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Literary Trials as Mirrors. An Introduction

Ralf Grüttemeier

The history of literary trials may have started 2,500 years ago with a case reported by Herodotus (6.21), only one or two years after the destruction of the Ionian city of Miletus – a colony of Athens – and the deportation of its inhabitants by the Persians in 494 BC. The drama writer Phrynichus turned these events into a tragedy that was performed in Athens around 493/2 BC. Unfortunately, we do not know the text of this play. But what we do know is that the whole theatre burst into tears while watching. For this reason Phrynichus was fined and the drama was forbidden ever to be performed again, Herodotus tells us (cf. Wilson 2000: 115–16). In our sources, there is no evidence that Phrynichus was punished for an individual message, for example concerning politics against Persia. Phrynichus' reputation and position seem not to have suffered, if we go by the list of plays attributed to him after the trial: he was still asked to contribute to the feast of the Dionysia and did win the competition. Nor did he change his ideas about playwriting fundamentally, since some ten years later, he returned to the 'contemporary mode' in *Phoenician Women* – in opposition to the dominant mythological mode as of for example Sophocles' *Oedipus* (cf. Cartledge 1999: 24). Apparently Phrynichus had not been convicted for using real historical topics in his drama but for approaching too directly a specific aspect of historical reality, here: the still fresh Athenian trauma of the deportation of the closely related inhabitants of Miletus, thus making the public consider and emotionally respond to this event. Or, in the words of Herodotus, he was punished 'for reminding the Athenians of troubles close to home (*oikeia kaka*)' (cit. Wilson 2000: 115). Obviously, Phrynichus had neglected 'the safe distance' that makes intense emotion in a tragedy pleasurable and valuable for the audience (cf. Finkelberg 1998: 179; Wilson 2000: 115). What the trial in the end sanctioned was the disorder caused during the sacred ritual and public feast of the Dionysia to which the performance of the tragedy contributed. Through the sanctions imposed (heavy fine for Phrynichus, eternal ban on the

drama), order was sufficiently restored – at least we do not know of any further consequences.

For *law and literature* scholars nowadays, this is a strange world: a whole theatre bursting out in tears of grief during a performance, and a court punishing exactly that, while after the verdict, author and theatre-world immediately back to business as usual. At the same time, this world is still close enough to ours to conceptualize the event, notably: as a trial in which the contemporary legal system negotiated what is societally acceptable in what we would now call art or literature. In this sense, a line of continuity can be drawn from fifth century BC Athens to our days concerning the long history of the phenomenon of literary trials.

More specifically, the Phrynichus trial can function as binoculars as well as a mirror – telling us something about the institutional status of literature and the theories about literature in times and places that are not ours, within and outside a legal context, some 2,500 years ago. At the same time, exactly because of the analogies and the differences, contrasting this legal conflict with present day literary trials we can see both sides of the comparison more clearly, including the possibility to re-think the corresponding practices in contemporary times and places. Trying to make use of these two heuristic functions of literary trials is, in a nutshell, what this book is about.

Let me specify this point with a reference to a trial that recently attracted international news coverage, i.e. the one against Antwain Steward, aka Twain Gotti, for double murder, in Virginia, USA, in May 2014. The widespread media attention was caused by a judicial practice in the preparation of the trial: the use of rap music lyrics as evidence. The use of this kind of evidence can be retraced to the 1990s. Lyrics like: ‘B— made me mad and I had to take her life/My name is Dennis Greene and I ain’t got no f—ing wife’ or ‘Key for Key, Pound for pound I’m the biggest Dope Dealer and I serve all over town’ (cf. Dennis 2007: 6 *et passim*) have been read literally and as autobiographical statements by the prosecution. Similarly, in the 2014 Virginia case, parts of the preliminary investigation had been directed at Gotti’s lines ‘Everybody saw when I motherfuckin’ choked him/ But nobody saw when I motherfuckin’ smoked him.’

