

Walking the Boundary – A Reply



DEBORAH WILLIAMS†

KIERAN DOLIN¹ has used a US Supreme Court decision, *Plaut v Spendthrift Farm*,² which manifested ‘an unusual degree of engagement with the literary realm’,³ in order to consider the relationship between law and literature in language and in concepts. The Supreme Court was asked to consider whether section 27A(b) of the Securities and Exchange Act 1934 was unconstitutional. The court held that, because it required federal courts to reopen final judgments, the section was indeed unconstitutional and invalid under the doctrine of the separation of powers.

What Dolin finds particularly interesting about the decision is that when writing the majority decision, Scalia J used the metaphor of a high wall to describe the doctrine of separation of powers, and then elaborated on this metaphor by reference to Robert Frost’s poem ‘Mending Wall’.⁴ Dolin is interested in how Scalia J went beyond the statutes and the cases to expose ‘how legal values and concepts are embedded in a broader and more diverse web of meanings’ in order to make ‘a rare acknowledgment of the formative power of cultural context upon the law’;⁵ that is, how law exists within the narratives that locate it and give it meaning. Also, he is interested in how Scalia J used poetry as his ally – to enable literature and the law to work together to amplify the meaning of the judgment.

Breyer J’s separate judgment, although concurring with the majority decision in relation to the application of the doctrine to the section, ‘qualified their statement

† Barrister and solicitor; PhD candidate, The University of Western Australia.

1. K Dolin ‘Law and Literature: Walking the Boundary with Robert Frost and the Supreme Court’ (2003) 31 UWAL Rev 202.
2. 514 US 211 (1995).
3. Dolin above n 1, 204.
4. R Frost ‘Mending Wall’ in EC Lathem (ed) *The Poetry of Robert Frost* (New York: Holt, Rinehart & Winston, 1969) 33-34.
5. Dolin above n 1, 204.

of the doctrine of separation of power, and in doing so qualified their understanding of the poem'.⁶ Breyer J disliked the wall metaphor, stating that the doctrine 'blends, as well as separates, powers in its efforts to create a government that will work for, as well as protect the liberties of, its citizens'.⁷ He disliked the use of Frost's poem to bolster the majority decision and cited other parts of the poem to illustrate his point, such as 'Something there is that doesn't like a wall' and 'Before I built a wall I'd ask to know/What I was walling in or walling out'.⁸

Dolin refers to the way in which judges and lawyers routinely seek to clarify their pronouncements and arguments by reference to metaphors and stories.⁹ He quite rightly points out that they do so because law is invariably a matter of language, and that the law can only be articulated in words. He then makes the assertion that: 'While the order of a court will be imposed on the body or the property of the parties to the case, it will originally have been spoken as a sentence. This is the fundamental connection between law and literature'.¹⁰ I disagree. The use by judges and lawyers of words and sentences is simply the connection between law and *language*. The use of words and sentences is also the connection between literature and language, and science and language. All of these disciplines must express themselves by using language. It is a factor common to each of them, but it is not a fundamental connection between them.

In *Plaut*,¹¹ however, the law does specifically engage with literature. The judgments contain a dispute over the meaning of a poem (although the ratio of the case is clear – that the doctrine of separation of powers applies in this instance to render a legislative amendment invalid). Dolin postulates that the written judgments of Scalia and Breyer JJ show how, in a common culture, a common cultural heritage grounds the authority of the doctrine of separation of powers, not just legal precedent. More importantly, in Dolin's view the judicial dispute over the meaning of the poem is more significant than the use of the poem by the judges.

The case became something of a cause célèbre for those who wished to find a relationship between the law and other disciplines, such as literature, as it evidenced the intertwining of legal and literary language. To Dolin the two judges themselves, Scalia and Breyer JJ, 'uncannily re-enact the roles of the two farmers' in the poem,¹² with Scalia J simply repeating 'good fences make good neighbours'¹³ and neglecting the context of the poem, while Breyer J takes on the role of the other farmer, who

6. Ibid.

7. *Plaut* above n 2, 245.

