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## Law and Literature: Who Owns It?

Law and literature: that is a sufficiently broad subject to warrant reference to the Fontane character Effy Briest's "wide field." Indeed, the sites where law and literature encounter each other, where they border on each other, merge, converge, overlap, or where they relate as opposites, even finding themselves as rivals or enemies seem legion. In contrast to the intentions of Effy Briest in that famous novel, my reference to this line is not intended to abort further inquiries; instead I want to chart the field in question with the aim of developing a preliminary typology of the ways in which law and literature have been engaged and have engaged one another. Against the background of this overview, I want to turn to a much smaller field. This small field – a plot of long fallow farmland, to be exact, located between two adjacent, perfectly maintained wheat fields in a fictive Swiss village – will serve as an example or test site for "law and literature" as they emerge in Gottfried Keller's narrative *Romeo und Julia auf dem Dorfe*, from his mid-nineteenth century collection of novellas *Die Leute von Seldwyla*. Whether and how the case study of that small field at the centre of Keller's story can make a case for the larger field of "law and literature" remains to be seen.

Given the programmatic intention of the present volume, Keller might seem an odd choice. Other authors – Kleist and Kafka, Dürrenmatt, and Schlink – come to mind more readily. This is the very reason for their omission here: an attempt to draw attention to less familiar figures, topics and paths. It goes without saying that the section on Keller as well as the preceding overview will be highly general, necessarily incomplete, and decidedly tendentious.

The broad field of law and literature can be divided into at least four rather distinct areas: 1. The common history and shared heritage of law *and* literature, 2. Law *as* literature, 3. Literature *vs.* law, 4. Literature *in* law.

### **1. The Common History and Shared Heritage of Law and Literature:**

Law and literature are both text-based and text-bound; so are many other fields and practices. But the particular types of textuality operative in law

and literature are structurally similar enough – for example, with respect to a self-reflexive use of fiction<sup>1</sup> – to have given rise to shared methodologies, hermeneutics being foremost among them. To be sure, from Schleiermacher to Gadamer, hermeneutics has claimed universality for itself, but it has been put to the test most frequently and most successfully in both the legal and the literary sphere. Looming behind the influence formal hermeneutics exerts in both spheres to this day is, of course, the exegetical tradition of interpreting scripture. Religion thus constitutes an oft-disavowed source of both law and literature. Alongside traditional hermeneutics, other methodologies, such as Niklas Luhmann's systems theory, have enjoyed comparable success in both fields.<sup>2</sup> Marie Theres Fögen is among those who have staged successful encounters between literature and law by taking recourse to systems theory.<sup>3</sup> In a systems theoretical perspective, law and literature or, to put it more technically, the legal system and the art system, appear to have co-emerged as operatively closed, autopoietic systems almost simultaneously and in highly comparable ways although it should be added that systems theory tends to describe pretty much everything in rather similar terms. Still, it cannot be denied that both law and literature share a similar *Sattelzeit* (Reinhart Koselleck), emerging around 1800. Romanticism was not just a literary and philosophical movement, but also spelled the end of natural law and the emergence of the historical school with Savigny and others. Equally, nineteenth century positivistic inclinations left their imprint on literary and on legal studies alike.

Academic theories and the history of the humanities in the West since the eighteenth century aside, literature maintained intimate ties with legal concerns long before hermeneutics staked out its claim as a universal method in the eighteenth century, or Niklas Luhmann founded systems theory in the twentieth century. A whole range of literary genres in the Western tradition would be inconceivable without their reference to the law. Greek tragedy, as it was understood up to and including Hegel's aesthetics, was generically defined by a new law emerging from the conflicts of existing orders, paradigmatically so in the *Eumendies*, the last play of Aeschylus' trilogy, or in the West's favorite Greek tragedy, Sophocles' *Antigone*. In *Oedipus Rex*, the play assumes the very form of a

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<sup>1</sup> For an instructive and exemplary interpretation in this vein, see Andriopoulos: *Besessene Körper*.

<sup>2</sup> Cf. Luhmann: *Das Recht der Gesellschaft*, and Luhmann: *Die Kunst der Gesellschaft*.