To the surprise of many, however, in the end, the prosecution avoided going into lyrics during the trial itself. This was probably not in the last place due to the fact that the scholar Erik Nielson was waiting in a hotel nearby ready to be called into court as an expert witness. Nielson’s position in these cases is clear: for him and other expert witnesses, the present judicial use of rap lyrics is ‘judicial abuse’

(Kubrin and Nielson 2014: 185), at least when the lines are read literally and autobiographically. Instead, rap music lyrics should be treated 'as an art form whose primary purpose is to entertain'. Rap requires from the 'aspiring artists to create a persona worthy of respect in the rap community', a process staged within 'record industry conditions that often push would-be artists toward violent themes' (Kubrin and Nielson 2014: 186, 195). Consequently, the debate about the judicial use of rap lyrics is seen by Kubrin and Nielson as a 'battle' between judicial practices on one side and lyrics on the other as an art form that is not adequately interpreted. From their perspective, the troops in this battle might be characterized as uninformed, uncomprehending judicial experts contributing to institutional racism, fought against by cultural experts with an affinity to new art forms. Or, more generally speaking, as a battle between law and art. There can be no doubt on which side Kubrin and Nielson stand in their fight for giving rap lyrics a special status within jurisprudence. Their effort is about making clear that this kind of lyrics needs trained experts for their interpretation, as for example Nielson himself – a teacher of courses on hip-hop culture at the university of Richmond.

Such an agenda directed against retarded legal structures and practices in the name of the arts can, on an institutional level, be seen as a fight for more autonomy of the arts and literature within the law. In this respect, Kubrin and Nielson are typical for what much scholarship in the field of (pre-publication) censorship and (post-publication) literary trials are working towards. One of the classical books in the field, Edward de Grazia's (1993) *Girls Lean Back Everywhere*, for example presents its author in exactly this way: 'he continues to work for the expansion of literary and artistic freedom'. That fighting for autonomy, however, is *not* at the core of the present book, neither as its starting point, nor as its aim. What *is* at the core of this book on the judicial dealings with literature in court rooms and other legal contexts is the idea that these conflicts can be used as an analytic tool to gain insights into the basic rules and conditions guiding these clashes around literature and art within the arena of the law at specific times and places.

The literary expertise on literary trials in the present volume will be used – *nota bene* by literary scholars – to address questions like: What is the institutional position of literature and the arts within a specific societal context at a specific moment? What theories of literature turn out to be dominating in the conflicts at specific moments, among literary as well as among non-literary experts? What conventions and poetic values can literary scholars detect in the verbal

behaviour of legal experts – ideas the latter may or may not be aware of? And what institutional explanations can be given for scholars who do take sides in what they see as a battle for ‘the expansion of literary and artistic freedom’?

As will be clear by now, the book is not aiming at juicy stories about sleeping judges and ridiculous prosecutors. Instead, the questions above will be used to establish a framework for the analysis of the discussions in and around literary trials between and within literary and legal scholarship – a framework directed too at explaining the open ridicule mentioned above, which can be found in quite some work on the matter by literary scholars. Following that route, a more adequate possibility of reflecting on the judicial clashes around literature might be within reach.

International comparison, history, institutions

The following essays together form a book that opens up a three-dimensional space along the axes of international comparison, history and institutions. Essential for the profile of the volume is, first of all, the *international dimension*: the book brings together specialists from different national traditions who have been working on literary trials. These scholars present a wide range of European countries, including some of the largest. The French case is treated by Gisèle Sapiro. A global picture of literary trials in Britain is drawn in three complementary essays by Anton Kirchhofer, Peter McDonald and Martin Kayman. Ralf Grüttemeier’s and Claudia Lieb’s contributions try the same for Germany, with Lieb also touching briefly on Austria and the European Court for Human Rights (ECHR). Sylvia Sasse deals with literary trials in the USSR, Czechoslovakia and today’s Russia. In other contributions, smaller European nations are at the centre of the essays. Klaus Beekman addresses trials in the Netherlands and Katharina Hupe deals with the basically bilingual (Dutch and French) Belgium. The set of objects is completed with a non-European point of reference: Ted Laros looks at cases of South African literary trials.

Of course such a list of topics gives an arbitrary impression – as any list would do that does not involve all countries in the world republic of literature. Let me therefore stress again that the choice of contributions in the present volume has not been one along lines of languages or countries. It has been a choice for international specialists in the field of research on literary trials. By bringing together these specialists, the volume, as a whole and in its parts, is deliberately

intended as an invitation to transfer the structural questions pursued here to countries that are not treated in this volume. In that sense, the contributions should be regarded as stimulating examples for further research elsewhere – which does not mean of course that the characterization of one country can be simply transferred to another. In fact, one conclusion of this volume is that research on literary trials can only yield results if the very different legal and literary traditions and practices in a specific national or supranational context are taken into consideration.

