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FIERCE AND CRITICAL FAITH:
A REMEMBRANCE OF PENNY PETHER

CHRISTOPHER TOMLINS*

“I retain, from another past professional life, the practicing lawyer’s visceral commitment to the faith that the practices of the rule of law, if you like, can matter in ways that challenge injustice tangibly”¹
- Penelope Pether (2012)

THOUGH it began in Brisbane, *Meanjin*—“Australia’s second oldest literary journal”²—is a Melbourne institution. “The name (pronounced me-AN-jin” and meaning “place shaped like a spike”) is Aboriginal in derivation and signifies the spit of land where the city of Brisbane was first established in 1825, a few miles inland from Moreton Bay.³ But it might just as well be Strine for “meandering,” which is just what Melbourne’s Yarra River does, and what the city’s many lanes and arcades invite. Founded in 1940, the journal moved to Melbourne in 1945, where it dwelled, somewhat uneasily, on the borders of Melbourne University in Parkville.⁴ Clem Christesen, irascible founder and first editor, gave *Meanjin* the leftist tilt that it shared with the later-arriving and far more self-consciously political *Arena*, another Melbourne institution.⁵ But *Meanjin* was not, first and foremost, on a political mission. It was created to be a beacon in Australian literary and intellectual life.⁶

In 2007, *Meanjin* published a short essay by Penny Pether, entitled *The Prose and the Passion*.⁷ It was a fitting match of forum, author, and subject.

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1. See Penelope J. Pether, “*Free at Last? Epilogues, Aftermaths, and Plotting the Nation: Christopher Tomlins*, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865, 24 LAW & LITERATURE 102, 107–08 (2012) (book review) [hereinafter Pether, *Free at Last?*].

2. See *Meanjin*, MELB. U. PUBL’G, https://www.mup.com.au/page/about_meanjin (last visited Aug. 7, 2015). The oldest, founded in 1880 in Sydney, was *The Bulletin*, proponent of Australia as a white man’s republic and home between 1880 and World War I to the *Bulletin* school of Australian literature—Henry Lawson, Banjo Paterson, Norman Lindsay, and others. Between the wars, *The Bulletin* became increasingly racist and anti-Semitic. It was eventually revived in the 1960s as a news magazine, finally ceasing publication in 2008.

3. *Id.*

4. See *About Meanjin*, MEANJIN, <http://meanjin.com.au/about-meanjin> (last visited Aug. 7, 2015); see also Jenny Lee, *Clem Christesen and His Legacy*, 21 AUSTRALIAN LITERARY STUD. 410, 411–12 (2004).

5. See *About Arena*, ARENA, <http://arena.org.au/about/> (last visited Aug. 7, 2015).

6. See Lee, *supra* note 4, at 410–11.

7. See Penelope J. Pether, *The Prose and the Passion*, 66 MEANJIN 43 (2007) [hereinafter Pether, *The Prose and the Passion*].

By then, Penny had been an expatriate for a decade, a United States-based academic lawyer of increasing renown, particularly in the interdisciplinary world of law and literature. But she remained Australian through and through. And in *Meanjin*, she used her skills both as literary critic and as lawyer to convey to an audience of Australian intellectuals the radical promise—the passion—that might be found in Australian law’s prose: not, to be sure, the technical legal prose of statute or hornbook, or the bureau-speak of Canberra, but the common law prose of the courts given life in Australian culture, in the “narratives that locate it and give it meaning,” and withal the possibility that it might become “an epic of Australian constitutionalism.”⁸

Themes on display in *The Prose and the Passion* had been crystallizing in Penny’s scholarly commentary for more than a decade prior to the essay’s appearance. They would thereafter become fixtures, stated ever more urgently, developed ever more fully. In that sense, the essay is a hinge at a turn in a maturing scholar’s intellectual life. But it is also a place where all the components of that life are on display—dedication to both constituent elements of “the interdiscipline”⁹ of law and literature, and to what they might reveal, once teased into propinquity, of each other’s potential; profound distaste for the superficialities of conventional, as opposed to critical, constitutional, and legal commentary; conviction, notwithstanding doubt, that a life spent in the law could be—should be—a life full of meaning; and conviction, as well, that in the interdiscipline, as it were, of Australia and America, the common law culture still alive in Australia might instruct those on the other shore who had largely abandoned it.

For all these reasons, *The Prose and the Passion* is an appropriate point of entry on Penny Pether’s intellectual world—at first as a commentator on the (scholarly) work of others, but also and increasingly as a commentator *for* “others,” for those of us fated to be the targets of cruel and uncarving state power. What emerges from these two forms of commentary is a fierce refusal to yield law to the state. Whether founded on the quotidian routines of professional legal practice, the fragile structures of constitutionalism, or the world of possibilities immanent in the common law, Penny’s commentaries speak of a deep critical faith that law can be what, on occasion, and falteringly, it has been: a shield for the weak and defenseless and deprived, one for which it is worth fighting against those who would make law simply an instrumentality of established power. There is indignant passion in Penny’s prose, and along with it a demand that we put aside our weary cynicism and see the law she wants us to see.

8. See *id.* at 44 (quoting Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983)).

9. A term Penny began using in the mid-1990s. See, e.g., 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, 317 (1996) [hereinafter Pether, *Jangling the Keys*].

I.

I will return to the *Meanjin* essay and to what it represents. But first, let us tarry for a moment on the lighter side of commentary, with the young Pether (and also an older Pether, for habits die hard) whose tart pen could wreak havoc with an author found wanting. Here was not so much fierce and critical *faith*, as someone who rather enjoyed being fiercely critical. One feels sorry, in a way, for Linda Wagner-Martin, whose book *The Modern American Novel, 1914–1945* incurred Penny's wrath in the 1993 *Australian Journal of American Studies*.¹⁰ "The quality of analysis of individual texts is patchy in the extreme, and generally unsophisticated," the book itself "a curious hybrid of revisionist criticism and introductory student text" ¹¹ Its keynote "confusion," Wagner-Martin's *Modern American Novel* "founders in a sea of cross-purposes."¹² And what of John Grisham's "airport novels which have been to law school," books that "both condemn and celebrate greed and lawlessness," but were "too innocent of the ethical contradictions at their hearts to make this characteristic interesting"?¹³ Dieter Paul Polloczek and Lynne Marie De Cicco had the misfortune to encounter each other, and Penny, in a 2001 double-review where their individual "book-length excursions into the literary critical arm of 'law and literature'" were awarded "the dubious distinction of being the very worst books I have read in a very long time."¹⁴ Both authors wrote "like Martians."¹⁵ Both were "entrenched in a reifying critical prac-

10. See Penelope Pether, *The Modern American Novel (new edition) by Malcolm Bradbury; The Modern American Novel 1914–1945: A Critical History by Linda Wagner-Martin*, 12 *AUSTL. J. AM. STUD.* 71 (1993) (book review). Professor Wagner-Martin has had a long, illustrious, and incredibly productive career, and so, one hopes, bears no grudges. As for Bradbury, although Penny did like his book much better, he did not survive unscathed, receiving a rap across the knuckles for his male-only canon of postmodern novels.

11. *Id.* at 73.

12. *Id.*

13. Penny Pether, *A Time to Kill by John Grisham; The Firm by John Grisham; The Pelican Brief by John Grisham; The Client by John Grisham*, 13 *AUSTL. J. AM. STUD.* 102, 103–04 (1994) (book review) (internal quotation marks omitted). *Contra* Penny Pether, *Defining Women: Television and the Case of Cagney and Lacey by Julie D'Acci*, 14 *AUSTL. J. AM. STUD.* 86, 87–88 (1995) (book review) (noting D'Acci's "searchingly ethical, impeccably theorised practice," and awareness that, "[a] television opts more and more for topics that it can play as alluring spectacles but that many people experience as the quotidian pain and terror of everyday life, we must be clever and energetic in inventing new ways of looking at and analyzing the medium." (quoting JULIE D'ACCI, *DEFINING WOMEN: TELEVISION AND THE CASE OF CAGNEY AND LACEY* 209 (1994))).