<sup>3</sup> Fögen: *Das Lied vom Gesetz*.

trial, which in turn sheds light on trials as essentially dramatic (a point not lost on producers of contemporary courtroom dramas.) Another generic tradition shared by law and literature is the case story, the *Pitaval*, for example, which was prefaced, translated, and edited in parts by Schiller between 1792 and 1794. Later, the case story gave rise to the crime story, a literary genre in its own right, exhaustively analyzed by the literary historian Jörg Schönert and his school.<sup>4</sup> Yet, such obvious cases of coincidence and interdependency between literary and legal traditions seem to belong to the past.<sup>5</sup> As literature began to free itself from generic constraints with the advent of modernism, the law in turn tightened its own. Increasingly focussing on its formal, procedural side, the law seems to have lost interest in the narration of cases or dramatic staging. In contrast, literature as well as film remains invested in legal issues. Thus it might seem that in the course of a close relationship between law and literature, literature continued to stand by law, whereas law strove to sever its ties to literature. In a systems theoretical perspective, law's insistence on self-referentiality contributed significantly to its operative closure, assuring its emergence as a full-fledged autopoietic system. By comparison, literature appears a little backwards. To put it another way: law knows that it is a system and acts accordingly. Literature and art in general act as a system but their self-descriptions tend to deny this.

## 2. Law as Literature

However, this view of things – law and literature as a happy love affair gone awry when one partner outgrew the relationship in the process of modern differentiation – is not the whole story. In recent times, law has launched recuperative efforts, courting literature in new ways. This is suggested by the emergence of a movement, particularly prominent in the US, which calls itself “law as literature.” Probably harking back to suggestions by Gustav Radbruch,<sup>6</sup> its proponents, particularly Richard A. Posner, but also Martha Nussbaum,<sup>7</sup> believe with surprising piety and enthusiasm that a sensitivity to metaphors, allegories and rhetorical strategies would greatly benefit legal practice. Given that ancient rhetoric originally served primarily legal purposes, this reminder of an essential

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<sup>4</sup> Cf. Schönert (ed.): *Erzählte Kriminalität*.

<sup>5</sup> The two spheres seem particularly close in the realm of aesthetics as it emerged after Baumgarten. Cf. Plumpe: *Eigentum – Eigentümlichkeit*.

<sup>6</sup> Radbruch: *Gesetzliches Unrecht und übergesetzliches Recht*.

<sup>7</sup> Posner: *Law and Literature*; Nussbaum: *Poetic Justice*. For the German discussion cf. Lüderssen: *Law as Literature*.

literary dimension of legal practice makes sense. But representatives of “law as literature” go further when they ascribe an ethical impulse to literary sensitivity. Emphatically underwriting the Western notion of *Bildung*, they argue that attention to the literary would result in better, more just judgments, whereas modern law usually prides itself in having uncoupled the question of justice and legitimacy from that of law and legality. Some scholars of literature may be startled by the movement’s professed faith in the powers of literature. Its pathos, albeit appealing, implies a link between the aesthetic and the ethic, the beautiful and the just. Any such suggestion conceptually traces back to before Kant, who irrevocably severed that connection.<sup>8</sup> Or, more carefully: He reduced it to a weak, merely symbolic link by way of the structure of aesthetic judgments in his third *Critique*. Moreover, claiming the literary character of all law or, conversely, investing literature with the power to educate the law amounts to an act of usurpation that wilfully ignores the fundamental differences of the respective institutional contexts.

In the past, you could go to prison for reading certain books under certain circumstances. In some parts of the world this is still the case. But on the whole, reading in the West amounts to an activity without consequences. As a matter of law, everybody is entitled to his or her opinion.<sup>9</sup> Hence one can decide freely what to read and how to understand it, but nobody is required to pass judgment. Those required to judge – critics, for example – can do so without fear of legal consequences. By contrast, a judge who fails to decide a case will not be a judge for much longer. In a recent introduction to the field of law and literature, Thomas Weitin utilized the different structures of judgment in the legal and the aesthetic sphere in order to draw the line between what is proper to literature and what is proper to law:<sup>10</sup> The former can leave things undecided and live with ambivalences, whereas the latter has no or very limited ways of failing to decide (for example by delaying and delegating, or, when the US Supreme Court or the German *Verfassungsgericht* decline to hear a particular case). Once a case is in court, however, a ruling is inevitable. This fact has been legally formalized as the *Rechtsverweigerungsverbot*.<sup>11</sup> Such self-imposed constraints are missing from literature; its cases, Weitin argues, can

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<sup>8</sup> It should be noted that recent aesthetic theory attempts to retrieve the pre-Kantian tradition, for example Scarry: *On Beauty and Being Just*; Schwering/Zelle (eds.): *Ästhetische Positionen nach Adorno*.

