in the frame of martyrdom, these narratives allow us to trace some of the ways in which women's explicit exclusion *from* the political sphere – the world of trials and treason – shaped their relationship *to* that world. As affected bystanders at traumatic legal and political processes the narratives produced by Love and Jekyll are used by their narrators to evoke the pain of injustice and political trauma. Expressing the pain rather than the theory of legal-political process the feminine voices of these stories were, it seems, seen by their editors as moving indictments of that world from those nominally 'outside' the action, yet intimately connected to it. Arguably it is their very status as narratives produced by those *just outside* political process which gives the stories power when circulated to their intended readers.

The presence of the law, and specifically the trial and martyrdom, is significant in relation to the question of subjecthood and citizenship in all the different stages through which Jekyll and Love's stories pass. And the addition of Lisle's dying speech – yet another drama in which the law is not only unrelenting but violent – indicates that the compiler was aware of the importance of the invoked legal context in shaping a drama of citizenship – or subjecthood – denied. The ambiguity between the authors' spiritual authority and political marginality works to link political and affective worlds for the reader of the texts. Subordinate to the

story they tell, yet claiming the reader's sympathy, the female narrators invite the reader's empathy, prompting them to remember the past and its relationship to the present.<sup>89</sup> The purpose of the circulation of these feminine tales of male martyrs is, in part, to allow the empathetic response of the reader, for the story is not only a political history of non-conformity told in terms of responses to political change but also, in a sense, the reader's own history. For the reader is in each case addressed as inheritor of a troubled present illuminated by a past of heroic struggle. The affecting first-person narratives of women's relationships to political cataclysm combine the force of masculine martyrdom in a drama of claimed and refused citizenship with the narrators' own innocence and status as victims. They offer a history of the struggles of nonconformity and Protestantism but simultaneously embody a carefully calculated balance between religious challenge and political subordination and obedience. For the reader, the stories of martyrdom offer an opportunity to weep over the history of the movement and invite an empathetic relationship to political change. But they also offer an identificatory narrative standing, in some ways, for that of the suffering self.

The story I have told, and the use of the feminized voice to evoke martyrdom, offers one kind of case study in the courts of literature and law. In the retelling, forgetting and remembering of the trial of Love, though, the voices of those excluded from the debate of masculine subjecthood or citizenship enunciate the martyr's poignant stories. Peter Goodrich has argued that the forgetting of the law is 'a displacement and as such it is a resource for the analysis and critique of law'. Yet it is also the case that in the 'reconstitution' and 'return of memory' that my story traces the martyr's voice emerges from and relies upon precisely that legal unitary judgement – and execution – which it rejects.<sup>90</sup>

## Notes

Thanks to Ann Hughes, Peter Mack, Julie Sanders, Erica Sheen and Rachel Weil for comments on earlier versions of this essay.

1. F. Nietzsche, *On the Genealogy of Morals*, trans. Douglas Smith (Oxford University Press, 1996), 42–3. See also Judith Butler, *The Psychic Life of Power* (Stanford University Press, 1997), 3; Wendy Brown on political memory 'Wounded Attachments: Late Modern Oppositional Political Formations', in Joan B. Landes (ed.), *Feminism, the Public and the Private* (Oxford University Press, 1998), 448–74.
2. P. Goodrich, 'Of Law and Forgetting: Literature, Ethics and Legal Judgement', in *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996), 112.

