



10-24-2016

Remembering Pether on Precedent: Crossing (National and Disciplinary) Borders

David S. Caudill

Follow this and additional works at: <http://digitalcommons.law.villanova.edu/vlr>



Part of the [Law Commons](#)

Recommended Citation

David S. Caudill, *Remembering Pether on Precedent: Crossing (National and Disciplinary) Borders*, 61 Vill. L. Rev. 465 (2016).
Available at: <http://digitalcommons.law.villanova.edu/vlr/vol61/iss3/7>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.

2016]

REMEMBERING PETHER ON PRECEDENT:
CROSSING (NATIONAL AND DISCIPLINARY) BORDERS

DAVID S. CAUDILL*

I. INTRODUCTION

“[I]ntellectual biography today seems to be mainly a matter of authorial attitude or methodology as exercised in portions of a general study of a subject’s life. At its best, it is something approaching a style, less a *kind* of biography than a *quality* found in certain works.”¹

UPON deciding to write this (memorial) Essay, I knew that I wanted to engage in an intellectual biographical study—albeit limited in scope to her work on precedent—of Professor Penelope Jane Pether, a “subject” whose “life” I knew well. Little did I know that the term intellectual biography is “employed rather haphazardly.”²

After all, since psychological analysis and attention to the history of ideas have become standard tools for the [] biographer, are not most serious biographies intellectual portraits to some extent, [i.e.,] studies of a subject’s thought, ideas, and mental processes?³

Notwithstanding such ambiguities, *intellectual biography* can refer to a particular focus “on the history of an individual’s mind, thoughts, and ideas as a means toward illuminating the subject’s life, personality, and character.”⁴ Forsaking “the need for basic chronological structure,” an intellectual biography “develops a narrative of a life through the conceptual analysis of the subject’s motives and beliefs within the world of ideas.”⁵

Intellectual biographies therefore generally exclude conventional biographical sources such as “childhood, family, love, material life, and so

* Professor and Arthur M. Goldberg Family Chair in Law, Villanova University Charles Widger School of Law. The author was married to Professor Penelope J. Pether from 1998 until her death in 2013.

1. Paul J. Korshin, *The Development of Intellectual Biography in the Eighteenth Century*, 73 J. ENG. & GERMANIC PHILOLOGY 513, 513 (1974).

2. *See id.*

3. *Id.*

4. *See id.* at 514.

5. *See* Craig Kridel, Presentation at the American Educational Research Association National Conference: An Introduction to Biographical Research (Apr. 2000), *available at* <http://www.aera.net/SIG013/ResearchConnections/IntroductiontoBiographicalResearch/tabid/15486/Default.aspx> [<https://perma.cc/RM6Z-QPUX>].

on[,]”⁶ but it can be difficult to “rigorously distinguish between the biographical and the intellectual”⁷ Some would say that the intellectual biographer “work[s] through [the subject’s] published texts,”⁸ but “an entire volume on a subject’s intellect would probably cease to be a biography; it would tend to become a critical study, an interpretation, or a commentary on someone’s writings.”⁹ I would like to avoid conventional critical commentary of an author’s work, in favor of highlighting the life—thoughts and ideas, motives and beliefs—that lies behind the author’s arguments. Indeed, I need not do a conventional commentary on Pether’s writings on precedent, because it has already been done—the *Villanova Law Review* recently published a symposium issue honoring Pether’s scholarship,¹⁰ including numerous articles but, for my purposes, specifically including (i) Pether’s fifth and final manuscript on precedent¹¹ and (ii) a thoughtful commentary by Professor Marianne Constable on that very posthumous publication (*and* on Pether’s previously published four articles on precedent¹² that, step by step over a decade, built a foundation for that

6. See Kas Saghafi, *A Matter of Rhythm: Benoît Peeters’s Derrida: A Biography*, L.A. REV. BOOKS (Mar. 30, 2013), <https://lareviewofbooks.org/review/a-matter-of-rhythm-benoit-peeters-derrida-a-biography> [<https://perma.cc/BDL8-A8AZ>].