The *historical axis* is the second dimension of the picture of literary trials drawn here, providing the general context of a certain national tradition and historical specificity in and around the trials analysed. There are two contributions that give a more or less complete historical overview of literary trials in one country. There is the opening essay by Sapiro who tells the story of 200 years of trials in France. She uses the opening of a new liberal era for the book market by the Bourbon *Charte constitutionnelle* of 1814 as a starting point and touches on, among others, the famous Flaubert and Baudelaire cases and the purge trials after 1945, up to the 2013 trial against Christine Angot, accused of defamation with her novel *Les Petits*. Laros does something similar for South Africa from 1910 to 2010, where only a very limited number of cases have been taken to court. Included are for example the English language case against Wilbur Smith, the Afrikaans language case against André Brink and the measures taken against Salman Rushdie's *Satanic Verses* in post-apartheid South Africa.

The other contributions generally focus on specific trials or shorter historical periods. These cases however are always put into a wider historical context, so the readers get at least a global idea of the history of literary trials in these countries over the last one or two centuries. Beekman focuses on Dutch legal actions against obscenity in literature, theatre and film in the 1960s and 1970s, framed by the most important Dutch literary trials from 1920 to 2001. Hupe deals with the recent 1999–2000 trial against the Flemish writer Herman Brusselmans for insulting the famous fashion designer Ann Demeulemeester in a novel, analysed against a background of trials that includes among others the 1900 trial in Bruges against Camille Lemonnier. The contribution by Sasse draws the picture of literary trials in what was called the Eastern Bloc with the focus on the 1960s and 1970s, showing their roots in post-revolutionary USSR and lines of continuity up to the 2012 Russian trials against Pussy Riot. The two contributions dealing with Germany depart from one specific case respectively:

Lieb analyses the 1895 Munich blasphemy trial against the writer Oskar Panizza and Grüttemeier the 2003–9 defamation case against Maxim Biller. Both papers taken together facilitate recognizing the first brushes of a general picture of the history of literary trials in Germany from the foundation of the *Deutsche Reich* in 1871 up until today.

In a similar way an overview is given by the three contributions dealing with the UK, stretching from the mid-nineteenth century (1843 Libel Act and 1857 Lord Campbell's Obscene Publications Act) via the famous 1960 *Lady Chatterley's Lover* trial to contemporary entanglements of law, literature and arts. In this triptych, Kirchhofer dives into the discussions leading to the 1959 Obscene Publications Act while McDonald takes a 2008 *Guardian* satire accused of defamation of Elton John as the focal point for his analysis taking him into the long history of libel. The essay by Kayman visits several signposts – the relative dearth of trials after the 1960 *Lady Chatterley* trial; *The Satanic Verses* as the most notable trial *not* to take place in the UK; the introduction of the Racial and Religious Hatred Act in 2006; and the abolition of the blasphemy laws in 2008 – which, taken together, point literary and legal scholars towards the contemporary diagnosis of 'secular law's nervous negotiation of its relations with the sacredness of religious belief in multicultural Britain' (Kayman, *infra*). Against the background of the protests and the terror related to Mohammad representations in literature or images, with the 2015 *Charlie Hebdo* attack fresh in mind, one can confirm that this 'nervous negotiation' is definitely not restricted to Britain nor is its possible ending in sight yet.

The final and third axis of the present volume is the *institutional dimension*. From this perspective, the national courts – from jury jurisdiction and lower courts up to the Supreme or Constitutional Courts – as well as supranational courts like the ECHR are the societal arena for literary trials in which one can recognize behaviour which is typical for certain groups of actors, bound together by shared practices and resources, and always acting in contradistinction to other groups of actors. These groups will be analysed as institutions, of which the most important for our enterprise are: in the legal field the prosecution, the defence counsels and the judges, and in the literary field the authors and their organizations, the publishers and literary criticism. The contribution by Sapiro starts with an explicit overview of these institutional agents and their behaviour and options in literary trials. Her notion of institution is based on a field theoretical model inspired by Pierre Bourdieu (2011), which also underlies

most other contributions in this volume, though some engage to highlight the institutional dimension from a view inspired by Michel Foucault (Kirchhofer), Judith Butler (Sasse) and post-structuralism (Kayman).

