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The Making of the 1959 Obscene Publications Act: Trials and Debates on Literary Obscenity in Britain Before the Case of Lady Chatterley

Anton Kirchhofer

1954 was a remarkable year for literature in UK courts. From provincial magistrates to the Central Criminal Court at the Old Bailey, a series of literary trials on charges of obscenity worried publishers and booksellers alike. The opposition suspected the conservative government of running a campaign against modern avant-garde literature, but this was repeatedly and resolutely denied. The Society of Authors started a campaign of its own, seeking to obtain better legal protection for the freedom of literary expression, and instituted a committee consisting of sixteen authors, public figures and politicians (cf. Herbert 1956: xi). The result of these efforts was a draft bill to amend the Obscene Publications Act of 1857, widely known as Lord Campbell's Act, so that literary works – past and present – as well as their publishers might be safe from the risk of being prosecuted alongside the large quantities of so called 'pure pornography' or 'mere pornography' which were regularly seized and destroyed by the authorities. The need for revised legislation was first suggested to the House of Commons in November 1954, but it took five years and a lengthy and tortuous process, before the 'Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography' was enacted (cf. Obscene Publications Act 1959).

The enactment of the new law has widely been described as the belated advent of literary autonomy in England, the formal recognition of an *exceptio artis*, permitting a defence on the plea of literary merit as well as the inclusion of 'evidence...from experts to support arguments of literary merit' (Dolin 2007: 49). The new law was immediately put to the test in the case of *Lady Chatterley's Lover*, and the ruling which cleared the novel from the verdict

of obscenity has been seen as the crowning moment, in the UK, of a 'long process of juridical and legislative activity' whose result was 'to overthrow bowdlerism and Comstockery, and to enable literature to explore sexuality as readily as any other aspect of social reality' (Dolin 2007: 49). In a similar fashion, David Bradshaw characterizes the trials of 1954 as an 'orgy of banning and burning' (Bradshaw 2013: 138) and suggests that 'the passage of the 1959 Act undoubtedly marks a defining moment in modern British cultural history' (Bradshaw 2013: 156).

Other recent historians have called for greater 'scepticism' towards 'the libertarian suppositions that inform this history when it's told by the lawyers who participated in it' (Glass 2009: 869; cf. specifically Stevas 1956, Rembar 1969, Rolph 1969) and consequently have been hesitant about adopting the 'point of view of a narrative recounting successive steps in a continuing march towards complete freedom of expression' (Ladenson 2007: xvii). Most substantially, Peter D. McDonald (2008) has argued that to understand the Obscene Publications Act (OPA) of 1959 as a landmark event in a narrative of progress and modernization is to ignore its fundamental continuities with the goals, the anxieties and the fundamental assumptions which had already guided the Victorian critics and legislators.

Building *inter alia* on earlier work by Gisèle Sapiro, Kees van Rees, Ralf Grüttemeier, and of course by Pierre Bourdieu (2011), Ralf Grüttemeier and Ted Laros have recently proposed a field-theoretical perspective that might provide a conceptual framework for this question. Calling for a 'comparative approach in reconstructing structural, regional and temporal differences and similarities in the process of the institutional autonomisation of literary fields' (Grüttemeier and Laros 2013: 217), the authors test their hypothesis that '[t]he recognition of the *exceptio artis* in the legal field can be taken to constitute a decisive step in the formation of a relative[ly] autonomous literary field' (Grüttemeier and Laros 2013: 205) in relation to the Dutch literary field, where they find that: 'The moment of the first occurrence of the concept of *exceptio artis* within judicial practice turns [around 1920] out to be a strong and decisive indication of the recognition of the independence of the literary field by the political and juridical elite' (Grüttemeier and Laros 2013: 217).

The following review of the parliamentary process triggered in the UK by the literary obscenity trials of 1954 will not quite bear out the same conclusion. The new OPA indeed indicates the existence of relatively autonomous literary field in the UK, but the final shape in which it becomes law appears in many

aspects incidental and contingent rather than ‘strong and decisive’. The result is contingent on a power struggle in which the participants cannot adequately be classified under the headings of literary ‘autonomists’ v. ‘heteronomists’. It is contingent to an even greater degree, as I will propose, on the underlying conceptions of power that inform the stances of all participants in the debates (and which I will suggest are best captured by reference to the Foucauldian notions of ‘governmentality’ and ‘biopower’). Even when the larger picture is taken into account – the comparison with previous legislative processes concerning obscenity in the mid-nineteenth century and the early twentieth century, as well as the literary trials of the 1960s – the adoption of *exceptio artis* into the 1959 OPA does not seem ‘decisive’: it does not bring a decisive alteration to a situation in which the autonomy of the literary field had traditionally been relatively well-established, though the risk of incidental prosecution on the count of obscenity had also existed, and continued to exist, often in a fairly incalculable, if not statistically predominant fashion.

Before I seek to carry this discussion further (in my final section), I propose to offer a brief factual summary of the five literary cases as well as a survey of the main steps in the prolonged parliamentary process that led to the revised legislation, and go on to single out what appear to me to be some of the remarkable features of these debates.