14. Penelope Pether, *Dieter Paul Polloczek, Literature and Legal Discourse: Equity and Ethics from Sterne to Conrad (Cambridge: Cambridge University Press, 1999); Lynne Marie De Cicco, Women and Lawyers in the Mid-Nineteenth Century English Novel: Uneasy Alliances and Narrative Misrepresentation (Lewiston, Queenston and Lampeter: Edwin Mellen, 1996)*, 13 *CARDOZO STUD. L. & LITERATURE* 323, 323 (2001) (book review).

15. *Id.* at 324.

tice, fixing texts like a lepidopterist and then breaking them on the wheel of relentless exegesis.”¹⁶

Richard Posner got his comeuppance just four years ago. His third edition of *Law and Literature* had shed the book’s original subtitled frown—“a Misunderstood Relation.”¹⁷ Now Judge Posner claimed that, swollen by successive revisions and enlargements, *Law and Literature* had become the interdiscipline’s leading authority. In its author’s own words, though “not quite a treatise,” the book was “the closest that the law and literature movement has come to producing one.”¹⁸ In the field’s “only comprehensive book-length treatment,” Posner had covered “all the topics that have engaged the interest of law and literature scholars . . .”¹⁹ The not yet late, never great, irreducibly conservative but ineffably memorable Ian Sinclair is rumored to have coined as the first rule of Australian politics, “if you see a head, kick it.”²⁰ What a head was this! Treatise? “Unhappily, Judge Posner’s ‘Revised and Enlarged Edition’ of *Law and Literature* reads like nothing so much as a ‘Nutshell’—a very long ‘Nutshell’, [sic] to be sure—but with attitude.”²¹ As scholarship, *Law and Literature* was really not up to much—it was no more than Posner’s “Desert Island Discs.”²² And its claim to authority was risible: “[M]uch of the best work in the field is something the judge ‘prefers not’ to acknowledge.”²³

But disdain can only do so much work. And so, boring in, remorselessly, on *Law and Literature*’s shortcomings, Penny turned serious:

The idiosyncrasies of the powerful, of course, are always with us, and one could dismiss Posner’s Third Edition as a mere artifact of celebrity publishing. But there is something more to say. The judge is at his most scornful when he castigates law and literature scholars for writing about power and its misuse, of domination and subordination, operative hierarchies of class, race, gender and sexual orientation. And in *Law and Literature*, as elsewhere,

16. *Id.*

17. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1st ed. 1988).

18. See RICHARD A. POSNER, *LAW AND LITERATURE: REVISED AND ENLARGED EDITION* xv (3d ed. 2009)

19. *Id.* (emphasis added).

20. Ian McCahon Sinclair (born Jun. 10, 1929), Member of the Australian Parliament for New England (New South Wales) 1963–1998, leader of the National Country Party (later National Party of Australia) 1984–1989, Speaker of the House of Representatives (1998).

21. Penelope Pether, *Richard A. Posner, Law and Literature (third edition)*, 7 *COMP. CRITICAL STUD.* 418, 420 (2010) (book review).

22. *Id.* “Desert Island Discs” is a weekly BBC Radio program, first broadcast in January 1942, and still going strong, in which celebrity guests are invited to name the eight pieces of music (originally gramophone records, hence “discs”) they would wish to possess if “cast away” on a desert island, plus one book (apart from the Bible and any of the works of Shakespeare) and one luxury.

23. *Id.* at 421.

he documents and indeed criticizes aspects of a practice that came to characterize the US federal courts after *Brown*, as its judges became exasperated by the appeals of those—the powerless—they ‘preferred not’ to hear: the widespread, largely covert, and inadequately supervised delegation of what appears to be a significant majority of federal appellate judging to new law graduates, increasingly ‘staff attorneys’, [sic] who, unlike the ‘elbow clerks’ who work with judges in chambers, and depending on individual court practice, have little contact with the judges whose work they do.²⁴

The delegation of the adjudication of the claims of the powerless to staff, while retaining for judges the claims of the powerful, was a scandalous indictment of American pretensions to justice, and of professional judicial ethics. Here—the material practices of Posner’s own office, that of a judge—were matters of real consequence that demanded his sustained attention. Instead, his “restless gadfly mind”²⁵ had wasted its time and ours in the production of an essentially useless book.

Forgive me, then, the wish that all that manic energy, that impatient critical intelligence, and that professional capital and institutional power might turn its attention from law and literature to a long overdue reform project in the area of the judge’s professional expertise. And that, if my wish is granted, Posner’s ‘walk on the wild side’ might have enabled him, against the grain, and in Avi Soifer’s phrase, to listen to (or for) the voiceless.²⁶

II.

The powerless, the voiceless, had long been on Penny Pether’s mind. I remember well the occasion of our first meeting. It was at an Australia-New Zealand American Studies Association Conference held in Melbourne, in June 1994. The conference was run by the late Greg Dening—yet another Melbourne institution²⁷—who in an inaugural plenary invited the assembled audience to reflect on the proper relationship between present historian and historical subject. Greg’s own suggestion was “empathy”—which one might define as

the ability to see and judge the past in its own terms by trying to understand the mentality, frames of reference, beliefs, values, intentions, and actions of historical agents . . . the skill to re-enact the thought of a historical agent in one’s mind or the ability to

24. *Id.* at 421–22.

25. *Id.* at 421.

26. *Id.* at 422.

27. Greg Dening (born 1931, died Mar. 13, 2008), Max Crawford Professor of History at the University of Melbourne, leading member (with Donna Merwick and Rhys Isaac) of the “Melbourne Group” of ethnographic historians.

view the world as it was seen by the people in the past without imposing today's values on the past.²⁸

As a recommendation for the office of historian, empathy has a long pedigree, and a respectable following.²⁹ Everyone nodded sagely.

Except Penny, who was having none of it. I recall her then as a sort of punk professional: tight black trouser suit with a long drape jacket; dyed bronze hair cut very short, almost like a helmet; bright red lipstick. She seemed angular, even spiky—very different in affect from later years. Her response to Dening was almost curt: what good was empathy when it came to the subordinated, the silenced, the subaltern masses whom the historian so often encountered? Didn't empathy simply abandon them to yet more of the same? Rather than understand or reenact the past, the historian should engage it as critic, as agent of redemption. Hers was an activist ethics of history as struggle, rather than the receptive but passive goal of understanding. Greg was somewhat taken aback. Penny and I went off to eat lunch together and began a lasting friendship.

There is no mystery about the source of Penny's activist ethics. They came from law practice in the first half of the 1980s. After finishing her LL.B. in 1982, Penny spent one year of professional legal training at a law college that allowed her to gain admission and practice as a solicitor. Actually learning how to be a solicitor was something you did on the job, which in Penny's case was mostly in the thankless environs of the Office of the Ombudsman, New South Wales: a "watchdog" agency created in 1975 to investigate the conduct of the State's notoriously corrupt government agencies and departments, not least the New South Wales police.³⁰ Years after Penny had ceased practice in 1988 and returned to the University of Sydney as an Associate Lecturer and Ph.D. candidate in English, followed by positions on law faculties at Wollongong (1993–1994) and Sydney (1995–1998) University, the by-line to a review that appeared in *The Alternative Law Journal* described her as "a feminist lawyer who teaches constitutional law at the University of Sydney."³¹ The "feminist lawyer" came first

28. Kaya Yilmaz, *Historical Empathy and Its Implications for Classroom Practices in Schools*, 40 HIST. TEACHER 331, 331 (2007). In Dening's philosophy of history, the role of the historian was to *present* the past (i.e., make the past present). The historian's relationship to the past should be one of humility. Dening's philosophy of history showed the influence of his training and vocation as a Jesuit priest between 1948 and 1970.

29. See, e.g., HISTORICAL EMPATHY AND PERSPECTIVE TAKING IN THE SOCIAL STUDIES (O. L. Davis Jr. et al. eds., 2001). For a critique, see Walter Benjamin, *On the Concept of History*, VII, reprinted in WALTER BENJAMIN: SELECTED WRITINGS, VOLUME 4: 1938–1940, at 391–92 (Howard Eiland & Michael W. Jennings eds., 2006).

30. See Penelope Jane Pether, *Curriculum Vitae*, [hereinafter Pether, *Curriculum Vitae*], available at http://works.bepress.com/penelope_pether/cv.pdf; see also NEW SOUTH WALES OMBUDSMAN, <https://www.ombo.nsw.gov.au/> (last visited Aug. 7, 2015).

