

“Who Speaks for Justice?”:
Renaissance Legal Development
and the Literary Voices of Women.¹

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When Stephen Greenblatt redescribed the professional, critical reading of early modern texts as motivated by a desire to hear the voices of the past, to ‘speak with the dead’, he also acknowledged the force of a paradox in his contention that the voices of the dead are more audible to us from the texts of fiction than from ‘any other textual traces’. The legacy of this statement for feminist criticism is distinctly double-edged. The full impact of the paradox in Greenblatt’s formulation only reveals itself with his admission of just how selective he was prepared to be in his choice of suitable interlocutors. What qualifies the textual traces of the past for dialogue with the present, he went on to explain, is ‘life’ and ‘intensity’. And, ‘conventional in my tastes’, he concluded, ‘I found the most satisfying intensity of all in Shakespeare’.²

Shakespeare’s once-celebrated ‘universality’ here translates easily into a guarantor of historical authenticity, the vitality of the Shakespearean text offering a way into the understanding of a vanished culture. The most pressing question raised by the Shakespearean artefact thus became, according to Greenblatt, ‘how did so much life get into the textual traces?’³ But to equate the question of the source of vitality in Shakespeare’s text with the project of entering into dialogue with a vanished culture is to ignore the most obvious fact about the selection of Shakespeare as a representative creator of ‘voices’: the fact that the voices of Shakespeare’s *dramatis personae* have remained more accessible to us than those of contemporary dramatists precisely to the extent that they give the impression of coming from timeless individual beings, from *characters*, rather from social or moral types which require us (as do the *dramatic personae* of so many ‘minor’ playwrights) to engage in historical reconstructions of early modern social codes. The question of how we translate what we perceive as ‘intensity’ into a quality of verisimilitude, of likeness to *life*, can’t even get off the ground until we start looking at what it is that enables us to read ‘intensity’ as contributing to the representation of coherent, continuous ‘individuals’, that is, speaking subjects whose voices seem to proceed not from what we know of the culture at large, but from autonomous, individuated being. Greenblatt’s equation of ‘intensity’ with ‘life’ in relation to Shakespeare assumes, I think, the givenness of the relationship that needs most questioning. If one were to substitute for Shakespeare, say, his brilliant contemporary, Thomas Nashe, there is no doubt that the equation could not be made. Nashe is capable of local effects of great intensity, but the limitations of his art are, precisely, that the

¹ My title echoes Jacqueline Rose’s question in a brilliant essay entitled ‘Just, Lasting, Comprehensive’ in *States of Fantasy* (Oxford: Clarendon Press, 1996) 81. I would like to thank Jacqueline Rose for her encouragement and criticism of this essay, and the members of SEDERI, especially Juan Prieto-Pablos, Manuel Gómez Lara and Pilar Cuder Domínguez, for their kindness, hospitality and criticism of the spoken version of this paper, delivered at the University of Seville.

² Stephen Greenblatt, *Shakespearean Negotiations* (Oxford: Clarendon Press, 1988) 1.

³ *Ibid.*, 2.

immediacy and vitality of the illusion of 'voice' that he produces is not matched by any sense of that voice's emanation from a continuous, individualised consciousness.⁴

The fact that we unthinkingly equate literary intensity with the capacity to produce the illusion of authentic, individual being - the dramatic 'character' that we identify as the hallmark of 'Shakespearean' drama⁵ - poses particular problems for feminist criticism. As Elizabeth Harvey has pointed out, feminist criticism has found practically irresistible the tendency to conflate the voice of the female author with the voices of brilliantly achieved characters of women composed by men.⁶ The common-sense response to this problem is one which simply acknowledges that men have long been better equipped by education and culture to compose strong characterological voices (that is, voices which sound as if they are emanating from individuated beings, rather than from a set of social codes or stereotypes) than have women. Yet such an acknowledgement, holding in place as does the assumption that revelation of 'character' is the supreme achievement of first person poetic speech, does nothing to enable us to distinguish what women who wrote in the early modern period might have brought to the established literary forms of female utterance, how they might have understood them differently from men. Another way of considering the problem, therefore, might be by offering a challenge to our assumption of the inherent superiority or even the necessary presence of characterological effects in first person poetic speech. The pressing question for a feminist criticism which wants to investigate the relationship between male and female fictions of femininity would then shift from the usual, 'What does it mean to write like a woman?' or 'What is it that constitutes the authentic voice of female experience?' to 'How can we prevent ourselves from assuming that certain conditions of first-person speech which we associate with women must be identified as expressive of the experience, and therefore of the moral qualities of an individual woman?'

I want, then, to question the extent to which it is appropriate to approach fictive first-person speech in women's poetry of the sixteenth and seventeenth centuries as if it were primarily concerned with the revelation of character. The poetry with which I shall be concerned belongs to a highly specific genre - the epistle of the abandoned woman to her lover, modelled on Ovid's *Heroides* - whence it has infused the more complex genres of dramatic and prose fiction, and conditioned our expectations of female character. Not that feminist studies of the influence of Ovid's *Heroides* on later literature have a simplistic approach to the question of character. Indeed, the most recent work has tended (having recourse to Howard Jacobson's rich and detailed study of the sources of Ovid's first fifteen letters) to emphasise the extent to which Ovid's reworking of Virgilian and Homeric ideals of womanhood (Dido, Penelope) anticipates a similar process of subversion in certain kinds of writing by women. Linda Kauffman, for example, writes, alluding to Howard Jacobson's commentary on the Ovidian Dido:

in his portrait of Dido, Ovid is not striving to represent the central core of woman's self, or 'woman's essence', for he is sceptical about the very idea of a center, a self, an essence, and about language's representation of such concepts. Instead, Ovid's portrait is a critique of a previous representation of Dido: Virgil's.⁷

As Ovid's Dido comes to stand, in Kauffman's analysis, for 'a conscious critique of Augustan Rome, of Virgilian values, and of epic itself', so Ovidian epistolary fiction anticipates the 'quiet, stealthy work of undermining' by means of which women's writing will, in later periods, seek to "'deflower myths" of woman by undermining mimesis'.⁸ The danger, however, of this Bakhtinian reading of Ovid as dialogically or novelistically engaging with the value systems of epic, is that it is so easily

⁴ Neil Rhodes, for example, remarks that Nashe's mind 'is similar to Shakespeare's', but that 'Where Nashe failed completely was in accommodating his material to strong and abiding dramatic structures', *Elizabethan Grotesque* (London: Routledge and Kegan Paul, 1980) 156.

⁵ On the importance of the illusion 'character' in Shakespearean drama, and of the failure of post-structuralism to account for its effects, see Alan Sinfield, *Faultlines* (Oxford: Clarendon Press, 1992) 52-79.

⁶ Elizabeth Harvey, *Ventriloquised Voices* (London: Routledge, 1992) 15-6.

⁷ Linda Kauffman, *Discourses of Desire: Gender, Genre and Epistolary Fictions* (Ithaca and London: Cornell University Press, 1986) 20. Kauffman refers to Howard Jacobson, *Ovid's Heroides* (Princeton, N.J.: Princeton University Press, 1974) 90.

⁸ Kauffman, *Discourses of Desire*, 23.

assimilated to a notion of character realism. If Ovid's subversion of epic values is achieved by imagining a Dido and a Penelope who insist on speaking up for 'the private life, the life of the feelings'⁹, then this subversion offers a hardly novel precedent for identifying women with the process of revealing emotions from a scene of privacy and marginality, as if Heroidean poetry were nineteenth century dramatic monologue. What tends to happen, in fact, is that Ovid's unidealised women are read as the precursors of a new verisimilitude in first-person speech, the very dialogism of which becomes identified with psychological realism. Howard Jacobson, on whose source study so much of the best recent criticism depends, himself tends to use the vocabulary of psychological realism. He observes, for example, of the letter of Phyllis to Demophoon (a poem which renders a story of great popularity in antiquity, although earlier treatments appear to have been lost¹⁰) that 'the poem revolves around the co-existence of apparently incompatible and (logically) mutually exclusive emotions: sincere love/genuine anger; hope/despair'.¹¹ This apparent incoherence is, however, resolved by an appeal to the distinction between conscious and unconscious emotion; Phyllis has decided that Demophoon is never coming back, but like any lover, she can't quite give up hope. So Jacobson writes, 'The despondency of 11-26 is at two points brilliantly contradicted by unconscious flashes of hope ... we detect, beneath the surface of her professed despair, a faint persistence of hope in Demophoon's good faith.'¹² Here, then, is a tension between the conscious rhetorical *presentation* of the self, and the inadvertent *self-revelation* that results. Our job in reading consequently becomes the discovery of how the women's speech is belied by the revelation of unconscious motives and feelings. Thus Florence Verducci, who particularly admires Howard Jacobson's analysis of Ovid's subversion of the Homeric Penelope, writes,