Five trials and five years of parliamentary debate

Starting in May 1954, five literary works in brief succession, and partly overlapping, faced legal charges on the count of obscenity, leading to court cases whose courses and outcomes varied substantially (cf. Sova 2011 as well as Kauffmann 1988 and the coverage in *The Times* newspaper for the information summarized in the following paragraphs). After Stanley Kauffmann’s *The Philanderer*, a novel about a married, but compulsively promiscuous young man, published by Secker and Warburg in the spring of 1953 (original US publication 1952), was acquitted in July 1954, the second case ended with a conviction. Vivian Connell’s novel *September in Quinze* described erotic entanglements among the international residents of the Côte d’Azur resort Cannes (involving some fierce descriptions of sexual activity featuring, for example, one man ‘savag[ing one woman] with his manhood in the forest of her hair’ or breasts ‘glow[ing] like gourds of love in the moonlight’ [quoted after

Sova 2011: 208]). The novel was indicted at Marlborough Street Magistrate Court in May 1954 and even though both the prosecution and the defence asked for a summary trial by the magistrate, Magistrate Milton committed the case to the Central Criminal Court. The trial at the Old Bailey took place in September 1954, and the publisher Hutchinson and Co., the printer Taylor, Garnett, Evans and Co. and Katherine Webb, director of both companies, were fined £500 each. We may note that expert evidence of a kind had been initially allowed. As *The Times* reported, 'September in Quinze... had been reviewed in conservative and most sober journals. No reviewer had suggested that there was anything in the book to offend against public taste or morals. Mr. MacDermot [the prosecutor] contended that reviews of the book were second-hand opinions and would not necessarily help the jury to form an opinion on it, but the magistrate allowed reviews to be put in as evidence' (*The Times* 1954a). According to Sova (2011: 209), the reviews were however 'disallowed when the case was heard at the Old Bailey'.

The third case attracted attention as a passing embarrassment to the legal system, because it concerned a literary classic. In July 1954, the Swindon Borough Magistrates Court, issued a destruction order for an edition of Giovanni Boccaccio's *The Decamerone* which had been seized along with other materials in a bookshop specializing in obscene publications, but the sentence was overturned by a higher court in September 1954.

In October 1954, the author Walter Baxter, the publishing company William Heinemann and Stewart Frere, one of its directors, were put on trial for obscenity at the Central Criminal Court for publishing *The Image and the Search* (1953), the story of a woman who lost her beloved husband in the war and embarked on an ultimately unsuccessful quest to find another lover like him. After two juries failed to agree, a third trial took place in December 1954, in which the prosecution offered no evidence and the jury returned a verdict of 'not guilty'.

The last novel prosecuted in 1954 was *The Man in Control* by Charles McGraw, the story of a middle-aged widower who marries a young woman and 'then discovers that she is frigid and has lesbian tastes' (Charques 1953: 26), as the *Spectator* reported in its dismissive notice of the book. The publishing company Arthur Barker Ltd., Edinburgh and its director Herbert Van Thal, were found not guilty of 'publishing an obscene libel' by a jury in the Central Criminal Court in December 1954.

A brief review of the trajectory of these trials shows that the first two judges offered highly divergent interpretations of the law and that the juries in each

case followed the indications given by the judges. In the trial relating to *The Philanderer*, the judge stated in his summing up of the case that ‘the literature of the world ... represented ... the sum total of thought of the human mind’, and stressed that ‘[a] mass of great literature was wholly unsuitable for reading by the adolescent, but that did not mean the publishers were guilty of a criminal offence for making these works available to the general public’ (*The Times* 1954a). In the trial against *September in Quinze*, the defence quoted extensively from these remarks. The presiding judge, however, described the book as ‘repugnant to every decent emotion which ever concerned man or woman’ and welcomed the verdict by saying: ‘It is a very comforting thought that juries from time to time take a very solid stand against this sort of thing, and realise how important it is for the youth of this country to be protected and that the fountain of our national blood should not be polluted at its source’ (*The Times* 1954b). The prosecution of Boccaccio’s novellas appears to have been seen as passing embarrassment soon put right again, while the final two trials show that no further convictions can be brought about. One might be tempted to conclude that after an intermittent reaction against the liberalism displayed in the first trial, the uncertainty of the situation manifested itself both in the overeagerness of the Swindon magistrates and in the hung juries of the trial against *The Image and the Search* though the year closed, as it had opened, with the acquittal of a literary work from the charge of obscenity.

But while the situation is still unresolved and the last two cases are still pending, in November 1954 voices were raised in the House of Commons to point out the need to reform the law in order to remedy the uncertainty which was manifesting itself. Lieut.-Colonel H.M. Hyde (the MP for Belfast, North) criticized the ‘anomalies and inconsistencies’ of the present legislation on literary obscenity, where there was one law concerning publishers, printers and authors (and dealing with the criminal offence of publishing an ‘obscene libel’), another law enabling the destruction of obscene books and the punishment of the retailers who stock them, a third and fourth law governing the importation of books through the Customs and the circulation of materials through the Post Office (Hansard 1954). At the core of the critique, however, is the perceived arbitrariness of the legal standard that applies in trials of this kind, and the long (and apparently ineffective) tradition which this critique already has: ‘The Cockburn test is purely speculative. It regards neither the author’s or the publisher’s intention, nor the merit of the work. It is solely concerned with its hypothetical effect on a susceptible reader.’ A reform of the law, making ‘[e]xpert

literary or scientific evidence...admissible', appeared long overdue. Nearly fifty years earlier, '[a]s long ago as 1908 a Select Committee of both Houses considered the question of indecent literature and recommended that evidence of this kind should be considered in the courts' (Hansard 1954).