8. Ibid.

9. Dolin above n 1, 203.

10. Ibid.

11. *Plaut* above n 2.

12. Dolin above n 1, 206.

13. *Plaut* above n 2, 240.

questions the need for a wall in all circumstances, but rebuilds the wall in any event. Dolin sees the judgment as ‘an excellent introduction to the study of law and literature’.¹⁴

Dolin uses this judicial reference to the poem in order to found his argument that the case is an example of how literature and law can meet and how literature can influence the law. In what I found the most disturbing part of the article, Dolin considers the judges’ assumptions about poetry. He suggests that Scalia J sees poetry as didactic. Breyer J, on the other hand, ‘wants some sort of guidance from the poem but, in correcting Scalia J, he is faced with the unconventional implication that the boundary fence does not matter’.¹⁵ Breyer J then can only emphasise ‘the poet’s caution’.¹⁶ Dolin says in relation to this:

We might call this the minimalist position; but we should nonetheless recognise his awareness of the complex meanings of the poem, and his refusal of any straightforward application of poem to law. The combination of literary text and legal context is a volatile one. One can imagine the consequences if Breyer J followed through the implications of his reading of Frost’s poem, and devalued the legal precedents. I read his ‘caution’ as putting a narrow interpretation on the poem, and in effect as maintaining the wall between law and literature.¹⁷

I strongly disagree with Dolin’s suggestion that Breyer J would ever be tempted to use a poetic insight to influence his view of the law. Breyer J has not used the poem in this way and, in my opinion, would never have considered so doing. He has a clear view of the operation of the doctrine of the separation of powers and uses the poem simply to elucidate that view. Unlike Dolin, I do not see the combination of legal and literary text as volatile and it seems to me that this is indicative of the major problem with the article as a legal essay: Dolin tries too hard to insist that the boundaries between law and other disciplines, such as literature, can be breached in ways that effectively influence the judicial interpretation of the law.

Dolin’s main argument is that the judicial appropriation of Frost’s poem in *Plaut* suggests ‘that law and literature are adjoining fields, divided by a boundary fence that keeps breaking down, despite regular maintenance’.¹⁸ In his view it is because ‘[t]he common ground of language resists the forms and divisions imposed on it’¹⁹ that gaps are opened in the wall, and ‘[t]his resistance creates opportunities for dialogue between the two disciplines, for licensed or unlicensed wanderings across the border, for “subversion” as well as surveillance’.²⁰

14. Dolin above n 1, 205.

15. *Ibid.*, 206.

16. Frost above n 4.

17. Dolin above n 1, 206.

18. *Ibid.*, 211.

19. *Ibid.*

20. *Ibid.*

Dolin accepts that law and literature are not identical, and that they make different uses of language. Thus, although legal texts can have literary qualities, in the final analysis the law's functions are different; the law commands obedience under threat of punishment while literature invites pleasurable recognition and assent. Yet Dolin suggests that the use by the judges of the poem 'Mending Wall' shows –

how a statement which has the integration, compression and mnemonic qualities of literary language ('*Good fences make good neighbours*') can encode values and govern conduct, can enchant judges, and provoke dissent outside the apparently sequestered 'valley of the saying'.²¹

Whilst I accept this view, and I accept that judges may disagree as to the meaning of a literary work, I do not accept that this poem or any poem can give much assistance to judicial reasoning, and I question the grounds for Dolin's statement that any literary incursion into a judgment creates opportunities for subversion.²²

Dolin is not alone in his view of the relationship between law and literature. He refers to 'a fertile interdisciplinary project in law *and* literature'²³ which has been in existence for more than 30 years and operates on the understanding that '[I]aw is associated with literature from its inception as a formalised attempt to structure reality through language'.²⁴ In the project, scholars on the borders of the two fields look at various structures and associations between law and literature. One of the matters considered by the project is the role played by narrative, metaphor and other rhetorical devices in legal judgments. Dolin sees the matters considered by the project as a bridge between the disciplines of law and literature 'which will enable even more connections to be discerned and possibly produce further transformation in both fields'.²⁵