Perhaps the greatest, and surely the most original, achievement of Ovid's letters is the impression they create of psychological authenticity, of convincing fidelity to the private perspective of a speaker caught in a double process of intentional persuasion and unintentionally revealing self-expression.¹³

The supreme accomplishment of the poetry - psychological verisimilitude - is thus identified with the very ways in which Ovidian heroines puncture their own idealisation in other genres. Ovid's epistolary fictions move us, some critics say, because they enable us to witness, behind the explicit protestations of the heroine, the revelation of less exalted feelings of which 'she' is barely conscious. thus, W.S.Anderson, challenging the view that Ovid's Dido is inferior to Virgil's, argues that our sense of the rhetorical contrivance with which Ovid's Dido speaks does not prevent us from imagining her to be *real*: 'as we start to respond with the pity she demands, we are stopped by our awareness that she is exploiting that pity, and we end up, I think, being charmed by the tension this one woman produces in us.' This tension then bespeaks a certain kind of female character, a character which seems the more accessible for being unidealised: 'Ovid seems intent on showing us a familiar feminine personality, warm, articulate, *self-conscious and self-deceiving at the same time*' (my italics).¹⁴ Jonathan Bate, also alluding to Howard Jacobson's analysis of Ovid's Dido as a reworking of Virgil's, finds in her a convincing model for Shakespeare's characterisation of Cleopatra: 'This Dido has a Cleopatra-like ability to blaze with love one moment and be manipulative the next.'¹⁵

My interest lies in the facility with which discontinuities and incoherences within the first-person speech of these fictive epistles are assimilated to a governing notion of the conscious or unconscious duplicity - what we might call the 'double voice' - of the female speaker. This tendency extends, I think, to criticism of Renaissance imitations of the *Heroides*. John Kerrigan's anthology of the genre, *Motives of Woe*, makes some of the same moves. Kerrigan observes that the genre has legal affinities;

⁹ Kauffman, quoting Richard Lanham on Dido in *Discourse s of Desire*, 49.

¹⁰ Howard Jacobson, *Ovid's Heroides* (Princeton, N.J.: Princeton University Press, 1974) 58n.

¹¹ *Ibid.*, 66.

¹² *Idem.*

¹³ Florence Verducci, *Ovid's Toyshop of the Heart: Epistulae Heroidum* (Princeton, N. J.: Princeton University Press, 1985) 15.

¹⁴ W. S.Anderson, 'The Heroides', in J.W.Binns ed. *Ovid* (London: Routledge and Kegan Paul, 1973) 55.

¹⁵ Jonathan Bate, *Shakespeare and Ovid* (Oxford: Clarendon Press, 1993) 212.

'plainants', he writes, 'are "plaintiffs" ... presenting quasi-legal "causes"'.¹⁶ What he concludes from this, however, is that the poems are trials of female morality, in which we are invited to act as judges. "'Causation" of this kind', he argues, 'makes it difficult but appropriate for the reader to judge how far plaintful speakers were responsible for their downfall.'¹⁷ Yet Kerrigan is aware that the lack of credibility allocated to female speech is in part an effect of social construction, and hesitates to translate this lack into a judgement of female character. The phrase 'doble voyce', which introduces the speech of the abandoned woman in the first verse of Shakespeare's 'A Louers Complaint' consequently indicates, Kerrigan suggests, a knowing allusion to the tendency of male listeners to dismiss or 'hysterice' the voice of the woman even before it is heard. The poem begins thus:

From off a hill whose concaue womb reworted
A plaintfull story from a sistring vale
My spirrits t'attend this doble voyce accorded ...¹⁸

Subsequently, however, Kerrigan's reading of the same phrase seems to creep back into the realm of character criticism. He makes a brilliantly suggestive connection between the woman's 'doble voyce', echoing off the hill, and the 'double ... Voice and Echo' of Rumour in Shakespeare's 2 *Henry IV*. Yet he leaves the connection in the form of a question, hanging in the air, returning after all to the previously eschewed issue of the female speaker's trustworthiness:

When Warwick assures Henry IV that the number of the rebels is exaggerated, he quibblingly says: 'Rumor doth double, like the Voice, and Echo, / The numbers of the feared.' Where does this leave the 'doble voyce' heard in Shakespeare's printed 'quire of echoes', the quarto of 1609? ... it is important to recognise the subtlety of the possible falsehood ... Even if the 'fickle maid' reports truth, she might not report 'the whole truth' (whatever that means), or the circumstances which make it so. We should resist the promptings of 'doble' either wholly to credit what she says, or to judge her account mendacious.¹⁹

I want to follow Kerrigan's lead in taking seriously the legal affinities of the 'complaint' poem, but, at the same time, to reverse the approach that would place the burden of intention upon the moral character of the woman speaking - 'what does her rhetoric intend?'; 'what do her words inadvertently reveal about her deeper intentions?' - suggesting, rather, that as far as early modern readers were concerned, more pressing ethical questions of intention and liability were raised in relation to the interlocutor who remained absent. I'm proposing, then, that sixteenth century readers of Ovid's *Heroides* were more inclined that we are to read them in relation to the problem that Isabella Whitney sets out in her Heroidean *Copy of a Letter* (1567), when she challenges her 'vnconstant Louer': If you 'take me to your wife', she says, '*So shall the promises be kept,* / That you so firmly made' (my italics).²⁰ The allegation of breach of promise at the heart of so many of the epistles of the heroines makes it possible that sixteenth century readers of the poems perceived their affinity with *specific* developments in legal thought and practice which were at that time transforming attitudes to intention and liability in relation to verbal promises. These developments were part of the larger contribution of a theory of equity to the sixteenth century English common law, a contribution which Luke Wilson has characterised in terms of a general 'increase in the sophistication of legal conceptions of intention'.²¹ Equity succeeded, as J.H.Baker explains, in enabling a medieval legal system which was largely hampered by 'the persistence of archaic methods of proof designed to settle general issues' but incapable of allocating guilt or liability in relation to specific cases which did not

¹⁶ John Kerrigan, *Motives for Woe: Shakespeare and 'Female Complaint'* (Oxford: Clarendon Press, 1991) 28.

¹⁷ *Ibid.*, 29.

¹⁸ Kerrigan, *Motives for Woe*, 209.

¹⁹ *Ibid.*, 43-4.

²⁰ Isabella Whitney, *The Copy of a Letter, lately written in meeter* (London: Richard Jones, 1567) sig. A2v.

²¹ Luke Wilson, *Hamlet, Hales v. Petit and the Hysterisis of Action*, *ELH* 60 (1993) 17-55, 31.

conform to an existing common law action.²² If we accept Luke Wilson's proposition that 'intention is that aspect of action traditionally understood as internal and subjective'²³, then it is not hard to concede that a legal system that begins to pay increasing amounts of attention to the question of the relation of intention to criminal or civil liability in court is one which will have an impact on the way in which the 'internal and subjective' aspects of action are represented in other kinds of discourse. And it is thanks to the introduction of an Aristotelian theory of equity that something like this kind of attention was beginning to be paid to questions of intention in the Courts of the King's Bench and of the Common Pleas in sixteenth century London.²⁴

Aristotelian equity, or *epieikeia* was, in essence, the means whereby the inevitable discrepancy between the letter of the positive law and the exceptional circumstances of a particular case might be adjusted by forging a relationship between the two in the form of a hypothesis of the legislator's intention in making the law, and of the intentions of individual parties to the case in 'transgressing' it. In the *Nicomachean Ethics* Aristotle explains that the need for equity arises from the *hamartia* or error inevitable in applying the law to cases for which the generality of its expression has made no provision. In these cases, writes Aristotle, 'When ... the law lays down a general rule, and thereafter a case arises which is an exception to that rule' the judge should, 'rectify the defect by deciding as the lawgiver would himself decide if he were present on that occasion and would have enacted if he had been cognisant of the case in question.'²⁵ In the *Rhetoric* he adds to this quest for legislative intention the imperative to investigate the intentions lying behind the transgressor's action. *Epieikeia*, he writes, looks, 'not to the letter of the law (*pros ten nomon*) but to the intention of the legislator (*pros ten dianonian tou nomothetou*); not to the act (*pros ten praxin*) but to the intention of the agent (*pros ten prohairetin*).' ²⁶ So when Christopher St.German introduced the concept of equity into the English common law in 1530, his definition turned on this Aristotelean quest for intention:

Equitye is a ryghtwisenes that consideryth all the perticuler cyrcumstances of the dede / the whiche is also temperyd with the swetnes of mercye ... And for the playner declaracyon what equitye is thou shalt vnderstande that syth the dedes and actes of men / for which lawes ben ordayned happen in dyvers maners infynytely. It is not possyble to make any general rewle of the lawe / but that it shall fayle in some case ... And therefore to folow the wordes of the lawe / were in some cases both agaynste Justice and the commonwelth: wherfore in some cases it is *good and even* necessary to leue the wordes of the lawe ... so it apperyth that equitye rather foloweth the intent of the lawe / then the wordes of the lawe.²⁷

Recent articles by Renaissance literary critics such as Luke Wilson and Katherine Eisaman Maus follows up the implications of earlier work on the relation of equity to the representation of intention in Greek and Renaissance drama with analyses that suggest a relationship between what Wilson calls the 'modularisation of intention' in sixteenth century legal discourse, and our sense that Renaissance tragedies such as *Hamlet* or *Othello* touch upon fundamental questions about the nature of the relation of the 'inner self' to outward action, gesture and show.²⁸ According to Wilson, one of the

²² J.H.Baker, *The Reports of Sir John Spelman* 2 vols (London: Selden Society, 1978) II.32.