3. T. Howell, *Complete Collection of State Trials* (1816), vol. 5: 51; C.H. Firth (ed.), *Acts and Ordinances of the Interregnum*, 3 vols (HMSO, 1911) vol. 2: 120–1, 550.
4. R. Tuck, *Natural Rights Theories* (Cambridge University Press, 1979), 147–9.
5. *An Act For the Establishing an High Court of Justice* with 'An Act declaring what Offences shall be adjudged Treason' (1653), 197.
6. See Nigel Smith, *Literature and Revolution* (Yale University Press, 1994), 132.
7. John Lilburne's trial for High Treason on Thursday 24 October 1649, Howell, *Complete Collection*, vol. 5: 1270–1.
8. *Ibid.*, 1271. See also Joan Webber, *The Eloquent 'I'* (University of Wisconsin Press, 1968), 68; John Knott, *Discourses of Martyrdom in English Literature 1563–1694* (Cambridge University Press, 1993), 144.
9. See John Bellamy, *The Tudor Law of Treason, an Introduction* (Routledge and Kegan Paul, 1979), 132–40.
10. This sense of 'law' as *Magna Carta*, the Bible (Old and New Testaments) and Coke's *Institutes* consistently underwrites Lilburne's sense of 'law'. The resonant, if repetitive, language of Lilburne's defence, the published image of him reading Coke's *Institutes* back to the court that tries him and his use of the law in his own defence are what is remembered about the trial; the specific occasion of it as a test for the nature of the law of the English republic has been lost, effaced with the removal of those laws from the statute book. Yet, understood together the two crystallize a moment in the invention of the citizen, or at the least the story and image – as in the image of Lilburne in the court – of the citizen.
11. P. Gregg, *Free-born John: a Biography of John Lilburne* (Dent, 1961; repr., 1986), 300–1.
12. Howell, *Complete Collection*, vol. 5: 43.
13. *ibid.*, 54.
14. *The Whole Triall of Mr Love* (1652), 3.
15. *Ibid.*, 3, 4.
16. *Ibid.*, 4.
17. Knott, *Discourses of Martyrdom*, 44.
18. J. Quick, 'Icones Sacrae Anglicanae' (Dr Williams Library, Mss. 38. 34; 35) collated much material from the 1650s on Love and writes of him as 'a man exceedingly beloved by som, & hated by others, who was highly honoured by his friend, & as much despised by his Enemys', fol. 279. See Howell, *Complete Collection*, vol. 5: 54.
19. *The Whole Triall of Mr Love*, 1; Howell, *Complete Collection*, vol. 5: 43.
20. Howell, *Complete Collection*, 113.
21. See Laura Gowing, *Domestic Dangers* (Clarendon Press, 1996).
22. *Calendar of State Papers Domestic* (hereafter *CSPD*), 1651, 6; Nov 4 1651: Council of State day's proceedings. 'On August 3 1652, The Council of State heard a Report from the Committee of Examinations and debated the reward of Adams, now in danger from his enemies, for his part in bringing Love to the attention of the authorities' (*CSPD*, 1652).
23. Jekyll was called immediately after Love had silenced Mr Cobbet, an army major on the grounds of his connection with Captain Adams, the man who had told the council of state about the conspiracy. Howell, *Complete Collection*, 113.

24. *Ibid.*, 154.
25. The diary of Elizabeth Jekyll, Osborne Collection, Bienecke Library, Box 58 H20, fol. 18.
26. *Ibid.*, 246.
27. 'Petitions Love and his supporters presented and a long debate in the Commons generated a reprieve and so he did not die on the appointed date, 15 July.' Howell, *Complete Collection*, 43. See also C.H. Firth and R.S. Rait (eds), *Acts and Ordinances of the Interregnum* (HMSO, 1911), vol. 2: 550–1.
28. His Presbyterian associates circulated his sermons, and his executors issued *Grace, the Truth and Growth and Different degrees thereof* (15 sermons) (1652) and at least six other publications generating a corpus of material associated with him as a martyr.
29. P. Goodrich, *Languages of Law: from Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990), vi.
30. C. Steedman, 'A Weekend with Elektra', *Literature and History*, 3rd series, 6/1 (Spring 1990), 21.
31. See Richard L. Greaves, *Saints and Rebels* (Mercer University Press, 1985), 33; Blair Worden, *The Rump Parliament* (Cambridge University Press, 1974), 243–8.
32. BL Sloane Ms 3945, 'The Life of Mr Christopher Love', fol. 80<sup>r</sup>. Erbury eventually 'fell ... into very loose, dangerous & damnable opinions' (as John Quick put it) but Love continued to regard him as his 'spirituall father' (Quick, 'Icones Sacrae Anglicanae', fols 271, 279). Richard L. Greaves and Robert Zaller describe him as believing that, although the Baptists were closest to the apostolic church, the whole church was in a state of apostasy: 'a millenarian who, while urging temporal reform, eschewed the activism of the Fifth Monarchists' (*Biographical Dictionary of British Radicals*, 3 vols, (Harvester Press, 1982) vol. 1: 253–4). In discussing Mary Love's 'Life' the holograph Sloane manuscript is used to discuss her text while that of T.H. is taken from the clearer copy in the Dr Williams Library, 'Life of Christopher Love', PP. 12.50<sup>r</sup>.4 (21) in an unknown seventeenth-century hand, checked against Sloane Ms 3945.
33. Sloane Ms 3945, fol. 80<sup>v</sup>.
34. Sloane Ms 3945, fols 102<sup>v</sup>–102<sup>r</sup>.
35. Sloane Ms 3945, fols 101<sup>v</sup>, 108<sup>v</sup>, 113<sup>r</sup>.
36. Sloane Ms 3945, fol. 106.
37. Sloane Ms 3945, fol. 107<sup>r</sup>.
38. D. Underdown, *A Freeborn People* (Clarendon Press, 1996), 110; Elizabeth Clarke, 'Elizabeth Jekyll's Spiritual Diary: Private Manuscript or Political Document?', *English Manuscript Studies 1100–1700*, vol. 9, ed. Peter Beal and Margaret J.M.Ezell (British Library, 2000), 218–37.
39. Elizabeth Jekyll, Osborne Collection Box 58 H20, fol. 2.
40. Underdown, *A Freeborn People*, 110, 130–1.
41. See also Elizabeth Clarke's discussion in 'Elizabeth Jekyll's Spiritual Diary', 229.
42. Osborne Collection Box 58 H20, fol. 2.
43. Patricia Crawford, 'Public Duty, Conscience, and Women in Early Modern England', in John Morrill, Paul Slack and Daniel Woolf (eds), *Public Duty & Private Conscience in Seventeenth-Century England* (Clarendon Press, 1993), 57–76, esp. 57.