31. Penelope Pether, Australian Constitutional Law and Theory: Commentary and Materials, *Tony Blackshield, George Williams & Brian Fitzgerald*, 21 ALTERNATIVE L.J. 196, 196 (1996) (book review) [hereinafter Pether, *Constitutional Law and*

in the self-statement, the academic second. Penny's self-consciousness was of someone who was, and would remain, a lawyer who had learned law through practice.³²

That 1996 *Alternative Law Journal* review stated, in an early and abbreviated sense, Penny's own emerging project as a constitutional lawyer. The review was of Blackshield, Williams, and Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials*, which was itself a new project in that it was an attempt thoroughly to recast the teaching of Australian constitutional law.³³ Penny gave the authors a *B*. She found the politics of the text refreshing, its substance clearly organized and accessible, its historical consciousness welcome, and its range commendable. Still, its attempts at innovation were only half-realized, for they came wrapped in an overall conception of the pedagogical task that perpetuated "the crude substance-form dichotomy which still bedevils Australian legal education . . ." ³⁴ Thus, on the one hand this was "a text which explicitly

Theory]. The *Alternative Law Journal* was the successor publication to the *Legal Service Bulletin*, which was begun in 1974 by the Fitzroy Legal Service, a legal aid service based in Fitzroy, Melbourne, with a particular mission to assist the area's urban Aboriginal population. During the 1980s, the *Legal Service Bulletin* became a national publication. An editorial in the *Alternative Law Journal's* inaugural issue (February 1992) stated its intention:

[T]o highlight concerns generally ignored by mainstream law journals and to provide an alternative perspective. Very often it is the disadvantaged, the 'underdogs' and the victims in our society who reveal the most valuable insights into the way we structure our world and set the agenda for reform. Provided we are willing to listen, the experiences of black Australians, prisoners, young people, prostitutes, and the injustices implicit in our responses to those unfortunate enough to have contracted the HIV/AIDS virus have much to teach those of us who aim for a more just and humane Australia.

Beth Wilson & Ian Freckelton, Opinion, *Time for a Change*, 17 ALTERNATIVE L.J. 2, 2 (1992). The editorial concluded:

In the Australia of the 1990s the alternative voice is being heard less and less in the clamour of economic rationalism, law and order politics, contracting media ownership and the desperate search for employment. The *Alternative Law Journal* plans to maintain the unique forum developed by the Legal Service Bulletin for views to be expressed which might otherwise be drowned out.

Id.

32. A self-consciousness manifest in the "lawyering skills" focus of much of her American career. See Pether, *Curriculum Vitae*, *supra* note 30. For critical commentary on the tendency manifest in U.S. legal education to separate "skills" from "doctrine" long before this became a fashionable current concern in American legal education, see Penelope Pether, *Legal Analysis: The Fundamental Skill*, by David S. Romantz & Kathleen Elliott Vinson; Professional Writing for Lawyers: Skills and Responsibilities, by Margaret Z. Johns, 7 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 116 (1999) (book review) [hereinafter Pether, *Legal Analysis*].

33. See generally TONY BLACKSHIELD, GEORGE WILLIAMS & BRIAN FITZGERALD, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS (1996).

34. See Pether, *Constitutional Law and Theory*, *supra* note 31, at 196.

challenges the High Court's coy *Realpolitik* in *Mabo*³⁵ by calling the issue of sovereignty in this country what it is—a constitutional issue of critical significance.³⁶ On the other hand, Blackshield et al. seemed to see no contradiction of their politics, or their innovative intentions, in happily “extract[ing] the ‘rationes’ of constitutional cases in digestible chunks and paraphras[ing] ‘material facts’ of cases”³⁷ This pointed to a crucial double failure for a purportedly critical project—a failure “to address the ways in which the law that constitutes our nation is constructed in its reading and writing” and a failure on the part of the authors to be properly self-aware in their own critical practice.³⁸ The irony of both failures was only heightened by the authors' studious inclusion of “sections on ‘Feminism and Constitutionalism’ and ‘Postmodernity and Postmodernism’ in their chapter on ‘Theoretical Approaches to Constitutional Understanding’”³⁹ Hadn't they read their own book?⁴⁰

Here were hints of the worldview that would mark the maturity of the scholar in her American phase: a synthesis of the sensibilities of law and

35. The reference is to *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.). This case is discussed further below, see *infra* notes 55–63 and accompanying text.

36. Pether, *Constitutional Law and Theory*, *supra* note 31, at 196.

37. *See id.*

38. *See id.*

39. *Id.*

40. *See id.* A more explicit call on Australian constitutional lawyers “to jettison increasingly inadequate interpretive paradigms and to reimagine their project” was issued in Penny Pether, *How Many Cheers for Engineers?*, (*Michael Coper & George Williams eds.*), 22 *ALTERNATIVE L.J.* 259, 260 (1997) (book review). In 1998, Blackshield and Williams produced an extensively revised second edition of *Australian Constitutional Law and Theory* that, in prefatory remarks, explicitly acknowledged the importance of “locat[ing] the study of constitutional law in a study of constitutional theory, and . . . open[ing] up that body of theory in turn to reappraisal from a diversity of theoretical and philosophical viewpoints.” TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS* vii (2d ed. 1998). In a review that appeared in *Alternative Law Journal*, Penny wrote “They're back! And they've written back!” and commended the authors for responding “thoughtfully and imaginatively, to criticisms made of their first edition” Penelope Pether, *Australian Constitutional Law and Theory: Commentary and Materials*, by *Tony Blackshield and George Williams*, 2d ed., 23 *ALTERNATIVE L.J.* 202, 202 (1998) (book review). By this time a regular visitor to U.S. universities, Penny concluded:

US scholars and teachers of constitutional law are generally bemused when they register that teaching the subject in this country is not the glamour assignment it has traditionally been in theirs. With the new edition of *Australian Constitutional Law & Theory: Commentary & Materials* their Australian counterparts have only ourselves to blame if it remains the Cinderella of the Priestley 11.

Id. The Priestley 11 refers to the eleven law subjects successful completion of which is required of applicants for candidate status for admission to legal practice in Australia. They are named for the Law Admissions Consultative Committee (chaired by Lancelot John Priestley) that, in 1992, determined the minimum academic study requirements for legal practice. For the full list, see LACC, *Uniform Admission Rules (2014)*, Schedule 1.

literature with an activist, feminist ethics and an active historical consciousness; an awareness of American legal scholarship's imagination and its Australian counterpart's deficits,⁴¹ but also of the dangerous "paradoxes" of American constitutionalism and the saving possibilities that might be found in Australian common law culture. More followed quickly. Her 1996 *Law Text Culture* review of James Boyd White's *Acts of Hope* was, in effect, an explicit declaration of independence from the stream of "liberal humanist" scholarship and its "decent, democratic" aspirations for law that White's highly influential scholarship represented in the law and literature interdiscipline.⁴² Her position was feminist and poststructuralist, her focus was power, her view of Anglophone culture's pervasive sexism, racism, and corruption was not, like his, that these were aberrations that could be corrected, but that they were current and historical norms that must be warred against.⁴³ As in her first review of Blackshield et al., the methodological message was that meanings could not be pronounced from a scholarly Olympus: texts must be read in context, perspectives and critical practices self-consciously examined. And this message came accompanied by another, announcing a critical perspective on America that was, fittingly, very foreign to White's. "[I]t is in Boyd White's explicit discourse of community, which elides populace and polity, muffles the discordant cadences of women and people of colour, that the underpinning faith which engenders his hope . . . resides: in the glorious democratic fiction which is 'the legacy America,' *always, somehow, bafflingly out of reach.*"⁴⁴ Once forced into history and context, White's inspirational texts told far grimmer tales, particularly when considered alongside "the voices of power, of dissonance, and of persuasion which clamour in the 'popular' culture so notably absent from this volume, and which constitute modern nations increasingly productive of despair."⁴⁵

41. Penny plainly stated this awareness:

Legal and literary studies have one of their busiest and potentially most troubling intersections in constitutional interpretation. This is, however, more evident in the US than it is in Australia. On that other side of the shifting imaginary zone which is the Pacific Rim, not only is the term constitutional theory more than oxymoronic, but also leading law and literature scholars like Richard Weisberg and James Boyd White are constitutionalists; 'mainstream' constitutionalists like L. H. LaRue and Sanford Levinson have essayed major scholarly projects which derive methodologically from literary studies; and one can, like the Stanford historian Jack Rakove, win the 1997 Pulitzer for a book on constitutional interpretation.