²³ Wilson, 'Hysterisis of Action', 22.

²⁴ I've argued this more fully in 'Not the King's Two Bodies: Plowden, Shakespeare and Political Consciousness'.

²⁵ Aristotle, *The Nicomachean Ethics* tr. H.Rackham (London: Heinemann, 1932) V.x.5-6, 314-6.

²⁶ Aristotle, 'Art' of *Rhetoric* tr. J.H.Freese (London: Heinemann, 1932); see also Kathy Eden's excellent study, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 1986) 45 and *passim*.

²⁷ Christopher St. German, *Doctor and Student* ed. T.F.T.Plucknett and J.L.Barton (London: Selden Society, 1974) 95-9. See also John Guy, 'Law, Equity and Conscience in Henrician Jurist Thought' in John Guy and Alistair Fox, *Reassessing the Henrician Age: Humanism, Politics and Reform 1500-1550* (Oxford: Basil Blackwell, 1986) 178-98 and Zofia Rieger, 'Gerson's Concept of Equity and Christopher St.German' *History of Political Thought* 3 (1982) 1-30.

²⁸ See Wilson, 'Hysterisis of Action'; Wilson, 'Hamlet: Equity, Intention, Performance', *Studies in the Literary Imagination* (1991); Katherine Eisaman Maus, 'Proof and Consequences: *Othello* and the Crime of Intention' in *Inwardness and Theater in the English Renaissance* (Chicago: Chicago University Press, 1995) 104-127; Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 1986) 7 and *passim*. See also Marvin T.Herrick, *Comic Theory in*

implications of the taking into account of intention in criminal trials is the recognition that intention is, necessarily, a hypothetical fiction - a way of accounting for action after the fact. This recognition must have been congenial to sixteenth century neoclassical drama, which is rhetorically conceived as a series of hypotheses or conjectures upon uncertain proofs. I have tried to show elsewhere how Renaissance humanist mediations and imitations of the comedies of Terence and Plautus are particularly interested in situations in which the *dramatis personae* display uncertainty about one another's intentions, and are hence obliged to hypothesise or invent plausible 'characters' for one another.²⁹ Wilson's argument, however, proposes further that a dramatic interest in the uncertainty of the relation of intention to action can have the effect, in tragic drama, of creating a sense of 'interiority', of the dramatic effect of 'character' for which Shakespeare is famous. If, as legal equity declares, intention is only knowable at the level of hypothesis, then its temporal relation to action is always retrospective, even for the intending agent. The creation, in *Hamlet*, of a kind of virtual temporality, in which the protagonist expresses a prospective intention in relation to an action already committed corresponds, according to Wilson, to the necessarily retrospective nature of intention itself, and so to the sense of provisionality which characterises the way we experience our own intentions, our 'subjectivity'.

What, however, were the implications of the newly emergent focus on intention in the common law courts for the artistic representation of female subjectivity or an individualised female 'voice' ? 'In order for intentions to enter into circulation as tokens of a general symbolic economy of liability', writes Wilson, 'they must be conceptualised as detachable or modular'³⁰ The area of the English common law in which such a 'modularisation of intention' was most in need of development was that of promissory liability. It was impossible, in sixteenth century common law, to bring an action on a debt that rested on a mere promise to pay; the only available approximation to such an action was that known as the 'wager of law' which simply obliged the accused debtor to defend himself by finding eleven men ready to swear that he owed nothing. Gradually, however, an equitable alternative to the wager of law emerged in the form of an action on the case known as 'assumpsit'.³¹ This led in a more or less direct line to the modern law of contract, according to which mutual promises are held to be binding, and actionable in law.³² I have argued elsewhere that the disappearance of the spiritual courts' hold over the action of promises between 1500 and 1550, together with the perception of the inadequacy of the common law action of debt, focused legally-minded attention on questions of promissory liability in the 1560s and 70s in ways which are discernible in the poetry and plays written in that period.³³ Ovid's *Heroides* - concerned as they are with women protesting the faithlessness of lovers who apparently promised to marry them - would seem to invite reading in the context of this sort of legal development, not least because (as Renaissance readers of Ovid, such as Jonson, were aware) Ovid's poetry deploys a precise legal vocabulary, deriving from his experience in the centumviral court.³⁴ The *Heroides* are particularly rich in this technical language; the pair of letters between Acontius and Cydippe, for example, explicitly turn on the question of whether a promise or an oath made unintentionally is valid in law. Here Ovid exploits the well-known legal

the Sixteenth Century (Urbana: University of Illinois Press, 1950); Joel Altman, *The Tudor Play of Mind* (Berkeley: University of California Press, 1978); Terence Cave, *Recognitions: A Study in Poetics* (Oxford: Clarendon Press, 1988);

²⁹ See my *The Usurer's Daughter* (London: Routledge, 1994) 165-223.

³⁰ Wilson, 'Hysterisis of Action', 31.

³¹ J. H. Baker, *An Introduction to Legal History* (London: Butterworth, 1979) 267-87; Baker, 'English Law and the Renaissance' in *The Legal Profession and the English Common Law* (London: Hambledon, 1986) 463; Baker, *Reports of Sir John Spelman*, II:37-43; R.E. Helmholz, 'Assumpsit and Fidei Laesio', *Law Quarterly Review* 91 (1975) 406-32.

³² T. F. T. Plucknett, *A Concise History of the Common Law* 5th ed. (London: Butterworth, 1956) 643-4; A.W.B. Simpson, *History of the Common Law of Contract: the Rise of Assumpsit* (1975); see also Luke Wilson, 'Ben Jonson and the Law of Contract', *Cardozo Studies in Law and Literature* 5, 2 (1993) 281-306.

³³ Hutson, *The Usurer's Daughter*, 140-2.

³⁴ E. J. Kenney, 'Ovid and the Law', *Yale Classical Studies* 21 (1969) 243-63, 254. For Jonson's knowledge of the centumviral court and Ovid, see Jonson, *Poetaster* ed. Tom Cain (Manchester: Manchester University Press, 1995) III.iv.51n, 142.

topic of the conflict between the spirit and the letter of the law, in other words, the conflict between the strict law, and its equitable intention.³⁵

In sixteenth century England, literary culture overlapped to a very great extent with legal culture. George Puttenham, for example, famous to literary critics as the author of *The Arte of English Poesie*, is so identified at least partly through the occurrence in that work of innovative legal terms used elsewhere by him; two of these terms are 'equitable' and 'equitably'.³⁶ One of the paradigmatic fictional situations employed by such literary-minded lawyers, and other intellectuals concerned with the question of equity, was that of the uncertain matrimonial promise, which rendered the distinction between unlawful and unlawful sex in terms of a question of masculine intention. The story of Epitia in Giambattista Giraldi's *De Gli Hecatommithi* is a particularly interesting example of the use of this situation, as *De Gli Hecatommithi* was evidently read by a number of English writers concerned with equity (George Whetstone used it for his play and novel, *Promos and Cassandra*; Lodowick Bryskett translated part of Cinthio's 'Dialogue of Civil Life', Shakespeare used both Cinthio and Whetstone for the plot of *Measure for Measure* ³⁷). The story begins with Juriste, a magistrate appointed by the Emperor Maximian to administer justice in the town of Innsbruck, where he condemns to death a young man called Vico for violating a virgin. Vico's sister, Epitia, has studied moral philosophy, and visits Juriste to plead on behalf of her brother, arguing that the severity of his penalty is inappropriate, given that her brother was moved by love, and intended to marry the girl. Juriste conceives a desire for Epitia, and exacts sexual consent from her on the condition that he both release her brother and marry her. He violates both promises, and she, distraught with grief, seeks an audience with the Emperor. The Emperor listens to her, and satisfying himself as to Juriste's guilt, orders the magistrate to wed Epitia before being beheaded. Epitia, who had previously been demanding justice as fast as Juriste begged for mercy, now, of her 'natural benignity' decides that desiring Juriste's death savours more of revenge than justice, and pleads once more with the Emperor that he let his legislative 'good intent find its proper end' in the preservation of her honour as the wife, rather than widow, of Juriste.