A long and laborious process is thus set in motion, carried by the energy and determination of a number of individuals over the period of nearly five years. Roy Jenkins, MP for Labour and one of the key promoters of reform, lists among the main achievements of the new legislation that the work as a whole has to be considered, that likely readership has to be taken into account, and that defendant may plead that the publication was in the interest of the public good, and may have this claim supported by expert evidence (cf. Jenkins 1959). But the details of the 'five-year struggle' summarized by Jenkins bring into view a highly precarious process whose course and outcomes depend on a whole array of contingencies. The following summary highlights only a few of the tactical moves and manoeuvres in this process which one of the promoters 'compared to a game of "snakes and ladders"' and whose fuller version can be found in Jenkins's account.

Since the government does not follow up the discussions of November 1954 with any proposed legislation, Roy Jenkins in March 1955 and the conservative MP Hugh Fraser in November 1955 unsuccessfully introduce private members bills. In November 1956, Viscount Lambton's bill is successful and during the second reading in March 1957 expressions of support are so widespread that the government proposes to second the bill and refer it to a Select Committee instead of the standing committee. This Select Committee, appointed to look comprehensively into all issues relating to obscene publications consists of 'a substantial group of convinced reformers, a number of determined "censors" ...and a few neutrals'. It works from May 1957 to March 1958 and produces a compromise in which the 'reformers' had to accept 'the additional powers for which the police had asked' in exchange for securing agreement for 'some of the liberalising provisions' (Jenkins 1959: 65). But late in 1958 there is still no progress. The government shows no readiness to propose legislation on the basis of the published report. None of the twenty MPs who win a place in the ballot on private members bills is prepared to sponsor the bill. Attempts to use the Ten Minute Rule to introduce the bill are blocked twice by objections from conservative back benchers. At this point, Sir Alan Herbert threatens to split the conservative vote at an important by-election and '[w]ithin a week we were offered a debate and with it the promise of an unopposed second reading'

(Jenkins 1959: 65). The government's plan to sabotage the bill in April 1959 by voting out the 'liberalising provisions' in the standing committee while leaving in the 'police provisions' fails, according to Jenkins, on account of the absence of many conservative MPs, which results in an unexpected majority for the reformers. In July 1959, the bill finally passes the House of Lords.

In Roy Jenkins's telling, this is the story of determination and progress prevailing after a long and often frustrating process shaped by a series of contingencies. The progressive principles of a labour backbencher have overcome a conservative government which had been motivated by an outdated fear of moral corruption as much as by a well-founded fear of appearing 'ridiculous to a highly articulate section of the public' (Jarvis 2005: 115), to pay the price of allowing greater autonomy to literature, in order to attain better control of pornography. If we map this opposition on the question of the relative autonomy of the literary field, then we may gloss the term 'reformers' as 'advocates of literary autonomy' and the term 'censors' as 'proponents of heteronomous views of literature'. Jenkins thus carries the political struggle into the literary field, with the labour opposition as the agent of progress and modernization and the conservative government as the agent of regression and heteronomy.

But it is to be questioned, how far Jenkins's account of the successive power struggles, tactical shifts and manoeuvres with highly contingent outcomes really bears out his claim that there is a clear-cut opposition between 'reformers' on the one hand, and 'censors' on the other. Clearly neither of the respective party leaderships takes an actively visible role in the process. Moreover, most of the other 'reformers' have unmistakable Conservative affiliations: Viscount Lambton and Sir Hugh Fraser are conservative MPs, and so is the publisher Nigel Nicolson (though he will not be re-elected later in 1959, after having published Vladimir Nabokov's *Lolita*). Sir Alan P. Herbert, the spokesperson for the Society of Authors in favour of law reform, was an independent MP for Oxford University until 1951 and his 'general political allegiance was firmly Conservative', as quoted above. Norman St. John Stevas, the legal advisor to the Society of Authors, was not an MP at the time though he had stood unsuccessfully for the Conservatives in a safe labour seat in 1951 (and became a conservative MP in 1964, as well as leader of the House of Commons under the government of Margaret Thatcher; on all actors in the process, cf. the respective articles in the *Dictionary of National Biography*).

The 'reformers', then, do not neatly fit the political binary of 'left' and 'right' which Jenkins uses to structure his account; and neither are the representatives

of the government willing to accept the label of ‘censors’: ‘[Roy Jenkins] has ... on occasion described the supporters of the Bill as liberalisers and its opponents and critics as at heart censors’, says the Attorney-General in the final debate on the bill in the House of Commons: ‘I do not put myself in the latter category’ (Hansard 1959a).

We ought to be aware, therefore, that the process that leads to legislative reform in 1959 can neither easily be mapped onto the confrontations between opposing political camps, nor can it always be adequately described as a contention between proponents of greater or lesser autonomy for literature. The adoption of the factors of ‘the work as a whole’, of ‘likely readership’, ‘literary merit’ and ‘expert evidence’ into the legislation on obscene publications is – from the perspective of some actors in the process – the final recognition of literary autonomy and thus the completion of a goal they have long aspired to. It may as much be seen as a concession that some are forced to make against their better judgements, or as a by-product of a parliamentary process that involves various agents and divergent stakes. From the government’s perspective, I will suggest the issue is one they would have preferred not to legislate on, but on which – once they accept new legislation as inevitable – they see themselves as championing the autonomy of literature – over, for example, the economic interests of publishers.

