Introduction to law and literature: walking the boundary with Robert Frost and the Supreme Court

In April 1995 the American Supreme Court decided the case of *Plaut* v. *Spendthrift Farm Inc*.[1] The case began in 1987 when Mr and Mrs Plaut and some other investors in Spendthrift Farm alleged that it had committed fraud and deceit when selling stock, contrary to Section 10(b) of the Securities and Exchange Act of 1934. The District Court in Kentucky held that this suit was time barred, following a recent Supreme Court decision in the case of *Lampf* which declared that such suits must be commenced within one year after the discovery of the facts constituting the violation and within three years of the violation itself. After this judgment became final, Congress enacted a new Section 27A(b) of the Securities and Exchange Act, providing that any action commenced before *Lampf*, but dismissed thereafter as time barred, could be reinstated. The Plauts moved for reinstatement accordingly, but the District Court held that Section 27A(b) was unconstitutional. This decision was confirmed by the Court of Appeal, and by the Supreme Court.

This case, like all legal cases, involves a story.[2] While it begins as a story of disappointed investors attempting to obtain redress for a wrong that has damaged them, the conflict shifts onto a new level after the failure of the initial suit. With the attempted reinstatement, both Plaut and Spendthrift Farm in effect become proxies for a contest between the judiciary and Congress. The Plauts' motion for the reinstatement of their action was defeated not in terms of securities law, but on constitutional grounds. Three courts found that Section 27A(b) contravened the Constitution's separation of powers in that it required federal courts to reopen final judgments entered before its enactment. The Constitution forbids the legislature to interfere with courts' final judgments. Congress had trespassed into the judicial realm with this law, which was therefore held to be invalid.

This legal story acquires a distinctly literary element in the judgments of the Supreme Court. Writing the opinion of the majority of the Court, Justice Antonin Scalia concluded his account of the legal authorities with a summary that relied equally on metaphor and logic: 'In its major

features . . ., [separation of powers] is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict' (356). In expounding legal principle and justifying his decision, Justice Scalia employs the rhetorical tools of metaphor and narrative. His metaphor of the wall represents the judicial power in the Constitution as a fortified city under assault from a hostile Congress or Executive. His exposition of the law rests on an implied, imagined narrative of battle. There is nothing extraordinary about Scalia's procedure here: this is a normal instance of judicial reasoning in a run-of-the-mill case. Judges and lawyers routinely seek to clarify their pronouncements and arguments about the law by resorting to metaphors and stories. They do so because law is inevitably a matter of language. The law can only be articulated in words. 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.

However, the legal language of *Plaut* v. *Spendthrift Farm* also manifests an unusual degree of engagement with the literary realm. Having invoked the metaphor of the wall, Justice Scalia seeks support for his formulation of the law by citing a well-known literary analogue: 'separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: good fences make good neighbors' (240). Scalia assumes that he and his readers share a common culture and that they will be able to recognise his allusion to Robert Frost's poem, 'Mending Wall'. What is most interesting about this part of his opinion is its recognition that law is an aspect of this 'distinctively American' culture that he invokes. The judge grounds the authority of the law of separation of powers not just in legal precedent, but in the national cultural heritage. Political theory, history and literature combine to authorise and authenticate this law, and locate it in a larger narrative. While most judgments refer only to statutes and past cases, implying the independence and autonomy of law, Scalia's allusion exposes how legal values and concepts are embedded in a broader and more diverse web of meanings. In this incidental rhetorical flourish, he makes a rare acknowledgment of the formative power of cultural context upon the law, confirming Robert M. Cover's insight that, 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'[3] Moreover, Justice Scalia's use of poetry is revealing: he brings it into the public sphere, as a kind of ally of law. Literature and law, it seems, can work together in the production of cultural ideals and values.

Another member of the Court, Justice Stephen Breyer, concurred with the majority decision but qualified their statement of the doctrine, and in doing so questioned their understanding of the poem. He cautioned against 'the unnecessary building of such walls' as 'in itself dangerous, because the Constitution 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' (359). He finds that past cases provide other metaphors than the wall: citing *Springer* v. *Philippine Islands* he argues that the doctrine does not 'divide the branches into watertight compartment', nor 'establish and divide separate fields of black and white'. In refining the meaning of 'separation of powers', Breyer also takes issue with the majority's use of Robert Frost's poem to bolster their decision: 'One might consider as well that poet's caution, for he not only notes that "Something there is that doesn't love a wall," but also writes, "Before I built a wall I'd ask to know / What I was walling in or walling out"' (359). The poet's belief in walls is not as clear-cut as Justice Scalia believed.