Around this core of institutions in literary trials, other groups of actors are analysed. A closer look at the roles of the witnesses for example unravels a broad range of national and historical options, reaching from laypersons whose function is only to corroborate the devastating effect of literature (or art) on others as a kind of 'effect witness' in the Eastern Bloc (cf. Sasse, *infra*) to literary experts who at certain points in history may or may not be admitted to the court room, as for example in South Africa (cf. Laros, *infra*) or the UK (cf. Kirchhofer, *infra*). These literary experts make it especially interesting to have a closer look at the institution of academic literary criticism and its relevance to the other actors in literary trials (see the contributions by Kayman and Grüttemeier). Finally, the volume touches upon institutions related to the political field, for example semi-judicial pre-publication censorship committees (as dealt with by Laros for South Africa concerning literature and by Beekman concerning film in the Netherlands) but also including looks at legislation, as in the analysis by Kirchhofer of how the 1959 Obscene Publications Act came about.

The volume does not intend to deliver a systematic classification of all institutions involved in literary trials, across times and nations – it even raises serious doubts that such an approach would be possible, given the often incompatible judicial frameworks in which these conflicts take place. The idea that binds the institutional panorama of this volume together is that only by uncovering the institutional dimension can literary trials be adequately understood. As John R. Searle (2010: 90) put it in general terms: 'We live in a sea of human institutional facts. Much of this is invisible to us. Just as it is hard for the fish to see the water in which they swim, so it is hard for us to see the institutionality in which we swim.' More specifically, the present volume shows that literary trials cannot adequately be understood when they are looked at as individual victories, losses or dramatic events – which they are of course, too, but only from the involved individual's perspective, as one of the parties in the fight. It is the institutional dimension that allows us to leave the trenches and analyse trials in their structural relevance for the relationship of literature and law and the specific societal and historical constellation of which both are a part.

Within this three-dimensional space along the axes of international comparison, historical specificity and institutions, the reconstruction of the literary trials should function as a double mirror: for literary as well as for legal

scholarship interested in the fundamental questions raised above, it stimulates the reflection of the role of law and literature in their work. In spite of all efforts – as outlined above – aiming at the coherence of an edited volume: it is a central generic feature of a collection of essays by different contributors, too, that such a collection will also float on the competent richness of different and not in all respects compatible work. Therefore it is impossible – and not intended – to coerce the ten paintings that follow into one painting, let alone one with a central perspective. However, it seems that at least some visual clusters come out of the analyses taken together. The insights the articles yield are most clearly visible around the two notions that form the subtitle of the present book: *exceptio artis* and literary theories.

Exceptio artis

A central feature of literary trials from the second half of the nineteenth century onwards is the judicial acceptance of a certain kind of autonomy for literature. The research on what one might call *literature in law* (as opposed to the established notions *law in literature* or *law as literature*, cf. Dolin 2007; Olson 2014) gathered in this volume could to a large extent be summarized as showing a codification of a certain degree of social esteem for literature in legal texts or legal practices in the context of a public judicial negotiation about the boundaries of what is allowed in literature and what not. At least in democracies, this double legal move – showing esteem and imposing restrictions – can be solidified into a specific legal figure in written law and/or in jurisdiction: from the second half of the nineteenth century onwards, a possible violation of the law by a text may be judged differently when the text is classified as a literary text. This figure is what is called in the following *exceptio artis*.

There are some misunderstandings about the term possible. First of all, it is a practice that does not necessarily need an explicit codification in written law, though there are quite some countries that do have a corresponding Article in their constitution. These Articles are basically aimed at guaranteeing the freedom of artistic creativity or artistic production or of art in general. Examples can be found in the constitutions of Austria (Art. 17a STGG), Germany (Art. 5 (3)), Italy (Art. 33), Portugal (Art. 42 (1)), South Africa (Section 16 (1c)), Spain (Art. 20 (1b)) or Switzerland (Art. 21 BV). Telling only from this list, it is hard to find an explanation why the freedom of art was explicitly incorporated in a constitution.

When adding the years of constitutional codification to the countries listed here, one might give as a rule of thumb that a more or less revolutionary democratic change, following a previous non-democratic regime, seems to improve the chances of finding such a paragraph in a constitution, especially when it is drafted after the Second World War: Italy in 1947, Germany in 1949, Portugal in 1976, Spain in 1978 and South Africa in 1996 might serve as cases in point. But a drastic political change is definitely not a necessary condition, as Austria (amendment of 1982) and Switzerland (amendment of 2000) show. Still one might claim that time is on the *exceptio artis*-side, apparently.