44. Osborne Collection Box 58 H20, fol. 3.
45. Osborne Collection Box 58 H20, fol. 4.
46. See also Nehemiah Wallington, *Historical Notices* 2v (1869).
47. Osborne Collection Box 58 H20, fol. 22.
48. Osborne Collection Box 58 H20, fol. 19.
49. Osborne Collection Box 58 H20, fol. 18.
50. Osborne Collection Box 58 H20, fol. 19.
51. Osborne Collection Box 58 H20, fol. 18.
52. Osborne Collection Box 58 H20, fol. 20.
53. Osborne Collection Box 58 H20, fol. 21. She quotes 1–2 and then adapts some of the rest to suit her situation.
54. Osborne Collection Box 58 H20, fol. 18.
55. Osborne Collection Box 58 H20, fols 29, 31, 37. This section offers a partly biographical passage on ‘What is Originall Sin’ in which she discusses her miscarriages, memoranda of her ‘wofull misery’, the poems ‘Upon Death’, ‘Upon Prayer’, and the rather fragmentary section concludes with a passage entitled ‘Upon Repentance’.
56. Osborne Collection Box 58 H20, fol. 37.
57. Osborne Collection Box 58 H20, fol. 39.
58. Thomas Jekyll (1646), later a divine, Elizabeth (1647), John (1648), Sarah (1649) and Jacob, born 13 September 1651 – just after Love’s death
59. Samuel Clarke’s martyrology went through many editions. See for instance, *A Collection of Ten Eminent Divines* (1662), 513.
60. Here I am drawing on the work of Phil Withington. See, for example, ‘Citizens, Community and Political Culture in Restoration England’, in Alexandra Shepherd and Phil Withington (eds), *Communities in Early Modern England* (Manchester University Press, 2000), 134–55.
61. A. Lisle, *Madam Lisle’s Last Speech* (1685), *The Dying Speeches of Several Persons* (1689), *The Second and Last Collection of the Dying Speeches of those Eminent Protestants Who Suffered in the West of England* (1689). For discussion of the possibility that women’s scaffold speeches had special propaganda value, see Lois G. Schwoerer, ‘Women and the Glorious Revolution’, *Albion* 18:2 (1986), 195–218, 214.
62. T. Hall, quoted by Ann Hughes in ‘The Frustrations of the Godly’, in John Morrill (ed.), *Revolution and Restoration* (Collins & Brown, 1992), 70–90, 88–9.
63. R. Clifton, *The Last Popular Rebellion* (Maurice Temple Smith & St Martin’s Press, 1984), 231–4, 245–6.
64. *The Dying Speeches*. For extensive discussion of the role of local revenge in shaping Restoration politics see Ronald Hutton, *The Restoration* (Oxford University Press, 1985).
65. DRW MS R.Morrice Entring-Book I, fol. .476. John Jekyll is discussed at length by Clarke, ‘Elizabeth Jekyll’s Spiritual Diary’, 233.
66. *Love’s Name Lives* or, a Publication of divers PETITIONS presented by Mistris LOVE to the Parliament, in behalf of her HUSBAND (1651 reprint, 1663). For Mary Love’s petitions see also *CSPD*, 1651, 9.
67. *Love’s Name Lives*, ‘Mr Jaquel his Letter to Mr Love’, 3.
68. R.L. Greaves, *Enemies under his Feet* (Stanford University Press, 1990), 245, 247.