The final tableau of this story is clearly an allegory of the overruling of strict justice by an equity 'that considereth all the pertyculer cyrcumstances of the dede' and 'is also temperyd with the swetenes of mercy'. The arguments upon which Epitia bases her pleading both for Vico and for Juriste exhibit a characteristically Aristotelian preoccupation with *intention*, both that of the law and of the party alleged to have violated that law. She counters Juriste's sentence against her brother with the argument that he was driven not by malicious intentions, but by love ('*non per ingiuria, ma spinto d'ardente amore*') and that she believed that the law had been intended as a terror, rather than to be enacted ('*ch' ella credea, che tale fosse stata costituita la legge più per porre terrore, che perche ella fosse servata*').³⁸

It is worth pointing out that Cinthio's story - and indeed the whole of *De Gli Hecatommithi* - invites the rather abstract, ethical/political interpretation I'm offering here. In the dedication of his collection to the Duke of Savoy, Cinthio explains that he wrote the stories in the flower of his youth ('*nel fiorire degli anni miei*') but only revised them for publication thirty years later, part of which time he spent as secretary to successive Dukes of the D'Este family, and part in '*gravi studi di*

³⁵ *Ibid.*, 261-2.

³⁶ George Puttenham, *The Arte of English Poesie* eds. Gladys Doidge Wilcock and Alice Walker (Cambridge: the University Press, 1936) xxxvii.

³⁷ Cinthio's story is the source of George Whetstone's play, *Promos and Cassandra* (1578) which is centrally concerned with contemporary questions of common law equity, and which was dedicated to the Recorder of London, William Fleetwood, the composer of an index to the current legal best-seller on equity, the *Reports* of Edmund Plowden. See Geoffrey Bullough, *Narrative and Dramatic Sources of Shakespeare*, vol.II (London: Routledge: 1968) 442-513. Lodowick Bryskett translated part of Cinthio into English; see below, n45. Shakespeare derived the plot of *Measure for Measure* from Whetstone, and possibly direct knowledge of Cinthio; see Bullough, II.399-417. For equity in Shakespeare and Whetstone, see John W. Dickinson, 'Renaissance Equity and *Measure for Measure*', *Shakespeare Quarterly* 13 (1962).

³⁸ *De Gli Hecatommithi di M.Giovannibattista Giraldi Cinthio, Nobile Ferrarese*, 2 pts (Venice: Girolamo Scotto, 1566) pt 2, p258.

filosofia, lecturing on ‘*l’opere di Aristotile*’ at the University of Mondavi.³⁹ Cinthio insists, in the dedication, on the relationship of the stories to his labours in the study of moral philosophy, which he calls ‘the fount and origin of praiseworthy customs, and of all honest disciplines’ (*fonte ed origine de’ lodeuoli costumi e di tutte le oneste discipline*).⁴⁰ His stories were recognised by contemporary readers as forming part of a civilising programme, and a ‘coherent, erudite debate’ on contemporary ethical and political life.⁴¹ The second part of the collection was prefaced by a philosophical dialogue ‘*dell’allevare et ammaestrare i figliuoli nella vita civile*’ (‘how to bring up and train young men in the virtues of civil life’), which deals with the cardinal virtues of justice, temperance, courage and prudence, and relates these to the well being of the political state. Cinthio’s friend, the scholar Bartolommeo Cavalcanti, compared the collection to Xenophon’s *Cyropaedia*, christening it ‘*Andropedia*’ for its promotion of ‘*quello che appartiene alla virtuosa educazione*’ (all that belongs to a virtuous education), and the dialogue on civil life was rendered into English as part of a more comprehensive work on ethics and politics by Lodowick Bryskett, which he himself compared to Edmund Spenser’s ‘civilising’ project in *The Faerie Queene*.⁴² The story of Epitia, in particular, relates to the third part of the dialogue on civil life in which the speakers discuss the nature of commutative and distributive justice, and the necessity of equity, without which, ‘*non solo era cosa lontana dalla humanità, ma crudele l’essere troppo giusto.*’ (‘it was not just far from humane, but actually cruel, to be too just’).⁴³

The first dilemma of Cinthio’s story is presented as a situation which seems to have been something a paradigm for fictional treatments by Reformation and Counter-Reformation authors of the problems posed by incorporating equity into the secular law.⁴⁴ All over Europe, the medieval Roman canon law had actively opposed the aristocratic consolidation of lands through dynastic marriages by recognising as a legitimate marriage the sexual consummation of privately exchanged words of betrothal.⁴⁵ In the course of the sixteenth century humanist intellectuals and politicians, both Protestant and Counter-Reformation Catholic, perceived the extent to which such retrospectively recognised ‘clandestine marriages’ (as they were known) damaged and undermined aspirations to achieve a well-ordered political state, or ‘commonweal’.

Cinthio’s Epitia defends her brother with a distinction between rape and marriage which turns on the question of his intentions and which, as such, marks out a dilemma which was shared by both Reformation and Counter-Reformation thinkers. For one objective of incorporating equity into the secular law was that of enabling the state to take over the conscionable jurisdiction of property transactions, so that the Church, formerly the only court of conscience capable of judging cases involving the examination of intention (such as cases of contract, or promise-breach) would cease to have such power in this vital aspect of the ‘commonweal.’⁴⁶ But if, in this fictional case, equity were to rule over justice, and Epitia’s distinction between lovemaking with intention to marry and mere sexual promiscuity were to hold good, then the equitable extension of the secular law would seem to sanction the old disorder of clandestine marriage, and the commonweal’s subsequent ruin.

³⁹ Cinthio, ‘Al Serenissimo et Invittissimo Signore Il.S.Emmanuelle Philiberto Duca di Savoia’, *Hecatommithi*, pt 1, 2; I quote from the version in Susanna Villari, *Per L’Edizione Critica degli Ecatommithi* (Messina: 1988) 39-48. See also P.R.Horne, *The Tragedies of Giambattista Cinthio Giraldi* (Oxford: Oxford University Press, 1962).

⁴⁰ Cinthio, ‘Al Serenissimo’, *Hecatommithi*, pt 1, 2; Villari, *Per L’Edizione Critica degli Ecatommithi*, 40.

⁴¹ Villari, *Per L’Edizione Critica degli Ecatommithi*, 7.

⁴² Bartolomeo Cavalcanti to Giraldi Cinthio, 3rd May, 1560, in Villari, *Per L’Edizione Critica degli Ecatommithi*, 135. Lodowick Bryskett, *A Discourse of Civil Life* (1606) (Amsterdam: Da Capo Press, 1971) sigs. E1v-E2v.

⁴³ Cinthio, ‘Della Vita Civile’, *Hecatommithi*, pt 2, p114.

⁴⁴ For the Counter-Reformation in Cinthio’s Ferrara, see P.R.Horne, ‘Reformation and Counter-Reformation at Ferrara: Antonio Musa Brasavola and Giambattista Cinthio Giraldi’ *Italian Studies* 13 (1958) 62-82.

⁴⁵ See George Duby, *Medieval Marriage: Two Models from Twelfth Century France* tr. Elborg Foster (Baltimore: Johns Hopkins University Press, 1978); Beatrice Gottlieb, ‘The meaning of clandestine marriage’ in Robert Wheaton and Tamara Hareven eds. *Family and Sexuality in French History* (Philadelphia: Pennsylvania University Press, 1980); James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: Chicago University Press, 1987) 551-75; Hutson, *Usurer’s Daughter*, 82-3; 178-87.

⁴⁶ See John Guy, *Christopher St. German on Chancery and Statute* (London: Selden Society, 1985) 19.

The acute, even irresolvable nature of the justice/equity debate requires the sacrifice of the heroine's plausibility as a fully interiorised 'character'. We are asked to believe not only that Epitia could *want* to take Juriste for her husband after what he has done, but that she could have entered into her sexual bargain with him on the basis of a contract which involved not only his promise to release her brother, but - and this is crucial - *his promise to marry her*. The dubiousness of this promise is all too apparent to a reader:

My brother's life is very dear to me, but my honour is dearer, and rather would I seek to save him by losing my life than by losing my honour ... There's no other way for you, said Juriste, than the one I have told you, which shouldn't appear to you such a terrible thing, because it might easily happen that our first joining together was such that you became my wife (*'perche potrebbe ageuolmenne auenire, che tali sariano i nostri primi congiungimenti, che mia moglie diuerresti'*). I don't want, said Epitia, to put my honour in danger. Why in danger? said Juriste, it may be that you will be what you can't imagine now, these things can happen. (*'perche in pericolo? disse Juriste, forse che tal sei tu che non ti puoi pensare, che cosi debba essere?'*). Think it over, and I'll wait till tomorrow for your reply. I can give you my reply right now, said Epitia. If you don't take me for your wife, if you really mean that my brother's release depends on that, you are throwing your words to the wind. (*'La risposta ui do io infino ad hora, disse ella, che non mi pigliando voi per moglie, quando pur vogliate, che la liberation di mio Fratello da ciò dependa: gittate al vento le parole'*).⁴⁷

Geoffrey Bullough translates Juriste's evasive prediction - 'forse che tal sei tu, che non ti puoi pensare' as 'You may well become my wife now though you cannot think it would ever be'⁴⁸, but this version masks the crucial ambiguity of the phrase, which, literally rendered, is something like: 'perhaps you will be such as you cannot think'. Behind such an evasive prediction, of course, whispers the word 'whore'. It is the fact that this *double entendre* must not be registered by Epitia in order to facilitate the subsequent fiction that her sexual consent had been conditional upon a promise of marriage that makes her seem to lack what we might call 'interiority', unless we imagine it self-defeatingly as duplicity or disingenuousness. Yet it is clear that Cinthio requires that there remain some ambiguity around the question of there having been a real promise of marriage; the heroine's consent to have sex with the magistrate can't simply be excused on the grounds of his promise to release her brother.