<sup>9</sup> On the emergence of this idea see Wetters: *The Opinion System*.

<sup>10</sup> Weitin: *Recht und Literatur*.

<sup>11</sup> On this distinctive feature see Fögen: *Rechtsverweigerungsverbot*; and my subsequent response Geulen: *Plädoyer für Entscheidungsverweigerung*.

therefore be left undecided. While it is important to be mindful of institutionally framed differences, one may question whether the different structures of judging are sufficient to mark the *proprium* of law and literature, respectively. At least three objections are conceivable. First, one should recall that the supposedly obvious institutional differences between the legal and the literary sphere are peculiar to our system. In the Jewish tradition, for example, not to mention other cultures, it would be much more difficult to isolate a literary from a legal stratum. However even if one limits oneself to Western democracies, one can observe that the law's requirement to rule under all circumstances also impacts other practices of deciding. That the judge eventually must decide entails that only the judge can decide. In fact, nowadays, judges decide on ever more things previously decided elsewhere and in extra-legal forms, such as smoking, genetic testing, etc. Hence, it could be argued that the law's self-imposed compulsion to rule furthers the ever-increasing juridification of life-worlds previously beyond the law's reach. If the "law as literature" movement amounts to a problematic usurpation of law by literature, here law in turn tends to appropriate other spheres, not exclusively or necessarily literary ones, but life-worlds with their own respective mechanisms of decision. For example, the legally protected freedom of religious beliefs, rightly considered a milestone, is also a political decision to privatize religion and therefore a ruling that excludes any political relevance of religious modalities of decision making. How very little understood, acceptable, or binding this is in Islamic countries and their respective legal cultures has become more than obvious.

A third and final objection to Weitin's attempt to call upon the institutional differences, particularly as they pertain to judgment, to mark the line separating literature from law is related to the first. People may not go to prison for reading books but certainly for writing them.<sup>12</sup> Frequently, the law has found itself in a position to have to pass judgment on literature, thereby subjecting its presumably (according to Weitin) inherent ambiguities and undecidabilities to legal decisions. In 1857, Flaubert's *Madame Bovary* went on trial. Most recently, we witnessed the debates over plagiarism committed or not committed by Helene Hegemann in her novel *Axolotl Roadkill*.<sup>13</sup> There is a whole range of sites where literature is under discussion by the law and in court. Yet it would be misleading to conclude that in such instances the law subjects literature to itself as the

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<sup>12</sup> On this distinction see Kant's 1794 "Beantwortung der Frage: Was ist Aufklärung" with its distinction between private and public reasoning.

<sup>13</sup> Hegemann: *Axolotl Roadkill*.

“law as literature” movement would like to see law subjected to literature. Precisely where literature stands accused, it is potentially in a position to profoundly impact, even alter, the law. Thus the *Bovary* case resulted in changes to obscenity law. Moreover, Flaubert’s acquittal of the indecency charge also greatly increased literary possibilities and altered the common understanding of what is literature. Similarly, recent discussions around Hegemann occasioned reconsiderations of the definition of plagiarism in light of new media.<sup>14</sup> Plagiarism is, of course, related to the question of intellectual ownership and property rights. Heinrich Bosse’s seminal study on the origins of intellectual property rights in the eighteenth century, programmatically entitled *Autorschaft ist Werkherrschaft*, has shown that our very notion of literary authorship is a complex interweaving of legal and literary notions.<sup>15</sup> Authorship in particular demonstrates how enormously difficult it is to separate law and literature. While their wholehearted identification, as proposed by “law as literature,” appears problematic, it seems equally questionable to assert a clear border separating the literary from the legal field. Perhaps the genuine difficulty of law and literature as a field, what makes it “a wide field” is precisely this uncertainty. Identifying all law as literature, or, conversely, attempting to separate the two, for example by taking recourse to their different institutional forms of judgment, are equally strategies designed to avoid the thorny issues of law’s and literature’s respective properties. In cases like that of *Madame Bovary* or the emergence of authorship in the eighteenth century, law and literature redefine themselves. They adjust and transform each other, and one would be hard pressed to say where one ends and the other begins.

In contrast to these first two subareas, the remaining two are characterized by temporarily suspending the question of *proprium*, of property and borders. This is all the more advisable as law and literature are by no means alone in the field, or the only fields, for that matter. At different times, multiple practices of knowledge and expertise enter and complicate the picture, such as psychology, physics, and, more recently, life sciences.