In the following sections I will review of the positions voiced in parliament in the course of these debates and tell the story not by adopting the perspective of one of the contestants, but by looking in some detail at the conflicting positions voiced in the course of the parliamentary process, before seeking to widen the perspective in my concluding analysis.

A consensus on the need to suppress pornography

If there is one point, on which all participants in the debates on obscene publications appear to be in fundamental agreement, it is that pornography ought to be suppressed. The debates are characterized by ‘a general consensus of opinion, as much on the part of those who support the Bill as those who oppose it, that the Bill must be sufficiently armed to deal with mere pornography’ (J.E.S. Simon, Joint Under-Secretary of State for the Home Department, Hansard 1957). Whatever we may surmise about the degrees of sincerity on the part of individual MPs, there are no explicit expressions of disagreement from this goal.

The idea that sexual excitement in itself is inoffensive and that consequently materials which are conducive to sexual stimulation are similarly inoffensive as long as they contain nothing else which constitutes an offence (an idea which proved central to the ruling in the US trials against *Fanny Hill* in the 1960s, cf. Ladenson 2007), never remotely enters the horizon in these debates. The chief concern is how pornography can be suppressed effectively, and much casuistry is expended on anticipating potential abuses of well-intentioned revisions and on preventing the inadvertent creation of 'new loopholes' for pornography (cf., e.g., the extensive discussions about the terms 'matter' v. 'an article' during the final reading in the House of Commons, Hansard 1959a; cf. also the revisions of the OPA of 1964, which were designed to close the 'loopholes' left by the Act of 1959, cf. Williams 1965).

As McDonald (2008) has noted, this position is in unmistakable continuity with the paternalistic concerns of Victorian legislators seeking to suppress pornography in the interest of safeguarding the moral well-being of the population. Nor is this view limited to those whom Jenkins has classified as 'censors'. Even the celebrated summing up in the *Philanderer* case uses this point. Justice Stable warns the jury, that a conviction could provoke a radical reform that might create openings for genuinely pornographic materials: 'If we drive the criminal law too far, in our desire to stamp out the "bawdy muck", isn't there a risk that there will be a revolt, a demand for a change in the law, so that the pendulum may swing too far the other way and allow to creep in things that at the moment we can keep out?' (Stable 1957: 283; cf. also Rolph 1969: 103) Such advocacy makes the *exceptio artis* appear like a concession whose purpose it is to protect the ulterior goal of suppressing pornography.

Recognizing the uncertainty of the legal framework of literature

There is widespread agreement, too, among members of parliament and government representatives participating in the debates that the legal situation as it stands in the mid-1950s creates a substantial degree of uncertainty for individual literary publications. But there is disagreement about how to reformulate the law so that it will provide greater certainty, and whether it will be possible to do so at all.

In introducing the Bill at its second reading in March 1957, Viscount Lambton deplores this lack of consistency. He evokes the contradictory interpretations of the law which had guided the several judgements in the cases of *The Philanderer* and *September in Quinze* and concludes that 'the law [is] uncertain', and 'judgments [are] dependent upon the whim of the judge' (Hansard 1957).

The voices disturbing this consensus do not advocate a heteronomous view of literature. Instead, they point out the difficulty of remedying this uncertainty. In a previous debate, Sir Beverley Baxter (Southgate) had expressed 'sympathy' for the reformers, but had also struck a note of scepticism, warning that 'there are some problems for which there is no solution. It seems to me that this question of censorship and the clarification of the law of obscenity is so complex and confusing that the Bill will only add to the present mess' (Hansard 1955).

In addition, opponents of legal reform question the magnitude of the problem. In the debate on 29 March 1957, only one member (Dudley Williams, Exeter) voices a sceptical attitude. Reviewing the literary obscenity cases of the past decades Williams concludes that the number of questionable prosecutions had been relatively small and that all important works which might have been initially banned or withheld had since become available. In relation to the trials of 1954, his view is 'that no serious harm was done by those five prosecutions' (Hansard 1957), and moreover that the legal system itself has proved capable of correcting its mistakes, as the destruction order issued against the *Decamerone* showed. After all, he argues, 'that decision was put right by the machinery of the law when the case was taken on appeal to the Wiltshire Quarter Sessions', and concludes: 'Surely, if a mistake is made by a bench of magistrates, it does not necessarily prove that there should be an alteration to the law of the whole country' (Hansard 1957).

Even though Jenkins reproaches Williams for his 'complacency' (Hansard 1957), the course of the debates shows that along with the praise for their laudable goals, the proponents of reform have to face the fact that the legal detail of their proposed revisions carries the danger of 'adding to the present mess' rather than solving it.

Proposing and abandoning the criterion of intention

One of the most prominent differences between the initial bill and the one finally enacted consists in the fact that the explicit use of intention in the bill was entirely abandoned. In the original proposal for revised legislation, the question

of intention is one of the paramount elements. The promoters see the fact, that intention has not played an explicit role in the legal consideration around obscene publications, as one reason for the difficulties they try to remedy. At its first presentations in 1955 Roy Jenkins describes the Bill as ‘a liberalising measure which would give greater security to *works of good intent*’ [my italics, AK], and expresses his belief ‘that if we act on the basis of intent it will be possible to give a greater security to valuable literary work without in any way opening the gates to a stream of pornographic publications, and I believe that we can put the law on a clearer and more sensible basis’ (Hansard 1955). His position received a fair degree of support among MPs in this as well as in subsequent debates. ‘I welcome the provision in the Bill which makes the intention of the author or publisher an ingredient of the offence,’ declared MP Anthony Kershaw in the debate on 29 March 1957. ‘That absence of intention at present is a very serious defect’ (Hansard 1957).