Penny Pether, *A Woman's Constitution? Gender & History in the Australian Commonwealth* (*Helen Irving et al. eds.*), 22 *ALTERNATIVE L.J.* 153, 153 (1997) (book review) [hereinafter Pether, *A Woman's Constitution?*].

42. See Penny Pether, *Acts of Hope, James Boyd White, Acts of Hope, Creating Authority in Literature, Law, and Politics*, 3 *LAW TEXT CULTURE* 276 (1996) (book review).

43. See *id.* at 277.

44. *Id.* at 278 (emphasis added).

45. *Id.*

Democratic fictions were clearly on Penny's mind in the mid-1990s. They reside at the center of her first attempt to bring the components of her emerging worldview into apposition, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*.⁴⁶ Written as an exercise in feminist law and literature pedagogy that (continuing the critique of White) "neither imagines the nation as discursive community nor seeks to recover an ethical essence beyond culture," the essay notes *The Crucible's* participation in the common American literary trope of employing the law "to suggest a fundamental sickness at the heart of American society" (specifically in this case to damn McCarthyism), but "insistently" rereads the play against the grain of imputed authorial intent by recovering from it not its "stubborn individualist" hero, John Proctor, but instead its marginalized women—"the black slave, the maddened wife, and adolescent girls and young women"—to whom the law of Arthur Miller's Salem grants the place, only, of "child, wife, slave, servant, or whore."⁴⁷ The constitutional paradox at the heart of the essay, and of *The Crucible*, lies in the American identification of law as "both the foundation and the guiding light of democracy" without recognizing that democracy and foundational authority are inherently at odds—as indeed the position of *The Crucible's* women reveals.⁴⁸ For in the play, it is precisely "when they seek to 'sport,' to achieve a measure of autonomy, and are in a measure successful, that the law goes mad . . ."⁴⁹ To this rich mix Penny added, characteristically, an Australian accent, in this case the threat posed to democratic processes by an Australian version of law gone mad, namely the development of an expansive "American model" High Court constitutional jurisprudence of review, without attention to the development of a corresponding "ethics of [democratic] accountability," or in other words the invention by implication of Australia's own constitutional paradox.⁵⁰

[W]hile the drafters of the Constitution and the politicians and citizens since Federation have declined to supplement the Australian Constitution with a written and explicit bill of rights, the High Court has discovered previously undiscovered civil rights implicit in the structure or text of the Constitution, or to be implied from Australia's system of responsible government.⁵¹

Why should this be problematic? Simply because:

46. See Pether, *Jangling the Keys*, *supra* note 9.

47. *Id.* at 318, 325, 328, 333, 334.

48. *Id.* at 319.

49. *Id.* at 328 (emphasis added).

50. *Id.* at 324.

51. *Id.* at 321.

In the absence of an express Bill of Rights, democratically mandated, and of the *amicus curiae* briefs which might lead the High Court to register the voices of feminists and victims of crime in their “due process” rights jurisprudence, the High Court occupies an ethical territory peopled only by those who have speaking parts in adversary proceedings and the pedagogy and practices which have shaped them, and the additional factors which constitute the *habitus* of members of the High Court bench.⁵²

As in *The Crucible*, read against its grain, the law we are called upon to venerate as “essential to democracy,”⁵³ the law that allows us to imagine communities, to create metaphysics of nationhood,⁵⁴ turns out to be the very same law that produces the powerless and the voiceless.

Jangling the Keys touched upon the High Court’s 1992 *Mabo*⁵⁵ decision in its critique of Australia’s new model constitutional jurisprudence, but only lightly. Penny turned fully to *Mabo* two years later, in *Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation*, in effect assimilating “what is arguably the most potentially constitutionally radical, and almost certainly the most politically contentious decision of the Australian High Court in its history”⁵⁶ to her developing account of democratic deficits. *Mabo* is well known, and often admired, for the High Court of Australia’s recognition of a concept of native land title in Australian common law, founded upon indigenous peoples’ connection to or occupation of the land in question under traditional laws or customs, although extinguishable by governments manifesting a clear and plain and legal intention to do so.⁵⁷ Recognition was a repudiation of the nineteenth century doctrine of *terra nullius*, which had denied the existence of an indigenous population with its own systems of law and had vested both “absolute beneficial ownership of the lands of the continent” and “sovereignty” in the British Crown colonizer.⁵⁸ The High Court refused to repudiate British colonial sovereignty—arguing that “Crown[] acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.”⁵⁹ Still, it found “that the establishment of

52. *Id.* at 324.

53. *Id.* (internal quotation marks omitted).

54. *See id.* at 321.

55. *See Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.).

56. Penny Pether, *Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation*, 4 LAW TEXT CULTURE 115, 116 (1998) [hereinafter Pether, *Principles or Skeletons?*].

57. *See Mabo*, 175 CLR at 3. The salient features of *Mabo* are discussed in TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 154–63 (5th ed. 2010).

58. Pether, *Principles or Skeletons?*, *supra* note 56, at 116; *see also Mabo*, 175 CLR at 43.

59. *See Mabo*, 175 CLR at 69. In this regard, the High Court found itself in substantial agreement with United States Chief Justice John Marshall, in an opinion delivered some 170 years earlier:

British colonial sovereignty in Australia only brought with it radical title to the lands of the colony [and] that some further disposition had to take place before an absolute beneficial ownership of such lands was . . . brought into existence,” extinguishing native title, such as a “dealing with the land inconsistent with the existence of native title . . .”⁶⁰ *Mabo* thus rewrote Australian common law “to recognise a law predating it and persisting alongside it . . .”⁶¹ But simultaneously, it declared that other law to be its inferior, “always subject to subordination and indeed extinguishment by it.”⁶² The judgment’s schizophrenia lay in its “ethical blind-spot”—the refusal to address Crown sovereignty.⁶³

In part, Penny’s argument consisted in advancing the (impossibilist?) demand, consistent with her critique in *Jangling the Keys*, that the Court address its ethical shortcomings, that it—in this case—“adopt an Iri-garayan ‘ethics of alterity’: an ethics of recognition not dependant on displacing or metamorphosing the other or imagining the other solely in terms of the self.”⁶⁴ In larger part, however, her argument centered on the meaning for Australian national identity of the Court’s refusal to do

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. *Conquest gives a title which the Courts of the conqueror cannot deny*, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. *It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.*

Johnson v. M’Intosh, 21 U.S. 543, 588–89 (1823) (emphasis added).

60. Pether, *Principles or Skeletons?*, *supra* note 56, at 117.

61. *Id.*

62. *Id.*

63. *Id.* at 118. As Blackshield and Williams put it in *Australian Constitutional Law and Theory*:

In *Mabo* . . . the High Court did not accord [the diverse patterns of belief and power expressed through the traditions and practices of Indigenous peoples] any legal force of its own. Through recognition by the common law, this older tradition was acknowledged as an embodiment of inherent and judicially cognisable bonds between Indigenous peoples and their ancestral lands. However, by formulating it as “native title” depending on common law recognition, the Court avoided any suggestion of Indigenous “sovereignty.”

BLACKSHIELD & WILLIAMS, *supra* note 57, at 152. Rather, “the High Court took care to avoid undermining the formal constituent structures of Australian governance. The Court recognised the customary laws and entitlements of Indigenous people only to the extent that they saw this as consistent with existing constitutional norms.” *Id.*

64. Pether, *Principles or Skeletons?*, *supra* note 56, at 118.

what it was, arguably both ethically and legally, obliged to do by its very discovery of native title and rejection of “absolute beneficial ownership” in the repudiation of *terra nullius*, namely address and repudiate exclusive Crown sovereignty too. What did it mean for “the appealingly democratic legitimating legal fiction that at some point between 1788 and 1986 the authority on which the Australian Constitution rested ceased to be that of the British Crown and became that of the Australian people,” that the High Court—which is “the judicial arm of the national government established under a Constitution which draws its power from the assent of the Australian people who are subject to it,” and which “makes the Australian common law”—holds it is foreclosed from ruling “on the legitimacy of the colonial annexation of Australia” by that same common law, in the making of which the Court’s authority was supposedly derived not from the colonizing Crown, but from the Australian people?⁶⁵ What did it mean “that the legitimacy of the British acquisition of sovereignty over Australia is not justiciable in Australian Courts?”⁶⁶ What did it mean, as Justice Gerard Brennan had put it, that “recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.”⁶⁷ And what was this skeletal principle, so crucial to Australian national identity?