### 3. Law vs. Literature

The tendency towards the juridification of life-worlds continues unabated and grows more complex as conflicts between European and national legal

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<sup>14</sup> For an overview cf. Rezensionenforum Literaturkritik.de; last accessed 30.6.2011.

<sup>15</sup> Bosse: *Autorschaft ist Werkherrschaft*. On the same subject cf. Plumpe: *Der Autor als Rechtssubjekt*.

cultures intensify. Nowadays, virtually all pressing political and social issues are decided in court rooms. This has raised considerable concerns. Leaving aside the practice of Critical Legal Studies,<sup>16</sup> I want to focus on a tradition of critiquing the law that cannot be readily subsumed under the familiar categories of literature, law, or philosophy. It gained prominence in the work of Jacques Derrida<sup>17</sup> and, more recently, through the publications of jurist *cum* philologist Giorgio Agamben.<sup>18</sup> A key reference for both authors is the 1921 essay by Walter Benjamin “Towards a Critique of Violence,” a highly influential and much discussed text too complex and multi-faceted to be discussed in a schematic overview.<sup>19</sup> Suffice it to say, that Benjamin was an important source for Giorgio Agamben’s critique of the law in his various books dedicated to the archaic legal figure of *homo sacer*. Agamben argues that law’s problematic power does not reside in its active forms of persecution, punishment or judgment, but, rather, in its passive ability to decide not to act, to withdraw and to suspend itself, as it does in the state of exception, infamously analyzed by Carl Schmitt.<sup>20</sup> Extending Schmitt’s definition of sovereignty, Agamben has built an entire theory around the paradoxical logic of exception. Isolating a territory or a person whom the legal order will henceforth consider to be beyond the law’s reach is said to constitute the originary act of any legal order and the origin of all sovereignty. This exclusion, ordered by the law (and in the case of a constitutionally anchored state of exception, self-imposed by the law), assures that what is excluded, banned and excepted remains related to the law. This is the reason, Agamben argues, why what was formerly considered outside of the law can find itself in the centre of the law’s attention. Historically seen, the originally excluded realm is the very creatural existence, bare human life, which has increasingly moved to the centre of legal debates since the eighteenth century. I am not interested in discussing the validity of Agamben’s theoretical edifice, but his mode of engaging texts and phenomena does seem noteworthy, precisely because Agamben refuses to separate legal and literary orders or sources. (To be sure, neglecting obvious differences also raises some concerns, but in light of the results this approach produces, they can perhaps be temporarily neglected.)

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<sup>16</sup> Cf. Halley/Brown (eds.): *Left Legalism/Left Critique*.

<sup>17</sup> Derrida: *Gesetzeskraft*; for an extended discussion see Haverkamp (ed.): *Gewalt und Gerechtigkeit*. For a more recent discussion see Goodrich/Vismann et al. (eds.): *Derrida and Legal Philosophy*.

<sup>18</sup> Agamben: *Homo Sacer*. For a general introduction to his work see Geulen: *Giorgio Agamben zur Einführung*.

<sup>19</sup> For a reading of Benjamin’s critique of law see Hamacher: *Affirmativ, Streik*.

<sup>20</sup> Schmitt: *Politische Theologie*.

Where the properties of law and literature are not denied but suspended, new zones of investigation move into view. With his idea of “bare life”, Agamben has produced such a new field of inquiry. One significant task of “literature and law” could be to disclose such new areas that do not belong to one field or the other. There is a whole range of investigations exploring such uncharted territories and constituting new objects of study, such as the oath or the idea of advocacy.<sup>21</sup>

#### 4. Literature in Law

Benjamin’s radical critique of all existing law as violent notwithstanding, he did identify areas removed from such violence. Among others he names the non-coercive sphere of diplomacy and that lovely untranslatable thing he calls “Herzenshöflichkeit.”<sup>22</sup> According to Benjamin, these forms of practice are binding, but not contractually so; they operate according to rules not legally codified. The law itself is home to extralegal or, at the very least, not strictly codified spheres, pointing beyond the law from within. In addition to the notions mentioned above, one could also focus on such extralegal elements operative in, but not governed by, law. Such ungovernable presuppositions – material and medial, conceptual and rhetorical – regularly surface when the issue of founding new law arises and the question of law– constituting on the one hand and law-preserving violence on the other is at stake. At such points of distress, narrative – for example in the form of founding legends – often steps in to supply the new law with the legitimacy the order cannot provide on its own account.<sup>23</sup> There are a number of scholars who have made efforts to shed light on those aspects within the law. In particular, Cornelia Vismann has explored the medial, narrative, and rhetorical strategies employed but not governed by the law.<sup>24</sup> This is an altogether different approach than claiming that the law is per se literary.

