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REPRESENTING INTERDISCIPLINARITY

KUNAL M. PARKER*

MY first meeting with Penny Pether involved a moment of mutual recognition as outsiders of a sort to conventional U.S. legal scholarship. I was presenting a paper at the law school at American University, where Penny was a member of the faculty. In the question period that followed my talk, I used the word “overdetermined” in response to a faculty question. Penny came up to me after the talk and said in (what I took to be) an approving way, “This is the first time I’ve heard the word ‘overdetermined’ used at a law faculty talk.” For me, there was an instant flash of intellectual kinship. In what is surely testimony to my *own* failure of good historian’s record-keeping and archival practice, I went back to my *curriculum vitae* to see if I could pinpoint the precise date of our first meeting. I could not, but it was somewhere around the fall of 2000. In the decade that followed, Penny invited me to a few conferences, and I put her in touch with friends I knew who were working on issues related to those that interested her. One of the last things she wrote, and which has now come out in print, was a review of my book on the common law.¹

David Caudill’s kind invitation to me to participate in this conference commemorating Penny’s scholarship afforded me the opportunity to read through a large portion—although by no means all—of the vast corpus of scholarship that Penny left behind. In our initial discussions about the nature of my contribution to this conference, I told David that I would look at one corner of Penny’s scholarship, that involving law-and-literature. David warned me that this would not necessarily be easy: “law-and-literature” was an approach for Penny, something that pervaded everything she wrote. It would therefore be difficult to restrict an exploration of Penny’s law-and-literature scholarship to work that employed texts conventionally recognized to be “literary” (although there was no shortage of those). David was correct. So I read and read and am grateful for the opportunity. I learned something of the tremendous range of Penny’s intellectual preoccupations, as well as of the erudition, honesty, forthrightness, and courage of her writing. In one sense, reading her work over the weeks leading up to the conference was an acquaintance with a Penny that I suspected existed but never knew as well as I now do.

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1. See generally Penelope Pether, *Review Essay: American Common Law: Politics, History, and Democracy*, 26 LAW & LITERATURE 249 (2014) (reviewing KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011)).

Based on this reading, I want to offer some reflections about interdisciplinarity, as practiced by Penny Pether and by those such as myself who describe themselves as legal historians. These reflections are in part about my own trajectory. Since the time I first met Penny, I pursued a doctorate in history. No doubt as a result of the disciplinary training I acquired as a historian, I ceased to use words such as “overdetermined.”

To begin with, it is perhaps important to confront what it means to say that law is a “discipline,” in relationship to which it is possible to do “interdisciplinary” scholarship. In 2001, Penny published a brave—but also uproariously funny—article, entitled *Discipline and Punish*, which was a send-up of scholarship and publishing in the U.S. legal academy.² It was her way of coming to terms with law as a “discipline” in the United States. To a former law review editor such as myself, the article could not have been more on point. Penny described in hilarious detail the utterly ludicrous norms regarding citation that law students imbibe, master, and reproduce, including such inane things as an appropriate ratio between “text” and “footnotes” (texts with more footnotes are desirable). She wrote about the ponderous citation reference manuals and citation manual wars that dominated the law review world. In American legal scholarship, Penny argued, footnotes were no longer a mere means of acknowledging the work of others or pointing towards further reading. Instead, ballooning in importance, they had become an end in themselves, an object through which authors and student editors could demonstrate mastery of a perverse—and perversely valued—skill. But there was more. Footnotes had become “a tidy way of consigning contingency to the textual margins, and the fact that their skilful and varied use is advocated to student authors and candidates for law review membership rewards the capacity to marginalise complexity and likewise reifies rigid doctrinalism.”³

Based on her discussion of footnoting culture, Penny’s overall diagnosis of the state of U.S. legal scholarship as a “discipline” was devastating. Academic U.S. legal culture was one “in which citation is extraordinarily powerful.”⁴ It betrayed an obsession with authority and a corresponding impoverishment of intellectual seriousness. Penny put it thus:

Massive citation [] and a comparative scarcity of the ‘original’ critical or imaginative or interdisciplinary or theoretical work of scholarship that one might anticipate finding in recent Australian legal periodicals, is a feature both of the work of those running law reviews and those whose work they accredit—who are often, of course, former law review editors themselves.⁵

2. Penelope Pether, *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, 10 GRIFFITH L. REV. 101, 119 (2001).

3. *Id.*

4. *Id.*

5. *Id.* at 120 (footnote omitted).