The promoters of the bill have to concede, however, ‘that it is difficult to prove in law that a publisher or author intends to corrupt by what he publishes’ (Viscount Lambton, Hansard 1957). But ‘[e]ven this Bill could not be said to make impossible the prosecution of reputable publishers and authors for obscene intentions which never entered into their minds’, says one of its supporters, Nigel Nicolson (Hansard 1957). In the interest of practicability, the reformers settle for ‘guilty knowledge’ as a more limited and specific version of intentionality (Hansard 1957). The Report of the Select Committee contains an argument advising against the inclusion of the term ‘guilty knowledge’ (Select Committee Report 1958b: xi) and the bill as it is finally enacted makes no explicit reference to the aspect of intention.

The (non)existence and the (un)desirability of censorship

Some of the most remarkable exchanges in these debates arise when the topic of censorship is addressed. Roy Jenkins is surely right in pointing out, that the ‘five-year struggle’ for the new act ‘has been illuminating ... about British attitudes to censorship’ (Jenkins 1959: 63), but this is so not least because the positions of the different participants tend to undermine the binary arrangement into ‘censors’ on the one hand and ‘reformers’ on the other, that Jenkins has suggested.

From the beginning, the government is emphatic in its commitment to the freedom of literature. In the first debate, the Home Secretary insists that it is essential to a free country, as ‘one aspect of the freedom of speech generally’

(Hansard 1954), and that consequently there is no place for any censorship of literature. At the same time, it is the sense of an incalculable and unofficial censorship hanging over all UK literature without being definitely graspable, that constitutes a central motivation behind the wish to revise the law. As Viscount Lambton points out in presenting the bill in 1957, there is a perception that 'publishers and printers had been so uncertain of the law that they were imposing upon authors a censorship which could be far stricter than any which the law could enforce' (Hansard 1957).

Concrete examples for the effect and the extent of this unofficial censorship are comparatively hard to come by. In the course of the Select Committee meetings, Lord Lambton asks the authors E.M. Forster and T.S. Eliot if they have 'ever been restricted in [their] writing by the present law' (Select Committee 1958b: 17). T.S. Eliot offers an unhesitating 'No' and goes on to discuss the past case of *Ulysses* which is no longer controversial, while E.M. Forster suggests in very general terms that '[s]ome authors – I will not say Mr. Eliot or myself – are inhibited by the harsh and at present uncertain position of the law as regards obscenity' and that 'many of them wish to introduce scenes or phrases and hesitate to do so in case they get into trouble' (Select Committee 1958b: 18).

While the authors who may have feared or suffered censorship do not wish to say so, the representatives of the law themselves do not wish to be considered as censors, even though the current situation makes this position difficult to maintain. Anticipating the Attorney-General's rejection of the label (cf. Hansard 1959a) by a year, Mathew Theobald, the Director of Public Prosecutions had declared in his memorandum to the Select Committee: 'I should strongly deprecate my Department being placed in the position... of being a literary or moral censor' (Select Committee 1958a: 25). Questioned by committee members, he is nevertheless compelled to concede that 'to [a] limited extent the office of the Director of Public Prosecutions is a censorship department'.

The intricacies of the issue of censorship do not stop here, however. Instead of objecting to censorship, the questioner suggests that, in order to be performed properly, censorship requires expertise: 'I think it is alarming that you as a semi-censor, if we can discover a censor anywhere in the whole cosmogony of the legal and police services, can do these things and can pass such a book [as *Ulysses*, AK] merely because, as you have admitted, you found it completely unintelligible' (Select Committee 1958a: 33). In the end, the reluctant censor admits that he would gladly be relieved of this role and its attendant difficulties: 'I should welcome, as Director of Public Prosecutions, obviously, any other form

of censorship authority who could deal with these matters before coming to me' (Select Committee 1958a: 40).

While the gist of the questions throughout this exchange is to demonstrate the desirability of establishing a board of literary experts who could arbitrate on literary works prior to their publication (as is the case elsewhere in the British Commonwealth), and while the Director of Public Prosecutions might be glad to leave responsibility to such a board, the authors make it clear in the Select Committee that they unequivocally reject this idea. 'Would you like to see literary men, both authors and publishers, pass judgment before the courts pass judgment, on books which fall on the borderline? In other words, ... would you like to see a board of people, like yourselves perhaps, ... giving advice to the Director of Public Prosecutions?' one questioner suggests. To which E.M. Forster replies: 'I should not like to see it at all' (Select Committee 1958b: 20). Instead, the authors advocate greater tolerance along with a minimum of legal interference in all doubtful cases. T.S. Eliot suggests in his concluding statement 'that really obscene literature is fairly easily identifiable to any person of education, intelligence and some sensibility', so that problems only arise with respect to 'certain border-line cases one way or the other' and that in these cases, decisions 'should be in favour of laxity rather than of strictness' (Select Committee 1958b: 21).