For the time being, it seems advisable to delay decisions as to what is legal and what is literary and instead privilege those approaches in which that decision is suspended for the sake of moving familiar things into an

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<sup>21</sup> Campe: An Outline for a Critical History of Fürsprache: *Synegoria* and Advocacy; Schneider/Friedrich (eds.): *Fatale Sprachen. Eid und Fluch in Rechts- und Literaturgeschichte*, Munich 2009; Vismann: *Akten. Medientechnik und Recht*.

<sup>22</sup> Benjamin: *Kritik der Gewalt*, p. 191.

<sup>23</sup> Cf. Adam/Stingelin (eds.): *Übertragung und Gesetz*.

<sup>24</sup> See Cornelia Vismann’s contribution to this volume.

unfamiliar light and disclosing new fields of inquiry. At this point, allow me to turn briefly to that small, ownerless field near Seldwyla in Keller's narrative *Romeo and Julia auf dem Dorfe*. It is not entirely correct to say that nobody owns the middle field in Keller's narrative. It does belong to someone. He is, however, a nobody, a nameless musician, referred to only as the "the black violinist."<sup>25</sup> He was born in the forest of parents who had left the rural community to live lawlessly as nomads. While the field does belong to him as his heritage, the violinist cannot legally claim the field as his property because he has no residence – according to nineteenth century Swiss law a prerequisite for owning property.<sup>26</sup> And he cannot become a resident because he is lacking a birth certificate. However, Keller's story is less about the violinist's fate than the fate of the piece of land that belongs to him but cannot become his property. It is a love story with a tragic end. Like Romeo and Juliet, the lovers Sali and Vrenchen are children of parents who turned from neighbours to enemies in the course of the legal dispute over that ownerless field separating their respective properties. Long before the narrative begins, the neighbouring fathers had used the middle field as a dumping ground for the stones they encountered when working on their own fields. On the fall morning with which the narrative opens, the farmers decide to plough into the ownerless land, each from their own side, enlarging their own properties by one row each. They proceed like this over many years until the former field has turned into a narrow strip covered with stones. The remaining land is auctioned off. One of the farmers gets it, but before he can take possession of it, his neighbour dumps all available stones on a tiny corner of the land now belonging to his neighbour. A protracted legal dispute ensues, ruining both families. The story ends tragically with the suicide of the farmers' children.

The narrative falls into two parts. The first part is about the farmers seizing the middle field row by row over many years as their children grow into young adults. The second part tells how they eventually lose all they used to own as their children become lovers. One farmer sells his land and moves to town where he lives miserably in a run-down bar; the other neglects his house and field to the point that they take on the appearance of the unfarmed, middle field in its original state: "*Auch lief Jedermann darin herum, wie es ihm gefiel und das schöne breite Stück Feld sah*

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<sup>25</sup> Keller: *Romeo und Julia auf dem Dorfe*, p. 25. All following quotations refer to this edition and will be cited in round brackets in the main text.

<sup>26</sup> Meier/Wolfensberger (eds.): 'Eine Heimat und doch keine'. *Heimatlose und Nicht-Sesshafte in der Schweiz*.

*beinahe so aus, wie einst der herrenlose Acker, von dem alles Unglück herkam*” (98).

In his *Metaphysics of Morals* (1797) Kant labours over a somewhat bizarre but, as it turns out, ethically and legally crucial question: whether and how something that belongs to nobody, like a field for example, big or small, could legally become someone’s property. Roman law had a concept for such objects, they were called *res nullius* or, if pertaining to land, *terra nullius*, in German they are usually called *herrenlos*, the very word Keller’s narrator chooses to describe the middle field (70). In English, they are referred to as unclaimed goods or derelicts. The latter term also informs the German legal notion of *Dereliktion*, describing the formal act of divesting oneself of or abandoning one’s property, thus making it available for someone else to claim and own. The notion of dereliction guarantees the possibility of legally claiming unclaimed goods, and, by implication, it suggests that things that do not belong at all and have never belonged to anybody simply do not exist. Contrary to the expectation that unclaimed territories may have been feasible in the eighteenth century but are not to be found in a globalized world, contemporary international law is very much concerned with *terrae nullius*, as the current geopolitical dispute between Russia, Canada, and several Scandinavian countries over the seabed under the Arctic Ocean demonstrates.