But there is more to be said when one sticks to the historical dimension a little longer: as far as I can see, the Constitution of the Weimar Republic in Germany of 1919 was the first one ever explicitly giving art a special status in a constitution (Art. 142). Again, this was a constitution generated by a democratic revolution. But what I want to point at is another aspect: in the constitutions after the democratic revolutions in 1848 in Germany, such a special status for art is absent. What can be found in the constitution of the *Paulskirche* of 1849 however was an exception for science (cf. Knies 1967: 185), which was taken over in all other German constitutions that would follow. Obviously, art followed historically, with quite some delay, in the slipstream of a special status for science in constitutional law. Both developments could be seen as indications for the emergence of a certain autonomy of the fields of science and arts/literature within the law between 1849 and today. From this perspective and concerning the arts, the increase of constitutional *exceptio artis* examples dating from after 1945 – when most nation states already had their constitutions: documents that do not easily lend themselves to changes – indicates a growing pressure on legislation to accept a special status for art and literature in the law. A growing institutional autonomy of the fields of art and literature can be inferred as underlying this pressure. The fact that Austria and Switzerland amended their constitutions – as mentioned before: a highly inert genre – could be seen as pointing into the same direction.

This assumption seems to hold, too, when we look at the legal systems of for example France, the Netherlands or Belgium where there is no such thing in the constitution (nor elsewhere in the law), or of course at the constitution of the United States, where art is protected on the constitutional level by the freedom of speech of the First Amendment. What is striking is that the absence or presence of an explicit *exceptio artis* in *written* law, be it constitutional or not, does not allow for significant distinctions concerning the way in which the judiciary

deals with literature, neither in internal comparison (for example, German jurisdiction before and after 1919; cf. Grüttemeier 2007) nor in international legal comparison between states with and without an explicit *exceptio artis* in their constitution (cf. Hempel 1991: 453; Bünningmann 2013: 452–78). In the Netherlands for example, in the most recent trials on literature before the Supreme Court (*Hoge Raad*) in 2001 dealing with Pieter Waterdrinker's novel *Danslessen* (cf. Beekman, *infra*), many quotes from the German Constitutional Court's legal rulings can be found – in spite of the lack of any explicit special status for art in Dutch law. Still, there is no doubt that German and Dutch jurisprudence guarantee literature a quite similar high degree of autonomy at the beginning of the twenty-first century (cf. Grüttemeier 2007).

Apparently, the *explicit* codification of *exceptio artis* is obviously only *one* possibility to indicate the acceptance of a certain kind of autonomy of literature in relation to the legal field – it is not what a logician would call a necessary condition for autonomy. The British Obscene Publications Act of 1959 is another case in point. It is the first act to introduce into UK law an explicit *exceptio artis* with the criterion of 'literary merit' and in that sense can be seen as making the *exceptio artis* 'more explicit and robust' (cf. McDonald, *infra*). At the same time, this explicit codification goes along with giving to the judiciary what could be described as a couple of other judicial tools that are now written into the law since there is: the necessity that a literary text must be read as a whole and not only in its possibly obscene parts, a restriction of the relevant readership must be taken into account (the 'likely reader' gives more autonomy to literature than the average reader, with vulnerable readers – for example youth – at the far end of this autonomy-heteronomy scale) and finally the admission of evidence given by literary experts in the courtroom. None of these judicial tools was invented by lawmakers around 1959 – parts of the arsenal had been in judicial use for quite some time in order to give some autonomy to literature, even in English-law dominated South Africa, as the contribution by Laros (*infra*) shows.

Consequently, the growth of the autonomy of literature in law must be described in terms of degrees. From this perspective, British legal history before 1959 already indicates a 'significant degree of literary autonomy', as Kirchhofer (*infra*) puts it. Reviewing this historical development from an institutional perspective, a growing robustness can be detected over the last 150 years. This process starts at the latest with the Campbell Act, which did not want to bother with classical, expensive books for the elite (cf. McDonald 2008: 298). It continues for example with the recommendation of a British Parliament Select

Committee in 1908 to add in a possible new Obscenity Act – which did not come into force – a provision ‘to exempt from the operation of the Act any book or reputation or any genuine work of Art’ (cit. Kirchhofer, *infra*). And a new degree of robustness of the *exceptio artis* is finally reached with the 1959 Obscene Publications Act and its explicit introduction of literary merit. In that sense the 1959 Act is not a decisive revolution but part of an overall gradual increase of institutional autonomy of literature within the judiciary.

