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“BE TRUE TO WHAT YOU SAID ON PAPER”: PENNY PETHER ON  
THE POSITIVISM OF LAW AND LANGUAGE

MARIANNE CONSTABLE\*

AT the end of the fifth and only unpublished<sup>1</sup> of Penelope Pether’s articles on “private judging” or “secret judging” or on the practices of unpublication, depublication, and non-citation of U.S. appellate opinions, Pether cites Martin Luther King Jr.’s speech, “I’ve Been to the Mountaintop.”<sup>2</sup> It is clear, she writes, that the contemporary judiciary has ceased to heed MLK’s call to the nation and to legal professionals: “Be true to what you said on paper.”<sup>3</sup> Being true to what one says on paper is a vexed matter at the best of times, as Penny, who among other things was a Derrida scholar, certainly knew, and as her five long articles on the writings of the federal appellate courts show.<sup>4</sup> In these articles, Pether argues that appellate practices of depublication, unpublication, withdrawal, and non-citation have become so prevalent that these practices have emaciated the meaning of common law precedent and undermine the courts’ ostensible commitments to the truth of what they have already said on paper. Pether reads not only texts and documents, but also the courts’ discursive practices with a critical eye and ear, finding in them an abnegation of

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\* I would like to thank David Caudill, the Shachoy Symposium organizers, and the *Villanova Law Review* editors for inviting me. I am very honored, and also humbled and saddened, by the opportunity to comment on some important work by Penny Pether, whom I met as a colleague about fifteen years ago, who became a friend, who was intelligent and gifted and charming, and who remains engaged and alive through the reading and writing that she leaves us.

1. At the time this Article was written and presented, Penelope Pether’s manuscript was unpublished. The manuscript is published posthumously in this issue with the assistance of her husband, Professor David Caudill, and Professor Pether’s former research assistant Peter F. Johnson. The published version can be found at Penelope Pether, *Strange Fruit: What Happened to the U.S. Doctrine of Precedent?*, 60 VILL. L. REV. 443 (2015).

2. See *id.* at 452.

3. See *id.* (quoting Dr. Martin Luther King, Jr., Speech at Memphis, TN Masonic Temple: I’ve been to the Mountaintop (Apr. 3, 1968), available at <http://www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm>).

4. The five articles, discussed in more detail below, are: *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553 (2005); *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955 (2009); and *Strange Fruit: What Happened to the U.S. Doctrine of Precedent?*, 60 VILL. L. REV. 443 (2015). I refer to them within the text and footnotes using the short titles: *Scandal, Letter, Sorcerers, Solipsism*, and *Strange Fruit*, respectively.

responsibility on the part of those legal actors most entrusted with responsibility, toward those most in need of it.

The judiciary's use, abuse, and misuse of what it has said on paper reveals, among other things, the positivism of contemporary U.S. law, Pether argues, distinguishing it from the law of Australia, New Zealand, Canada, and the U.K. It also warns of the positivism of language, an issue about which she is a little less explicit. Despite her ostensibly dark diagnosis of law and language and her repeated calling out of cynicism and disingenuousness in these articles, Pether's own commitment to the possibilities of law and of language remains unshaken. The imperfections and flaws and even failures of U.S. law, language, and institutions manifest themselves against the background of another possible account of law and language, in which account (as we shall see) Pether figures law and language neither as ideal, romantic, or utopian, nor as totalizing and cynical matters of domination or of brute power and fact.

In what follows, I turn to these five fascinating articles not to figure out if Penny is right about what could or should be done, but to see what those pieces say about law and language. I present them to you, very much drawing on Pether's own words, to show how she reads and understands law, language, writing, and precedent. In her work lies a depth of insight into many truths, which she found and expressed not only on paper, but in her life as a legal professional, a language practitioner, and a person concerned with justice.