In Brennan’s mind, the crucial skeletal principle was Australian law’s “organic” connection with the law of England.⁶⁸ In Penny’s, it was (which amounted to the same thing) the subordination of the Aboriginal:

Claims for the recognition of aboriginal sovereignty, that which is unspeakable in the High Court’s discourse on native title, remind the Australian constitutional imaginary that there is something anterior to the text of the ‘common’ law and the territory of the realm that undermine both their foundational claims, that disable the imperial body of Australian law from remaining ‘wrapped in its self-evident and productive virtue.’⁶⁹

That was precisely the reason the claims could not be allowed, the reason for the Court’s embrace of extinguishment, and for the resultant crippling

65. *Id.* at 126.

66. *Id.* at 127–28.

67. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 43 (Austl.).

68. *Id.* at 29.

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England.

Id.

69. Pether, *Principles or Skeletons?*, *supra* note 56, at 139 (citation omitted).

of its well-meaning native title jurisprudence.⁷⁰ “[T]he neocolonial constitutional story which says that our municipal courts cannot scrutinise the validity of the acquisition of sovereignty which effectively brought them into being has become the brittle skeleton on which the law of this land depends.”⁷¹ What could be summoned to oppose the influence of this story? Here was a point where Penny could have taken a “popular constitutionalist” turn, calling for the Court to obey the will of the sovereign

70. Thus, *Wik Peoples v Queensland*, stated:

So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. *If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.*

Wik Peoples v Queensland (1996) 187 CLR 1, 133 (Austl.) (emphasis added).

In *Members of the Yorta Yorta Aboriginal Community v Victoria*, the High Court confirmed lower court decisions denying the Yorta Yorta people of Northern Victoria and Southern New South Wales continuing native title over their traditional country in a ruling that required those seeking to assert native title to demonstrate continuous occupation in a manner according with traditional laws and customs since the moment of the arrival of the British in 1788. *Members of the Yorta Yorta Aboriginal Cmty. v Victoria* (2002) 214 CLR 422, 461 (Austl.). According to the Federal Court decision, which the High Court declined to disturb:

The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forbears. The facts in this case lead inevitably to the conclusion that before the end of the nineteenth century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.

Id. at 461 (Gaudron & Kirby, J.J., dissenting) (quoting *Members of Yorta Yorta Aboriginal Cmty. v Victoria* (1998) FCR 608 (Austl.)).

As Aboriginal legal activist Noel Pearson put it in the wake of *Mabo*, *Wik*, *Yorta Yorta*, and the 2002 Western Australia case of *Mirriuwung Gajerrong*:

The three principles of native title law are not that the whitefellas get to keep all that they have accumulated, that the blackfellas get what is left over and they share some larger categories of land titles with the granted titles prevailing over the native title. Rather the three principles of native title are that the whitefellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof—and indeed only where they prove that they meet white Australia’s cultural and legal prejudices about what constitutes “real Aborigines.”

Noel Pearson, *The High Court’s Abandonment of ‘The Time-Honoured Methodology of the Common Law’ in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta*, 7 NEWCASTLE L. REV. 1, 4 (2003).

71. Penelope Pether, *Pursuing the Unspeakable: Toward a Critical Theory of Power, Ethics, and the Interpreting Subject in Australian Constitutional Law*, 20 ADEL. L. REV. 17, 21 (1998) [hereinafter Pether, *Pursuing the Unspeakable*].

people. She did not.⁷² Instead, her answer was to repeat her demand for the judges of the High Court to manifest a heightened ethical consciousness that would render impossible “the unexamined judicial life,”⁷³ to which she added—this for the first time, grounded in an appreciation of the New Zealand jurist Sir Robin Cooke—the possibility that, in a common law culture, support could be found for the imagining of “fundamental common law rights *beyond the modification of government . . .*”⁷⁴ In judicial ethics and common law rights, one might find a meaningful and responsible basis for the otherwise specious claim of the Australian judiciary to *Marbury*-like powers of review: “[A]n independent judiciary administering the rule of law [to ensure] a government of laws and not of men . . . holding the powerful accountable to the laws of the land and protecting vulnerable minorities from majoritarian tyranny.”⁷⁵

III.

It is past time to return to *Meanjin*, and to *The Prose and the Passion*. Written a decade after the emergence in the mid-1990s of Penny’s core concerns—ethics and history, judging and democracy, vulnerable minorities and majoritarian tyrants—and also a decade after she had departed Sydney for the United States, the essay is striking for the consistency of focus it suggests, but also for a new note that it sounds, a note of hope—or at least expectation—for law. The essay springs from Robert Cover’s contention that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,” hence that “[f]or every constitution there is an epic . . .”⁷⁶ It asks what might be the epic of an Australian constitution, or of Australian constitutionalism.

72. She would debate the wisdom of “popular constitutionalism” a decade later, in an article written for a Quinnipiac University School of Law Symposium on the work of constitutional law scholar Mark Tushnet. See Penelope Pether, “*No One Does That Anymore*”: *On Tushnet, Constitutions, and Others*, 26 QUINNIPIAC L. REV. 671, 678–82 (2008) [hereinafter Pether, “*No One Does That Anymore*”]. But she had already made reference to her reasons for distrusting the simplistic embrace of popular democracy in her reaction to the election, in 1997, of Pauline Hanson, founder of the political party One Nation, to the Australian Federal Parliament. The election had exposed liberal expectations that wider participation of women would, as such, enlighten Australian politics. It had shown:

[T]hat a woman politician can be virulently racist and oppose gun control, and thus also oppose herself to the interests of women of colour, non-Anglo migrant women, and women victims of domestic violence; and that to flourish in the predominantly masculine world that is Australian party and parliamentary politics, women who succeed sufficiently to earn ministerial portfolios may almost inevitably embody and espouse the kinds of values that many feminists might find problematic.

Pether, *A Woman’s Constitution?*, *supra* note 41, at 154.

73. Pether, *Pursuing the Unspeakable*, *supra* note 71, at 24.

74. *Id.* at 21 (emphasis added).

75. *Id.* at 21–22.

76. Cover, *supra* note 8, at 4.

The question is continuous with the conclusion of one of the last commentaries Penny wrote before leaving Australia, *Pursuing the Unspeakable: Toward a Critical Theory of Power, Ethics, and the Interpreting Subject in Australian Constitutional Law*. There she posited an “as yet unimagined [Australian] constitutional theory” that would accept as a fact of life that “the High Court has the power to make [the] Constitution,” and would ask “which subjects”—that is, judicial subjects or citizen subjects—“should hold that power, and how it should be exercised.”⁷⁷ In *The Prose and the Passion* that “as yet unimagined” constitutional theory has gained substance and is ready to offer answers.

The constitutional theory on display in the essay is one of a nation brought into being “as a specific kind of legal entity.”⁷⁸ What kind? Well, for a start, one that is realistic in its expectations of law, one that does not ask “that law do more than it can”⁷⁹ Here we can hear the skeptic of grandiose “American model” constitutionalism and its democratic fictions, and perhaps of James Boyd White’s liberal humanism too.⁸⁰ Second, it will be the kind of legal entity that has honorable officers.⁸¹ “[I]f the law is to do justice, it will depend on the people who practice it and lay it

77. Pether, *Pursuing the Unspeakable*, *supra* note 71, at 28.

78. Pether, *The Prose and the Passion*, *supra* note 7, at 43.

79. *Id.* at 44. This argument responds to Australian novelist Helen Garner’s “stubborn [] insistence” in *The First Stone* (1992) and *Joe Cinque’s Consolation* (2004) “that law do more than it can,” that is, that it comport itself in line with Garner’s conception of justice. *Id.* “The law . . . as a ragtag system constituted by institutions, discourses, and subjects, predictable only because of the iteration of practices passed from hand to hand, always falls short [of such demands].” *Id.* at 44–45.