7. See *id.* (citing JACQUES DERRIDA, *THE EAR OF THE OTHER* 5 (Christie V. McDonald ed., Peggy Kamuf trans., Schocken Books Inc. 1985) (1982)). Derrida, noting that the biographical is “currently undergoing a reevaluation,” thought biographies (“lives”) of philosophers problematic—we must “question[] the *dynamis* of that borderline between the ‘work’ and the ‘life[]’ This borderline . . . is neither active nor passive, neither outside nor inside.” DERRIDA, *supra*, at 5.

8. See Martin McQuillan, *The Book of the Week—Who Was Jacques Derrida? An Intellectual Biography*, TIMES HIGHER EDUC. (Dec. 31, 2009), <http://www.timeshighereducation.co.uk/books/the-book-of-the-week-who-was-jacques-derrida-an-intellectual-biography/409754.article> [<https://perma.cc/7PS5-VA3E>]. McQuillan defines *intellectual biography* as “work[ing] through an author’s published texts . . . to construct a life narrative” “in the absence of access to any of the sources necessary to write a traditional biography” *Id.* That project is, indeed, as he calls it, a “curious academic subgenre,” but I do not believe it is an exhaustive definition of intellectual biography (thus demonstrating the haphazard use of the term, see *supra* note 2 and accompanying text). See *id.*

9. Korshin, *supra* note 1, at 514.

10. Norman J. Shachoy Symposium: A Symposium in Honor of Professor Penelope J. Pether, 60 VILL. L. REV. 443–692 (2015).

11. Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443 (2015) [hereinafter Pether, *Strange Fruit*].

12. See Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955 (2009); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) [hereinafter Pether, *Inequitable Injunctions*]; Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553 (2005) [hereinafter Pether, *Take a Letter*].

final manuscript).¹³ The present Essay, by contrast, will attempt to explain *why* Pether chose precedent as one of her fields of scholarly inquiry.

It bears mentioning that Pether had numerous scholarly interests, represented by over seventy publications, but the controversy over federal circuit publication practices was of major importance to her. The aforementioned (posthumous) article—entitled *Strange Fruit: What Happened to the U.S. Doctrine of Precedent? (Strange Fruit)*—was a sort of *pièce de résistance* in her mind, insofar as it was the culminating chapter in a planned book collecting (and editing) her writings on precedent. Significantly, although she had plans for two scholarly, “academic” books (one on food and law, under contract and nearly completed¹⁴ and one on indefinite detention, under contract but barely begun¹⁵), she wanted her book on precedent to be a “popular” publication, written not for judges, lawyers, and law professors, but for the intellectual public. This might explain why the structure of *Strange Fruit* is almost like that of Dante’s *Inferno*,¹⁶ with the anticipated reader in the position of Dante Alighieri—the narrator reporting on his tour through hell—and Pether in the position of Virgil—the tour-guide who sets out to amaze and horrify Dante. In *Strange Fruit*, Pether intends to shock the reader. Just as Dante (i) faints when he is crossing the river Acheron on Charon’s ferry boat filled with miserable—wailing and cursing—souls,¹⁷ (ii) faints again with pity in the second circle of hell,¹⁸ (iii) cries out when he realizes what is going on in the fourth circle,¹⁹ and (iv) cannot express the terror of what he sees in the ninth

13. Marianne Constable, “*Be True to What You Said on Paper*”: Penny Pether on the Positivism of Law and Language, 60 VILL. L. REV. 549 (2015). Pether intended to revise and combine the five articles into a book, more of a popular than an academic or scholarly work, because they serially advanced a single thesis concerning a serious yet little known deficiency in the U.S. legal system.

14. Penelope Pether, *A Seat at the National Table: The Culinary Jurisprudence of Edna Lewis* (2014) (unfinished manuscript) (on file with author).

15. Penelope Pether, “Perverts,” “Terrorists,” and Business as Usual: Indefinite Detention before and After 9/11 (unfinished monograph).