## I.

Four of the five articles appeared in the first decade of the 2000s. The other was an unpublished manuscript when David Caudill generously shared it with me. Together, these pieces serve as a strong and forceful indictment of the so-called publication, or rather de/un/non publication practices, of the U.S. federal appellate courts. At stake in not publishing or withdrawing an opinion is, at one level, its searchability and its citeability. More problematic though, as Pether argues, are the "Rule of Law" and "equality" (read: "inequality") effects of the mass screening and delegating of appellate decisions to inexperienced and undersupervised staff. In the context of a system that proclaims its commitment to equality and its observance of the United States Constitution, these effects matter the most to "have-not" appellants, such as aliens, immigrants, prisoners, and racial minorities.<sup>5</sup> I refer to the five pieces by their short titles and present them chronologically, as *Scandal*, *Letter*, *Sorcerers*, *Solipsism*, and *Strange Fruit*. (Penny enjoyed clever titles—and long sentences).

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5. The term "have-not" in this context refers to those who do not "come out ahead," as Marc Galanter puts it in his discussion of "one-shotters" and "repeat players" in his now-classic law and society article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

The first article, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, or *Scandal*, published in the 2004 *Stanford Law Review*, presents Pether's investigation into the history of unpublication, depublishing, and stipulated withdrawal. Unpublished opinions are those "not designated for publication in the jurisdiction's official reporter, if it has one . . . ."<sup>6</sup> This limits the opinion's precedential value and its citation is either banned or limited.<sup>7</sup> "Depublishing" refers to "a jurisdiction's highest appellate court stripping an opinion of an intermediate appellate court of precedential value without an appeal to or hearing by the depublishing court . . . ."<sup>8</sup> "Stipulated withdrawal" occurs as a condition of a settlement between parties during a pending appeal; the opinion is thus vacated and stripped of precedential value. Like depublished opinions, such opinions are difficult to find.<sup>9</sup>

The thrust of the article is Pether's discovery that contemporary institutionalized unpublication developed in the Fourth Circuit Court of Appeals as a reaction against pro se prisoner appeals and civil rights litigants, precisely at a time—the late 1950s and 1960s—when equity jurisprudence was being developed.<sup>10</sup> In other words, rather than being justified for reasons of crisis—presenting an overwhelming volume of book-bound precedent—or efficiency—saving the judicial time it takes to polish writing—such practices developed in part out of judicial impatience or frustration with what were perceived as meritless appeals and in part as "judicial backlash against the desegregation mandate of *Brown v. Board of Education*."<sup>11</sup>

Pether opens this powerful article with two quotations from Derrida, whose work animates her critique of the "scandalous" state of affairs in the federal appellate courts in 2004, when approximately eighty percent of the opinions of the United States courts of appeals were unpublished.<sup>12</sup> The "scandal" consists in the following:

Forced to abandon enforcement of Jim Crow laws, which were the successors of the legalized slavery constitutive of the nation, U.S. courts developed institutionalized practices that both produced and avoided the evidence of their structural subordination of "others." These practices manifest blindness and deafness to the "supplement"—the opinions that provide evidence of that structural subordination—achieving this via the citation bans usually imposed on the products of private judging, and by deny-

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6. See Pether, *Scandal*, *supra* note 4, at 1437.

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.* at 1440–41.

11. Pether, *Letter*, *supra* note 4, at 1555; see also Pether, *Scandal*, *supra* note 4, at 1444.

12. See Pether, *Scandal*, *supra* note 4, at 1441; see also Pether, *Strange Fruit*, *supra* note 1, at 446 n.23 (providing updated 2010 figures, stating "The 2010 rates run from 62% for the DC Circuit to 93% for the Fourth Circuit.").

ing the precedential status of the vast majority of U.S [sic] court opinions. While formally outlawed by the Constitution and the Supreme Court, subordination of “others,” then, remains constitutive of U.S. law.<sup>13</sup>

The “scandalous injustice” of the subordination of others and of blindness and deafness to evidence of it that Pether crusades against is at the core of all of the articles and of what she comes to call the “‘secret’ judging,” which has, since the mid-twentieth century,

become the national norm rather than the exception, rendering withdrawing and replacing opinions under the influence of powerful repeat-player parties and in the interests of manipulating the *corpus juris* common, frequently flouting statutes prescribing accountability owed by judges to litigants, and hiding what the courts do from the public—and why they do it—an institutional way of life.<sup>14</sup>