80. Here, it seems to me, we encounter Penny Pether speaking for a particular kind of (Australian) jurisprudence that is coldly clear-eyed in its assessment of what can actually be expected of law in the current conjuncture. For other examples, see SHAUNNAGH DORSETT & SHAUN McVEIGH, *JURISDICTION* (2012); Shaun McVeigh, *Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law*, 4 U.C. IRVINE L. REV. 471 (2014); Jeffrey Minson, *How to Speak Well of the State: A Rhetoric of Civil Prudence*, 4 U.C. IRVINE L. REV. 437 (2014).

81. Penny had her favorites, notably President of the New Zealand Court of Appeal Sir Robin Cooke (on whom see, for example, Pether, *Pursuing the Unspeakable*, *supra* note 71, at 21); Australian High Court Justice Michael Kirby (on whom see, for example, Penelope Pether, *Militant Judgment? Judicial Ontology, Constitutional Poetics, and “The Long War”*, 29 CARDOZO L. REV. 2279, 2292–2314 (2008) [hereinafter Pether, *Militant Judgment?*]); and New South Wales QC—and later President of the NSW Court of Appeal—Keith Mason (on whom see, for example, Pether, *Pursuing the Unspeakable*, *supra* note 71, at 23–24). She even had a good word for Murray Gleeson:

I recently read a paper on judicial decision making delivered by Australian Chief Justice Murray Gleeson. Before his elevation to the bench, Gleeson was widely regarded as the best lawyer in the nation by aficionados of the law’s supposed “black letter” (they do not number your reviewer among them). However, having briefed him when I was a young solicitor and he an eminent Queen’s Counsel, this estimation is not one I would dispute. Gleeson’s account of what it is that judges do was much closer to that of Duncan Kennedy than John Finnis.

Pether, *Legal Analysis*, *supra* note 32, at 117.

down, on their characters, their courage, their convictions, on how they read the nation's legal history, and write it."⁸² Invoking the description of Lindy Chamberlain's Melbourne barrister, Andrew Kirkham, in John Bryson's *Evil Angels* (1988), Penny writes of the character of Australian lawyers "at their best: independence from the client, a willingness to give unwelcome advice if professional judgment demand[s] it."⁸³ Such independence rendered "the best of Australia's lawyers and judges . . . fiercely protective of what the rule of law can mean if it is precept, not cipher, article of faith, not rhetoric."⁸⁴ It was what stood between "individuals, especially the powerless . . . and raw, unchecked government . . ."⁸⁵ Casting about for a representation, Penny settles on the 1997 Australian comedy *The Castle*, in which the legally-challenged Kerrigan family, threatened with compulsory purchase of their home to allow extension of a Melbourne Airport runway, is rescued by a big-hearted QC, who takes their case to the High Court *pro bono*.⁸⁶ Analogies to *Mabo* and indigenous land rights abound but are rendered obscure by the film's quasi-ocker sensibility.⁸⁷ For Penny, the clearer lesson "is that good lawyers take pains to mount constitutional challenges on behalf of the poor, disenfranchised and unpopular . . ."⁸⁸

Finally, it will be the kind of legal entity that empowers subjects with fundamental common law rights, freedoms, and immunities, interference with which by legislatures is tolerable only when "manifested by unmistakable and unambiguous language" and only when "courts exercising the judicial power of the Commonwealth determine whether the legislature

She also had her un-favorites, notably U.S. Ninth Circuit Judge Alex Kozinski (on whom see, for example, Penelope Pether, *Regarding the Miller Girls: Daisy, Judith, and the Seeming Paradox of In re Grand Jury Subpoena, Judith Miller*, 19 LAW & LITERATURE 187, 198–99 (2007)) [hereinafter Pether, *Regarding the Miller Girls*].

82. See Pether, *The Prose and the Passion*, *supra* note 7, at 45.

83. *Id.* at 46.

84. *Id.*

85. *Id.* Contrast her distaste for "torture memos" authors "Jay Bybee and John Yoo, then both of the increasingly inaptly-named Justice Department, now a federal appellate judge and Boalt Hall law professor respectively, lawyers far too close to their client, executive government, with little awareness of being servants of the law." Penelope Pether, *Comparative Constitutional Epics*, 21 LAW & LITERATURE 106, 111 (2009) [hereinafter Pether, *Epics*] (footnote omitted).

86. Although he goes unmentioned in *The Prose and the Passion*, my own favorite character in *The Castle* is Darryl Kerrigan's hapless solicitor, Dennis Denuto, who explains to the bench that depriving Darryl of his house goes against "the vibe" of the Constitution. See *THE CASTLE* (Miramax Films 1997).

87. See *id.* The film's humor relies mainly on caricatures of the white Anglo-Celtic working class and of Mediterranean migrant Australians, of how, as paterfamilias Darryl Kerrigan puts it, they are "really startin' to understand how the Aborigines feel" (an unlikely sentiment in 1997 Australia), and on how ordinary Australians and eminent QCs can become good mates. As Penny notes, "[s]ome might judge *The Castle* [as] the cinematic double of the *Mabo* decision itself, which . . . can be read as an attempt to redeem the common law from the stain of colonialism." Pether, *The Prose and the Passion*, *supra* note 7, at 47–48.

88. Pether, *The Prose and the Passion*, *supra* note 7, at 48.

and the executive act within their constitutional powers.”⁸⁹ It will be the kind of legal entity of whose constitution “it may fairly be said that the rule of law forms an assumption.”⁹⁰ Such displays of robust common law constitutionalism were, Penny noted, fleeting. The contemporary Australian High Court, like its American counterpart, appeared more concerned with its own legitimacy than with developing and safeguarding a doctrine of constitutionalism.⁹¹ Perhaps that is why the essay places such stress on the office of the good lawyer, the ethical professional, and why it ends—as a law and literature essayist should end—emphasizing the crucial role of the purveyors of legal culture, “the writers and film-makers who create Australian constitutional epics,” who educate the nation in what separates “a mere constitution” from “genuine constitutionalism.”⁹²

And so here we have the collection of components—the constitutional prose—which creates ‘nation’ as a specific kind of legal entity, prose about which to be passionate, prose without which “we are meaningless fragments”⁹³ These components would figure, insistently and urgently, in Penny’s post-2007 commentaries, increasingly focused on the United States, in which the Australian side of the “shifting imaginary zone which is the Pacific Rim,”⁹⁴ and the constitutionalist aspirations and resources it displays, fleetingly, in *The Prose and the Passion*, seems to become a fountain of hard-won experience to which the American side should (but does not) listen. Thus, in *Regarding the Miller Girls*, the target was the “new” American exceptionalism (in truth not so very different from the original brand), the “manufactured consent” and studied ignorance of the past that sustained it, the abysmal judicial ethics that made a mockery of it, and the manipulated 9/11 hysteria that justified any crime in defense of it.⁹⁵ What should Americans learn? The honest craft, and graft, of judging; the meaning of professional ethics; and a common law constitutionalism of fundamental rights.⁹⁶ To “legislatively entrepreneurial” judges like Antonin Scalia and the Ninth Circuit’s Alex Kozinski, who had seemingly foregone judicial independence for a share of governing powers,⁹⁷ Penny held up the example of the late Sir Robin Cooke, Lord Cooke of

89. See *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 (Austl.); see also Pether, *Militant Judgment?*, *supra* note 81, at 2302; Pether, *The Prose and the Passion*, *supra* note 7, at 48.

90. See *Austl. Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Austl.); see also Pether, *The Prose and the Passion*, *supra* note 7, at 48.

91. See Pether, *The Prose and the Passion*, *supra* note 7, at 48.

92. *Id.* at 48.

93. E.M. FORSTER, *HOWARDS END* 213 (1921) (alteration in original) (epigraph to Pether, *The Prose and the Passion*, *supra* note 7, at 43).

94. See Pether, *A Woman’s Constitution?*, *supra* note 41, at 153.

95. See Pether, *Regarding the Miller Girls*, *supra* note 81, at 188–92.

96. See *id.* at 200–01.

97. *Id.* at 198–99.

