

## **Critical and Feminist Legacies: Unmaking law to make better futures**

### **An Introduction to a Celebration of Penny Pether's Life and Work**

**Terry Threadgold\***

When I first delivered this paper at the symposium to honour Penny's life and work, I began by declaring my intention to quote her often, to ensure that she would be heard at the event, as she had been heard at so many others previously. As I said at the time, I did this because I knew Penny would have been very cross if she was not allowed to speak. In this, the written version of that paper, I still intend to quote her often and for the same reasons but I also intend to do so because I believe that what she had to say *matters*. It intervened, it changed things, it challenged the taken for granted – and it still does.

I spent a lot of time re-reading Penny's words in preparation for the symposium, and like the good structuralist that I always was, I found a whole series of patterns, strategies and theoretical narratives in what I read. I had always known they were there but the process of re-remembering, re-working and re-writing, made them much more explicit than they had been in the reality and practice of working with her. I also began to see patterns and strategies I had not recognised at the time and to re-cover the sheer fun and excitement, as well as the absolute seriousness, of what working with her had been like.

I knew and worked with Penny from 1988 when she was a tutor

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in English at Sydney University, until around 2005, by which time both she and I had left Australia (she for the USA and I for Cardiff University). Between about 1999 and 2005, we shared migration stories – more of which later.

I last saw her in Washington, with David Caudill, in 2002, when I was doing research at the Pentagon on the use of embedded journalists in the Iraq war. We crossed paths many times between then and what the Welsh would call her ‘passing over’ and we had a long and pleasurable e-mail re-engagement in the last months of her life. So my close knowledge of her work does not extend right to the end of her life and it is always partial and selective. In particular, although I have learned about it and explored it since, I did not know her work on detention or culinary jurisprudence. That will be for others to develop and take forward. I will necessarily talk most about the period and the work I know best.

I want then to focus on a number of very specific aspects of Penny’s work: first, interdisciplinarity – her openness to looking again from somewhere else and acknowledging and then using the difference; second, her commitment to the interconnectedness of theory, research and pedagogy; third, her understanding of the need to theorise the academy we work in – as institution, workplace, industry and discursive formation; fourth, the challenges, after deconstruction, that she saw theory as posing to methodology (in the social science sense of that term); fifth, the strategies she developed for ‘troubling the waters’ of established disciplines and groups and for speaking to the ‘uncomprehending’ (again and again, never giving up, until they began to understand); sixth, the way she would enlist others as ‘agents of change’ to do the same thing; the way she learned to use the irony of ‘reading discourteously’ to challenge power and influence; and finally, the sheer tenacity of her endeavours – against all the odds. I will explore all of these across a range of always partial, but interrelated and overlapping contexts and activities, providing a kind of genealogy of her originality and determined creativity and of its ultimately global reach.

## **1 The Context: Beginnings**

Penny's lifelong commitment to interdisciplinarity, real interdisciplinarity, where texts from different disciplines were made to talk to one another, to listen to and question one another, emerged early in her career as a result of the embodied and lived experience of being disciplined in both law and literature. Until 1992, after her early work as a solicitor, she worked as an Investigation officer in the Office of the Ombudsman in NSW. In 1987, when she received her PhD in English Literature at Sydney University, she also joined the staff of the English Department, first as a Tutor, then as an Associate Lecturer. It was in the Office of the Ombudsman that she first learned to understand the significance of legal fictions – of narrativity, intertextuality and embodiment (although no doubt she did not yet use this terminology) and of their collective textual power to cause people to invent or ignore facts and evidence.

When Penny later taught a course called *Legal Fictions* at Sydney University, she explored these theoretical issues by telling a story about a professional man working in country town NSW, Australia, who was sacked for being a homosexual. Penny was called upon to investigate this case and could find no evidence for either the charge, or its consequences, until she spoke to a neighbor who, when asked how she knew with such certainty that the man was homosexual, explained that 'it was the way he did the ironing'. Thus, as Penny learned and her students came to understand, narratives and myths are constructed, put together from chunks of unrelated information, and then they circulate as facts and evidence in everyday life with often devastating consequences.