Of course, this tendency of increasing autonomy for literature is not a general rule for all countries since it depends on specific constellations of state and market (cf. Sapiro 2003). For example, the developments in the communist Eastern Bloc and today’s Russia show signs of autonomization only in what could be called ‘a defiant subfield based on artistic merit and political disloyalty’, as opposed to the dominance of political heteronomy in the official state-controlled and state-sponsored area of culture, including political interference in the judiciary, too (cf. Sasse, *infra*). But the other legal fields analysed in the present volume corroborate the tendency of growth and stability of the autonomy of literature and art during the last 150 years. As Sapiro summarizes regarding France: ‘The French laws on the freedom of the press never recognized any *exceptio artis*. In practice, however, a process of progressive recognition of the relative autonomy of literature can be observed, starting under the Third Republic, in close relation to the autonomization of the literary field’ (Sapiro, *infra*).

Again, several possible misunderstandings must be addressed. One is that this ‘progressive recognition’ is neither teleological, nor is it linear. It is the result of a societal institutional fight between legal, political and literary actors, the result of the relation between the field of power and the literary field, and its history is full of rollbacks, as Laros (*infra*) shows for certain periods in the South African apartheid system or as the German Nazi dictatorship of 1933–45 reminds us. Furthermore, as has been stressed before, the autonomy of literature within the judiciary is always a gradual phenomenon. It never was and has nowhere become a trumping value: play this card and any prosecution will stop. I do not know of any legal system that guarantees such a status to literature, nor, by the way, to science. All there is are claims demanding such a status, but they are generally strategic claims originating from the literary field (cf. Sapiro, *infra*). The autonomy of literature in the judicial field never was and never will be absolute, it will only be a *relative* autonomy.

This has two implications: one is that the judicial conviction of a specific literary text is always an option even under the most robust *exceptio artis* existing.

The other is that a verdict in which the literary side loses is not automatically an indication for the end of literature or autonomy as we know it. The relevance of a specific verdict can only be determined when the structural and institutional dimensions of the case are focussed. This institutional perspective must take into account that the law is aiming at predictability and stability – which however always seem to lay beyond the horizon, as the saying (and much *law as literature* research) reminds us: *coram iudice et in alto mari sumus in manu Dei* (before the court and on the high sea one is in God's hand). Furthermore, the institutional view urges scholars to reconstruct the degree of autonomy at any specific historical moment in the relationship between literature and the judiciary in order to understand literary trials better. This is what the volume will do with exemplary cases.

In this context it is interesting to point to the fact that in some states there is evidence for a temporal connection between the emergence of a literary field *sensu* Bourdieu and the consecration of a relatively high degree of *exceptio artis* in the legal field. This seems to be the case for example in the Netherlands (Grüttemeier and Laros 2013) and South Africa (Laros 2013). Obviously the introduction of significant tools of *exceptio artis* into jurisdiction – whether into positive law or not – can be seen as a kind of consecration of the literary field by the field of power, indicating a structural and conceptual homology between the elites in both fields. This homology however, is not only traceable on the institutional side – it may also be found on the level of theories of literature.

Theories of literature

The institutional autonomy given to literature within the judiciary depends in parts on what legal experts think of the nature and properties of literature and, in relation to that, of the specific incriminated text at trial. In other words, the judicial dealings with literature rely on judicial theories of literature – concerning form and content, ways of interpretation, effect and function – even when the legal field is usually very implicit and reluctant about its ideas of literature. Nevertheless, some general insights can be yielded, for example when looking at the British case.

As we heard before, 'literature' was not meant to be bothered by the Obscene Publications Act of 1857 in the view of its architect Lord Campbell. But what

were ‘works of literature’ to him? Some of his remarks in Parliament give a clue to what he was thinking of: ‘the classics, Rochester’s poems, plays of Wycherley and Congreve and so on’ (cit. Kirchhofer, *infra*). This normative preference for late seventeenth and early eighteenth century British classics to be exempted from the act went along with analogous preferences for writers of antiquity, as we can tell from other contextual sources. The contemporary leading journal *Pall Mall Gazette* for example argued in July in the context of the Hicklin test trial of 1867 that ‘grossly obscene’ matter could be found in medicine, law and ‘many classical books – Ausonius, Juvenal, Aristophanes, and many others’: ‘but such publications are not criminal, because the interests of medicine, law and classical literature require it’ (cit. McDonald 2008: 299). So it is canonical *classical* literature, both national and from antiquity, made for the elite and not for mass consumption, that should not be bothered by the act. Comparing this view with the Obscene Publications Act from 1959 and the Lady Chatterley trial one year later, it is clear that 100 years on there are other theories of literature at stake and there is other literature to be exempted. These theories now include from a legal perspective *contemporary* British literature, the extensive and serious dealing with sex and with the lower classes, and what is more, they include distributing this literature in cheap paperback versions for the masses. Another metonymic indication for changing theories of literature in the judiciary can be found in the quoted recommendation of the 1908 Select Committee, though the Committee did not give any explicit clues as to what it had in mind as being valuable literature. However, at least one can hold that their conception of literature must have been wider than that of Lord Campbell, since the adjective ‘classic’ is nowhere to be found in their deliberations.