*Scandal* relies on the 1972 case of *Jones v. Virginia State Farm*<sup>15</sup> (*Jones II*) and its Appendix, the Haynsworth Report (Report), as public and textual evidence that the development of unpublication practice in the Fourth Circuit stemmed from judicial anxiety about postconviction appeals.<sup>16</sup> The Report ultimately reveals a process in which two habeas clerks, doubling as judicial assistants and petitioner advocates, handled 500–600 appeals per year, preparing records on the basis of which an appeal was disposed of without a formal hearing.<sup>17</sup> Interestingly, *Jones II* is itself a case about the accessibility of a written transcript. In its original decision (*Jones I*),<sup>18</sup> the Fourth Circuit had reversed a trial court order requiring the state to give Jones the habeas transcript.<sup>19</sup> This was the only transcript in existence because there were not even notes of the evidence at his trial, where, by the way, he had represented himself.<sup>20</sup> The reason for denying his claim to the transcript was that he had demonstrated no “need” for it.<sup>21</sup> With an attorney this time, Jones then filed a petition for a rehearing on the basis of a holding in an unpublished opinion the previous year, *Knight v. Coiner*,<sup>22</sup> in which, Jones claimed, another Fourth Circuit panel

13. Pether, *Scandal*, *supra* note 4, at 1441–42 n.20.

14. See Pether, *Strange Fruit*, *supra* note 1, at 445–46 (footnotes omitted); *id.* at 448 (“It also occasioned scandalous injustice. That injustice was not merely that of the obvious stripe, which arises from a litigant being told that a court will not be bound . . .”).

15. 465 F.2d 1091 (4th Cir. 1972) (*Jones II*).

16. See Pether, *Scandal*, *supra* note 4, at 1447 n.4.

17. See *id.* at 1461 (citing *Jones II*, 465 F.2d at 1095).

18. 460 F.2d 150 (4th Cir. 1972) (*Jones I*).

19. See Pether, *Scandal*, *supra* note 4, at 1456 n.95 (citing *Jones I*, 460 F.2d at 153).

20. See *id.* at 1446.

21. See *id.*

22. No. 14,940 (4th Cir. Feb. 11, 1971).

had written that there is a constitutional obligation on the part of “states to furnish free to indigents trial transcripts for purposes of collateral attack absent a showing of need.”<sup>23</sup>

*Jones II* denied the petition for rehearing and sought to account for the conflicting precedent about a prisoner’s right to a transcript.<sup>24</sup> It also acknowledged that not only was Jones “entitled to a complete explanation of an apparent disregard of precedent, but so also is the bar . . . .”<sup>25</sup> In an admirable feat of legal research and reading, Pether does not only trace many of the unpublished opinions that *Jones II* and its predecessors cite, showing along the way how opinions favoring disempowered litigants’ appeals were unpublished and those which disfavored them were published.<sup>26</sup> She also points out the contradictions and inconsistencies in the *Jones II* opinion (as well as in others). Both as an example of an appeal that cites an unpublished opinion and through what its own (published) opinion says—and does, which is not always the same thing—about published and unpublished writings, *Jones II*, Pether concludes, “demonstrates the folly of scholars who take the judges at face value. It is time that we ask more of them.”<sup>27</sup>

The article offers “data establishing that we cannot trust the judges when they tell us that the system of shadow precedent works equitably.”<sup>28</sup> “[P]rompted by appeals from litigants for whom the judges had scant regard; eliciting still less regard for the rights of those litigants or for the rule of law; providing cover for ineptitude and bad faith; [and] normalizing structural subordination,” depublication practices contribute to a lack of transparency, a lack of judicial accountability, and unfairness to litigants.<sup>29</sup> The alternative to the “disingenuousness or cynicism that has itself become the scandal of the U.S. judiciary” and was manifest in such (proposed) strategies as making certain opinions “‘look like an unpublished opinion’” but be citeable is, according to Pether, a concern with what procedure can be “in the hands of genuinely ethical lawyers who are unafraid to speak truth to power . . . .”<sup>30</sup> For Pether, this means “to make the law as responsive to the plight of the dispossessed as to the powerful, to the appeals of all citizens and others who seek access to law or to justice in the nation’s courts.”<sup>31</sup>