69. See SP/29/417 (part 3), 'Votes in Councill', which associates him with strong players in petitioning the Crown to disappoint Roman Catholic 'hopes of a popish successor', such as Papillon, Dubois or Player. See also Mark Knights, *Politics and Opinion 1678–81* (Cambridge University Press, 1994), 280, 330–1; J.R. Woodhead, *The Rulers of London 1660–1689*, (London & Middlesex Archaeological Society, 1965), 98, 100. In this connection the king ordered Jekyll to be brought before him at the Council (CSPD 1670, 312). In 1670 he and Alderman Hayes were both imprisoned, apparently as 'jurymen that were fined for finding not guilty the Quakers'. CSPD, 1670, June 4, June 9, June 27 (300–1, 312), November 22 (545), Dec 7 (566), *ibid.*, 1671, July 18, 386. See *ibid.*, 1671, 497 as part of a plot against the king, revealed by Blood. The text this is drawn from is described by the calendar as 'Notes by Williamson', 'in parts illegible' and the same sentence is read by R.L. Greaves as referring to Captain Roger Jones. See Greaves, *Enemies under his Feet*, 211. Renewed nonconformist protests and defiance followed Charles's proclamation against conventicles of 3 February 1675.
70. Bodl. Ms Tanner 40, fol. 37 'Character of John Jekel' 1676. Letter from Dr Guy Carleton Bishop of Bristol, to Archbishop Sheldon. In 1677 he is mentioned in connection with the mayoral election of Robert Cann, in 1681 he was involved in the furore around the choosing of a London mayor. In 1683 after the arrests of the Rye House plotters Jekyll was informed against. Greaves, *Enemies under his Feet*, 231; CSPD, 1683, 356. This was in a list of those seen at the house of Sir Thomas Player – a list including Francis Jenks the linen draper (who, in June 1676 had been urging the Lord Mayor to call Common Council in order to petition Charles II to call a parliament) and the Duke of Monmouth. Jekyll, it seems, participated in the crossover between City and aristocracy facilitated by the Earl of Shaftesbury (Clifton, *The Last Popular Rebellion*, 138).
71. *Collection of the State Papers of John Thurloe* made by Thomas Birch (1742), 7 vols: 'a series of papers discovered in the reign of King William, in a false ceiling in the garrets belonging to secretary Thurloe's chambers'. Although Thomas was ordained in the Church of England he was mobbed in January 1675 in Bristol over a speech he was to have given and in 1682 was to have preached an inflammatory sermon before the Duke of Monmouth entitled *True Religion Makes the Best Loyalty*.
72. N.H. Keeble, *The Literary Culture of Nonconformity* (Leicester University Press, 1987), 78–82. See also Sharon Achinstein, *Literature and Dissent in Milton's England* (Cambridge University Press, 2003).
73. M. Zook, "'The Bloody Assizes': Whig Martyrdom and Memory after the Glorious Revolution', *Albion* 27 (Fall 1995), 373–96, writes of 'The interplay between memory, radical propaganda, and reader expectations' in Whig polemic after the Glorious Revolution, 374.
74. Zook, "'The Bloody Assizes'", 377.
75. Now held at the Dr Williams Library where there is also a full copy of the Sloane manuscript, bound in with a set of nonconformist funeral sermons including one by Quick (*Sermon Preached at Meeting House in Bartholomew Close Jan 16 1697*) and others by Edmund Calamay and Gilbert Burnet. 'Iconaes Sacrae Anglicanae' was to have been published with the aid of another survivor of the civil war, William Russell, fifth earl (later first duke