Kant was aware of the problems inherent in the existence of *terrae nullius*, which came to signify the no man’s land on a war front only in the twentieth century. Before that the notion played an important role in the European expansion. Declaring a territory *terra nullius* was used as a license for colonization; in the process people originally inhabiting the territories were turned into nobodies, like the nameless black violinist in Keller’s narrative.<sup>27</sup> Kant explicitly rejected this practice as illegal and illegitimate. If there were people – “wild people,” Kant says – inhabiting a *terra nullius*, annexing their land remains illegal even if dubious contracts are involved: “*Durch betrügerischen Kauf Colonien zu errichten und so Eigenthümer ihres Bodens zu werden und ohne Rücksicht auf ihren ersten Besitz Gebrauch von unserer Überlegenheit zu machen . . . diese Art der Erwerbung des Bodens ist also verwerflich.*”<sup>28</sup> While he condemns such practices unequivocally as illegitimate and immoral in the sphere of international law, the issue of the *res nullius* turns out to be more complicated when viewed from the perspective of private law. As Peter

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<sup>27</sup> See Vismann: *Terra Nullius. Zum Feindbegriff im Völkerrecht*, p. 166.

<sup>28</sup> Kant: *Metaphysik der Sitten*, p. 266.

Fenves has recently shown, Kant ultimately fails to answer the question whether a *res nullius* could ever become legal property.<sup>29</sup> It is worth noting that Kant did not argue that the problem of *res nullius* reveals the usually concealed origins of law in violence. By contrast, most interpreters of Keller's narrative have pursued this approach. They read the ruin of the families as a consequence of repressed violence and injustice looming behind law and morals that return with the vengeance of the repressed.<sup>30</sup> The young lover's suicide, some interpreters have claimed, is tragic because it bespeaks Vrenchen's and Sali's blind allegiance to bourgeois notions of legality, epitomized by their desire for legal marriage.<sup>31</sup> However, there is at least as much to suggest that Keller's point was not to discredit law and manners.<sup>32</sup> Conversely, the story could also be read as a plea for other and better property rights.

When exploring the legal problem of *res nullius*, Kant not only refused to assume that all property is theft, but he also rejected the inverse idea that all land in particular is originally collective property, as Locke had done and Marx later did in a different vein. In the mid-nineteenth century, Keller picks up the issue where Kant left off at the end of the eighteenth – as an open and perhaps irresolvable question. In Keller, the field, explicitly referred to as “*herrenlos*” (70), is without owner to the extent that it is not farmed and that the violinist is himself legally *herrenlos* and homeless. What the farmers do with his property is not exactly illegal, but certainly immoral. Yet, it is important to remember that the inappropriate appropriation of the field in question is preceded by a less easily identifiable or condemnable practice. Prior to stealing the land, row by row, the two farmers had made use of the field without seizing it, by utilizing it as a dumping ground for the useless stones from their own fields. Every time they found “*einen Stein in ihren Furchen . . . so warfen sie denselben auf den wüsten Acker in der Mitte*” (70). More than the field, those wandering stones are the narrative's *res nullius* in the strict sense. Early on, they are used by the still young children playing on the middle field as a headstone for the girl's abused doll which they bury with a fly buzzing in its hollow head (75). Later on, the violinist uses a heap of those stones as a stage from which he lectures the children about how their fathers

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<sup>29</sup> Fenves: *Niemands Sache. Die Idee der res nullius*‘.

<sup>30</sup> See Holub: *Realism, Repetition, Repression*.

<sup>31</sup> Uerlings: „Diesen sind wir entflohen, doch wie entfliehen wir uns selbst?“. *Heimat und Heimatlosigkeit in Kellers ‚Romeo und Julia auf dem Dorfe‘*.

<sup>32</sup> For those arguments see Geulen: *Habe und Bleibe in Kellers ‚Romeo und Julia auf dem Dorfe‘*.

wronged him (102). Sali uses one of those stones to attack Vrenchen's father, who never recovers from the blow and ends up in an insane asylum (108). At one point, the narrator refers to those variously used and abused stones as the "*Grundstein einer verworrenen Geschichte*" (82). At the bottom of the question of property as explored by Keller in the dual light of law and justice are those circulating stones belonging to nobody, yet used by all. For those ploughing through the field of law and literature, this might mean not only exploring the borderlands where the two fields touch and compete, but also paying attention to the equivalent of Keller's stones, inconspicuous concepts and notions used and abused by various agents and under different circumstances, harder to detect than visible or invisible boundaries.