16. DANTE ALIGHIERI, *Inferno*, in *THE DIVINE COMEDY* (Henry Wadsworth Longfellow trans., Ticknor & Fields 1867) (1314).

17. *See id.* Canto 3, at 19.

[Virgil:] This way there never passes a good soul
[O]f that terror [t]he recollection bathes me still with sweat.
The land of tears gave forth a blast of wind,
And fulminated a vermilion light,
Which overmastered in me every sense,
And as a man whom sleep hath seized I fell.

Id.

18. *See id.* Canto 5, at 33.

And all the while one [suffering] spirit uttered this [confession],
The other one did weep so, that, for pity,
I swooned away as if I had been dying,
And fell, even as a dead body falls.

Id.

19. *See id.* Canto 7, at 40.

circle,²⁰ Pether reveals to the reader phenomena that, to her eyes, are both breathtaking and appalling. She hoped that a thoughtful citizenry would react to her revelations in ways that most judges, lawyers, and law professors have not. Indeed, one of her primary theses in *Strange Fruit* is that most scholars of precedent have paid scant attention to the frightful development of a binary system of precedent—one genuine, for “important” parties and issues, and one quite shoddy, for the “have-nots” in society.

Briefly, Pether’s argument is that in the latter half of the twentieth century, the U.S. doctrine of precedent changed radically with the increase of unpublished opinions—e.g., 88% of merits decisions in federal appeals in 2013 were unpublished.²¹ Most such opinions, impliedly of inferior quality, are formally nonprecedential, and some are written by unsupervised court staff, which means many citizens (e.g., prisoners, veterans, social security claimants), instead of having an authentic right of appeal, are given second-rate, assembly-line justice, while large corporations enjoy a real appellate process. This binary system is justified on pragmatic grounds and even defended in shocking pronouncements by federal judges—for example, Judge Edith Jones referred to a federal appellate “docket [] ‘dumbed-down’ by an overwhelming number of routine or trivial appeals,” necessitating courts to

employ staff attorneys rather than leaving initial review to individual judges. Staff attorneys often take primary responsibility for reviewing the trial court record, assessing the issues presented,

Justice of God, ah! who heaps up so many
New toils and sufferings as I beheld?

. . . .

My Master, now declare to me
What people these are

Id. (internal quotation marks omitted).

20. *See id.* Canto 28, at 171.

Who ever could, e’en with untrammelled words,
Tell of the blood and of the wounds in full Which now I saw . . . ?
Each tongue would for a certainty fall short
By reason of our speech and memory,
That have small room to comprehend so much.

Id.; *see also id.* Canto 32, at 204.

If I had rhymes both rough and stridulous,
As were appropriate to the dismal hole

. . . .

I would press out the juice of my conception
More fully; but [] I have them not

Id.; *id.* Canto 34, at 212.

How frozen I became and powerless then,
Ask it not, Reader, for I write it not, Because all language would be
insufficient.

Id.

21. *See Pether, Strange Fruit, supra* note 11, at 446 & n.22.

and preparing memoranda that can readily be transformed into unpublished or published opinions.²²

As no other common law country issues formally nonprecedential opinions, *and* given that “[m]ass processing by non-judicial personnel of specific classes of cases on the basis of their subject-matter and the type of litigant involved”²³ falls short of the system that precedent theorists describe, Pether questions whether we even remain a common law country! In the debate over citation (of unpublished opinions) bans, for example, it seemed reasonable to Pether for Chief Judge Holloway in the Tenth Circuit to state, “all rulings of this court are precedents, like it or not”²⁴ However, she found astounding the admission by Judge Kozinski in the Ninth Circuit:

Any nuances in language [in nonprecedential opinions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were published opinions—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.²⁵

Pether identifies in appellate court practices a “fear” of precedent,” an anxiety about being bound to a spectral—and different—vision of the national future.”²⁶ Hence the notion that “common law” is “sufficiently principled and stable to be applied in the same way to yield the same results in the hands of different adjudicators” becomes a fantasy when “the subjects who—and material practices which—produce decision, rationale, or

22. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492, 1492–93 (1995). Judge Jones went on to theorize that “judges’ legal talents [are] jeopardized by a steady diet of minor appeals.” *Id.* at 1493. Pether notes the “breathhtaking arrogance” in such statements. Pether, *Strange Fruit*, *supra* note 11, at 482.