This academic culture had pernicious effects not only on legal scholarship, but also on lived racial, class, and gender hierarchies on law faculties, in law classrooms, and, no doubt, in the world at large.

Penny argued that this ponderous, intellectually impoverished, profoundly hierarchical system had a precise birth date. An outgrowth of law's pretension to be a "science," it could be traced back to the celebrated pedagogical and scholarly style that had been developed by Harvard Law School's Dean Christopher Columbus Langdell in the 1870s and that had spread across American legal education thereafter. According to Penny, "Langdell's legal science"—which she saw as dominant in both contemporary U.S. legal scholarship and pedagogy—stood for "a hostility to theory, or scholarship of the kind that does something other than labor doctrinal points to death with the accompaniment of an hysterical profusion of citations to authority."⁶ Insofar as "Langdell's legal science" sought to become "a system of rules and identify[] a body of doctrine that language describes rather than constitutes," it consistently suppressed law's rhetoricity and history.⁷

Penny could not have been clearer about this. She once put it thus: "Langdell's legal science forgets the common history of law and rhetoric"⁸ Elsewhere, she said: "[L]egal science denies history."⁹ Not surprisingly, insofar as it suppressed law's rhetoricity and history, "Langdell's legal science" was "gendered and classed and raced, depending for its authority on removing contestation, the voices of others, from the text and hermeneutics of the law."¹⁰ Most law professors were male and thoroughly schooled in Langdellian science; they had no experience with rhetoric or history and therefore reinforced the Langdellian idea that law is doctrine.¹¹

For Penny, in other words, law as a "discipline" was something of an enemy, a curious way to do interdisciplinary scholarship. However, once one had identified the enemy, one knew how to defeat it. In diagnosing the problem, Penny prescribed the solution. If "Langdell's legal science" reigned supreme in the law reviews and legal scholarship, Penny's interdisciplinarity could—and should—deflate law's pretensions to be a self-sufficient scientific "system" that described an existing world. Interdisciplinarity would return law to its history and its rhetoricity. But what did it mean to return law to its history and its rhetoricity (which, I would argue, were often one and the same for Penny)? Why would one do so? To what end?

6. Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 502 (2002) [hereinafter Pether, *Measured Judgments*].

7. *Id.* at 500.

8. *Id.* at 502.

9. *Id.* at 500.

10. *Id.* at 517.

11. *Id.* at 502.

The aim was quite explicitly to open law up to destabilization, contestation, reinterpretation, and remaking. From a perspective that Penny repeatedly identified as “feminist poststructuralist,”¹² she represented the function of what she called the “law and literature methodology” as that of “reading literary texts against legal texts in order both to make certain kinds of discourses—cultural stories—that they have in common and re/produce visible, and to use law and literature’s interdisciplinarity as a way to destabilize the discipline of law in the interests of making change.”¹³ Elsewhere, she wrote of “‘an alliance [between law and literature] that aims at generating political friction, intentionally going against the grain’ and ‘an effective agitation of the organs of power’”¹⁴