The publishers' representatives, however, find it harder to abandon the idea of consistency through censorship. In the parliamentary debate on the Report, Nigel Nicolson, a conservative MP and member of the select committee, as well as a partner in the widely respected publishing house Weidenfeld and Nicolson, declares that it 'would be quite wrong to imagine that the publishing profession is against a censorship' and mentions two reasons. Firstly, 'it demands a censorship, because it shares with all hon. Members who have spoken in the debate a desire to eradicate pornography'. Secondly, '[i]t wishes to publish works which it considers contribute towards the stock of literature. It does not wish to be deterred from such publications by the fear of a law which in the opinion of every enlightened person is already out of tune with public opinion' (Hansard 1958).

In this situation it falls to the government representative, in this case the Home Secretary R.A. Butler himself, to reiterate the unequivocal rejection of a censorship of literature. Censorship 'has been adopted in one way or another for the theatre and the cinema, but I would most violently rebel at the idea of a censor or board of censors applying his or its activities to literature and art. It

would not only be complex, but utterly unacceptable in a free country' (Hansard 1958). The autonomy of literature is then asserted in the strongest terms by the government, and from this commitment arises the task of defining the scope of the *relative autonomy* of literature by casting it in effective legal form – even though the question to what degree it will be possible to reconcile the dual goals of safeguarding the population from moral corruption and safeguarding the progress of literature, remains open. It is the conflict between these two goals that creates the difficulty of 'trying to find a limit for the law' on the one hand, and 'trying to make it ... effective in this very difficult matter' on the other (R.A. Butler, Home Secretary, Hansard 1958).

Even in the final draft of the bill, the promoters of legal reform seek to involve the Director of Public Prosecutions in all prosecutions on the count of obscenity, in order to ensure greater consistency in the legal practice. The government representatives oppose this on the grounds of a principal opposition to literary censorship. In the debate on the bill, the attorney-general, warns that in effect the Director of Public Prosecutions 'will be asked by publishers to operate a kind of censorship' (Hansard 1959a), and in the end, the Clause is dropped.

As a consequence, 'borderline' cases will still be decided by the courts, even if the defences of the public good and of literary merit, on which experts may be called to testify, are now available. To this extent, the institutional autonomy of literature has no doubt been strengthened. But the debates about censorship have shown two additional and significant points: On the one hand, the promoters of legal reform appeared to be ready to make the literary field more heteronomous for the sake of establishing greater consistency. And on the other hand, the absence of an *exceptio artis* clause in obscenity legislation has been quite compatible with a principal recognition of the autonomy of literature.

Conclusion: 'Adding to the present mess'? Protecting public morality and the *exceptio artis* in 1857, 1908 and 1959

Looking back over the process of legal reform, one might be tempted to agree with the MP who warned 'that this question of censorship and the clarification of the law of obscenity is so complex and confusing that the Bill will only add to the present mess' (Hansard 1955). The difficulty of encoding literary autonomy in legal terms is indicated clearly by the abandonment of the criterion of intention along the way, as well as by the fact that the proponents of the bill

were prepared to place the Director of Public Prosecutions in the position of a quasi-censor in order to remedy the inconsistencies of the legal situation, while the government opposed this on the grounds of practicability as well as of an emphatic commitment to the autonomy of literature. Clearly the protection of literature from interference by extra-literary institutions was a 'complex' matter.

This point is made late in the final debate on the bill in the House of Commons, which is about to conclude with a series of congratulations extended to Jenkins and the supporters of the Bill when one speaker rises to express his utter incomprehension of the core provisions of literary merit and expert evidence:

[W]hat has been said to be the main improvement in the Bill is not... understood by anyone.... Mr. Roy Jenkins... was in favour of... experts... sometimes because he thought that their evidence might go to upset what would otherwise be *prima facie* obscene, and sometimes... because even if the article were obscene, if the experts thought that it had sufficient literary value it would not be interfered with. That is the deepest thing in the Bill. I have heard not a word about it today. We have not heard a word about it on the Floor of the House either before today. What was the intention of the Bill... on that point I do not know. What is the intention of hon. Members opposite or the Solicitor-General at the moment, I do not know, and if I knew both those things I should not have the least idea what the effect is going to be. (Hansard 1959a)

No one replies to this speech; instead Hansard drily records the conclusion of proceedings: 'Bill... read the Third time and passed' (Hansard 1959a).

As Peter McDonald (2008) has noted, the OPA of 1959 does not ultimately address this central issue whether something can be obscene and literature at the same time. It places an ultimately unfounded confidence in critical expertise: '[N]o expert witness could ever give an incontrovertible answer' to the questions 'What is obscenity? What is literature?' because literature 'constitutes a labile, even anarchic space', rather than being 'a determinate object nor, indeed, an incontestable "public good"' (McDonald 2008: 301). A similar point had been made by T.S. Eliot in the course of the Committee hearings, and as Roy Jenkins records, 'gave some ammunition to those who were against "expert evidence"' (Jenkins 1959: 65) by doing so. What is at stake here, is the role of literature in modern or modernizing societies, and the question to what extent it is part of this role to challenge existing conditions by transgressing norms – and hence to what extent literature needs to retain the capacity to enter into conflict with existing norms (cf. Levine 2007).