23. See Pether, *Strange Fruit*, *supra* note 11, at 480; see also Pether, *Inequitable Injunctions*, *supra* note 12, at 1492.

[T]he associated practices of “screening cases for the nonargument track” and unpublication, together with the delegation of much judicial work either to clerks or to staff attorneys who are often junior, inexperienced, minimally trained, and dissatisfied with the tasks assigned them, mean that judges often do not read any part of the record of an appeal before “signing off” on an unpublished opinion written by a staff attorney.

Id.

24. See *Re: Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1986) (Holloway, C.J., dissenting).

25. See Letter from Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 7 (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf> [https://perma.cc/U85J-SK5Y].

26. See Pether, *Strange Fruit*, *supra* note 11, at 454.

both” are unreliable.²⁷ The groundwork for those practices is traced by Pether to both an early twentieth century jurisprudential preference for liberty over equality and a mid-twentieth century tendency to see certain types of federal cases which were flooding the courts—prisoner claims, Social Security disability claims, and civil rights actions—as straightforward, vexatious, and unworthy of careful review.²⁸ The result, by the late twentieth century, was “the untethering of judicial authority from accountability or governance by [a] distinctively common law legal method.”²⁹

As a legal scholar, Pether clearly stands in the critical legal tradition. The Critical Legal Studies movement, by the time Pether immigrated to the United States, had splintered into radical feminism, critical race theory, legal Queer Studies, and law-and-the-humanities scholarship, each of which held interest for her even before leaving Australia. Her concern for the marginalized—for women in rape prosecutions, for refugees, for indigenous Australians, for the LGBT community, for prisoners—was reflected in her writings, teaching, and involvement with law school clinics and organizations. This concern, however, would not alone explain her enduring and relatively unique interest in the so-called citation wars.³⁰ In short, there are a lot of critical legal scholars in the academy who would not have noticed the “citation wars” as signaling a much deeper jurisprudential problem.

Two aspects of Pether’s background, however, gave her a particular and critical perspective on the phenomenon of unpublished opinions, namely her status in the United States as a foreigner from another common law country and her dual graduate training in law and English Studies. (The two are related, although indirectly, in Pether’s notion of subject formation as an important and often ignored aspect of law and legal processes.) After receiving her law degree from the University of Sydney, Pether worked in two Sydney law firms and then took a position—investigating police misconduct—as executive assistant to the New South Wales Ombudsman. She then returned to the University of Sydney and taught English while completing a Ph.D. in that field³¹ and later taught law (at Wollongong University and the University of Sydney) before immigrating to the United States in the late 1990s.

27. *See id.* at 483.

28. *See id.* at 454 n.76 (flagging prisoner habeas and § 1983 Civil Rights Act claims, Social Security disability claims, civil rights actions arising from access to public accommodations and employment as among leading causes of increases in federal appellate caseload[,], which Wilkinson characterizes as “relatively straightforward cases” since 1950s (citing Pether, *Strange Fruit*, *supra* note 11, at 454 n.76 & J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1158–59 (1994))).

29. *Id.* at 509.

30. So named because of the controversy over rules prohibiting citation of unpublished opinions.

31. Her dissertation was entitled, *A Transcending Civilization: England and Englishness in the Works of E.M. Forster and Virginia Woolf*.