This unusual judicial dispute over the meaning of a poem was reported in the *New York Times* and in *Mediator*, the bulletin of the Law and Humanities Institute.[4] To quote the latter: 'It is always a treat, and a rare one at that, to see the Supreme Court intertwine legal and poetic judgments.' The Law and Humanities Institute aims to foster an understanding of law's interrelations with literature. Underpinning its celebratory note on the case is a belief that poetry has a proper, but generally unacknowledged, role to play in the public debates, that literature has something to offer the law in its resolution of social conflicts. By evidencing the 'intertwining' of legal and literary language so clearly, the case of *Plaut* v. *Spendthrift Farm* provides an excellent introduction to the study of law and literature.

However, it is not only the justices' common interest in the poem which is significant; their different interpretations of it are even more instructive. While Robert Frost's 'Mending Wall' is widely known, a substantial quotation will assist our understanding of the text and its relevance to the law. Two farmers walk along their common boundary 'at spring mending-time', replacing the fallen stones of the fence:

> There where it is we do not need the wall:
> He is all pine and I am apple orchard.
> My apple trees will never get across
> And eat the cones under his pines, I tell him.
> He only says, 'good fences make good neighbors.'
> Spring is the mischief in me, and I wonder
> If I could put a notion in his head:

> '*Why* do they make good neighbors? Isn't it
> Where there are cows? But here there are no cows.
> Before I built a wall I'd ask to know
> What I was walling in or walling out,
> And to whom I was like to give offense.
> Something there is that doesn't love a wall,
> That wants it down.' . . .
> He moves in darkness as it seems to me,
> Not of woods only and the shade of trees.
> He will not go behind his father's saying,
> And he likes having thought of it so well
> He says again, 'Good fences make good neighbors.'[5]

Justice Scalia and Justice Breyer uncannily re-enact the roles of the two farmers. Scalia repeats the proverb, 'good fences make good neighbours', and attributes it to Robert Frost, completely neglecting the context of the poem. Breyer asks the sceptical questions while rebuilding the wall, noting that Frost doubts the wisdom of the wall, whilst agreeing with Justice Scalia to apply the separation of powers doctrine to this case. Breyer's opinion exposes a rift between the poem and the law: to agree on the law but disagree on the poem either cancels out the significance of the poem, or it undermines the metaphoric wall of the separation of powers doctrine.

In exploring this contradiction, we can begin by examining the judges' assumptions about poetry. Justice Scalia seems to see poetry as didactic, as a repository of quotable moral and political truths, 'what oft was thought but ne'er so well expressed'. What he calls the 'advice' offered by Frost conforms with the wisdom of American political doctrine; indeed the law 'profits from' the poetic statement. In this view poetry is sententious: its moralising maxims harmonise with the task of applying legal rules. Modern poetry does not fit this description, and Frost's poem is primarily a narrative in which two opposite viewpoints on the events being recounted are aired. Frost discouraged moralistic readings of this poem in a 1944 interview, saying there was no 'rigid separation between right and wrong. "Mending Wall" simply contrasts two types of people.'[6] The following year he emphasised this ambivalence: 'Twice I say "Good fences" and twice "Something there is –".'[7] Justice Breyer picks up on the anti-sententious note in Frost's poem, in which the speaker is tempted to undermine his neighbour's belief in the value of fences, by questioning, '*Why* do they make good neighbors?' Breyer still wants some sort of guidance from the poem, but in correcting Scalia, he is faced with the unconventional implication that the boundary fence does not matter. This would have startling implications for the separation of powers, not to mention the law

of real property. Faced with these difficulties, Breyer can only emphasise 'the poet's caution'. 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. Can you imagine the consequences if Justice Breyer 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.