From 1993 – 1998, Penny was a Lecturer and then Senior Lecturer in Law, first at the University of Wollongong and then at the University of Sydney where she had completed her own undergraduate law degree. In 1997, she held a visiting Associate Lectureship at the University of California Irvine. By 1998, she had moved to the United States, to Southern Illinois University, then in 2004 to the American University, Washington College of Law and in 2005 until she died, she worked at

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Villanova University School of Law.

In 1998, she taught for a period at the Benjamin N Cardozo School of Law in New York, and joined a group of us who were working at the Humanities Institute, University of California, Irvine, on a project on comparative multiculturalisms in the USA, Canada, New Zealand and Australia. Penny had initiated this project during the time she had worked at UC Irvine in 1987. It was led by Brook Thomas and included myself, Nan Seuffert, Fazal Rizvi and Sneja Gunew among many others. Penny joined the group for one symposium at U.C. Irvine and invited me to teach with her at Cardozo School of Law while she was working there. She was by now widely recognised, influential on an international stage, organising significant events and initiating important interdisciplinary intersections between people, ideas, methods and disciplines.

In 2002, in the context of her growing critique of, and then contributions to, the restructuring of the first year of US legal education, she wrote about the process of being ‘disciplined’ (in Foucault’s sense) as both a literary scholar and a legal professional and scholar. She also wrote about the interdisciplinarity and the theory that informed the movement that by then had become known as Law and Literature in Australia. For Penny, although there were precedents in the United States for Law and Literature Associations, scholarship and teaching, what she meant by Law and Literature was never exactly what these movements involved, although she clearly used that ‘discipleship’, as we shall see, to make Law and Literature happen and evolve in Australia. Turner argued that ‘the United States has pioneered this movement ... Australia can now claim to be the foremost disciple of the Americans’ (1994: vii).

Her own education in an Australian law school in the late 1970s and early 80s was, she said, ‘very like the legal education delivered in the first year curriculum’ in US Law Schools when she was teaching there in the 90s (Pether 2002: 506). Tracing the changes to that paradigm in Australia, she wrote that ‘The Pearce Report (1986) ... condemned elite, conservative Sydney for shoddy teaching on the cheap and the

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widespread dissatisfaction of its graduates' (Pether 2002: 506-7). This, she argued, and changes in the legal curriculum at Wollongong and elsewhere, challenged the market share of 'elite graduate placements' to such an extent that Sydney appointed a radical dean, David Weisbrot, who 'changed the paradigm for the Sydney law school faculty' and among other things introduced into the first year curriculum:

... a course that treats law, legal institutions and lawyers as an object of scholarly enquiry and at the same time destabilizes the hegemony of doctrine. ... including interdisciplinary materials, texts drawn from sources other than appellate cases, and texts that examine the material and cultural practices through which societies are regulated (Pether 2002: 510).

She saw these changes as very similar to Wollongong's 'Law in Society' course, and to the other non-hierarchical, intertextual, and interdisciplinary pedagogical practices into which she was 'disciplined' at Wollongong when she became a law teacher there in the early 1990s. She describes these practices as troubling 'doctrinal boundaries' and drawing students' attention to 'the impact of race, gender, sexual orientation, and socioeconomic status on one's relationship with legal institutions and authorities' (Pether 2002: 508). For her, the making of this legal habitus went alongside what she had been learning and practicing in the literary field: new historicism, Peter Goodrich's work on law and rhetoric and Haydn White's on narrative historiography. She writes of a 'law and literature methodology' for reading literary texts against legal texts in order to use this interdisciplinarity to 'destabilise the discipline of law in the interests of making change' (Pether 2002: 491). And she is scathing elsewhere about the work of many US scholars in law and literature whose work is 'uninformed by the history of English Studies', the discipline on which they 'make border raids' to produce a 'fundamentally humanist poetics of law that denies its essentially political investments' (Pether 2002: 519-20). She talks too about the ways in which the disruptive interdisciplinary pedagogy and methodology she has described was later reflected in her own development of what she came to call a 'schizophrenic' model for