II. A FOREIGNER

“Each time I tried to do a piece of theoretical work, it had as its starting point elements of my own experience and was always in relation to processes that I saw going on around me. It’s because I thought I could recognize in the things I saw, in the institutions that I was dealing with, in my relations with others, some cracks, mute tremors, malfunctions, that I undertook a particular piece of work—some fragments of autobiography”³²

Legal scholarship is inevitably grounded in personal experiences. We look around and react to what we see “going on,” and we make judgments about what is going well and what is “malfunctioning.” A lawyer educated and trained in another country might notice malfunctions in the United States that most of us do not see. This could be explained in terms of comparative law—“an avenue to new insights about one’s own legal system.”³³

It could also be explained, by analogy, in terms of Marxian theory of ideology, insofar as we

use ideological frameworks in order to interpret the material world. These ideologies act as grids for analysing experiences. They are acquired through all the processes of socialization including education and . . . linguistic skills.³⁴

And as ideologies are typically invisible to their holders, then to the extent that there are malfunctions,

[they] will appear to be the natural order of things since they are confirmed by everyday experience. . . . [L]aws enacted according to the dictates of a dominant ideology will appear . . . as rules designed to preserve the natural social and economic order.³⁵

In Marxian terms, the dominant ideological framework can only be demystified by the development of “a coherent ideology in opposition” to it, which is difficult because “ideological hegemony” tends to “prevent the development of alternative [] perspectives.”³⁶ Recasting the issue in Gramsci’s terms, how does re-education work—how is “natural” consciousness transferred to ideological class consciousness—when the “existing social order enjoy[s] the support or at least the usually unquestioned

32. DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 234 n.61 (1995) (quoting Interview by Didier Eribon with Michel Foucault (David M. Halperin, trans.), in *Est-il donc important de penser?*, LIBÉRATION, May 30–31, 1981, at 21).

33. See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 333 (1998).

34. HUGH COLLINS, MARXISM AND LAW 38 (1982).

35. See *id.* at 43.

36. See *id.* at 39, 50.

acceptance of the majority of a population[?]"³⁷ Or in Lukács's terms, not only is cognition distorted to make power relations appear natural, but "the irrational structure of capitalist society produces the need for theories to explain and justify the confusion and madness that appear[] on its surface."³⁸ And finally, in Fromm's psychoanalytic perspective, a dominant ideology is not so easily demystified—we are socialized by family experiences in capitalist society, which "stamp[] its specific [economic] structure on the child."³⁹ The link between Marxian and Freudian analyses in the work of Frankfurt School scholars such as Fromm is mirrored in neo-Marxist Louis Althusser's appropriation of neo-Freudian Jacques Lacan, who is credited with discovering how the

transition from (ultimately purely) biological existence to human existence (the human child) is achieved within the . . . Law of Culture [T]he *whole of this transition* can only be grasped in terms of . . . the law of language in which is established and presented all human order, i.e. every human role.⁴⁰

Ideological *discursive* formations are here offered as examples of Lacan's symbolic order of language. How can those invisible, majoritarian ideological grids (acquired through socialization) be demystified?—how can one see alternatives?

The analogy with Pether's critique of judicial practices lies in the fact that she was socialized into a different common law system, such that the unique features of the U.S. legal system were not invisible and did not seem normal—indeed, its theoretical justifications were not compelling at all, and an alternative ideological framework was not hidden. Pether did not believe that Australian judges would behave like, or become comfortable with the practices of, the U.S. federal appellate judiciary. Moreover, an Australian judge would not *talk* like our federal appellate judges, and just as Althusser highlighted the rhetorical and discursive aspects of socialization into an ideology, Pether's persistent focus on the role of language in law generated critical insights into how judges are socialized.

III. A LITERARY SCHOLAR

"[A]cronym, euphemism, context, signifiers, and what they signify, writing, positive law and its bureaucratic and institutional simulacra, institutional and disciplinary discourses, surprise, its absence, familiarity,

37. See Ron Eyerman, *False Consciousness and Ideology in Marxist Theory*, 24 ACTA SOCIOLOGICA 43, 46–47 (1981) (footnote in title omitted).