The existence of this wall can be elucidated by a closer reading of Frost's poem. Frost described 'Mending Wall' as a 'parable', but kept 'the secret of what it means' to himself.[8] However, we may approach a statement of its meaning by noting that the poem's speaker sees a contest between unknown forces in nature that dislodge the stones and inherited cultural practices which demand the rebuilding of the structure. He aligns himself with scepticism and freedom, and his neighbour with custom and traditional authority. The language of each is appropriate to his ethic, one tentative and exploratory, the other proverbial and inherited:

> He only says, 'Good fences make good neighbors.
> Spring is the mischief in me, and I wonder
> If I could put a notion in his head.'

The speaker's complaint against the man of maxims is literature's challenge to law: the challenge offered by a self-consciously creative domain, where alternative voices can be heard, where hypothetical situations can be explored and where the settled questions of society can be reopened through the medium of fiction. He imagines a different world and poses questions: what if . . . ? why . . . ? His mischievous approach matches Jonathan Culler's description of literature as 'an institution based on the possibility of saying anything you can imagine . . . [F]or any orthodoxy, any belief, any value, a literary work can mock it, parody it, imagine some different and monstrous fiction.'[9] Equally, the other farmer is speaking the law. He accepts the rule that 'good fences make good neighbors'. The proverb is a catchy phrase that carries the force of belief, that compels acceptance and a certain course of action. He does not question its truth but respects its authority as something handed down from his forefathers. For him, the proverb is sufficient and complete: nothing more, nothing else, need be said. In recognising the archaic origin and 'darkness' of this mental enclosure, Frost intuits key features of all authoritative language. 'The authoritative word', according to M. M. Bakhtin, 'is located in a

distanced zone, organically connected with a past that is felt to be hierarchically higher. It is, so to speak, the word of the fathers . . . It is a *prior* discourse. It is therefore not a question of choosing it from other possible discourses that are its equal. It is given in lofty spheres, not those of familiar contact.'[10] From Mount Sinai to the bench and bar of the world's Supreme Courts, the law is emphatically an instance of the authoritative word. Like the neighbour, it permits 'no play with its borders'.[11]

The repair of the wall is a declaration of the importance of the boundary as a marker of the limits of property, of what land each can call his or her own and what is acknowledged as the other's. However, in debating the value of walls the poem symbolises not only the law's upholding of private property, but its fundamental reliance on boundaries. As the editors of a recent guide to socio-legal studies observe:

> In its basic operations, law attempts to create, police, and occasionally transgress social, spatial and temporal boundaries. The pre-eminent declaration of a legal system – its announcement of its own existence – establishes jurisdictional boundaries within which its authority prevails. This definition of a geographical space is matched by the declaration of temporal boundaries (statutes of limitation, ages of minority and majority, retroactive or prospective application of statutes or case law) within which legal authority is exercised. Within law's spatio-temporal grid, complex systems of classification are established, creating boundaries that define individuals, communities, acts, and norms: Who is a criminal? A citizen? A victim of negligence? A person or group entitled to legal protection or remedy?[12]

The inseparability of laws and walls was recognised by the ancient Greeks. Plato invokes 'Zeus the protector of boundaries' to authorise the first of his agricultural laws: 'No man shall disturb the boundary-stones of his neighbour, whether fellow-citizen or foreigner.'[13] Hannah Arendt traces the importance of the wall as a symbol of law from Heraclitus to Montesquieu and insists that its borders are always under pressure, due to 'action's inherent tendency to establish relations, force open limitations and cut across boundaries'.[14]

An understanding of 'Mending Wall' in this context reveals what was at stake for the Supreme Court in *Plaut* v. *Spendthrift Farm*: the policing of temporal and institutional boundaries that had been deliberately transgressed; the defence of intrinsic legal and judicial functions. Little wonder that Justice Scalia imagined the two branches of government as warring states, far removed from the civil dialogue and co-operation of Frost's farmers. The more tempered approach of Justice Breyer is shown in his adoption of the literary 'side' of the argument, his willingness to evaluate the need for the wall: 'Before I built a wall I'd ask to know / What I was

walling in or walling out, / And to whom I was like to give offense.' Like the speaker in the poem, he upholds the wall in its customary place despite his openness to change. 'Mending Wall' sets the language of proverbial truth against the language of possibility. What the 'Supreme Court Poetry Seminar' suggests is that while both languages are available at law, the former is more likely to prevail. This book will explore instances of legal creativity, as well as the experience of those offended by its demarcations and exclusions. The questions posed by Frost's speaker and invoked by Breyer are among the vital questions literature can ask of law.