Thorndon, “the other Coke,”⁹⁸ as the acme of the common law judge. Though defiant, it was, frankly, a despairing essay:

In the America of New Exceptionalism, even law and literature’s “professional skeptics,” journalists, lawyers, and judges, are co-opted by an emperor without clothes, with whom they have affiliated themselves, believing that there is nothing principled in law, that it is merely a rhetorical cover for politics. At home and abroad in the name of the rule of law we carve out spaces beyond the rule of law. And we abandon the supposed genius of our tripartite government, with its checks and balances, and the material practice that sustains it, judicial review, by exorcising what Dicey called law’s spirit: common law constitutionalism.⁹⁹

Professional law and literature skeptic though she was herself, this lawyer would not be co-opted by the corrupt cynicism that found no principle or spirit in law in which to believe, yet found herself shockingly alone both in her criticism of the corruption and in her determination to fight against it.

An allowable nostalgia for Australia might have furnished the Anglophone common law “other” to the American Babylon, but it had not warped the critic’s gaze back across the Pacific. In *“No One Does That Anymore”: On Tushnet, Constitutions, and Others*, Penny’s “accidental comparativism” led her to extol Mark Tushnet, an American constitutional commentator, while declaiming against his faith in “popular” constitutionalism.¹⁰⁰ Her reason? The 1997 election of One Nation party founder Pauline Hanson—“a much more dangerous, much more rhetorically astute, female antipodean David Duke”¹⁰¹—to Australia’s federal parliament and the resultant rapid move of “mainstream conservative politics in Australia strategically [to] remake itself in Hanson’s image (to its enormous electoral good fortune).”¹⁰² Sharing Tushnet’s commitment to the “thin Constitution” of fundamental rights, equality, and justice,¹⁰³ Penny maintained alongside it her critical faith that legal institutions could be made to work, and rejected Tushnet’s dismissal of judicial review as “‘noise around zero.’”¹⁰⁴ *Mabo*, for all its faults, had been far from noise around

98. *Id.* at 200 (internal quotation marks omitted). “I refer here to [Sir Edward] Coke’s judgment in *Doctor Bonham’s Case* [1610] that ‘in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.’” Pether, *Militant Judgment?*, *supra* note 81, at 2292 n. 94 (quoting 8 Co. Rep. at 11a; 77 E.R. at 652).

99. Pether, *Regarding the Miller Girls*, *supra* note 81, at 200–01 (footnotes omitted).

100. *See* Pether, *“No One Does That Anymore”*, *supra* note 72, at 674–76, 681–82.

101. *Id.* at 681 n.61.

102. *Id.* at 681.

103. *Id.* at 675–76, 679 n.46.

104. *Id.* at 679 (quoting MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (1999)).

zero.¹⁰⁵ Rather than taking the Constitution away from the courts,¹⁰⁶ the courts should be confirmed in their share of responsibility for the Constitution and made to exercise it in defense of the thin Constitution of common law constitutionalism. This was not starry-eyed idealism. Given the example of Australian native title jurisprudence after *Mabo*, one could have no illusions about the effort that would be required to hold courts to the demand. But the alternative—jurisdiction stripping—was far worse.¹⁰⁷ Once again, the conclusion was dark, but it was also determined:

[A] “thin constitution” [] promises two things. First, that it might shield us and Others from at least the worst excesses of the violence of state tyranny. Second, it encodes what may be cynical rhetoric, aspirational constitutive national text, denial that is admission of the originary national pathology that eats out the nation’s core, or all of these things. That is, a commitment to equality in a nation with a government “defective from the start,” founded on chattel slavery and persistently unwilling to address that inheritance from the Founders, a pervasive structural subordination of Others that imbricates its fiber yet.¹⁰⁸

As in Australia, the task in the United States was to recognize the potential in legal principle, and spirit; to see that the commitment to equality, even if cynical, or founded in original sin, had nevertheless been made at least formally, and hence might be made reality.

The year after her encounter with Tushnet, Penny was confirmed in her “accidental” constitutional comparativism by a different encounter, this time with Nan Seuffert’s *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand*, which she reviewed at length in *Law and Literature*, and which inspired a second *Law and Literature* essay, entitled *Comparative Constitutional Epics*, in 2009.¹⁰⁹ Penny found Seuffert inspiring for her assault on “relentlessly monologic constitutional imaginaries,” on constitutional jurisprudence blinkered (as in the U.S.) by “arid textualist pieties” on the one hand, and “etiolated instrumentalism” on the other, her determination to ground “alternative jurisprudences” in material histories that could not be blithely controverted.¹¹⁰ Seuffert had written a legal history of Aotearoa New Zealand

105. *Id.* at 680–81, 681 nn.59–60. Recall that, in 1998, Penny had described *Mabo* as “arguably the most potentially constitutionally radical, and almost certainly the most politically contentious decision of the Australian High Court in its history.” See Pether, *Principles or Skeletons?*, *supra* note 56, at 116.

106. See generally TUSHNET, *supra* note 104.

107. See Pether, “No One Does That Anymore”, *supra* note 72, at 688.

108. *Id.* (footnote omitted).

109. See Penelope Pether, *Cautionary Tales*, 20 LAW & LITERATURE 477, 477–86 (2008) [hereinafter Pether, *Cautionary Tales*]; see also Pether, *Epics*, *supra* note 85.

110. See Pether, *Cautionary Tales*, *supra* note 109, at 479, 481 (internal quotation marks omitted).

that was intimately familiar with the violence of its colonization, and consequently with the vital necessity of ethical intervention in the constitutional structures which that violent colonization had erected.¹¹¹ Most of all, perhaps, Penny was inspired because Seuffert's worldview seemed so much akin to her own. "Nations are imagined political communities," Seuffert had written, "which need boundaries, and [tellingly,] enemies."¹¹² Law was "integral to the construction and maintenance of these boundaries, and the identification of enemies."¹¹³ Nations created stories of collective identity, which established the terms upon which individual identities might be asserted.¹¹⁴ Nations were *imagined* because they were fictions: no individual member could know all other members, hence the image of the nation each carried was an invention.¹¹⁵ They were *communities* in the sense that every member was imagined as part of the collective.¹¹⁶ But, Seuffert added, "[t]his part of the fiction typically masks various forms of inequality, exclusion and exploitation."¹¹⁷

Seen from anywhere within that "shifting imaginary zone" of the Pacific Rim—New Zealand, Australia, Canada, the United States—the constitutive stories that had constructed nations and constricted their members were bleak: all were "forged from violent dispossession, institutionalized racism, and lies in the form of laws . . ."¹¹⁸ Returning in *Comparative Constitutional Epics* to the themes initially canvassed in *The Prose and the Passion*, Penny tried to uncover additional "constitutional epics" that might leaven the bleakness with hope. She offered five: Toni Morrison's *Beloved*; David Marr and Marian Wilkinson's account of the Howard Coalition Government's crushing of asylum-seekers and of its grotesquely cynical 2001 Australian election campaign, *Dark Victory*; David Malouf's *An Imaginary Life*; the Canadian *Report of Events Relating to Maher Arar*, an innocent Canadian citizen subjected while in transit through the United States, with Canadian government foreknowledge, to "extraordinary rendition" to Syria, where he was interrogated under torture on behalf of the United States; and the Report of the Australian Human Rights and Equal Opportunity Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, entitled *Bringing Them Home*. All share the characteristic of speaking "brutal truths" about history, law, and the violence done by power.¹¹⁹ Placed among what one

111. *See id.* at 484.

112. *See* NAN SEUFFERT, JURISPRUDENCE OF NATIONAL IDENTITY: KALEIDOSCOPIES OF IMPERIALISM AND GLOBALISATION FROM AOTEAROA NEW ZEALAND 2 (2006) (citation omitted) (epigraph to Pether, *Cautionary Tales*, *supra* note 109, at 477).

113. *Id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *Id.*

118. Pether, *Epics*, *supra* note 85, at 106.

119. *Id.* at 124.

might term “complicit” texts—here, notably, the Australian High Court’s 1997 judgment in *Kruger v Commonwealth* (*Stolen Generations Case*), affirming the constitutionality of 1918 legislation that had authorized the forced removal of indigenous children from their families and the denial of damages for the injuries resulting¹²⁰—the effect of these constitutional epics is at once repudiatory and redemptive: they “testify to the inadequacy of the present language of law to doing justice, and bespeak the ability of a differently constituted legal language to make it possible.”¹²¹ And they demand of “[c]onstitutional judges” that they embrace “interpretive integrity” and “peace” over the narrow positivism, “hierarchy,” and “violence” of state law.¹²² “That which is capable of moving them to such a choice,” Penny concluded, directly referencing her *Meanjin* essay, “to ‘fac[ing] the commitments entailed in their judicial office and their law,’ is ‘the stories the resisters tell, the lives they live, the law they make.’”¹²³

IV.