Penny’s espousal of the feminist poststructuralist perspective, and her corresponding interest in destabilizing law, made her quite certain what law-and-literature should *not* be. She did not want a law-and-literature “interdiscipline” that taught students “to be intellectual democrats, or . . . [to] acquire empathy, or . . . [to] cultivate the sensibility of the civil and the civilized”¹⁵ Assumptions such as these, she insisted, growing as they did out of a humanistic faith in literature’s potential, should be deeply troubling to any scholar who knew something of the “histories of the moralizing missions of English studies.”¹⁶ Indeed, flinching whenever she “witness[ed] law’s grasping for the literary or . . . literature’s ideologically sanitised synecdoche, narrative, as nurse, priest, or therapist,” Penny said she was always reminded of one of her Australian literature professors who said that “many of the most venal people he knew were literary critics.”¹⁷ The work of the right kind of law-and-humanities scholarship necessarily entailed pedagogical violence; it did not come out of a placid and reassuring place called “literature.”¹⁸

This sense of what law-and-literature should and should not be was the basis of Penny’s critique of the work of James Boyd White, whose “liberal humanist commitments,” as she put it, sought to reinforce a sense of community and commonality in ways that Penny was suspicious of.¹⁹

12. See Penny Pether, *Acts of Hope, James Boyd White, Acts of Hope: Creating Authority in Literature, Law, and Politics*, 3 LAW TEXT CULTURE 276, 276 (1997) (book review).

13. Pether, *Measured Judgments*, *supra* note 6, at 491.

14. Penelope Pether, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*, 8 CARDOZO STUD. L. & LITERATURE 317, 318 (1996) (quoting Judith Koffler, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 1375 (1989) (book review)).

15. Penelope Pether, *(Re)centering*, 10 CARDOZO STUD. L. & LITERATURE 131, 132 (1998) [hereinafter Pether, *(Re)centering*].

16. *Id.*

17. Penelope Pether, *On ‘Cruelty’: Law, Literature, and Difference*, in DELEUZE AND LAW 69, 76 (Laurent de Sutter & Kyle McGee eds., 2012) [hereinafter Pether, *Cruelty*].

18. *Id.* at 75.

19. Penelope Pether, *Language, in LAW AND THE HUMANITIES: AN INTRODUCTION* 315, 319 (Austin Sarat et al. eds., 2010) [hereinafter Pether, *Language*].

Penny insistently distanced herself from White's assumptions about his imagined audience of autonomous individual subjects and from "what is presented as a purely ethical project of self-shaping through a certain type of intellectual commitment, cerebral rather than embodied . . ." ²⁰ For her, Austin Sarat and Robin West offered "[s]ignificant 'supplementary' models of humanist law and language scholarship," but the use of the dreaded adjective "humanist" reveals where she was coming from in regard to the work of these scholars as well. ²¹ Equally trenchant was her critique of Ian Ward for arguing that law-and-literature scholarship seeks the "inculcation of empathy; the engendering of the ability to recognise and hear those 'others' the law renders mute; the drawing of the cloistered legal subject into engagement with the world; providing an heuristic for discerning moral touchstones serviceable in that world . . ." ²² All of this, Penny concluded, only "enabl[ed] a kind of narcissistic therapeutics of identity . . ." ²³

As one might imagine, Penny's understanding of *how* and *from where* law should be destabilized extended not just to law-and-literature, but to all interdisciplinary endeavors. It was not only literature, in other words, that should become the object of endless and vigilant scrutiny, even as it provided a ground from which to destabilize law. Any discipline that purported to destabilize law in the name of interdisciplinary scholarship should also destabilize itself. This view allowed Penny to criticize many dominant forms of interdisciplinary scholarship. Here is what Penny said about Realist legal thought and law-and-society scholarship generally:

Offering accounts of the "truth" of "law" or legality or legal processes or the operation of legal institutions drawn from other disciplines, and implicitly predicated on understanding those disciplines as truth procedures, [interdisciplinary work] differs fundamentally from work in the critical theoretical tradition [i.e., her own], which provides supplementary rather than totalizing accounts of law, often passing judgment on law, while refusing to foreclose the "possibility of justice." ²⁴

Thus, interdisciplinary work could not be "truth procedure" of any kind and Penny was correct that it often functions this way.