Published a year and a half after *Scandal, Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, or *Letter*, originally written for a symposium and published in the *Washington and Lee Law Review*

23. See *Jones II*, 465 F.2d 1091, 1092 (4th Cir. 1972).

24. See Pether, *Scandal*, *supra* note 4, at 1446 n.4.

25. See *id.* at 1451 (quoting *Jones II*, 465 F.2d at 1092).

26. See *id.* at 1454 n.82, 1535.

27. See *id.* at 1536.

28. *Id.* at 1532.

29. See *id.* at 1464.

30. *Id.* at 1536.

31. *Id.* at 1534, 1536.

in September 2005, responds in part to the Judicial Conference of the United States' proposal to amend the Federal Rules of Appellate Procedure by restricting non-citation bans.<sup>32</sup> The Rule (32.1) to prevent federal courts from banning citation of any of their unpublished opinions was eventually adopted in 2006 and took effect December 1, 2006.<sup>33</sup> Arguing that the non-citation ban and the issues that it raises deserve to be taken very seriously, Pether also maintains that the citation ban is the easiest and least problematic of the practices surrounding private judging.<sup>34</sup> Written in the mode of a "letter" that in "'respectfully dissent[ing]'" calls out "'inconsistency,'" Pether addresses her epistle to Judge Kozinski of the Ninth Circuit Court of Appeals, whose 2001 decision in *Hart v. Massanari*<sup>35</sup> upheld the constitutionality of nonpublication and what Pether calls a two-tiered system of precedent.<sup>36</sup> Using the "critical discourse analysis" that she had earlier described in a 1999 article, *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*,<sup>37</sup> Pether reads *Hart* and its affirmation of nonpublication, as well as others of Judge Kozinski's non-formally-judicial statements about nonpublication, against the earlier Eighth Circuit decision *Anastasoff v. United States*,<sup>38</sup> which struck down nonpublication.

In Judge Kozinski's jurisprudence, she finds a danger: "the emergence of a theory and practice of judicial lawmaking that is explicitly legislative and brooks no effective constraints other than judicial fiat."<sup>39</sup> Contrasting Judge Kozinski's *Hart* opinion to Judge Arnold's *Anastasoff* opinion, Pether notes the irony that, although *Hart* arises as an appeal by a social security applicant, it is never dealt with on the merits, but is completely taken up with issues of judicial power. Arnold links the duty of judges to follow precedent, which he associates with the articulation of rules and their equal application, to Article III and a slough of references to eighteenth-century Framers and others. For law to be reason not fiat, according to Judge Arnold, common law precedent and the United States Constitution place constraints on a backward-looking judicial power in which judges find or discover law. Comparing Judge Kozinski's "almost civilist understanding of those legal texts [of treatise writers] as authoritative, and of those [legal texts] of judges as generally not,"<sup>40</sup> Pether argues that Judge Kozinski differentiates the modern United States federal

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32. See Pether, *Letter*, *supra* note 4, at 1555.

33. See FED. R. APP. P. 32.1.

34. See Pether, *Letter*, *supra* note 4, at 1556, 1558, 1565.

35. 266 F.3d 1155 (9th Cir. 2001).

36. See Pether, *Letter*, *supra* note 4, at 1558, 1593.

37. See generally Penelope Pether, *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*, 24 S. ILL. U. L.J. 53 (1999).

38. 235 F.3d 1054 (8th Cir. 2000).

39. See Pether, *Letter*, *supra* note 4, at 1559.

40. See *id.* at 1570.

courts' precedential system from that of the common law.<sup>41</sup> The former, according to Judge Kozinski, binds the future, while the latter is bound to follow the past. Arguing on the one hand for a strict and rigid account of hard doctrine and precedent that can be established by a single case, then, Judge Kozinski's legislative and codifying impulse also prompts him to argue for "selective" rather than strict binding precedent, in a discourse that valorizes the authority of the individual court or even judge.<sup>42</sup> Rather than a (common law) discourse that is responsive to appeals to its authority and itself appeals to a rhetoric of responsibility, a double discourse emerges in Judge Kozinski's account of law such that gaps appear between the spoken and the unspoken, the public and private, and the ostensibly published and unpublished.