If we follow Culler in thinking of literature as 'an institution based on the possibility of saying you can imagine', must we conclude that, unlike law, literature is hostile to boundaries? A moment's reflection suggests not. The distinction between poetry, fiction and drama; the subdivisions of each of these genres – including novel and romance, sonnet and haiku, tragedy and comedy; the evaluative distinctions between high and low art – poetry as against doggerel, drama and melodrama, or Graham Greene's division of his fiction into novels and entertainments; and the fundamental boundary between literary and other writing are all examples of literature's dependence on external and internal boundaries for its identity and its everyday functioning. Yet we can readily see that these boundaries seem made to be transgressed, at least by modern writers: the verse-novel, the dramatic monologue, tragicomedy, the non-fiction novel are only the most obvious of many experiments in form and discourse. The Italian writer and critic Claudio Magris, a native of the city of Trieste, on the border of what used to be 'Western' and 'Eastern' Europe, has reflected on the relationship between writing and boundaries:

> Boundaries between states and nations, established by international treaties or by force, are not the only kind. The pen that scribbles on from day to day . . . traces boundaries, moves, dissolves and restores them . . . Literature is intrinsically a frontier and an expedition in search of new frontiers, to shift them and define them. Every literary form is a threshold, a zone at the edge of countless different elements, tensions and movements, a shifting of the semantic borders and grammatical structures, a perpetual dismantling and reassembly of the world, its frames and its pictures.[15]

Magris acknowledges the value of boundaries as well as their limits in this capacious and socially alert description of literature. In his view literary texts can question traditional borders and distinctions; writing is an engagement with and an extension of existing boundaries. His passionate and idealistic reflection is useful for its insight that boundaries are dissolved and re-formed in and by literature. Whether Magris's argument is overstated,

whether all texts produced in the literary field possess the openness and exploratory quality that he claims, may be questioned.[16] His insistence on literature's 'tracing' of boundaries, its drawing attention to borders and their effects, however, is illustrated with great clarity by many texts, including Frost's 'Mending Wall'.

For literary scholars and critics, too, a consciousness of the role of frames and boundaries has transformed their studies:

> Foregrounding the issue of boundaries has reminded us that literature is not something given once and for all but something constructed and reconstructed . . . Not only is the canon of literary works in any genre fashioned by a simultaneous perambulation and transgression of boundaries but the very concept of the literary is itself continually renegotiated. Any study of literature, then, is necessarily bound up explicitly or implicitly with an interrogation of boundaries: their identification or definition, the regulation of what may cross them and at what times and under what circumstances, the alarms that go off when unauthorized crossings occur, and so on.[17]

This awareness of barriers and their effects, especially the realisation of modes of inclusion and exclusion, abounds in traditional and modern literary representations of law, as the most cursory review shows. Sophocles' *Antigone* begins with the dilemma created by the unburied body of Polynices, declared a traitor by his uncle Creon, and condemned by his edict to rot outside the city walls. Antigone elects to defy that law, and cross the boundary marking his expulsion from the polity, with fateful consequences for herself and her society. The action of Shakespeare's *The Merchant of Venice* shows how the racial and religious difference of Shylock the Jew forms an ethical barrier for the Venetians which is reinforced by laws subjecting him to special penalties as a so-called alien. Kafka's brief and mysterious parable 'Before the Law', imagines the citizen seeking the aid of the law as eternally waiting outside its walls, never gaining admittance, let alone justice. Works like these may question the boundaries established by the law, or they may simply reflect such boundaries. In either case, it is the ability of literary texts to represent and draw attention to such boundaries and how they function that produces their greatest insights into law.