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teaching legal literacy (Pether 2002: 508):

We developed this model of literacy in order to equip students to be potential agents of change in a generally hierarchical and conservative profession. ... Law is a practice of language ... a conclusion which is at odds with many of the assumptions underpinning much liberal humanist and feminist law and literature scholarship and the related legal literature on empathy. (Pether 1999b: 56)

Listening to Penny in the quotations above makes it very clear that her understandings of what law and literature could be or accomplish, and what legal literacy could do or accomplish, were worlds away from several kinds of well-established law and literature scholarship and from the dominant traditions of legal literacy which she encountered in her transition and migration to law schools in the United States.

What I want to explore next are some of the other influences, texts and encounters that got her to this point. These are a part of this genealogy that I know because I shared it with her in Sydney and in Melbourne in the period we worked together in these places. What is very clear in the narrative I will construct are the generative aspects of power, its productivity (Foucault 1980: 118-119) in her work. This genealogy then is:

... a form of history which can account for the constitution of knowledges, discourses, domains of objects etc., without having to make reference to a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history. (Foucault 1980: 117)

### **2 Working in Law and the Humanities in Australia in the 80s and 90s**

So much of what is now taken for granted in the fields of legal and literary scholarship and pedagogy, or which has by now been lost to these endeavours, was very new, very successful and still entirely controversial in the 1980s in Australia. The challenges offered at the time to established disciplines and male dominated academic systems

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and structures were very real. The struggle to ‘trouble the waters’ was a collective struggle with significant consequences both for individuals and for the academy. The recession in Australia in the nineties with its restructurings and re-orderings of disciplinary boundaries, weakened much of this work and made it harder to maintain, but it did survive and it does still (Threadgold 1998a, 1998b). It was a fascinating and challenging time to be working in these contexts. Penny’s work is notable both for the ways in which it was influenced by (its openness to the new) and in turn changed what it encountered.

## **A The New Humanities**

I will begin with what was then called the ‘New Humanities’, a space recently occupied by ‘foreign theory’, which I will locate in time as roughly occurring between 1980-2000 (Ruthven 1992). This was the period when theorists such as Althusser, Bakhtin, Barthes, Kristeva, Foucault, Derrida, Deleuze and Guattari, Bourdieu, Irigaray, Grosz, Haraway, Butler, Spivak, Said (to name just a few) were being actively taught, read, struggled with, and pored over in contexts of teaching and research in the Australian humanities, and later social science contexts. New theories produced new interdisciplinary areas of study and research that worked hard to make differences that mattered and to make difference matter. These included critical theory, cultural theory, feminist theory, semiotics (in some of its forms), cultural studies, women’s and gender studies, postcolonial studies, multicultural studies, legal studies, critical literacies and critical discourse analysis – all ‘troubling’ the established disciplines, producing a very distinctive discursive formation, and leaving interesting legacies in the Australian context.

New historicism and the work of Peter Goodrich and others in law (mentioned above) together with other areas of feminist legal work (see below) also emerged in this context. Narrative and myth, genre, Intertextuality, genealogy, reading against the grain, deconstruction, theories of embodiment, habitus and performativity, theories of difference and the ‘other’ and of the postcolonial, became

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the theoretical/methodological tool-kit of the new humanities. It is worth noting that Penny taught courses called *Institutional Discourses* and *Legal Fictions* in the English/Women's Studies/Semiotics programs at Sydney University from 1988-1992.

The interdisciplinarity which all this involved and encouraged included radical teaching and research in the field of education, where faculties of education, often allied with critical discourse analysis and critical (often feminist) linguistics, used all of these tools and more to develop theories and practices of critical literacy. Many influential names could be listed here (such as Allan Luke, Jay Lemke, Peter Freebody, Alison Lee and Bill Green, Cate Poynton, Valerie Walkerdine). Penny read and worked with many of them, attending literacy conferences, delivering joint papers. Foucault's work on discipline was central to, and demanded, attempts to deconstruct and to understand disciplinary formations, both institutional and individual and to theorise the material practices of the academy of which we are all part. Penny's theories of schizophrenic literacy were born and developed in these textual and embodied encounters.