- of Bedford) and the father of the William Russell executed in connection with the Rye House Plot. However, in 1700, just as publication was to take place the duke died. A week later Quick himself was disabled so he could not collect subscriptions and the project languished in manuscript.
76. Quick incorporates also the poem of the Northamptonshire wit and non-conformist, Robert Wild, done as a five-act tragedy of Charles I's martyrdom followed by that of Love. 'The Tragedy of Christopher Love', incorporated by Quick, seems to have been written in 1660. Wild is another figure combining royalism with puritanism and the problematic moment of the Restoration, and he was ejected from his ministry at Aynhoe, Northamptonshire, in 1662.
  77. Williams PP.12.50\*.4(21), fol. 3
  78. T.H. is at present unidentified. If, as is possible but not likely, the text was being prepared for print in the 1680s rather than, as seems more likely, earlier, then one person with the right initials, though in terms of status and commitments an unlikely candidate, is Thomas Hunt, a lawyer of Gray's Inn.
  79. PP.12.50\*.4 (21), fol. 3<sup>r</sup>.
  80. PP.12.50\*.4 (21), fol. 3<sup>v</sup>.
  81. PP.12.50\*.4 (21), fol. 4<sup>r</sup>.
  82. PP.12.50\*.4 (21), fol. 4<sup>r</sup>.
  83. PP.12.50\*.4 (21), fol. 4<sup>v</sup>.
  84. PP.12.50\*.4 (21), fol. 4<sup>v</sup>.
  85. Aristotle, 'On Memory', in *The Complete Works of Aristotle*, revised translation, ed. Jonathan Barnes (Princeton University Press, 1984), 715–16; Giorgio Agamben, *Infancy and History: the Destruction of Experience* (1978), trans. Liz Heron (Verso, 1993), 91.
  86. Aristotle, 'On Memory', 714–16.
  87. S. Freud, *Complete Psychological Works*, ed. James Strachey (London: Hogarth Press, 1957), 16–17; Krell, 2.
  88. Natalie Zemon Davies and Arlette Farge (eds), *A History of Women in the West* (Belknap, 1994), 169. Compare Merry Weisner's assessment of female citizenship, 'The Holy Roman Empire: Women and Politics', in Hilda Smith (ed.), *Women Writers and the Early Modern British Political Tradition* (Cambridge University Press, 1998), 305–23, 316. See also Constance Jordan, *Renaissance Feminism* (Cornell University Press, 1990), 308; Patricia Crawford, "'The Poorest She": Women and Citizenship in Early Modern England', in Michal Mendle (ed.), *The Putney Debates* (Cambridge University Press, 2001), 197–218. See also Hilda L. Smith, *All Men and Both Sexes: Gender, Politics, and the False Universal in England 1640–1832* (The Pennsylvania State University Press, 2002).

Particularly significant for male citizenship in this period are the arguments about natural law, what Richard Tuck calls 'inalienable right', both in terms of the defence of a larger social body against its ruler and, as significantly, in terms of the claims of the individual's inalienable rights ('every man by naturall instinct aiming at his owne safety and weale' as Richard Overton put it). These issues were important as were the demand from the Levellers and others for government by constitution, expressed at the Putney debates and embodied in the different versions of *The Agreement*

*of the People*. In sum, these debates meant that the citizen, though the term itself might not be used, was coming into sharp focus in the debates about the rule of Charles I to the establishment of the republic. Tuck, *Natural Rights Theories*, 147, see also 148–9; Richard Overton, *An Appeale from the degenerate representative body* (London, 1647), in Don M. Wolfe (ed.), *Leveller Manifestos of the Puritan Revolution* (Humanities Press, 1944; repr. 1967), 162. As C.B. Macpherson notes, the Leveller demand that the franchise be extended to include all men who were not servants or beggars (doubling the number of voters) would have been enough to concentrate the minds of lawyers, MPs and soldiers on the questions of the nature of ‘citizenship’. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962; repr. 1990), 117.

89. Steedman, ‘A Weekend with Elektra’, 23.

90. Goodrich, ‘Of Law and Forgetting’, 137.

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