The judicial appropriations of Frost's 'Mending Wall' suggest that law and literature are adjoining fields, divided by a boundary fence that keeps breaking down, despite regular maintenance. The common ground of language resists the forms and divisions imposed on it, opening 'gaps even two can pass abreast'. This resistance creates opportunities for dialogue between the two disciplines, for licensed or unlicensed wanderings

across the border, for 'subversion' as well as surveillance.[18] Frost directs our attention to the nature of borders, and to the various relations and exchanges they make possible. Claudio Magris has observed how the experience of a border can shift: 'at one moment it is a bridge on which to meet, at another, a barrier of rejection'.[19] As we shall see throughout this book, the border between law and literature has sometimes functioned as a bridge, promoting dialogue, and at others served as a barrier inhibiting it.[20]

However frequent the exchanges, however open the frontier between literature and law, it does not imply that the two fields are identical. Just as 'He is all pine and I am apple orchard', so we can think of literature and law as different uses of language. Brook Thomas makes this point forcefully in his closely reasoned 'Reflections on the Law and Literature Revival': 'Without a doubt legal texts can have literary qualities. But in the last analysis their function is different.'[21] A useful approach to the variety of functions or uses of language is provided by the philosopher Ludwig Wittgenstein's concept of 'language-games'. Among the 'multiplicity of language-games' listed in his *Philosophical Investigations* are 'Giving orders, and obeying them – . . . Reporting an event – . . . [and] Making up a story, and reading it –.' He explains that 'the term "language-*game*" is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life'.[22] As distinct linguistic forms of life, law and literature speak different kinds of sentences: one commanding obedience under threat of punishment, the other inviting pleasurable recognition and assent. The speaker of legal sentences has an 'imperative to issue exclusive judgments', to quote Thomas again;[23] while the creator of literary texts may suspend judgment in favour of inclusivity and dialogue, as the Frost poem shows.

If these obvious and fundamental differences appear at first glance to locate the two language types at a distance from each other, the example of *Plaut* v. *Spendthrift Farm* shows how the legal form of life produces several kinds of sentence, narrative and hortatory as well as imperative. Equally, despite W. H. Auden's poetic disclaimer, 'For poetry makes nothing happen: it survives / In the valley of its saying / Where executives would never want to tamper', the example of 'Mending Wall' shows how a statement which has the integration, compression and mnemonic quality of literary language ('*Good* fences make *good* neighbors') can encode values and govern conduct, can enchant judges and provoke dissent outside the apparently sequestered 'valley of its saying'.[24] As different forms of life, they enable different understandings of the world, or to give due weight to the organic metaphor they construct reality differently.

Auden was probably right in thinking that not many business executives read poetry (or bought his books). Since the deaths of Tennyson and Kipling it has become an increasingly specialist activity. However, specialisation does not imply seclusion. Gillian Beer points to the inevitableness and plurality of cultural encounters in society: 'Train-spotters, mothers of babies, astronomers, horse-riders have each their special knowledges and vocabularies; but none of them lives as train-spotter, mother, astronomer, horse-rider alone. Each inhabits and draws on the experience of the historical moment, the material base, the media, and community in which they all dwell.'[25] Although Beer's interest is in border crossings between science and literature, her vision of multiple relations, roles and vocabularies, and her insistence that these can only be understood in the light of the particular 'historical moment' in which the individual lived are equally useful to the interdisciplinary study of law and literature. Understandings of literature and of law have changed throughout history, and Beer argues that interdisciplinary activity promotes change: 'Interdisciplinary studies do not produce closure. Their stories emphasize not simply the circulation of intact ideas across a larger community but transformation: the transformations undergone when ideas enter other genres or different reading groups, the destabilizing of knowledge once it escapes from the initial group of co-workers, its tendency to mean more and other than could have been foreseen.'[26] In this book we shall explore many such stories of transformation in a variety of cultures, and reveal the 'diverse articulations which obtain in different historical and geographical loci'.[27]

For almost three decades the opportunity of cross-border travel broached by Frost's persona has been exploited by a fertile interdisciplinary project in Law *and* Literature.[28] One of the fundamental propositions of this movement was succinctly put by Richard Weisberg and Jean-Pierre Barricelli in a pioneering essay: 'Law is associated with Literature from its inception as a formalized attempt to structure reality through language.'[29] Several such structures and associations have been identified by scholars working at the border of the two fields, including:

(i) literary representations of legal trials, practitioners and language, and of those caught up in the law;
(ii) the role played by narrative, metaphor and other rhetorical devices in legal speech and writing, including judgments;
(iii) how the supposed freedom of literary expression is contained and regulated by laws;
(iv) the circulation of legal ideas in literary culture, and vice versa in various periods and societies;