There were however some absolutely key triggers for that work and they came from a group of scholars working with Bourdieu, and with theories of the habitus and performativity around the formation and disciplining of gendered bodies in literacy classrooms. Pam Gilbert's work on *Writing, Schooling and Deconstruction* (1989) and on Gender and Language (1993), Kamler, Maclean, Reid and Simpson's study of the formation of schoolgirls and schoolboys in the first month of schooling (1993), Alison Lee's work on gender, genre and the Geography classroom (1996) and Cate Poynton's feminist linguistic work (2000) were all texts and research Penny knew well. But it was perhaps above all Barbara Kamler and Rod Maclean's paper 'You can't just go to court and move your body: First Year students learn how to read and write the Law' (1996: 176), and Rod Maclean's work in his PhD on students learning to occupy 'positions as law students and as potential lawyers' and on the making of the legal body in moot courts that provided the impetus for some of her own work with Dean Bell, resulting in the



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legal writing program they first taught at the University of Sydney in 1996: *Integrated Legal Writing Skills*. Thus did law, literature and literacy education come together – and they stayed that way.

In 2001, Penny identified herself as a ‘displaced intellectual’ (2001: 103), ‘a foreign body who threatens to make the hidden gender of law visible by her difference’ (2001:132) and wrote her very powerful account and theorised critique of US legal education. In this she covered the politics of the feminised teaching of legal literacy, law review culture and the practices of citation typical in that context. Her principle thesis was that: ‘it is extraordinarily important to maintain the perspectives on the material practices of the academy offered by theory’ (Pether 2001: 118). She identified the difficulties she described around teaching fundamental legal writing and other skills as having to do with the relationships of law and language (rhetoric in Goodrich’s sense) because:

The one makes visible the performativity and generic linguistic moves by which the other is constituted. ... the one is a strategy for reading the law disrespectfully against the grain of its own authorised reading practices (2001: 129).

This is similar, but different to her definition and use of feminist discourse analysis in an earlier paper where the focus is on the feminine, on embodiment and on the intertextual permeability of the law:

Feminist Discourse Analysis pays particular attention to the embodied experience of those who pass judgment and make the law, and to the ways in which cultural stories circulating within and without legal discourse describe and construct women’s bodies and the feminine. ... it is also both linguistic and intertextual (Pether 1999b: 60-61).

I co-authored one paper with Penny, ‘Feminist Methodologies in Discourse Analysis: sex, property, equity’ (2000). It is interesting on reflection to recall that the cases we analysed in the paper were given to us by one of the very senior judges who had taken part in judicial training workshops in Sydney, which I will discuss below. Here, he had been exposed to feminist discourse analysis and critical theory and he believed we would find the cases interesting. There is not the space here to explore the arguments about equity and the changes

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that were embedded in and performed by these judgments. My focus here is on the way this paper attempted to articulate a methodology in a book (Lee and Poynton 2000) which had been commissioned to do precisely that, to be specific about poststructuralist and feminist method in work which had always deconstructed the very concepts of objectivity and distance implied in the usual social science meanings of the term. Poststructuralist modes of discourse analysis 'have argued that the binary separation of metalanguage (or theory) and data (that which is given to be observed and analysed) is already an impossible separation' (Threadgold 2000: 40).

It was Penny who found the literary new historicist arguments that would make clear what the method involved. Levinson's work on Wordsworth's *Tintern Abbey* was what we used to articulate, and to provide a helpful model of, and analogy for, the techniques 'we want to use' in reading the texts of equity. What Levinson did was to provide evidence of a very different Tintern Abbey to the one Wordsworth romanticised, an industrialised place inhabited by 'beggars and the wretchedly poor'. She used what Goodrich called 'techniques of interruption in interrogating and criticising' Wordsworth's text (Pether and Threadgold 2000: 140). This is how we explained the methodology:

She [Levinson] is purposefully discourteous in explaining the poem intertextually, situating it in a network of other contemporary texts, outside the literary canon, indeed notably from contemporary popular culture – tourist guidebooks, journalism, the interdisciplinary perspective offered by economic history – using these to explore the resonances between the poem and its textual others. This 'iteration' of Wordsworth criticism is specifically different because of the discourteous way in which the feminine author exceeds but does not ignore dominant reading practices, the way in which she produces the scene of writing differently, the way in which she refuses the constraints of the 'closed system' (Pether and Threadgold 2000: 141).