Parallel to the binaries of this double discourse is another binary between those seeking to maintain the status quo and those with no such investments; there also lies a gap between the public and private utterances of some members of the judiciary—most notably, but not exclusively, Judge Kozinski—on the subject of depublication. On the one hand, Judge Kozinski affirms that unpublished opinions are written by judges; he describes them as "more or less" a "letter" from the court to parties familiar with the facts. He thereby widens the gap between public and private, as such materials are often effectively inaccessible to anyone except repeat players who have the resources to keep well-indexed libraries of unpublished opinions and do so as a matter of course. On the other hand, Judge Kozinski also elsewhere says or admits that such opinions are written by clerks and staff attorneys. He thereby suggests their unworthiness as precedent, exemplifying, for Pether, something akin to Sedgwick's critique of the binary.<sup>43</sup>

Again referring to the combination of "cynicism and disingenuousness" that characterizes issues of "private" or "secret" judging in what some, familiar with what goes on "behind the closed doors of chambers," would label "corruption," Pether characterizes the situation otherwise. She attributes it—charitably—to "a lack of comprehension and valuing of the enormous responsibility of the common law judicial office in Anglo-American constitutional democracies."<sup>44</sup> If Judge Kozinski's writings "manifest a tolerance for what some might call intellectual sloppiness and others disingenuousness [and] also exhibit an acceptance of unaccountability to the public and the law and for the work of minimally supervised underlings," Pether turns the cynicism of others (and occasionally in herself, to which she alluded in note eighty-two of *Scandal*) into issues of

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41. *See id.*

42. *See id.* at 1574.

43. *See id.* at 1591.

44. *Id.* at 1581.



ethics and responsibility.<sup>45</sup> The ethical task, she writes, is what the rule of law can be.<sup>46</sup>

*Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, or *Sorcerers*, turns to the institutional structure and dynamics of the judging about which Pether is concerned. She cites the account of clerking for Lewis Powell, by Anne Coughlin—“no poststructuralist jurisprudential radical”—approvingly, to the effect that “[w]ords are (most of) that stuff we call law.”<sup>47</sup> That words of judgment are entrusted (thinkingly or not) to those with little experience and skill with words and law continues the “scandal” of the previous articles, although by 2007, Rule 32.1 had been adopted into the Federal Rules of Appellate Procedure (despite Pether’s fears, expressed in *Letter*, that it was doomed to fail).

Elsewhere (*Measured Judgments*), Pether had shown in the context of legal pedagogy how “techniques of reading are processes of professional subject formation, or, in Foucault’s terms, of disciplining.”<sup>48</sup> Likewise, in *Sorcerers*, she turns to the work of judicial clerks and staff attorneys to show how “mistakes” and “sloppiness” in their decision-making and opinion-writing reinforce unequal treatment of “have-nots.”<sup>49</sup> In her very grounded account—worthy of use in a socio-legal studies class—of the practices in an empirically-observable institution, Pether shows how

sociology, education, selection, and training of judicial clerks and staff attorneys, together with the material practices by which they produce unpublished opinions, manifest a reflexive and insistently replicating hierarchy, to the enormous cost both of U.S. common law itself and of those members of structurally subordinated groups who are effectively denied access to justice.<sup>50</sup>

In what is the most socio-legal of the five articles, then, Pether shows how the problem in appellate courts is not simply a socio-theoretical one of Bourdieuan transmission of judicial habitus, but also, in legal doctrinal terms, involves the delegation of Article III judging to non-judges.<sup>51</sup> “Surrogates” for judges work in conditions which further compromise their independence.<sup>52</sup> At best, appellate courts are engaged in managerial judging, incompetently so.

45. *See id.* at 1593.