Having used – or abused – a piece of literature in order to give an example of how literature engages the law, but even more so for the purposes of allegorically suggesting a possible research strategy for law and literature, I feel obliged to address the question of literature's own grounds. What is the field Keller's narrative calls its own? What are the stones and who owns the stones he uses to build his story? To be sure, neither grounds nor stones are Keller's property. *Romeo and Juliet* has no owner, it is *herrenloses Gut*. Its supposed owner and originator remains unnamed, like the violinist. And one cannot be certain whether Shakespeare actually is the rightful owner of *Romeo and Juliet*, since he already drew on a rich tradition stretching from Arthur Broke and Boccaccio back to Ovid and beyond. He used and abused the material of that tradition much like the farmers in Keller's novella used and abused the field, and much like I used and abused the story about that field.

However, Keller is a moral and dutiful writer who justifies his recourse to the literary tradition. According to his narrator, the story of *Romeo and Juliet* is retold, "*zum Beweise wie tief im Menschenleben jede der schönen Fabeln wurzelt, auf welche ein großes Dichterwerk gegründet ist*" (69). As a poetic realist, Keller believes that all literature is and must be rooted in life. The fables literature tells and retells are said to be lodged in the essence of human life as precious metals are lodged deep in the "*guten Grund und Boden*" (137) of life. This is the rock on which Keller's poetic universe rests: The unshakable belief that literature is essentially life, just more condensed and intense, more precious, beautiful and essential. Such rock-solid foundations are no longer available, not to literature and not to its scholarship. Therefore, scholars of law and literature will have to join the black violinist and his crowd, making claims, while roaming forests and fields, big and small, without, however, owning the field.

## References

- Adam, Armin/Stingelin, Martin (Hg.) (1995): *Übertragung und Gesetz. Gründungsmythen, Kriegstheater und Unterwerfungstechniken von Institutionen*, Berlin.
- Agamben, Giorgio (2002): *Homo Sacer. Die Souveränität der Macht und das nackte Leben*, Frankfurt a.M.
- Andriopoulos, Stefan (2000): *Besessene Körper. Hypnose, Körperschaften und die Erfindung des Kinos*, München.
- Benjamin, Walter (1991): "Zur Kritik der Gewalt," in: *Gesammelte Werke*, hg. von Rolf Tiedemann und Hermann Schweppenhäuser, Frankfurt a M., vol. II/1 pp. 179–203.
- Bosse, Heinrich (1981): *Autorschaft ist Werkherrschaft. Über die Entstehung des Urheberrechts aus dem Geist der Goethezeit*, Paderborn.
- Campe, Rüdiger (2008): "An Outline for a Critical History of *Fürsprache: Synegoria* and Advocacy" in: *DVjS* 3, pp. 355–381.
- Derrida, Jacques (1991): *Gesetzeskraft. 'Der mystische Grund der Autorität'*, Frankfurt a. M.
- Fenves, Peter (2009): "Niemand's Sache. Die Idee der *res nullius*," in: *Philo:Xenia*, hg. von Thomas Schestag, p. 123–206.
- Fögen, Marie Theres (2006): "Rechtsverweigerungsverbot. Anmerkungen zu einer Selbstverständlichkeit," in: *Cornelia Vismann/Thomas Weitin (Hg.), Urteilen/Entscheiden*, München, p. 37–50.
- Fögen, Marie Theres (2007): *Das Lied vom Gesetz*, Frankfurt a.M.
- Geulen, Eva (2006): „Plädoyer für Entscheidungsverweigerung.“ in: *Cornelia Vismann/Thomas Weitin (Hg.), Urteilen/Entscheiden*, München, p. 51–54.
- Geulen, Eva (2008): *Giorgio Agamben zur Einführung*, Hamburg (2<sup>nd</sup> edition).
- Geulen, Eva (2010): „Habe und Bleibe in Kellers ‚Romeo und Julia auf dem Dorfe‘, in: *ZfDP* 3, pp. 253–264.
- Goodrich, Peter/Vismann, Cornelia et al. (eds.) (2008): *Derrida and Legal Philosophy*, New York.
- Halley, Janet E./Brown, Wendy (eds.) (2003): *Left Legalism/Left Critique*, Durham.
- Hamacher, Werner (1994): "Afformativ, Streik" In: *Christiaan Hart-Nibbrig (Hg.): Was heißt 'Darstellen'?*, Frankfurt a.M., p. 340–374.