38. See *id.* at 49.

39. See *id.* at 54 (quoting Erich Fromm, *The Method and Function of an Analytic Social Psychology: Notes on Psychoanalysis and Historical Materialism*, in THE ESSENTIAL FRANKFURT SCHOOL READER 477, 483 (Andrew Arato & Eike Gebhardt eds., 1978)) (internal quotation marks omitted).

40. See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 142–43 (Ben Brewster trans., 2001) (1971).

shock, and outrage; and cultural stories, tropes, schemas, or plausible narratives, like the performance of both truthfulness and trauma, or what we might call their discursive construction; and the sites where law and language are evident kin [W]ork on law and language that proceeds from the premise that language is but a medium of transmission for the substance of law has been left methodologically behind by contemporary law and language scholarship”⁴¹

Pether’s academic training, and her law-and-literature publications, gave her a prominent place in contemporary law and language scholarship. She did feel, however, that something was missing in the field, namely an emphasis on subject formation—the way that law students, lawyers, and especially judges, are professionalized:

Both critique and change require subjects, and the most notable gap in contemporary law and language scholarship lies in how adequately to account for subjects, and thus for agency and cultural reproduction and change, in accounts of the relationships between law and language.⁴²

She found an explanation of the deficiencies in judicial practices, with respect to precedent, in Bourdieu:

If, on Pierre Bourdieu’s account of professional subject formation, the judicial *habitus*, the embodied experience which makes professional subjects who they are and thus in turn shapes how they make the world, is *transposable*, then crafting appellate decisional texts that foreclose appeals is a result to be expected when appeals from trial courts are perceived as impossibly burdensome.⁴³

We do not live, and judges do not write, from a position of objectivity or neutrality—“[k]nowledge is always situated in particular, partial experiences.”⁴⁴ Pether was situated first as an outsider with respect to the U.S. legal system, able to see what went unquestioned as natural, but second as

41. Penelope Pether, *Language*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 315, 317–18 (Austin Sarat, Matthew Anderson & Catherine O. Frank eds., 2010) (discussing lawsuit).

42. *Id.* at 337.

43. See Pether, *Strange Fruit*, *supra* note 11, at 502 (emphasis added) (footnote omitted); Pether, *Take a Letter*, *supra* note 12, at 1555 n.17 (“[The national judicial habitus can be] described as the ‘embodied experience’ which makes members of particular cultures or professions ‘who they are.’”); see also PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (Richard Nice trans., Polity Press 1990) (1980). Bourdieu has written on legal professional subject formation. See generally Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987).

44. See Nan Seuffert, *Locating Lawyering: Power, Dialogue and Narrative*, 18 *SYDNEY L. REV.* 523, 526 (1996); see also DONNA J. HARAWAY, *SIMIAN, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 183–201 (1991).

an insider (heavily influenced by Peter Goodrich) with respect to the common law tradition, wherein “the process of reading [the law] is an inherently social and political activity.”⁴⁵ Yet the “rhetoric of legal reasoning hides the complex economic, political and ethical choices that the judiciary are inevitably making in their decisions about how best to apply the law.”⁴⁶ Again, as with ideological grids hidden in plain sight, Pether’s approach is characterized by uncovering what is hidden—that the law’s power is “far more open to manipulation, negotiation and technique generally, interpretation and abuse, than is admitted by legal doctrine.”⁴⁷ A covering has been provided *discursively* for the “systemic lapses of judicial propriety, accountability, ethics, and duty” that Pether hoped to reveal in her studies on precedent.⁴⁸

Abuse hidden by language, manipulation of law’s power—these images of law are reminiscent of Robert Cover’s oft-quoted aphorisms linking law, language, and violence, which Pether found to be compelling:

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.⁴⁹

Pether’s vision of law is also reminiscent of how Gustav Klimt represented “Jurisprudence” in a painting (with that title) intended for a ceiling at the University of Vienna (but never displayed there). Klimt’s initial composition study was “bright and airy,” idealizing the figure of Justice “as active and alive, swinging her sword as she swept through the air to ward off the threat of the shadowy octopus of evil and crime below.”⁵⁰ For various reasons, including a controversy over his two other ceiling paintings (entitled “Philosophy” and “Medicine”) that left him indignant,

45. PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* v (1986).

46. *Id.* at 87.