We argued that rather like Wordsworth, judges in equity are able to withdraw into a carefully constructed world where they can also perform their writings in denial of the realities around them. We used precedent 'against the grain', intertextually, locating the judges' own

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use of precedent:

... as part of the network of texts, material conditions and embodied experiences which are precisely the historical conditions of possibility for the contingent opinions that judges come to hold (Pether and Threadgold 2000: 151).

We argued that they were also metonymic of wider social and cultural contexts and indeed of the judges' own 'limited because legally disciplined habitus' (Pether and Threadgold 2000: 151).

### **3 The Legal Context in the 80s and 90s: gender, race and nation**

This poststructuralist feminist work is in many ways very different from some of the radical feminist legal and policy work which was going on at the same time in Australia. Graycar and Morgan's *The Hidden Gender of Law* was published in 1990 and became very quickly a key text for those of us not trained in law, enabling interdisciplinary work by offering us accessible accounts of the gendered nature of legal texts, cases, judgments and practice. In 1994, the Law Reform Commission published a significant report *Equality Before the law: Women's Equality*. In that same year, the Senate Report on Gender Bias and the Judiciary was published. Between 1993 and 1996, the Department of Education, Employment and Training (DEET), The Office of the Status of Women, and the Attorney General's Department supported a remarkable project funded by Australia's federal department of education to produce teaching materials to write gender issues into the core law curriculum.

The teaching materials were made available on the Internet and distributed widely to law schools. Graycar and Morgan wrote about this project in a paper published in 2008 called: 'Gender and the Law Curriculum 'Making Gender examinable''. Graycar and Morgan, Marcie Neave, Paula Baron, and Sandra Berns wrote the curriculum materials. These materials too provided a remarkable resource for interdisciplinary research as well as for teachers in law schools. The account given by Graycar and Morgan of the purpose and reception

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of these materials, and of the fact that DEET, although funding the work, did not actually require them to be used, anticipates in some of its aspects the account Penny gives (see below) of working as a woman in the hostile environment of law schools:

Materials that treat women as central participants in the legal system, and make their participation “normal” and routine rather than “add-ons”: ... are essential to making law schools a tolerable environment for women, as well as making the men who will become lawyers realise that women (51% of the population) are legal subjects, legal objects, clients, judges and lawyers. ... hopefully this project will help us to reveal that “men and the law” has masqueraded as “people and the law” for too long (Graycar and Morgan 2008: 450).

Associated with this work was a great deal of radical critique of women’s experiences of the law and its processes, and a number of very practical attempts to change or revise these to improve those experiences. For example, this work appeared in the proceedings of Law and Literature conferences, in the *Australian Feminist Law Journal*, the *Journal of Australian Feminist Studies*, the *UTS Review*, the *Griffith Law Review*, *Law Text Culture*, and *Social Semiotics* – all journals founded in this period. The work that was done around rape is a case in point. Penny encountered this work in her teaching, research and supervision.

The infamous case of Justice Bollen’s jury instructions in 1992, partly responsible for the 1994 review of gender bias in the judiciary (Naylor 1997: 421 – 440), left a lasting impression on her work and practice. In *R v. Johns*, a spousal rape case, Justice Bollen caused a media and political furore by among other things declaring that:

There is nothing wrong with a husband, faced with his wife’s initial refusal to engage in sexual intercourse, ... In attempting to persuade her ... and that may involve a measure of rougher than usual handling.