Here, then, the female figure has to bear the burden (at the level of 'disingenuousness' or 'lack of interiority') of the reader's awareness of the possible injustices of equity. Epitia's retrospective hypothesis of Vico's honourable intentions of marriage looks less respectable in view of our scepticism about Juriste. It seems obvious that he had no intention of fulfilling any promise to marry Epitia, yet the fiction that he did, or at least that she understood him to have such an intention, is necessary to preserve her honour as a woman whose admission of sexual consent is part of her evidence against him. If the story harbours a doubt about the justice of equity - that is, about the consequences of extending the power of secular judgement to questions of contractual *intention* - then that doubt is surely registered as our uncertainty about Epitia herself, our sense of her 'duplicity', or lack of reality as a character. (Indeed, it may be because of his dissatisfaction with this perceivable discontinuity of feeling in the character of Epitia, that Shakespeare chose, in *Measure for Measure*, to split this heroine into two figures, that of Isabella and Mariana. Isabella pleads for Angelo, as Epitia does, but she does so on behalf of the woman whom he had promised to marry: Mariana. Mariana's affinities with the abandoned women of the *Heroides* were recognised by Tennyson, when he wrote the haunting Heroidean lament, *Mariana in the Moated Grange*.)

If Epitia seems duplicitous or incoherent as a fictional character, then, this is partly because she embodies the temporal distortion of the legal taking of intention into account, a distortion whereby it

⁴⁷ Giraldi, *Degli Hecatommithi*, pt.2, 259.

⁴⁸ Geoffrey Bullough, *Narrative and Dramatic Sources of Shakespeare* vol. II (London: Routledge and Kegan Paul, 1968) 424.

becomes possible to re-open past events, to change the way in which they tell the story that will affect a future which still hangs in the balance. This sense of distortion is, I suggest, precisely what characterises the peculiar temporal space opened by Ovid's *Heriodes*. As we've seen, critics are inclined to read the poems as ineffectual acts of persuasion, which inadvertently reveal unconscious truths, and thereby invite us to judge the culpability of the speakers. But we might, rather than seeing self-revelation as the accidental effect of incompetence in persuasion, consider the possibility that the poems offer simultaneous but incompatible motives for utterance by a woman who, at the moment of composition, knows that the circulation of her account will compound the dishonour consequent upon her loss. One motive is, indeed, persuasive; if she acts fast, she might still be able to get him to change his mind and come back, restoring love and honour. Thus Oenone's letter to Paris ends with the plea that he return, and transform her future: *tua sum tecumque fui puerilibus annis / et tua, quod superest temporis, esse precor !* ('I am yours, and I was with you in childhood years, and yours through all time to come I pray to be!').⁴⁹ At the same time, however, another motive, which doesn't cancel out the first, is that of despair; there is no longer any point - whether or not any hope of his return remains - in preserving silence on the question of the dishonour that his failure to return constitutes for her. So Dido's complaint begins by disavowing any persuasive motive: 'Not because I hope you may be moved by prayer of mine do I address you ... but because, after wretched losing of desert, of reputation, of purity of body and soul (*merita et famam corpusque animumque pudicium*), the losing of words is a matter slight indeed.'⁵⁰ These incompatible motives are harmonised in relation to the present moment of composition by the writer's uncertainty about the absent lover's intentions, but they also necessarily offer, in the course of a single poem, competing fictions of those intentions. Thus, for example, while the poem *Phyllis to Demophoon* begins like a legal action against the violation of a contract: 'I, Phyllis, who welcomed you to Rhodope complain ('*queror* ') that the promised day is past, and you not here', it continues, after alledging evidence of violated oaths and broken contracts, with a readiness to believe in the very same vows, handfastings and pledges as reasons to plead the provisionality of the wrong, its recuperability under the sign of thwarted intentions: 'return only, though late, to her who loves you, and prove your promise false only for the time you delay!'⁵¹ George Turberville's much-reprinted translation of 1567 stresses the suggestion of legal redress for damages. Turberville begins:

I, that thine hostesse, Phyllis, was
 a Rhodopeian mayde:
 Mislike that thou my guest, beyond
 thy fixed time hath stayde.
 Thy plighted promise was with shippe
 here to arryue againe
 Before or neere about the time
 The waxed Moone should waine ...

And yet I can but long to see
 thy comming, though be long:
 Though fixed day be past, reuert
 and quite some part of wrong.⁵²

⁴⁹ Ovid, *Heroides and Amores* tr. Grant Showerman, revised by G.P.Goold (London: Heinemann, 1986) V.157-8; 68-9.

⁵⁰ *Ibid.*, VII.5; 82-3.

⁵¹ *Ibid.*, II.1-2; 101-2. For other examples of broken faith urged both as accusation and in evidence of good intention, see Hypsipyle to Jason, VI.41-44, 72-3; Dido to Aeneas, VII, 7-8, 82-3.

⁵² George Turberville, *The Heroicall Epistles of the Learned Poet Publius Ovidius Naso in English Verse* (London: Henry Denham, 1567) fol.5v-9r.

Affectless as Turberville's translation might seem to us, it inflects the original in ways to which contemporaries could respond. A sixteenth century reader of the 1567 edition in the Bodleian tends to underline phrases associated with the problems of crediting promises; 'Thy many smooth and filed woordes /did purchase credits place', 'O where is plighted fayth?', 'When salted teares berainde/ Thy falsed face', for example.⁵³ In this version of *Phyllis to Demophoon*, Turberville's use of the term 'fixed day' evokes contemporary debates about usury, and about the difficulties of establishing a common law remedy for 'nonfeasance', or failure to act by a certain time in fulfilment of a promise or a contract.⁵⁴

In the account I'm trying to develop, then, what Howard Jacobson called the 'apparently incompatible' and 'mutually exclusive' emotional positions occupied by the speaker of *Phyllis to Demophoon* cease to be readable in terms of a contrast between surface and depth (the 'deeper' unconscious emotion breaking out to contradict the contrived emotion of the rhetorical surface). They become, rather, both effects of the speaker's obligation to render intelligible the uncertainty that surrounds the intention of the absent lover in the past moment when he promised to return, and in the present moment of writing, when the promise appears to be void. The imperative to render this uncertainty intelligible in terms of one or other fiction of intention (the fiction that matrimonial intentions informed the original vows, which in turn implies the fiction that lover still intends to return and make all good) is, of course, identical to the speaker's obligation to preserve her own good name. As Cinthio's Epitia was obliged to seem both to have understood Juriste's words as a promise of matrimony, and to have expressed scepticism about such a promise ('if you don't take me for your wife ... you are throwing your words to the wind!' she exclaims, echoing many an Ovidian heroine), so Phyllis both condemns Demophoon for promising without having any intention to fulfil his promise ('Demophoon to the windes ingadde/ his promise with his sail'⁵⁵), and continues to believe in the potential of his intention to prove her judgement against him wrong.

It is crucial for us, I think, to try and recapture the way in which the voice of the abandoned woman was, in this period, associated with the new possibilities that equity was opening up in legal practice. As equity seeks to establish guilt or liability by hypothesising a probable intention to make sense of a series of actions, so it requires a lack, an absence of certain knowledge with which to work. An unfulfilled promise creates just such a lack, and is the precondition for female speech in the *Heroïdes*, and its imitations. Thus, in the printed text of the 'casket sonnets' attributed to Mary Queen of Scots, the Heroïdean sequence concludes with a coda in which the speaker gives, as the origin of her writing, an absence resulting from an unfulfilled promise:

Ne vous voyons selon qu'auuez promis
 L'ay mis la main au papier pour escrire
 D'vn different que ie voulu transcrire.
 Ie ne scay pas quel sera vostre aduis
 Mais te scay bien qui mieux aymer scaura.
 Vous diriez bien que plus y gaignera.

(Not seing you as you had promisit,
 I put my hand to the paper to write,
 Of ane differens that I haue willit cotype.
 I can not tell what shalbe your iugement,
 But I knawe well qhuo can best loue.

⁵³ *Ibid.*, fol.7v; 35v.

⁵⁴ See, for example, William Harrys, *The Market or Fayre of Usurers* (London: Steven Mierdman, 1550) sigs. F7v-G8v; J. H. Baker, 'The establishment of assumpsit for nonfeasance' in *The Reports of Sir John Spelman*, II.258-272.