Dolin accepts that not everyone agrees that this 'expansive vision' is possible.²⁶ The legal scholar, Robert M Cover, has argued that one cannot idealistically assimilate law with literature as law has immediate bodily consequences for people and this creates an ensured difference between the fields.²⁷ Richard A Posner, a judge and legal academic, considered the potential benefits of such interdisciplinary activity for the understanding of law, and concluded that neither the examples nor the theorists of this interdisciplinary work have much to offer law in practice because

21. Ibid, 212.

22. Ibid, 211.

23. Ibid, 212-213.

24. RH Weisberg & J-P Barricelli 'Literature and the Law' in J Gibaldi & J-P Barricelli (eds) *Interrelations of Literature* (New York: Modern Language Assoc, 1982) 150.

25. Dolin above n 1, 213.

26. Ibid.

27. RM Cover 'Violence and the Word' (1986) 95 Yale L Journ 1609.

the 'differences between the two institutions, [including] their varying tolerance for individual creativity and openness to multiple interpretations ... are too great'.²⁸ As Dolin says, Posner emphasises and therefore reinforces the boundaries between law and literature. Posner has also stressed the need for special knowledge as a prerequisite to contributing to the law's development, stating: 'The biggest danger in any interdisciplinary field is amateurism'.²⁹ (Apparently Posner J does accept that the study of the regulation of literature by law and the study of legal rhetoric as a means of improving forensic argument is appropriate.)

Although Dolin sets out the views of Cover and Posner J in his article, he clearly appears to share an expansive vision of the project. He reasserts his view that the idea that law and literature structure reality through their language is central to an understanding of their relations and refers to the insights of the sociologist, Pierre Bourdieu, that law can create things simply by naming them or can make things 'true' simply by saying them.³⁰ By way of example he refers to how 'pensioner' became a new social identity with the Old Age Pensions Act 1908 (UK), and how the monarch could ennoble commoners just by saying so.³¹ He also asserts that literature, too, names and brings forth new visions of society, while accepting that this usually remains confined to the symbolic domain.³²

Dolin refers favourably to Bourdieu's view that although the law in some way creates the social world, this world first creates the law, so that the law usually tends to reinforce the status quo or to announce changes already emerging in society.³³ By way of example Dolin acknowledges that the Old Age Pensions Act 1908 (UK), which he referred to previously as an example of how the law can create, came out of many complex social factors, such as the longer life span of workers, debates about charity and a recognition of a national interest in the health of the population. This, in his view, 'harmonises with that of Robert Frost's persona, who knows that his questioning will have no effect unless his neighbour can begin to formulate new ideas about the fence for himself'.³⁴ To my mind the problem with this example is that it was Parliament, not the judiciary, that enacted the Old Age Pensions Act. No one doubts the direct influence of social factors, and perhaps the symbolic power of literature as well, upon the legislature. Nevertheless, although Parliament also creates

28. Dolin above n 1, 214.

29. RA Posner *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard UP, 1988) 363.

30. P Bourdieu 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 *Hastings L Rev* 838.

31. Dolin above n 1, 214.

32. *Ibid.*, 215.

33. Bourdieu above n 30, 839.

34. Dolin above n 1, 216.

the law, it is clearly not Parliament of whom Dolin is speaking when he discusses 'the law and its speech'.³⁵