In a larger historical perspective, I suggest that the issues around literature and obscenity are best understood in relation to what Michel Foucault has called 'bio-power' (Foucault 1978: 140; cf. also Hunter, Saunders and Williamson 1993: 135–48). They are effects of a conception of power which links the legitimacy of exercising power to the goal of fostering, promoting, nourishing the lives of citizens. In fact, what emerges from the debates on obscenity, pornography and literature is the existence of conflicting goals which can nevertheless be traced to a common source. Problems of literary obscenity arise, wherever – and as long as – the goal of safeguarding the moral well-being of the population by the suppression of pornography comes into conflict with the – equally biopolitical – goal of protecting literature and creating the best possible conditions for a flourishing national literature. For a long time, politicians have recognized both goals, but placed the legislative focus exclusively on the former goal. The conflict between the two goals is preserved by the OPA of 1959, which retains the general idea that politics must protect the population against materials that have a tendency to deprave and corrupt; it all but disappears when this idea is partly abandoned and partly refocused on other (mainly visual) materials and media. This shift definitely changes the conditions under which literature is practiced, but it occurs in the field of what Foucault has called 'power-knowledge', and it concerns the relationship in which sexuality is thought to stand with the moral well-being of the population. It is as an effect of this shift, that the two bio-political goals – that of creating conditions in which the moral well-being of the population will be ensured and that of creating conditions in which the literature of the nation will prosper – whose conflict produced the political and juridical dilemmas, for example, in the literary trials of 1954, have largely lost their specific potential for conflict.

This proposition also enables a perspective on the conflicts and confrontations in the wider legal history of obscenity in the nineteenth and twentieth centuries. As in the entire course of the process of the 'governmentalisation of the state' (Foucault 1991: 104), not all politicians have readily accepted or contributed to the acceptance of responsibility for more and more areas of social, personal and biological life by the institutions of the state. There was resistance to the suggestion that the production and distribution of obscene publications needed to be policed or prosecuted, just as there was resistance to the idea that a legal provision was required to safeguard literature from such prosecution. And there has been the view that the absence of legal provisions might be the better way

of creating conditions in which a particular aspect of human life or creativity might flourish.

In 1857 there is resistance to the idea that there should be a law against obscene publications, and part of this resistance is motivated by the potential damage that might be done to literature by such a law. In 1959, in the House of Lords, this resistance is evoked in the debates on the Obscene Publications Bill:

In this House the Bill [of 1857] was very strongly opposed, notably by Lord Lyndhurst, who made a speech which is still most interesting to read, and by Lord Brougham, and the objection which they made is one that has been raised almost ever since. They said that the Bill was too severe, in that it would injure the true interests of literature; and they cited the classics, Rochester's poems, plays of Wycherley and Congreve and so on. I mention the point for this reason. Lord Campbell said in this House: 'It is not within my most distant contemplation that works of literature should be affected by this Bill at all. This Bill is aimed exclusively at those who have the single purpose of corrupting the morals of youth or of shocking the conscience of reasonably minded people.' In a word, my Lords, the Bill of 1857 ... a Bill aimed at pornography ... I do not suppose that anywhere in this House there is a noble Lord who would not be extremely keen that the strongest possible measures should be maintained in our law against pornography of that kind. (Hansard 1959b)

As the conclusion of this quotation shows, the dilemma arising from the potential conflict between two biopolitical goals exists in 1857 in very similar terms as in 1959. It shows as well, that in some form the recognition of literary autonomy was widespread even among Victorian legislators. It shows, finally, that no one saw the need or the possibility to codify this recognition of literary autonomy in legal terms.

The findings of a Select Committee appointed in 1908 in order to look into 'lotteries and indecent advertisements' as well as the obscene literature associated with these in popular print media, present a similar picture. As it is supposed to do, the committee devotes its energies overwhelmingly to questions concerning 'lotteries and indecent advertisements'. The forty-sixth and final recommendation it makes in its report, however, states:

A provision should also be inserted to exempt from the operation of the Act any book of literary merit or reputation or any genuine work of Art. The Committee consider that it would be almost impossible to devise any definition which would cover this exception. In their opinion the decision in such cases should be left to the discretion of the Magistrate; but they believe that, if a provision such

as they recommend were inserted into the Act, a Magistrate would be enabled to take into consideration all the circumstances of the case, and would be free from a supposed obligation merely to decide upon the decency or the indecency of the particular literary or artistic work brought to his notice. (Select Committee 1908: ix)

This recommendation was not followed up, but it is brought up early in the parliamentary debates in the 1950s, where the government representative, Sir Hugh Lucas-Tooth, uses it as an argument for the difficulty of devising any legal provision that would effectively make the *exceptio artis* operational. 'As an expression of ideal opinion, that recommendation was admirable and would, I think, be agreed in all parts of the House,' he declares, 'but it is equally clear that the Committee itself was quite satisfied that, beyond expressing the ideal, it was unable to suggest any method by which it could be carried out' (Hansard 1954).

This examination of the moves, issues and positions in the parliamentary debates which have led to adoption of such a 'method' has clearly illustrated the difficulties involved in the legal recognition of literary autonomy. Moreover, it has demonstrated that there were other threats to literary autonomy involved here than the well-known ones posed by the bio-political imperative of governmental responsibility for the moral well-being of citizens, as well as by the inconsistencies of legal practice. Specifically there was the threat of instituting one of several varieties of pre-publication censorship that would reduce the economic risks for publishers while reducing the options that authors had as part of the contingent process of getting a work that might be considered 'borderline' in the parlance of the time published. If the OPA of 1959 brought to literature a limited increase in institutional autonomy, the process of making it can also serve as an illustration of the significant degree of literary autonomy that had existed long before its enactment. While legislators as a body accept the integration of external expertise into the legal discourse when they see that there is no longer any alternative to doing so, they also resist any moves – even on the part of the reformers – that might work to reduce the autonomy of literature.