As will be obvious by now is that a handicap of this kind of research is the very limited kind of empirical evidence it can use. Nevertheless, I hope that I could make plausible what is an important assumption of this volume: legal experts do rely on theories of literature, and these theories change over time in a way that can tell us something about the ideas on literature in non-literary circles and about the way the autonomization of the literary field was conceptually underpinned. The example given here allows at least to confirm that classical literature was the ‘crack in the door’ through which later on contemporary and erotic fiction could pass, as Felice Flanery Lewis (1976: 44–5) once put it.

This ‘crack in the door’ – I would add: the door giving way to institutional autonomy of literature in the legal field – is on the level of theories of literature closely connected to a version of a Platonic, idealist aesthetics, as already

could be inferred from the names quoted above. As the judgement in the 1857 Flaubert trial for example elaborately explains, ‘the mission of literature should be to beautify and enhance the spirit by elevating the intelligence and purifying morals’ (cit. Ladenson 2007: 25). The 1857 version of ‘beauty, goodness and truth’ constitutes the dominating values underlying most legal dealings with literature from the nineteenth far into the twentieth century in many countries. Examples are, next to the UK, the United States (cf. Beisel 1993: 153), Germany (cf. Jauß 1991; Grüttemeier 2007: 183) or the Netherlands (cf. Beekman, *infra*). The shape that this modern version of idealist aesthetics usually receives in the courts is that of a transformation of the world of accidentals and contingencies into something essential and valuable. In literary trials, a prominent argument is that showing vice and what is ugly is transformed in literature into a respectable, moral view of the author. The line of this didactic inversion, often used by the defence, can be drawn from Balzac and Flaubert (cf. Sapiro, *infra*) via the Lady Chatterley trial and an argument for defending erotic movies in the 1970s (cf. Beekman, *infra*) up to the defence of *Lord Horror* around the end of the millennium (cf. Kayman, *infra*). However, the success of such a defence lies not in the argument itself, nor in how it is individually presented or received. Its success depends on the institutional and literary-conceptual context, as we have seen above and as the outcomes of the different trials show. On this level, Sapiro comes to the conclusion that the truth- and transformation-bound intentional conception of the writer’s responsibility enacted in the arena of the courts ‘contributed to the long-term process of “subjectivation” of responsibility’ that the history of legal responsibility shows (cf. Sapiro, *infra*).

This process of subjectivation of responsibility is closely connected to the judicial (and literary) norm of interpreting the ‘work as a whole’ – one of the tools used for corroborating the relative autonomy of literature within the judiciary. But at the same time, this tool can be seen as part of a process that contributes to the societal negotiations of how to read literature. This becomes especially clear during the clashes of deviating theories of literature with the established idealist aesthetics in the 1960s and 1970s, when not only ideas about sexual liberties changed but many writers aimed at blurring the separation between high and low art (cf. Beekman, *infra*). In such a context it seems that the more the literary field splits up in opposing theories of literature, the more carefully the legal experts try to avoid making their own literary theories explicit. Still, Beekman plausibly argues in his contribution that ‘there were changes on the level of theories of literature in the legal field, which seem

to have been triggered by the rise of corresponding poetics becoming dominant among experts in the fields of literature and the arts’.

Apparently, the shaping of how to read literature through literary trials is not specific for political constellations based on a separation of powers and on a relatively autonomous judiciary dealing with actors from a relatively autonomous field. Something very similar is at stake in literary trials in systems where the state massively interferes with both kinds of autonomy as in the former communist Eastern Bloc and in contemporary Russia. Still, also in these cases literary trials can ‘become the stage to create a valid understanding of literature’: in the Russian case one ‘in which the belief in a word’s performativity is paramount’ (Sasse, *infra*). This belief in performativity and the word or image ‘as deed’ can be related to Socialist Realism and writers like Gorky. Its traces reach even further back to Tolstoy, to an understanding of images ‘which is at the same time religious and iconic’, and to Russia’s legal history of the seventeenth century (cf. Sasse, *infra*).