I have a great deal of sympathy for Penny's perspectives on interdisciplinarity and, indeed, have proceeded from similar ground in my own attempts to make sense of the history of U.S. legal and historical thought. But I also have some questions to raise and, if Penny were here, I would have loved to know how she would have responded to them. Some of

20. *Id.* at 320.

21. *Id.* at 322.

22. Pether, *Cruelty*, *supra* note 17, at 73.

23. *Id.*

24. Pether, *Language*, *supra* note 19, at 329.

these come from my own preoccupations with historical knowledge, others from reflections on interdisciplinarity that emerge from my reading of Penny's work.

First, as the philosopher Karl Löwith reminded us decades ago in his book, *Meaning in History*, religious knowledge is as capable of destabilizing the orders of this world as skeptical knowledge is.²⁵ In other words, although the difference between disciplines invested in a notion of truth and those suspicious of it, or the difference between humanist understandings of literature and non-humanist ones, mattered a great deal to Penny, if the object of interdisciplinary work is to destabilize law, the ground from which one destabilizes—especially in a specific context—might not *always* matter a great deal. Religious fundamentalists, orthodox Marxists, and critical-theoretical thinkers might all do an equally effective job of destabilizing law and, indeed, might agree on the results, even if not on the basis from which they proceed. The Christian tradition has been as adept at calling for redistribution of wealth as an avowedly secular Leftist one. Furthermore, both traditions have long been open to different interpretations and do not point in any unitary direction.

Similarly, humanist empathy of the kind Penny deplored might work in ways entirely congruent with the non-humanist approaches she preferred. If we look at the long history of attempts to destabilize law from its “outside,” we see that powerful forms of historical contextualization—for example, the feudalism-to-commerce narrative associated with the Scottish Enlightenment—were as skilled at arguing for and bringing about change as the more self-consciously anti-foundational modernist and post-modern ones of our own time. Judging from the perspective of effects and consequences, if not of intellectual commitments and aesthetics, I might at least wonder how we might read our own self-consciously post-structuralist interdisciplinary endeavors against those of periods past. How might we situate our interdisciplinary efforts in relationship to those of earlier times once we know that, in many ways, they were as effective as our own? How might this undermine our complacency regarding our own fetish for destabilizing?

Second, I wonder how, if we are all equally committed to destabilizing law, different disciplinary commitments from and through which we proceed might nevertheless continue to have different effects. What Penny often did in her work was “essay” what she called “an intertextual exploration” that would involve juxtaposing texts from one genre (literature) against those from another (law). Thus, in her article, *Regarding the Miller Girls*, Penny offered a reading of Henry James's novella, *Daisy Miller*, alongside an exploration of the early twenty-first-century trials of the journalist Judith Miller of *The New York Times*. As Penny put it:

25. See generally KARL LÖWITH, *MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY* (1949).

Daisy's story is represented and interpreted in a novella, later the basis of a film, made in 1974. Judy's played itself out on the pages of the nation's press and other media organs, from NPR to the blogosphere, and in an opinion of the U.S. Court of Appeals for the D.C. Circuit.²⁶

There was a point, of course, to this interdisciplinary strategy. It was supposed to jar. As Penny put it, this "diachronic strategy sets itself against [legal] doctrine's synchronic, ahistorical, acontextual hermeneutic practices."²⁷

But such an interdisciplinary strategy would also be jarring to many historians who might share Penny's destabilizing inclinations. Penny undoubtedly knew this. In arguing that her "diachronic strategy"—juxtaposing Henry James's heroine with a contemporary journalist—distinguished her approach from that of New Historicists, she was also aware that her approach was different from the approaches of professional historians, who are committed to situating objects in historical context, which often means cabining them into their "own" time. In their elaboration of "periods," historians typically use "synchronic" strategies to contextualize objects, although these strategies ultimately underscore change over time (thus implying "diachronicity") and are therefore as capable of destabilizing objects as the more stark "diachronic" strategies of law-and-literature that Penny self-consciously employed.