- Haverkamp, Anselm (ed.) (1994): *Gewalt und Gerechtigkeit. Derrida – Benjamin*, Frankfurt a. M.
- Hegemann, Helene (2010): *Axolotl Roadkill*, Berlin.
- Holub, Robert C. (1985): *Realism, Repetition, Repression: The Nature of Desire in Keller's "Romeo und Julia auf dem Dorfe,"* in: *MLN* 100, p. 461–497.
- Kant, Immanuel (1968): *Die Metaphysik der Sitten* in: *Kants Werke* (= Akademieausgabe), Berlin, vol. VI.
- Keller, Gottfried (1989): "Romeo und Julia auf dem Dorfe" in: *Die Leute von Seldwyla*, hg. von Thomas Böning (= *Sämtliche Werke*, vol. 4), Frankfurt a. M., p. 69–144.
- Lüderssen, Klaus (2002): "'Law as Literature' oder wenn die Wissenschaft zur Kunst wird: Dekonstruktion in der Jurisprudenz," in: *Produktive Spiegelungen. Recht in Literatur, Theater und Film*, Baden-Baden (2nd edition), p. 47–57.
- Luhmann, Niklas (1993): *Das Recht der Gesellschaft*, Frankfurt a.M.
- Luhmann, Niklas (1997): *Die Kunst der Gesellschaft*, Frankfurt a.M.
- Meier, Thomas Dominik/Wolfensberger, Rolf (Hg.) (1998): "Eine Heimat und doch keine": *Heimatlose und Nicht-Sesshafte in der Schweiz (16.–19. Jahrhundert)*, Zürich.
- Nussbaum, Martha C. (1995): *Poetic Justice*, Boston.
- Plumpe, Gerhard (1979): „Eigentum – Eigentümlichkeit. Über den Zusammenhang ästhetischer und juristischer Begriffe im 18. Jahrhundert“, in: *Archiv für Begriffsgeschichte*, 23, p. 175–196.
- Plumpe, Gerhard (1981): „Der Autor als Rechtssubjekt“, in: Helmuth Brackert/Jörn Stückrath (Hg.), *Literaturwissenschaft. Grundkurs* (2), Reinbek, p. 179–193.
- Posner, Richard A. (2009): *Law and Literature*, Harvard (3<sup>rd</sup> edition).
- Radbruch, Gustav (1990): "Gesetzliches Unrecht und übergesetzliches Recht," in: *Gesamtausgabe*, hg. von Arthur Kaufmann, Vol .3, Heidelberg.
- Scarry, Elaine (1999): *On Beauty and Being Just*, Princeton.
- Schmitt, Carl (1922): *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Berlin.
- Schneider, Manfred/Friedrich, Peter (Hg.) (2009): *Fatale Sprachen. Eid und Fluch in Rechts- und Literaturgeschichte*, München.
- Schönert, Jörg (Hg.) (1991): *Erzählte Kriminalität. Zur Typologie und Funktion von narrativen Darstellungen in Strafrechtspflege, Publizistik und Literatur zwischen 1770 und 1920*, Tübingen.
- Schwering, Gregor/Zelle, Carsten (Hg.) (2002): *Ästhetische Positionen nach Adorno*, München.
- Uerlings, Herbert (2007): "'Diesen sind wir entflohen, doch wie entfliehen

- wir uns selbst?'. Heimat und Heimatlosigkeit in Kellers 'Romeo und Julia auf dem Dorfe,'" in: Ulrich Kittstein/Stefanie Kugler (Hg.), *Poetische Ordnungen. Zur Erzählprosa des deutschen Realismus*, Würzburg, pp. 157–185.
- Vismann, Cornelia (1994): "Terra Nullius. Zum Feindbegriff im Völkerrecht" in: Armin Adam/Martin Stingelin (Hg.), *Gründung und Gesetz. Gründungsmythen, Kriegstheater und Unterwerfungstechniken von Institutionen*, Berlin, p. 159–174.
- Vismann, Cornelia (2000): *Akten. Medientechnik und Recht*, Frankfurt a. M.
- Weitin, Thomas (2010): *Recht und Literatur*, Münster.
- Wetters, Kirk (2008): *The Opinion System. Impasses of the Public Sphere from Hobbes to Habermas*, New York.