47. *Id.* at 17.

48. See Pether, *Strange Fruit*, *supra* note 11, at 518.

49. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

I have used the term ‘legal interpretation’ . . . though my argument is directed principally to the interpretive acts of judges. To this specifically *judicial* interpretation my analysis of institutional action applies with special force. Nonetheless, I believe the more general term ‘legal interpretation’ is warranted, for it is my position that the violence which judges deploy as instruments of a modern nation-state necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence.

Id. at 1601 n.1.

50. CARL E. SCHORSKE, *FIN-DE-SIÈCLE VIENNA: POLITICS AND CULTURE* 247 (Vintage Books ed. 1981) (1980).

Klimt drastically altered his conception. . . . The scene has moved from the breeze-swept Heaven of version I to an airless Hell. No longer is the central figure a soaring Justice but rather a helpless victim of the law.⁵¹

The painting ended up a “frightening spectacle of the law as ruthless punishment”—in its lower half a “passive, depressed, [and] impotent” man is depicted, surrounded by three “snaky furies [who] are the real ‘officers of the law’” and showing that “law has not mastered violence and cruelty but only screened and legitimized it.”⁵² In the upper half, “the allegorical figures of Truth, Justice, and Law” are far removed, performing “no mediating role.”⁵³

Thus only the pretensions of the law are expressed in the ordered upper portion of the picture. It is the official social world: a denatured environment of masoned pillars and walls ornamented in mosaic-like rectilinear patterns. The judges are [also pictured] there with their dry little faces, heads without bodies. The three allegorical figures are impassive too, beautiful but bloodless in their stylized geometric drapes.⁵⁴

The reality of the law, in Klimt’s vision, lies in the lower realm. And likewise, for Pether, it was always the ugly reality of the law, behind the “stylized regularity and static decorum” of the “official social world,”⁵⁵ that needed to be uncovered. And while Klimt was criticized (by Karl Kraus) for symbolizing *criminal law*, *not* jurisprudence,⁵⁶ Pether would also come to see the criminal law and prisons as the site of particularly striking injustices.⁵⁷ Throughout *Strange Fruit*, it is the effect of our binary system of precedent on prisoners that concerns Pether and provides her with ready examples of judicial failures.⁵⁸ Failures, however, can be corrected, and Pether’s project was driven by the hope that disclosure can precede change for the better.

51. *Id.*

52. *Id.* at 250–51.

53. *Id.* at 250.

54. *Id.*

55. *Id.* at 250–51.

56. *Id.* at 251* (asterisked footnote) (quoting Karl Kraus in his own Viennese newspaper, *DIE FACKEL*, No. 147, Nov. 21, 1903, at 10).

57. Pether taught criminal law, co-authored a criminal law casebook, and, in the last two years of her life, worked with the Inside-Out Prison Exchange Program to bring law students into prisons to take a course alongside prisoners. For reference to Pether’s co-authored criminal law casebook, see DAVID CRUMP, NEIL P. COHEN, JOHN T. PARRY & PENELOPE PETHER, *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* (3d ed. 2013).

58. See, e.g., Pether, *Strange Fruit*, *supra* note 11, at 448–49, 453–62, 464–67.

IV. CONCLUSION

“Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”⁵⁹

I have not attempted to adequately summarize Pether’s complex analysis and critique of the unfortunate precedential practices of the U.S. federal appellate judiciary. I only want to suggest that there are some reasons—perhaps obvious in retrospect—for the particular insights she brings to the theoretical and jurisprudential “table.” Her arguments have everything to do with who she was, not only as a lawyer, a law professor, a feminist, and a “crit,” but importantly as an Australian with a Ph.D. in English.

59. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).