If historians might not care for the particular "diachronic" strategies Penny employed, many of them might also be inattentive to language in ways that Penny was, which underscores Penny's own particular disciplinary training in literature. Penny could write (as she did in a book review): "The clogged prose and wordiness are features of this book, as is the lack of care evident in flaws in punctuation: the frequency of these latter, and of spelling errors, reflects on both author and publisher."²⁸ She was attentive to writing in a way that many historians, at least now that history has shed many of its belle-lettristic trappings, might not be.

Yet another difference, and an important one, between the approach of the historian and the approach of the literary scholar (which might speak to the difference between a focus on history and one on rhetoricity) might have to do with the implications of interdisciplinary scholarship in a legal context. "'[U]sing the literary genre of law to reinstate the uncer-

26. Penelope Pether, *Regarding the Miller Girls: Daisy, Judith, and the Seeming Paradox of In re Grand Jury Subpoena*, Judith Miller, 19 LAW & LITERATURE 187, 194 (2007) [hereinafter Pether, *Regarding the Miller Girls*] (footnotes omitted).

27. Pether, *Measured Judgments*, *supra* note 6, at 492.

28. Penelope Pether, *Review Essay*, 13 CARDOZO STUD. L. & LITERATURE 323, 323 (2001) (reviewing DIETER PAUL POLLOCZEK, *LITERATURE AND LEGAL DISCOURSE: EQUITY AND ETHICS FROM STERNE TO CONRAD* (Cambridge University Press, 1999) & LYNNE MARIE DE CICCIO, *WOMEN AND LAWYERS IN THE MID-NINETEENTH CENTURY ENGLISH NOVEL: UNEASY ALLIANCES AND NARRATIVE MISREPRESENTATION* (Lewiston, Queenston and Lampeter: Edwin Mellen, 1996)).

tainty and the undecidability of the writing of law’²⁹ was explicitly tied by Penny to legal pedagogy, to her faith and insistence that teaching students to interpret would make them better lawyers. Historians are content to demonstrate the changeability, uncertainty, and undecidability of law, but they do not always have a concrete proposal for legal pedagogy. Penny tied her work in literature to her intense engagement with the structures and hierarchies of legal practice and pedagogy. Her interdisciplinary preoccupations were always worked out in a practical and lived way.

I suggest these differences between the interdisciplinary approaches of literary scholars and historians to get us to think hard about to how our different disciplines exercise a hold over us, even as we all might share the project of destabilizing law. Destabilization looks different depending upon the place *from which* it is done. What might that mean?

Third, I wonder how, whether, and when interdisciplinary work exhausts itself. The effort to destabilize law has been going on for centuries. It is at least as old as the effort to stabilize law. But the specific interdisciplinary moment which Penny and I shared, albeit coming at it from different disciplines, has itself been a rather sustained one. Where is the “charge” or “rush” now in restoring to law its historicity and rhetoricity? Where is the excitement of railing—in iconoclastic fashion—at “Langdell’s legal science”? To be sure, Penny’s rage at the injustices of the world, and her courage in identifying and denouncing these injustices, might obviate such questions. Why might one care about intellectual novelty in the face of a world of persistent injustices? But in a meditation on interdisciplinarity, such questions might be apposite.