⁵⁵ Turberville, *Heroïcall Epistles*, fol.6v.

You may tell who shall winne maist.)⁵⁶

The incriminatory quality of these poems as they are presented to the reader in George Buchanan's *Detection of the duinges of Marie Quene of Scottes* is, of course, their function, identifiable as it is with the self-incriminatory tendency of a genre which necessarily confesses the loss of 'merita et famam corpusque animumque pudicium.' What is new, however, is the inclusion of such poetry as part of a probable discourse ostensibly made possible by the 'equitie' of the English Queen, who, according to Buchanan, requires that the evidence against her kinswoman be 'by necessarie argumentis playnly prouit', rather than remaining the subject of wild rumours.⁵⁷

In Buchanan's text of the poems the femininity of the speaker's voice is at once associated with self-incrimination, and with the capacity of the equitable judge to ascertain motive and intention from uncertain evidence. One reason why we find it difficult to recapture the ambivalence of the Heroidean position - the position of writing in response to an unfulfilled promise - as a precondition for female speech is, I think, because we live in the wake of what P.S. Atiyah has called 'the rise and fall of freedom of contract'. Freedom of contract, the corner-stone of nineteenth century legal thinking in the west, rests on the principle that promises *per se* are morally binding.⁵⁸ This principle, as Atiyah writes, tends to be thought of as universal, but was in fact a consequence of the transformation of English legal attitudes to the actionability of promises between 1600 and 1800. One of the effects of its conceptual universalisation in the nineteenth century has been the evolution of a philosophy of ethics which starts from the assumption that a promise is always liable because it effects the promisor's intention; that is, that an intention to be bound is by definition anterior to any promise. Our own harbouring of similar assumptions, however latently or unconsciously, must affect our reading of Heroidean poetry. Because we don't consider the predication of female speech upon this condition of uncertainty about masculine intention, we tend to *characterise* the women who speak under such conditions as either credulous or deceptive in their attempts to establish masculine promissory liability. I'm suggesting, that is, that we read the *Heroides* in the way that J.R. Searle reads the famous case of *Bardell v. Pickwick* when he cites it as evidence for the philosophical proposition that promissory liability cannot exist where there was no intention to make a promise. Searle writes, in the *Philosophy of Language*:

The essential feature of a promise is that it is an undertaking of an obligation to perform a certain act ... having this intention is the necessary condition of making a promise; for if a speaker did not have this intention in a given utterance, he can prove that the utterance was not a promise. We know, for example, that Mr. Pickwick did not promise to marry the woman because he did not have the appropriate intention.⁵⁹

Here, of course, Searle alludes to the unfortunate Mr Pickwick's finding himself sued by his landlady for breach of promise after inadvertently raising her matrimonial expectations in an ambiguous dialogue not unreasonably construed by her as a delicate courtship and proposal:

'You'll think it very strange now', said the amiable Mr. Pickwick with a good humoured glance at his companion, 'that I never consulted you about this matter, and never even mentioned it, till I sent your little boy out this morning, eh?'

Mrs. Bardell could only reply by a look. She had long worshipped Mr. Pickwick at a distance ...

'It'll save you a good deal of trouble, won't it?' said Mr. Pickwick.

'Oh, I never thought anything of the trouble, Sir,' replied Mrs. Bardell, '... but it is so kind of you, Mr. Pickwick, to have so much consideration for my loneliness.'

⁵⁶ George Buchanan, *Ane Detectioun of the duinges of Marie Quene of Scottes* (London: 1571) sig. O2v.

⁵⁷ *Ibid.*, sig. A2r, sig. F4v.

⁵⁸ P. S. Atiyah, *Morals, Promises and Law* (Oxford: Clarendon Press, 1981) 4; see also P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

⁵⁹ J. R. Searle, 'What is a Speech Act?' in *The Philosophy of Language* ed. J. R. Searle (Oxford University Press, 1971) 50.

‘Ah to be sure,’ said Mr.Pickwick, ‘I never thought of that. When I am in town, you’ll always have someone to sit with you. To be sure, so you will.’⁶⁰

Atiyah, who gives Searle’s reading of Dickens as an example of the effects of the ‘triumph of contract’ on the philosophy of promise-keeping, points out that Searle here ignores the difference between novels and life. ‘[S]ince, in everyday life, there is no benevolent author to tell us what other people’s intentions are’, Atiyah remarks, ‘we are, in fact, entitled to assume that their intentions are what they appear to be. The jury’s verdict in *Bardell v. Pickwick* ... was thus sound in law.’⁶¹ Mrs. Bardell, then, had a case; but Dickens’s comic point, of course, depends on the extent to which our knowledge of Mr.Pickwick’s innocence of any intention of marrying his landlady coincides with our sense of the capacity of her desire - *the desire of the unmarried woman* - to transform ambiguity into liability; that is, to make of the man’s ambiguous words a plausible fiction of his ‘honourable intentions’ towards her.

The modern common sense assumption of the dependence of promissory liability upon the intention of the promissor was not quite so securely in place during the sixteenth century, as the common law groped, via the concept of equity, towards the establishment of a remedy for the non-fulfilment of verbal contracts. Until the sixteenth century, the ecclesiastical courts had overseen the jurisdiction of the violation of sworn promises, while in the common law an archaic action of debt permitted the defendant accused of defaulting on a payment to ‘wage his law’ which in practice meant employing eleven other men (possibly professional compurgators) to swear he was innocent.⁶² The introduction, therefore, of the common law action known as ‘assumpsit’, in which the action was brought on the promise to pay or to fulfil rather than on the debt itself, was of immense historical significance, leading in a more or less direct line to the nineteenth century triumph of the principle of freedom of contract in the United States and Britain.⁶³ The establishment of assumpsit has been described as ‘a reorientation of human interiority in terms of intentional action’⁶⁴, a reorientation which inevitably raised questions about the common law’s capacity to know intention. In Christopher St.German’s immensely popular legal textbook, *Doctor and Student*, the Doctor argues for the canon law *status quo*, maintaining intention creates obligation, even when there is no outward sign of that intention.⁶⁵ The student, however, replies that,

no accion can lye ... vpon suche promyses / for yt ys secrete in hys owne consyence whether he entendyd for to be bound or naye. And of the entent inward in the herte: mannes lawe can not Juge / ... and yf an accyon sholde lye in that case in the law Canon: than sholde the law Canon Juge vpon the inwarde intente of the herte / whyche can not be as me semeth.⁶⁶

In the common law, as the student informed sixteenth century lawyers, an action for a verbal promise could only lie if there was some kind of ‘consideration’, some evidence for the hypothetical reconstruction of an intention to fulfil the promise:

As if .A. promyse to give .B. .xx.li. bycause he hathe made hym suche a house or hath lent hym suche a thyng or suche other lyke / I thynke hym bounde to kepe hys promyse. But yf hys promyse be so naked that there is no maner of consyderacyon why yt sholde be made / than I thynke hym not bounde to performe it / for it is to suppose that there was som error in the making of the promyse.⁶⁷

⁶⁰ Charles Dickens, *The Pickwick Papers* ed. James Kinsley (Oxford University Press, 1988) 138-9.

⁶¹ Atiyah, *Morals, Promises and Law*, 147.

⁶² See above, note 26, and R. H. Helmholz, ‘Assumpsit and Fidei Laesio’, *Law Quarterly Review* 91 (1975) 406-32.

⁶³ See above, note 27, and Martin Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); Atiyah, *Freedom of Contract*.

⁶⁴ Luke Wilson, ‘Ben Jonson and the Law of Contract’, *Cardozo Studies in Law and Literature* 5 (1993) 283.

⁶⁵ St.German, *Doctor and Student*, 229.

⁶⁶ *Ibid.*, 230.

⁶⁷ *Ibid.*, 229.