46. *See id.* at 1594.

47. *See Pether, Sorcerers, supra* note 4, at 37 (alteration in original) (quoting Anne M. Coughlin, *In Memoriam: Writing for Justice Powell*, 99 COLUM. L. REV. 541, 541–42 (1999)).

48. Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 490 (2002).

49. *See Pether, Sorcerers, supra* note 4, at 18.

50. *Id.*

51. *See id.* at 19, 61.

52. *See Pether, Solipsism, supra* note 4, at 1029.

The emphasis in *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, or *Solipsism* (which I'm also tempted to call "Duty"), is less literary and less sociological and much more conventionally legal in method, if more radical in the doctrine that it proposes, than the three preceding articles. Here, Pether seeks to develop a "deep" theory of Article III (judicial) powers, or of "duty," in an argument that makes the most of her interpretive skills and reinforces her commitment to law as a discourse of responsibility. She ultimately aims to show that judicial claims placing judicial opinions outside precedent are beyond the powers of the judiciary (*ultra vires* Article III). The material practices that support such claims (screening, delegation, and so forth) amount to bad faith certiorari (or review) procedures that jeopardize fundamental Fourteenth Amendment rights of access to the court doctrines.<sup>53</sup>

As in earlier articles, Pether closes this "grim history of the development of nonprecedential status rules" with constructive suggestions in the mode of the standard law review article.<sup>54</sup> Showing what she can do with doctrine in a piece that a doctrinal scholar would certainly see as much broader, she calls for a doctrine of Article III "duty" that would "refocus[ ] [ ] the gaze of the Article III appellate judge away from personal or institutional power, interests, and convenience, and towards those on whom he passes judgment, to rule of law and constitutionalist values, and to the constitutional logic of existing Article III jurisprudence."<sup>55</sup> For aliens and others, Pether concludes, "replacing constitutional solipsism with constitutional duty is long overdue."<sup>56</sup>

*Strange Fruit*, subtitled *What Happened to the U.S. Doctrine of Precedent?*, is a 100-page manuscript that picks up and reflects deeply on the history of what is arguably the keystone to common law jurisprudence—precedent. In this rich, radical, and sweeping intervention, Pether presents the history of the common law with awesome breadth to address such thorny issues as why writing should correspond with precedent and why earlier decisions should be binding. Written in 2011, the work represents a quest for U.S. constitutionalism that parallels what Tomlins describes as Pether's exploration of the identity of the Australian common law system (elsewhere in this issue). In *Strange Fruit*, Pether takes up the theorization and history of the U.S. common law in major twentieth-century academic works—such as those of Eisenberg, Schauer, Horwitz, and Parker, and in Supreme Court cases. She shows how the terms for the particularly American and problematic binary system of precedent, and what she comes to call a "precedent-fear" that explains but does not justify such a system, were established

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53. *See id.* at 962.

54. *See id.* at 1035.

55. *See id.* at 1032.

56. *See id.* at 1035.

in the eighteenth and nineteenth centuries and put in place in the twentieth.

Pether argues that the democratic motive behind written law in the U.S. is consistently belied or frustrated by literary and interpretive practices that treat the written law as an encoding and veiling of legal rules. Showing how the decision in *Brown v. Board of Education*<sup>57</sup> relies on citation rather than analogical reasoning, Pether finds a parallel there with contemporary theorists' understanding, as in the *Hart* case, of a "prison cage of words" in which decisions either offer "numb rules" or "arbitrary action."<sup>58</sup> In Pether's account of this distinctly national approach, language is key.

## II.

Through this brief overview of some 400–500 pages of Pether's articles on only one topic, I have tried to convey, first, the ways in which Pether's alertness to textual figures, such as irony and paradox, and to reading practices, informs her critique of the law of appellate procedure and the de/un/non publication of judicial opinions. Pether's analyses of arguments on both—or all—sides reveal the instrumentalism, utilitarianism, and often, hypocrisy of positions supporting those practices. Her analyses also show the positivism inherent in the conceptions of law of those who would defend those practices. Such positivism limits law to ostensibly-empirical matters of power rather than to the possibilities given by its language.