It might seem fitting to end here; fitting, in that structurally I began this remembrance with *Meanjin* (quite deliberately, to underline the importance of Australian identity in what Penny wrote about, in how she wrote about it, and in what she fought for); then I circled back to *Meanjin* half way through to identify *The Prose and the Passion* as a key to the mature scholar; and just now I have drawn attention to Penny’s own self-referencing of her *Meanjin* essay in her maturity. But a few things have been left out.

One thing left out is the very first commentary Penny wrote—a 1990 review of the redoubtable Ian Hunter’s book *Culture and Government: The Emergence of Literary Education for Antithesis*, a graduate student journal housed at the University of Melbourne’s School of Culture and Communication.¹²⁴ A graduate student herself at the University of Sydney, the question uppermost in Penny’s mind at the time was “[h]ow are we in English studies to deal with Dawkins?”¹²⁵ This was no reference to some abstruse, arcane dispute amongst literary theorists, or an Antipodean anticipation of the God problem. “Dawkins” was John Dawkins, the incumbent Minister for Employment, Education, and Training in the Federal Labor Government, responsible for the introduction of sweeping reforms of Australian higher education, including forced amalgamations of universities and colleges of advanced education, the resumption of student fees, the expansion of bureaucratic management, and the redirection of univer-

120. See *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.).

121. Pether, *Epics*, *supra* note 85, at 121.

122. *Id.* at 121, 125.

123. *Id.* at 125 (alteration in original) (footnotes omitted) (quoting Pether, *The Prose and the Passion*, *supra* note 7, at 44).

124. See Penelope J. Pether, *Review: Ian Hunter, Culture and Government, “And After the Time of Cholera?”*, 4 ANTITHESIS 186 (1990) (book review).

125. *Id.* at 186.

sity resources toward “applied” and “practical” research. Here was an Australian aping with a vengeance Thatcherism’s assault on British university philosophy departments. How to deal with “Dawkins” was a question on the lips of practically everyone in a humanities or social science department in an Australian university at that time. I should know. I was there.

But what had this to do with Hunter’s book? The book argued that the history of literary education was the history of “a governmental pedagogy aimed at the cultural transformation of populations.”¹²⁶ This history showed that the privileged position of English studies in Anglophone higher education was purely fortuitous, the critical practices of university departments, defined by the poles of “literary theory” and “romantic criticism,” incidental and ancillary—hence dispensable—to literary education conceived as a social technology of government. Given their genealogy, the humanities would do well to locate themselves amongst the positive sciences (in English studies’ case by privileging rhetoric and philology). Here was an answer to the Dawkins problem that Penny summarized as “the pragmatism of not biting the hand that feeds us.”¹²⁷ Though Hunter’s “occasionally impenetrable prose” suggested he could benefit from literary education’s traditional role,¹²⁸ Penny was receptive to his “post post-structuralist” argument.¹²⁹ Her antipathy to the state’s management of culture, however, was clear, and a foretaste of arguments that, as we have seen, were to come.

The other things left out are three recent commentaries, the end of Penny’s life, and an attempt to give it meaning.

To move from *Culture and Government*, the first of Penny’s commentaries, to those most recently written is to move, with mounting sadness, toward her death. I have mentioned our first meeting. Our last—apart from a very brief encounter in London in March 2013, when she was already very ill—was at the Law, Culture and Humanities meeting two years earlier in Las Vegas, where Penny had kindly agreed to comment on my book, *Freedom Bound*.¹³⁰ The comment became a commentary, published in *Law and Literature*, which in effect claimed the book for Penny’s still expanding collection of constitutional epics—works that, by examining “national literary and legal imaginaries,” provided constitutions with their “epic supplements.”¹³¹ That commentary furnished the epigraph to this Essay, which I believe more pithily summarizes what Penny Pether was about than anything else of hers that I have read.¹³²

126. *Id.* at 187.

127. *Id.* at 186.

128. *Id.* at 189.

129. *Id.* at 186.

130. See CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865* (2010).

131. See Pether, *Free at Last?*, *supra* note 1, at 103.

132. *Id.* at 107–08.

As she was dying, and struggling bravely with her fear of pain and death, Penny still managed to complete two other commentaries, each responding to the book of a friend that, like mine, she found spoke to her long-time commitments as scholar and as ethical lawyer. The first of these was Kunal Parker's *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism*.¹³³ Here was a book that recovered common law sensibilities absent from—indeed profoundly foreign to—twentieth-century America. In no sense a romance of times gone, Parker's book is nevertheless edged with a clear sense of what has been lost to legal thought *after* its turn to modernism. It should be obvious why this book so appealed to Penny. A common law sensibility, I have argued here, is of central importance to understanding Penny Pether herself. Her Australian work is deeply marked by its presence, her American work by the realization that she—a common lawyer—had entered a legal culture from which a common law sensibility was very largely absent. Parker's history helped to explain that absence.¹³⁴

The last commentary Penny wrote was on Joseph Pugliese's *State Violence and the Execution of Law*.¹³⁵ Obviously this is a very different book from Parker's, or for that matter, from mine. But like those it spoke viscerally to an urgent impulse, a present danger, that inspired her. Penny thought it brilliant—"a primer of postmodern statist violence," a book that had grasped "the significance of both postmodern iterations of the somatechnics of state violence and of the construction of 'the subjects of the Global South within institutional and discursive structures that position them as non-human animals that can be tortured, killed and disappeared with impunity.'"¹³⁶ Key to her reading was Pugliese's concept of "biopolitical caesura," the radical, often physical, separation of human from animal, citizen from non-citizen, civilized from savage, that enabled the destruction and death, without consequence, of those whom the state would "let die."¹³⁷ What, Penny asks—her last words—what position might *we* be occupying "in the hierarchy of the biopolitical caesura, depending on who has the power to name and to torture, to allow to live and let die, to mark out the sites of exception where the enforcement of law and its breaching are one, to assign to those who once were human the

133. See KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011).

134. Penelope Pether, *Review Essay: American Common Law: Politics, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism*, 26 *LAW & LITERATURE* 249 (2014) (book review).

135. See JOSEPH PUGLIESE, *STATE VIOLENCE AND THE EXECUTION OF LAW*: (2013).

136. Penelope Pether, "Deep South" and *Worlds Without Ends: Orientalist Logic and the Biopolitics of "the Disappeared,"* 27 *LAW & LITERATURE* 161, 161 (2015) (reviewing and quoting PUGLIESE, *supra* note 135).

137. *Id.* at 161 (quoting PUGLIESE, *supra* note 135, at 4).

status of slave or animal, or of ‘bare life that can be killed with impunity.’”¹³⁸

Passionate prose written on behalf of the powerless and the voiceless, those on Penny Pether’s mind throughout her life. Still on her mind at the moment of her death. Is there anything that can be said of Penny’s life that in any measure fills the emptiness left by her death?

At the very end of *Remembering Babylon*, his extraordinary meditation on Australian colonizing and Aboriginality, on encounter and its cruelties, David Malouf uses moonrise over Moreton Bay (Brisbane) to signify the possibility of redemptive reconciliation, of life approaching knowledge by approaching other life:

It glows in fullness till the tide is high and the light almost, but not quite, unbearable, as the moon plucks at our world and all the waters of the earth ache towards it, and the light, running in fast now, reaches the edges of the shore, just so far in its order, and all the muddy margin of the bay is alive, and in a line of running fire all the outline of the vast continent appears, in touch now with its other life.¹³⁹

Like Malouf, like the ethics of Luce Irigaray and Emanuel Levinas that inspired her,¹⁴⁰ Penny’s fierce and critical faith teaches us that if we would seek knowledge, we must first hold ourselves open to the lives of others; we must face the faces of all those who are other life, and acknowledge our responsibility for them, and to them.

138. *Id.* at 165 (quoting PUGLIESE, *supra* note 135, at 18).

139. See DAVID MALOUF, *REMEMBERING BABYLON* 200 (1993).

140. See, e.g., Pether, *Pursuing the Unspeakable*, *supra* note 71, at 18, 25–26.