As St. German expresses it, intention cannot be known, but only 'supposed' by equitable judge, on the evidence of some 'consideration', without which evidence 'it is to suppose there was some error in the making of the promise.' It is precisely this condition of *having to suppose* the man's intentions, both when he swore to her, and in the present moment of his failure to return, that permits the female voice to speak in the *Heroides*, and related poems ('Not seeing you as you had promised / I put my hand to the paper to write ...'). Modern criticism registers this as the emotional incoherence of the female speaker, or as Ovid's failure of characterisation; in the case of Dido, for example, the female first person's integrity is called into question by the sheer virtuosity of her persuasive rhetoric: '[a]rguments of all sorts gush in a never ending casacade'.⁶⁸ In the sixteenth and seventeenth centuries, I suggest, the idea of Heroic speech as an opportunity created by masculine elusiveness for the generation of feminine arguments was associated with the trend towards a form of legal action that sought - however crazily - to establish proof of intention as the basis of liability for verbal promises. If *2 Henry IV*, a play founded on a legal anecdote⁶⁹, proceeds towards the establishment of good relations between the monarch and the judiciary through Falstaff's being hounded by the Lord Chief Justice, it is surely significant that the action for debt pursued against Falstaff by Mistress Quickly in Act II, scene I, is transformed, at the point at which Falstaff inquires into the extent of his debt, into an equitable action of assumpsit, turning on the question of his having promised to marry her. 'What is the gross sum that I owe thee?', Falstaff asks, and Mistress Quickly replies, with a Dido-like unstoppable:

Marry, if thou wert an honest man, thyself and thy money too. Thou didst swear to me upon a parcel-gilt goblet, sitting in my Dolphin chamber, at the round table, by a sea-coal fire, upon Wednesday in Wheeson weeke, when the Prince broke thy head for liking his father to a singing-man of Windsor -- thou didst swear to me then, as I was washing thy wound, to marry me, and make me thy lady thy wife. Canst thou deny it? Did not goodwife Keech the butchers wife come in then and call me gossip Quickly? -- coming in to borrow a mess of vinegar, telling us she had a good dish of prawns, whereby thou didst desire to eat some, whereby I tolde thee they were ill for a green wound? And didst thou not, when she was gone downstairs, desire me, to be no more so familiarly with such poor people, saying that ere long they should call me madam? And didst thou not kiss me, and bid me fetch thee thirty shillings? I put thee now to thy book oath, deny it if thou canst.⁷⁰

Here Mistress Quickly's evidence of 'good consideration' for Falstaff's having meant to make the promise - the kiss and the request for thirty shillings - tend rather to cast doubt on her status as a credible plaintiff than to persuade us of Falstaff's intention to create her Lady Falstaff. There's a broad resemblance here, then, to the way in which the humour of *Bardell v. Pickwick* works. In both cases, the joke depends on our understanding the unmarried but unvirginal female (always a 'hostess' - as indeed Phyllis and Dido were) as having a tendency to produce fictions of matrimonial intention from areas of complete uncertainty. Dickens, like Shakespeare, enjoyed the notion of there being a resemblance between the law's ability to generate proofs from circumstantial evidence, and the unmarried woman's creative capacity to generate plausible fictions of marital intention where no such intention was likely to exist.⁷¹

If we return, at this point, to Kerrigan's reading of the words 'doble voyce' in the first quatrain of Shakespeare's *A Louers Complaint*, we may recall how his reading tended to construct a duplicitous female character as the origin of the voice's 'doubleness', while acknowledging this move to be

⁶⁸ Howard Jacobson, *Ovid's Heroides* (Princeton NJ: Princeton University Press, 1974) 84.

⁶⁹ See Geoffrey Bullough, *Narrative and Dramatic Sources of Shakespeare* vol. IV, 288, 299-343; see also my 'Not the King's Two Bodies: Plowden, Shakespeare and Political Consciousness'.

⁷⁰ Shakespeare, *Henry IV part 2* ed. A. R. Humphreys (London: Routledge, 1966) II.i.83-101, 43-4.

⁷¹ Sometimes the 'doctrine of consideration' was employed in rather eccentric ways in equitable cases of assumpsit. Baker observes that Plowden managed, in 1566, to argue successfully that desire for the continuance of male heirs was 'good consideration' for there having been contractual intention in the case of *Sharrington v. Strotton*. See Baker's 'Origins of the "Doctrine" of Consideration 1535-1585', *Legal Profession and the Common Law*, 396-92.

unsatisfactory: ‘Even if the ‘fickle maid’ reports truth’, wrote Kerrigan of Shakespeare’s female narrator, ‘she might not report ‘the whole truth’ (whatever that means), or the circumstances which make it so. We should resist the promptings of ‘doble’ either wholly to credit what she says, or to judge her account mendacious.’⁷² We may also recall, however, that Kerrigan linked the use of the epithet ‘double’ to Shakespeare’s characterisation and deployment of the figure of Rumour in 2 *Henry IV*: ‘When Warwick assures Henry IV that the number of the rebels is exaggerated, he quibblingly says: “Rumor doth double, like the Voice, and Eccho, / The numbers of the feared.” Where,’ asked Kerrigan in conclusion, ‘does this leave the ‘doble voyce’ heard in Shakespeare’s printed ‘quire of echoes’, the quarto of 1609?’⁷³ It’s a good question, and one worth pursuing. What are the poetic antecedents of Shakespeare’s figure of Rumour, who introduces to us the play of 2 *Henry IV*? One indisputable antecedent is Virgil’s description of Fame in the fourth book of the *Aeneid*. Shakespeare’s Rumour, ‘*painted full of tongues*’ recognisably derives from the titan described by Virgil (I give Ben Jonson’s free translation of the passage in *Poetaster*):

Look, how many plumes are placed
On her huge corpse, so many waking eyes
Stick underneath; and (which may stranger rise
In the report) as many tongues she bears,
As many mouths, as many listening ears.⁷⁴

The occasion of this monster’s appearance, however, is none other than that of one the fictions of matrimonial intention that we’ve been concerned with. Dido willingly makes love to Aeneas in the cave:

For now, nor rumour’s sound
Nor nice respect of state moves Dido aught.
Her love no longer now by stealth is sought:
She calls this wedlock, and with that fair name
Covers her fault. Forthwith the bruit and fame
Through all the greatest Lybian towns is gone.
Fame, a fleet evil, than which swifter none.⁷⁵

The ‘doble voyce’ of Rumour in Shakespeare is already, then, plotted within the narrative of femininity’s obligation to generate fictions of honourable male intentions - intentions to marry, intentions to return after all - which rebound back on the voice of the woman by casting doubt upon her integrity, emotional, moral and sexual. Dido ‘calls this wedlock’, but such a name in itself presumes to speak for Aeneas’s intentions, and as such is belied by Fame, who speedily proclaims the woman’s fault abroad, while we, as readers, are to understand that her fault is compounded by this act of deception, this ‘fair naming’.

In view of this it actually seems not ‘appropriate’ as Kerrigan suggests, but quite inappropriate for us to read sixteenth and seventeenth century poems modelled on Ovid’s *Heroides* as exercises in judging ‘how far plaintful speakers are responsible for their downfall.’⁷⁶ More appropriate, I think, would be a kind of reading which took account of the asymmetry of the allocation of blame for sexual misdemeanour, understanding thereby that a woman’s voice may well be ‘doubled’ by the imperative

⁷² Kerrigan, *Motives of Woe*, 43-4.

⁷³ *Idem*.

⁷⁴ Ben Jonson, *Poetaster* ed. Tom Cain (Manchester, 1995) V.iii.85-9, 223.

⁷⁵ *Ibid.*, V.iii.69-75, 222. See also Virgil, *Aeneid*, tr. Robert Fitzgerald (Harmondsworth: Penguin, 1983) 101; Shakespeare, *The Second Part of Henry the Fourth, A New Variorum Edition* ed. Matthias a.Shaaber (London and Philadelphia, J. B. Lippincott & Co., 1940).

⁷⁶ Kerrigan, *Motive of Woe*, 29.

to construct a fiction of masculine matrimonial intention in order to justify, and perhaps even bring about, the marriage that would retrospectively turn her 'fault' into her 'good name'.

Did sixteenth and seventeenth century women show an awareness of the legal affinities of the *Heroides*? I think they did. As Laura Gowing has pointed out, the late sixteenth and early seventeenth centuries were years of unprecedented increase in numbers of women suing in the church courts against having been sexually defamed by other women - the equivalent of Virgil's 'monstrum horrendum', the rumours spread about Dido. Yet, as Gowing observes of this phenomenon, its status as a linguistic opportunity for women was distinctly ambiguous:

In many ways ... the language of slander offered particular linguistic powers to women, through which they asserted their verbal, physical and legal agency to judge and condemn other women. But such sexually explicit speech had its risks for women. Using sexual insult to prove other women dishonest left slanderers themselves open to charges of impropriety, and the dangers of women's speech about sex were particularly apparent when women alleged seduction, assault or rape.⁷⁷

Isabella Whitney's verse anthology, *A Swete Nosgay* (1573) is throughout obliquely preoccupied with the dangers of allowing oneself to be spoken about. Whitney warns her sisters, serving in London, to guard against gossip, 'Yf to rehearsall oft you come, ' she says, 'it wyl your quiet wound.' Yet she herself cannot exactly name the reason why: 'I cannot speake, or wryte to much', she explains, 'because I loue you well.' The reason seems to lie in the power of defamatory words: 'For words they are but winde. / yet wordes may hurt you so: / As you shall neuer brook the same / yf that ye haue a foe.'⁷⁸ That women should urge each other to behave in such guarded ways corresponds with the conclusion of a poem in Tottel's Miscellany, entitled, 'Of the choise of a wife'. In this poem, the author's principle criterion in selection of a wife is that she should remain quite unknown to the eye and ear of fame: 'Let fame not make her knowen whom I shall know ... Sufficeth me that vertue in her grow, / Whose simple life her fathers walles do hide.'⁷⁹

It may be that Whitney spoke from bitter experience in warning her sisters against 'all such, / as would be word or Byll./ Procure your shame'.⁸⁰ Having written her own spirited version of a Heriodean epistle in the *Copy of a Letter*, published in 1567, she went on the *Swete Nosgay* to arrogate to herself the position of the most desolate of Ovid's heroines, reprimanding Dido for presuming to make such a claim. 'Good DIDO stint thy teares', she begins, 'and sorrowes all resigne / To mee: that born was to augment misfortunes lucklesse line.' The Carthaginian Queen, she argues, might have lived 'a happye Woman styll' in spite of Aeneas's absence. Indeed, it seems that Aeneas's absence was just what was required to restore her happiness:

For as the man by whom,
thy deadly dolours bred:
Without regard of plighted troth,
from CARTHAGE Citie fled.
So might thy cares in tyme,
be banisht out of thought:
His absence might well salue the sore,
that earst his presence wrought.
For fyre no lenger burnes,
then Faggots feed the flame:
The want of things that breede annoy,

⁷⁷ Laura Gowing, *Domestic Dangers: Women, Words and Sex in Early Modern London* (Oxford: Clarendon press, 1996) 109-110.