Dolin sees a close relationship between law and literature through the way they use language and symbols; he is interested in particular instances of 'symbolic revolution' or the moment of crisis where the struggle over certain words or forms of representation can be traced in both the legal and literary fields.³⁶ Yet he then concedes that *Plaut* is not an instance of a revolutionary link between law and literature. Robert Frost, the author of the poem, was the 'quintessential American poet', but he was a conservative poet, who refused the radical 'free verse' and preferred to adapt traditional narrative and poetic form to evolving speech and situations of rural New England.³⁷ Similarly, the persona from the poem adopted by Breyer J is conservative, and although he questions the need for a wall in all cases, he continues to repair the wall which metaphorically represents the doctrine of the separation of powers. As Dolin admits, the conservative but aphoristic sentences from 'Mending Wall' can be easily applied to defend the law's boundaries in the case: 'The openness of the literary text made it useful to Scalia J as the capstone of a strong conservative defence of separation of powers, and equally useful to Breyer J as the strategic tool for a moderate reformist critique'.³⁸

Dolin concludes his article by stating that:

The poetic quotations are like windfall apples blown across the wall into the neighbouring field of the law. Their circulation proves that the absolute separateness or autonomy of the two domains cannot be sustained. The study of [the law] opens up the cultural context, the ideological choices, and the rhetorical work which underlie the pronouncement of the authoritative word. The law and literature project adopts a critical perspective towards both its constituent fields – and their border.³⁹

Dolin wants to find a role for literature in the law. In this final paragraph he suggests that, without meaning to do so, the law needs to use the realm of literature in order to find meanings. Yet he fails to recognise the importance of what he stated only a few sentences previously: 'The openness of the literary text made it useful to Scalia J ... and equally useful to Breyer J...'.⁴⁰ The law will use whatever tools it wants in finding the appropriate words to make its pronouncements. The use of Frost's poem in the *Plaut* judgment is simply indicative of his stature as 'the

35. Ibid, 215.

36. Ibid, 216.

37. WH Pritchard *Frost: A Literary Life Reconsidered* 2nd edn (Amherst: Massachusetts UP, 1993) 255.

38. Dolin above n 1, 218.

39. Ibid.

40. Ibid.

quintessential American poet⁴¹ and shows how literary language can be used to express legal concepts. In the end a legal decision must always be set firmly within the defined parameters of the law. In literature (or sociology) knowledge or insight for its own sake is appropriate, but in the law there must always be a decision, a pronouncement, a *ratio decidendi*. Poetic quotations and even poetic insights may serve as tools to make a legal decision more interesting, or as embellishments to make it more accessible, but they are irrelevant to its main objective, which is that of making a judicial pronouncement with precedent value.

Thus, while the article is interesting for lawyers, in that it gives some insight into the way in which literary academics view the law and how interdisciplinary studies are attempting to appropriate legal discourse, it is not a 'legal' article. I found the use by two justices of the United States Supreme court of Frost's poem, particularly the differing views as to its meaning, very interesting. But I must admit to some sympathy with the views of Richard Posner, who 'though well-read and appreciative of the humanistic value of literature ... concludes that neither its examples nor its theorists have much to offer law in practice'.⁴²

I accept that the law is not an autonomous domain, but although Dolin may describe poetic quotations as 'windfall apples blown across the wall into the neighbouring field of the law',⁴³ these metaphoric apples provide no real substance for the legal discourse. They serve to provide spice to otherwise dry legal pronouncements. With or without the use of Frost's poem, the application of the doctrine of the separation of powers is clearly stated in the judgment, in language appropriate to a system based on precedent. That Breyer J disagreed with the majority's interpretation of Frost's poem is irrelevant to the precedent value of the decision because he agreed with the majority on the law. In this particular instance section 27A(b) of the Securities and Exchange Act was held to be unconstitutional and that, in the final analysis, is the use that the law will make of the case. Those in the interdisciplinary sphere wish to concentrate upon the use of a literary quotation by the judiciary in the case, but in my opinion Dolin's reasoning is flawed when he sees the reference to the poem as indicative of a breach in what is a metaphoric wall (and a real barrier) between the law and literature. I am in sympathy with William Pritchard's assessment, as set out in the article, that: 'The final lesson appeared to be that poetry and power only went together in poems'.⁴⁴

41. Ibid.

42. Posner above n 29, 363.

43. Dolin above n 1, 218.

44. Pritchard above n 37, 255.