I have also suggested, second, that Pether's critique of U.S. law and its practices constitutes a defense of "have-nots" and "one-shotters" in the name of justice. Unlike the author of the original law and society classic, *Why the "Haves" Come Out Ahead*, which introduced the terminology of "one-shotters" and "repeat-players," Pether attends explicitly to the ways in which reading, writing, recording, citing, petitioning, and so on, matter to the ways in which the "haves" come out ahead.<sup>59</sup> In Pether's own words (and not simply those of a nonpoststructuralist and non-jurisprudentially-radical former Supreme Court clerk), "the law we read, write, and practice is all the law we have."<sup>60</sup> Or to be more precise, "[i]ntertextual reading," she writes, "will suggest how the law we read, write, and practice is all the law we have."<sup>61</sup>

That law is a matter of language and text is key to Pether's conception of law. Such a conception of law is at one level very familiar to those en-

57. 349 U.S. 294 (1955).

58. Pether, *Strange Fruit*, *supra* note 1, at 504.

59. See MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 43–45 (2014). See generally Galanter, *supra* note 5.

60. Pether, *Letter*, *supra* note 4, at 1558; see also Pether, *Sorcerers*, *supra* note 4, at 37 (quoting Coughlin, *supra* note 47).

61. *Id.*

gaged in U.S. legal pedagogy, whether as students or as teachers. Legal education, after all, is largely a matter of reading and writing as Penny well knew. But unlike many in the legal academy, Pether was not satisfied with a conception of reading and writing law that conceives of such practices narrowly, in terms of spotting issues and applying rules mandated or legislated by entrenched authorities. The practice of law for her, rather, is a matter of the skillful use of language. Using language (like practicing law) involves naming (through words) situations, actions, and things, as well as inquiring into them and being receptive to what one perceives or hears in response, so as to be able to name properly. As a skill, using language (again like practicing law) can be done more or less well, more or less appropriately, more or less properly, and hence, involves the exercise of judgment and responsibility.

For this reason, Pether challenges the legal positivism of a Judge Kozinski or a Justice Scalia who would make of law a matter of fiat; she challenges depublication and like practices because they remove opinions from the realm of continuing judicial discourse.<sup>62</sup> Such practices—and the instrumental justifications given for them—proceed from a very limited comprehension of what the “law is” (as Justice Grodin of the California Supreme Court put it) and impede its development as common law.

This is not to say that for Pether the exercise of judgment in language or in law, or the power of language and of law to judge, is unlimited. Indeed the history of the common law that Pether pits against the theory of legal positivism precisely constrains the power to judge while retaining the need for responsibility. Law (and language) are subject to interpretation; their texts are subject to interpenetration by one another and by other texts; and the (skilled and less-skilled) practices surrounding them are active and dynamic processes. That these practices or processes involve training and institutional cultures opens them to empirical study of sorts (as in *Sorcerers*), but nevertheless does not reduce them to the behaviors or powers of officials (or non-officials) that socio-legal scholars who urge a strong distinction between law in action and law on the books might describe. Rather, law on the books—or law on paper—is itself a material trace of law in action or practice, which in its citational and intertextual workings testifies further to the dialogic—and linguistic—character of law.

If law is language for Pether, then language is also law. The promise of language is to speak the truth, although one can of course use language to say contradictory things and to deceive, as Pether, drawing on Sedgwick and Goodrich in her analyses of depublication practices and arguments, points out. Likewise, the promise—or perhaps the insistence or even, simply, the desire—of the common law has been to hold language, however imperfectly, to its imperfect promises. Law too can fail and can deceive. In pointing to the failure of U.S. federal appellate courts to be true to

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62. See Pether, *Scandal*, *supra* note 4, at 1501.

their words, Penny Pether insists—as she maintains the common law has done and can do—on holding law to the language of its promises. Through her literary criticisms of legal positivism in depublication practices, she warns of the danger of an all-powerful positive law. She also holds, or insists with Martin Luther King on holding, language to *its* law: to the promise, however imperfect, of truth.