⁷⁸ Isabella Whitney, *A Swete Nosgay, or Pleasant Posy* (London: 1573) sig. C8r.

⁷⁹ *Songs and Sonettes written by the ryght honorable Lorde Henry Hawarde* (London: the Scholar Press Ltd., 1970) sig. Bb2r.

⁸⁰ Whitney, *Swete Nosgay*, sig. C8r.

may soone redresse the same.⁸¹

Whitney here draws our attention to what is wrong with trying to account for the despair of the abandoned women of Ovid's *Heroides* simply in terms of the emotional oscillations arising from abandonment in love, without any attention to the legal questions of matrimonial intention and honour, on which the material prospects of the woman's future are contingent. The delicate Virgilian and Ovidian associations of Dido with an inextinguishable, smouldering love⁸² are crudely rewritten as the brisk common-sense observation that 'fyre no lenger burnes / Then Faggots feede the flame', which, along with the irreverent opening says in effect: 'Dido, forget the bastard; you are, after all, still queen of Carthage'. Whitney's point, in the context of her own narrative (which emerges through the collection of poems that make up the *Nosgay*) is that the position from which the 'abandoned woman' speaks must be understood in terms of the deprivation of agency, which makes it at least partly a socio-economic position. If we assume that the voice of inconsolable grief over abandonment in love must be female, then we make gender an effect of the extent to which the loss of love also represents the irremediable material and social loss consequent upon the loss of good name. Whitney boldly denies the assumption that loss of love is the real cause why the Ovidian heroine weeps. In the references she elsewhere makes to the defamatory 'euell words' which were spoken about her by her 'enemies tong'⁸³, She echoes Dido's own admission of having lost '*faman corpusque animum pudicum*' ('the reputation of a chaste mind and body'). Whitney's claim, therefore, that her own grief and loss exceeds that of the Carthaginian Queen is a measure of the extent to which the loss of good fame is seen to a more irreparable loss than that of the lover. For Whitney the injustice she has suffered in having 'euell words' spoken about her appears to have led directly to 'the losse ... of seruice' for which she now 'languish[es]'⁸⁴ in poverty. Dido's emotional loss, by comparison, can easily, as Whitney says (using the vocabulary of justice), be 'redress[ed]' by itself.

In the third book of Lady Mary Wroth's *Urania*, an ingenious Heroidean poem is similarly framed by a story of the loss of good name consequent upon a sexual liaison. The poem hovers between suicide note and attempt at persuasion; as its author says

when I saw no merit, no love, no remembrance, nor any thing could worke against
a newe choice which he had made, I framd these lines as my last peece, resolving if
they prevailed not to let all goe ...⁸⁵

Wroth first introduces the author of the poem to us in such a way as to suggest that we should, indeed, read it in the fashion of modern *Heroides* criticism, as the revelation of a self torn by conflicting emotions. An assembly of lovers, walking up and down in a grove, saw as they passed

a handsome, and well-clothed woman, neither walking, running or staying, but as
she had made a motion of them all, and imploied them to her vanity; shee one while
cryed, another chafed, smil'd, scratch'd her head, stamp'd, rail'd and all at Love ...
No greater diversity is there in womens dispositions, (who are richer in vanity then
men) then she had in her selfe, so as good women might hope all the superfluous
vanity of that sexe had been collected, and settled by uncertainty in her.⁸⁶

Yet as this woman - whose name is Dorolina - tells her tale, it becomes less and less easy to think of reading the oscillation between different kinds of subject position in her poem as symptomatic of this feminine 'diversity in disposition', or the 'double voice' of unconscious self-deception. She refuses

⁸¹ *Ibid.*, sig. D3v.

⁸² Virgil's allusions to Dido's 'flames' are frequent; see Virgil, *Eclagues, Georgics and Aeneid 1-6*, with tr. by H. R. Fairclough (London: Heinemann, 1935) IV.54, 66, 68-9, 400-1.

⁸³ *Ibid.*, sig. D7r.

⁸⁴ *Ibid.*, sig. C6v.

⁸⁵ Lady Mary Wroth, *The Countess of Montgomeries Urania* ed. Josephine Roberts (New York: Medieval and Renaissance Texts and Studies, 1995) 492.

⁸⁶ *Ibid.*, 490-91.

to give her name, on the grounds that she herself is so defamed that the very sound of it breeds dishonour:

‘I am, said shee, a Gentlewoman, though ungently used by Love, my name not worthy of Knowledge, my estate overthrowne by misfortune, my friends not to be named as being unfit to consanguinate with miserie ...’⁸⁷

She tells how she loved a man, ‘the brother to the Dutches I serv’d’. When, after her yielding to him, he departed, she wrote and asked for what she thought was her due as ‘both giver, and bringer’ of love, but without success. ‘I ... recover’d not so much as dammages’, she complains.⁸⁸ In the poem itself, Dorolina exploits the contradictory positions I’ve identified as typical of the genre - sustaining competing fictions of the probable intentions the addressee, her lover - by comparing her own lot to that of one Ovidian heroine after another. She thus moves through a series of Ovidian exempla towards a position of maximum rhetorical effectiveness, both likening herself to the Heroidean victim and then denying the ill-fatedness implied by the likeness. Dorolina first likens herself to Ariadne (‘I Ariadne am alike oppress’d, alike deserving..’) and then to Phyllis, the injustice of whose sufferings as a result of the broken faith of Demophoon is in no doubt. ‘Shee’, Dorolina says of Ariadne, saved the life of Theseus, while, ‘he her honor lost / Leaving her desolate, alone to prove /His love ... but given for neede.’ The death of Phyllis is explicitly linked to a similar loss of honour:

... *Phyllis* selfe, her lovely selfe did kill,
Making a Tree her Throne, a Cord the end
Of her affections, which his shame did send.⁸⁹

The grammar makes her self-inflicted end the object of a shame which is ‘his’ in origin, but which he ‘did send’ to kill her. Having thus identified herself with heroines who, in Ovid, express extreme grief in relation to the yielding of their chastity to the departed lover (Phyllis wishes she had died the night before they made love, while Ariadne wonders whether a woman so disgraced as she can be said to continue to live), Dorolina transposes the identification, via an acknowledgement of Medea’s power to enchant Jason, on to the figure of the ‘other woman’, thereby enabling herself to take up instead the position of the ‘good woman’ in the Ovidian Penelope, whose known end as the wife to whom Ulysses eventually returned implicitly denies the spectre of shame and ‘honor lost’ aroused by the evocation a likeness to Ariadne or Phyllis. The epistle thus changes from complaint to an empowered assurance of forgiveness:

Come you now backe, I thus invite you home,
And love you, as if you did never roame:
Come, I say, come againe, and with *Ulysses*
Enjoy the blessings of your best blisses;
Happy the comfort of a chaste loves bed,
Blessed the pillow that upholds the head
Of loyall loving, shame’s the others due ...⁹⁰

Shame is disowned as the end Dorolina herself is bound to face should the addressee of the letter fail to return; it becomes the penalty of the ‘other’, the woman who, if Dorolina’s plea is fulfilled, must become the victim of the ‘evil words’ that otherwise define the author herself as unchaste. If the female voice of the lover’s complaint is, then, always a ‘double voice’, then its doubleness must be the effect of sustaining competing hypotheses of the intentions of the absent lover, while attempting to anticipate and deflect the ‘voice and eccho’ of sexual slander. These strategies inevitably produce

⁸⁷ *Ibid.*, 491.

⁸⁸ *Ibid.*, 492.

⁸⁹ *Ibid.*, 493.

⁹⁰ *Ibid.*, 495.

the effect of an inherent duplicity or capacity for self-deception in the moral character of the female narrator. We cannot begin to 'judge' the fallen woman until she herself establishes for us the hypothesis that she has not 'fallen', a hypothesis which must remain ambiguous and unprovable, since it depends on a retrospective re-opening of the already closed-off possibility that her absent lover will, in fact, return after all.

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