What binds together these two very different cases analysed by Beekman and Sasse is that the process of literary theories dripping into the legal field can apparently be detected in a close analysis of the arguments exchanged in and around the trials in both the fields of literature and the judiciary. At the same time, it seems that the judicial preference for a certain aesthetics or a theory of literature can be explained by preferences of relevant authorities in the field of literature, art and aesthetics – relevant in the eyes of the judiciary. Those authorities are in western countries usually sought in the academic community (cf. Grüttemeier and Laros 2013: 212–16; Grüttemeier, *infra*). Against this background, one might conclude that the legal and the literary elites are bound together, too, by homology on the level of literary theories.

There is also an indirect indication for this homology – that is, the threat that legal experts might become a laughing stock when they appear to be out of touch with what at a certain moment are regarded as legitimate theories of art and literature. The idea of courts making themselves ridiculous runs like a thread through art trials from the nineteenth century onwards. In 1880 for example, Flaubert wrote a letter as a public statement in support of Maupassant, anticipating what would happen if the prosecution continued: ‘it will look ridiculous’, and Maupassant will win notoriety (cf. Ladenson 2007: 8). Similarly, after Anthony Comstock had instigated the arrest of the respected art dealer Roland Knoedler in New York in 1887 the *New York Herald* titled: ‘How Paris Will Laugh!’ (cf. Beisel 1993: 155). Nearly a century

later, a similar threat is diagnosed by M. Jarvis to have fed the motivation of the Conservative government to agree on the 1959 Obscene Publications Act, that is, the fear of appearing ‘ridiculous to a highly articulate section of the public’ (cit. Kirchhofer, *infra*). Apart from the fear of actors, the very problem of the judiciary becoming a laughing stock indicates something fundamental about legal and aesthetic discourse in general, which Kayman (*infra*) puts in a nutshell: ‘While law must not take itself too seriously, it is of course, no laughing matter. An anxiety about humour is thus fundamental to its negotiations with aesthetics.’

The homology described here can be summarized as translating into legal discourse what the literary field considers legitimate ideas about reading. And because it is a translation, an analysis of legal discourse (the target language, so to speak) by literary scholars (as literary native speakers) promises to be fruitful for a better understanding of the translation and what is done with it. As has been argued above, this analysis can work both ways: it helps to make explicit what legal scholars seem to think about properties, functions and the nature of literature, but it also may help literary scholars to gain a clearer idea on what kind of literary theories do find acceptance outside the literary field and crystallize there in the efforts of the judiciary to develop more or less systematic dealings with literature and art.

This is especially relevant when considering ‘the fact that there is no way of telling how to distinguish literature from other kinds of writing’, as McDonald (*infra*) compellingly states. It is exactly here that the heuristic possibility of literary trials comes into play to get an indication of which ideas from the literary battlefields on literary theories actually did manifest themselves outside the literary field – not in search of an arbiter, of course, but as an extra possibility for historical diagnosis. Research on the more or less systematic judicial efforts to come to terms with literature can indicate which literary theories are regarded as societally (in the sense of: outside the field of literature) more compelling and authoritative than others at a specific historical point. The comparison of these preferences with the existing accounts of literary history by literary scholars should enable us to more precisely determine the interaction between the legal and the literary field and the constellations of temporary dominance of literary theories within both at different historical moments. However, the relevance of this approach lies not only in the historical perspective but can be taken into our present time. Research into the most recent trials could tell us something about cultural and literary changes that are on their way, and that may not yet, or not

yet as sharply, have been detected by research focussed only on literature and/or the literary field.

Taking into account this double relevance of historical and contemporary diagnosis, the volume presents itself with a bipartite structure. The first part offers the reconstruction of an international, institutional and historical framework of literary trials over the last two centuries in six essays (Sapiro, Kirchhofer, Laros, Beekman, Lieb and Sasse). The second part contains four essays which are based on the multifaceted matrix of the first part, taking very recent trials (or the dearth of them) as a point of departure to address what seem to be recent changes on an institutional and conceptual level in law, literature and their interaction, in and around the arena of literary trials (Grüttemeier, Hupe, McDonald and Kayman).

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