In my view, the issue is not as much about looking for the next new thing, the newest vital “charge,” as it is about recognizing that the “law” that we seek to destabilize as interdisciplinary scholars has long been imbibing critiques, and presenting itself differently, both in the world of practice and in the world of pedagogy. Indeed, “Langdell’s legal science”—which for Penny was *the* enemy—was not ahistorical in its own day. Instead, it was quite historical and intended explicitly to reveal the evolution of legal doctrine on the lines of the dominant Darwinian-Spencerian historical temporalities of the day. This is quite clear from the structure of Langdell’s famous casebooks, which included “correctly” and “incorrectly” decided cases in order for the student to see the unfolding of legal doctrine over time.³⁰ If “Langdell’s legal science,” the thing we have grown to love to hate, was not what we have made it out to be even at its moment of origin, it is certainly not today. Today’s law professors, and the casebooks and materials they use, routinely employ work produced in other disciplinary contexts to “round out” or “provide context” to the doctrines they

29. Pether, *Language*, *supra* note 19, at 331 (quoting PETER GOODRICH, *LAW IN THE COURTS OF LOVE* 8 (1996)).

30. I discuss this in KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–2000: LEGAL THOUGHT BEFORE MODERNISM* 253–54 (2011).

teach. The results are often disappointingly shallow: other disciplines are there to provide a gloss, a whiff of erudition, or a brief preface before students can get on to the “real work” of studying doctrine. Law students, in turn, see things this way. They stop taking notes when history or literature is discussed, but return to their keyboards once the discussion returns to cases and statutes. But my point is that our object of contextualization—law—is thoroughly aware of our critiques. For a while now, it has become resilient, inoculated itself against the disease of interdisciplinarity, and developed hardy antibodies. This might be the problem of interdisciplinarity today, the problem it needs to confront.

At this point, then, where do we turn? If the power of critique might have dimmed as a result of its domestication, where do we look? Within certain strands of history and anthropology, including my own work, the effort has been to shift gears, to learn from the object of contextualization itself. Instead of turning our critical lamp on our objects, letting our objects turn their lamps on us. This is a provisional approach, not the end of the line.

Penny’s approach in law-and-literature was generally to use literature against law, and not to use law against literature. As she put it in a footnote in her essay entitled *Language*: “It might—aptly—be said that ‘Law’ is the privileged element in this dyad: that my focus is on what language scholarship can tell us about law, rather than what legal scholarship can tell us about language. I would concede the point”³¹ Following from what I just said, my own approach to interdisciplinarity, in contradistinction to Penny’s, was to turn to the common law, and specifically to its notions of temporality, to reflect upon the limits of historical time and contextualization. In other words, I sought to bring law to bear on history, even as I brought history to bear on law.³²

But Penny’s extraordinary vigilance and courage as a thinker meant this approach was implicit in her writing as well. She would never be content merely with bringing literature to bear on law. Always able to turn on herself, she was acutely attentive to what she called the “great uncertainty” that beset “scholarly and pedagogical practices of law and literature”³³ She worried incessantly about “whether in exploring what our bodies can do . . . we may engage with other bodies to reproduce the molar ‘overcoding’ of the seductively familiar logic of ‘us and them’”³⁴

In the late 1990s, in testimony to her ability to turn on her own preferred interdisciplinary approach, Penny recounted something she had learned from working with students at the Benjamin N. Cardozo Law School. She wrote of a student in her class who read stories about Austra-

31. Pether, *Language*, *supra* note 19, at 318 n.7.

32. See generally PARKER, *supra* note 30.

33. Pether, *Cruelty*, *supra* note 17, at 86.

34. *Id.* (citation omitted).

lian indigenous peoples forcibly removed from their families by Australian law. These foreign narratives that furthered a change in perspective began when the student had read U.S. slave narratives as an undergraduate. The student now believed that affirmative action was right. Penny wrote: “Once [the student] had made that judgment abroad, he brought it home; his view was that the defensiveness engendered by his position in American culture would not have been moved without this comparative law perspective.”³⁵ The destabilization—the goal of interdisciplinarity for Penny—had happened. Penny could well have been offering the ideal case of how literature should destabilize law. But it was not to be. Penny continued: “But that student still believed that affirmative action was unconstitutional, a conviction that profoundly challenged me: a teacher and scholar of constitutional law in my country of origin.”³⁶ The law-and-literature method could fail. In the case of this student, perhaps it had.