References

- Baxter, W. (1953), *The Image and the Search*, London: Hutchinson.
 Bourdieu, P. (2011), *The Rules of Art: Genesis and Structure of the Literary Field*, Cambridge: Polity.

- Bradshaw, D. (2013), 'American Beastliness, the Great Purge and Its Aftermath (1946–1959)', in D. Bradshaw and R. Potter (eds), *Prudes on the Prowl: Fiction and Obscenity in England, 1850 to the Present Day*, 138–58, Oxford: Oxford University Press.
- Charques, R.D. (1953), 'New Novels', *Spectator*, 27 November: 26.
- Dolin, K. (2007), *A Critical Introduction to Law and Literature*, New York, NY: Cambridge University Press.
- Foucault, M. (1978), 'Right of Death and Power over Life', in *The History of Sexuality: An Introduction*, tr. R. Hurley, 133–59, London: Penguin Books.
- Foucault, M. (1991), 'Governmentality', in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, 87–104, London: Harvester Wheatsheaf.
- Glass, L. (2009), 'The Ends of Obscenity', *American Literary History* 21(4): 869–76.
- Grüttemeier, R. and T. Laros (2013), 'Literature in Law: *Exceptio Artis* and the Emergence of Literary Fields', *Law and Humanities* 7(2): 204–17.
- Hansard (1954), 'Obscene Publications', HC Deb 22 November 1954 vol 533 cc1012–20.
- Hansard (1955), 'Obscene Publications Bill', HC Deb 25 November 1955 vol 546 cc1883–92.
- Hansard (1957), 'Obscene Publications Bill', HC Deb 29 March 1957 vol 567 cc1491–581.
- Hansard (1958), 'Obscene Publications', HC Deb 16 December 1958 vol 597 cc992–1051.
- Hansard (1959a), 'Obscene Publications Bill', HC Deb 24 April 1959 vol 604 cc803–57.
- Hansard (1959b), 'Obscene Publications Bill', HL Deb 02 June 1959 vol 216 cc489–531.
- Herbert, Sir A.P. (1956), 'Introduction', in N. St. J. Stevas, *Obscenity and the Law*, xi–xvii, London: Secker and Warburg.
- Hunter, I., D. Saunders and D. Williamson (1993), *On Pornography. Literature, Sexuality and Obscenity Law*, London etc.: Macmillan.
- Jarvis, M. (2005), 'Obscenity and Pornography', in *Conservative Governments, Morality and Social Change in Affluent Britain*, 113–22, Manchester: Manchester University Press.
- Jenkins, R. (1959), 'Obscenity, Censorship, and the Law: The Story of a Bill', *Encounter* 13(4): 62–6.
- Kauffmann, S. (1988), 'Album of Obscene Libel', *Grand Street* 8(1): 176–85.
- Ladenson, E. (2007), *Dirt for Art's Sake*, Ithaca, NY etc.: Cornell University Press.
- Levine, C. (2007), 'Obscenity and the Democratization of Culture', in *Provoking Democracy: Why We Need the Arts*, 103–45, Malden, MA: Blackwell.
- McDonald, P.D. (2008), 'Old Phrases and Great Obscenities: The Strange Afterlife of Two Victorian Anxieties', *Journal of Victorian Culture* 13(2): 294–302.
- Obscene Publications Act, 1959*, 7 & 8 Eliz. 2 CH. 66, London: Her Majesty's Stationery Office.
- Rembar, C. (1969), *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer and Fanny Hill*, London: Deutsch.

- Rolph, C.H. (1969), *Books in the Dock*, London: Deutsch.
- Select Committee on Lotteries and Indecent Advertisements (1908), *Report from the Select Committee on Lotteries and Indecent Advertisements Together with the Proceedings of the Committee, Minutes of Evidence and Appendices*, HC 1908 (275), London: Her Majesty's Stationery Office.
- Select Committee on Obscene Publications (1958a), *Minutes of Evidence Taken before the Select Committee on the Obscene Publications Bill, and Appendices, in Session 1956–57*, HC 1957–58 (122), London: Her Majesty's Stationery Office.
- Select Committee on Obscene Publications (1958b), *Report from the Select Committee on Obscene Publications, Together with the Proceedings of the Committee, Minutes of Evidence and Appendices*, HC 1957–58 (123), London: Her Majesty's Stationery Office.
- Sova, D.B. (2011), *Banned Books: Literature Suppressed on Sexual Grounds*, 3rd ed. New York, NY: Facts On File.
- Stable, Mr. Justice (1957), 'The Summing Up by Mr. Justice Stable', in S. Kaufmann (ed.), *The Philanderer*, 273–83, Harmondsworth: Penguin.
- Stevas, N. St. J. (1956), *Obscenity and the Law*, London: Secker and Warburg.
- The Times* (1954a), 'Judge on Role of the Novel', 3 July: 4.
- The Times* (1954b), 'Obscene Libel in Book', 18 September: 3.
- Williams, D.G.T. (1965), 'Obscene Publications Act, 1964', *Modern Law Review* 28(1): 73–6.