As part of Penny’s recognition of the possibilities of failure, I would argue that Penny not only brought literature to law, but also law to literature. She might not necessarily have seen it as such.

As stated above, Penny fervently believed that the power of the critical law-and-literature technique came in revivifying a sense of law’s interpretivity. Hope for a better world lay in restoring a sense that law was endlessly susceptible to interpretation and remaking. She put it thus:

I believe that with [] interpretivity . . . comes the possibility of ethics in Levinas’s sense. . . . It will take our theorizing and practicing and theorizing again a pedagogy of what I might call law and literature, or interpretivity, or, borrowing from Peter Goodrich, of rhetoric as well as one of hermeneutics.³⁷

In recent years, however, Penny saw everywhere a tendency in the legal world to turn away from interpretivity. In her work on the increasingly prevalent practice of not publishing federal court opinions,³⁸ Penny argued that federal judges were doing all they could “to foreclose [the] interpretation of the texts they produce”³⁹ This was also a deplorable tendency among law students: “I am despairing about my students’ yearning for rules and for abstractions, about their unwillingness and thus inability to interpret.”⁴⁰ In shunning interpretation, students seemed both

35. Pether, *(Re)centering*, *supra* note 15, at 133.

36. *Id.*

37. Penelope Pether, *Is There Anything Outside the Class? Law, Literature, and Pedagogy*, 26 *CARDOZO L. REV.* 2415, 2421 (2005) [hereinafter Pether, *Is There Anything Outside the Class?*].

38. For her posthumously published work on this matter, see Penelope Pether, *Strange Fruit: What Happened to the U.S. Doctrine of Precedent?*, 60 *VILL. L. REV.* 443 (2015).

39. Pether, *Is There Anything Outside the Class*, *supra* note 37, at 2422.

40. *Id.*

to be making themselves worse lawyers and to be shying away from doing justice.

So it was supremely interesting to me that, in her work on the spreading practice of not publishing federal court opinions, Penny should have turned not only to literature, but also to the common law. It was the old common law, Penny argued, that best embodied the interpretivity that law-and-literature scholarship sought to achieve in and for law. The object of the critique (law) thus revealed itself to contain, prior to critique, what the critique was intended to achieve. Penny argued that the federal judiciary was betraying the ethics embodied in common law practice:

Through the systems of institutionalized unpublication, depublication, and stipulated withdrawal of judicial opinions, the fetishizing of the *per curiam* in its various historical iterations, and the egregious practice of issuing large numbers of one-word judicial opinions without reasons, U.S. judges have learned to foreclose the engagement that produces the common law at its interpretable best⁴¹

This is related to what, in her essay juxtaposing Daisy Miller and Judith Miller, Penny deplored as a creeping “Continentalization” of law. In James’s novella, the Continentalization/Europeanization of the character Winterbourne resulted in his inability to read Daisy Miller herself. In the judicial realm, it meant a certain textual fundamentalism, a civilian—and decidedly non-common lawyerly—fetishization of text that closed off interpretation. At the end of the essay, Penny assails those, including law-and-literature scholars, for “believing that there is nothing principled in law, that it is merely a rhetorical cover for politics.”⁴² She condemned the federal judiciary for “exorcising . . . law’s spirit: common law constitutionalism.”⁴³ The common law’s emphasis on interpretation needed to be revived; in that emphasis, which could never be “mere” rhetoric, lay its “principle.”

In other words, after critique, or rather before it, the object of critique revealed itself to have already contained all that critique sought to accomplish. Law could do for itself what law-and-literature sought to have it do. Upon the exhaustion or domestication of interdisciplinary work lay the ahistorical discipline of law itself. I would have loved to hear Penny’s response to this reading of her work.

41. *Id.*

42. Pether, *Regarding the Miller Girls*, *supra* note 26, at 200.

43. *Id.* at 201 (footnote omitted).