Penny analysed the instructions in full (1999b: 79-86) in a paper she wrote to critique the jury instruction simplification project in rape trials in the US. Her argument, using Bourdieu, Foucault and others, was that there is no such thing as ‘plain language’, that the simplified jury instructions would not – and did not – work because the only way

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to change outcomes in rape trials was to change the habitus and beliefs of those involved:

If a change in jury behaviour is desired by those who make and administer the laws, discourses on men and women and sex and rape that embody that change need to circulate in everyday culture and statutes and judicial training if they are in turn to be found in the decisions of juries and the opinions of judges (Pether 1999b: 86).

Other influences were also at play in the legal context of the 80s and 90s. I will name just a few. Margaret Davies *Asking the Law Question*, emerging from the practice of an innovative first year law course at the new Flinders University law school was published in 1994, bringing together legal feminist work and the theoretical approaches of the new humanities and critical legal studies. Her *Delimiting the Law: 'Postmodernism' and the Politics of Law* followed in 1996. Two other books that did similar work were Margaret Thornton's *Public and Private* (1995) and *Romancing the Tomes* (2002). The last one I will mention is a book on the law within which the radical purchase of law and literature, law and society, critical and feminist theory and race theory all come together: Pheng Cheah, David Fraser, Judith Grbich eds., *Thinking Through the Body of the Law* (1996). This is a collection which itself embodies the radical theory work that was by then being done in these interdisciplinary contexts in Australia:

The collection lays down a sympathetic challenge to Critical Legal Studies and Critical Race Theory: to continue the critique to the point of overturning the last remnants of the rationalist primacy of mind over body still haunting many rethinkings of justice (Brian Massumi in Cheah et.al. 1996).

This was also the period that prompted Penny's work on the constitution. It was the period of *Bringing Them Home: The Stolen Children Report* (1997), of the ground breaking native title judgments in *Mabo* (1992) and *Wik* (1996) and of the debates and consequences which followed these. And it was when Penny wrote her 'Principles and Skeletons' piece (1998a) and two other related papers on Australia's constitution in relation to these radical unsettling of the nation's

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imaginary (1996, 1998b), all delivered in a range of international contexts. It was the time when the postcolonial and the violence of the state began to surface as a theme in her work. But this was also the time when she left Australia for the United States.

### **4 Migration, Foreign Bodies, Discipline and Punish and Theory Work**

Penny's story of migration, of exclusion from and by a foreign culture, is one that could be replicated in the stories of a number of senior Australian academics, mostly women, including myself, who left Australia in the nineties to work elsewhere. The experience was a reasonably common one and thoroughly merits the kind of theorisation to which Penny subjected it. Her particular story in her 2001 *Griffith Law Review* paper offers a careful analysis of the issues at stake, both for herself and for the legal academy into which she had been (or failed to be) inserted. She speaks of 'her difference, her corporeal and pedagogic squareness in a round hole' (2001: 132). This is how she describes her response as she proceeded, with characteristic resilience, to square that round hole, reading and writing against the grain, disrespectfully, and making visible the issues that structured her distress and alienation in two papers written in 2001, for the National Conference of Law Reviews at the University of Baltimore Law School, one on citation and one on ethics:

Dear reader, I did not do what I was bid. What I in fact did was to begin to articulate the theory-work that I desperately needed to do ... near the end of an academic year during which I struggled with the anger and distress attendant on teaching fundamental legal skills in the US academy (Pether 2001: 127).

Summarising the two papers she describes her un/disciplined/theorised and decidedly feminist approach to educating the managing editors of law reviews, continuing to do the theory work even to uncomprehending audiences, until in the end they began to hear and understand. This was a lifelong strategy of hers to which I will return. Here therefore I quote her at length:

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The paper on ethics that I delivered to the (largely uncomprehending) participants in the workshop for managing/executive editors of law reviews – the people chiefly charged with the disciplining and punishing of the law review staffers my students were jockeying to become ... It introduced them to Foucault's theories of the disciplining of bodies in institutions and Bourdieu's notion of the habitus, and problematised some specific aspects of the ways law reviews operate and thus teach: ... I posed some questions to the participants. What were their policies and practices doing to the disciplining of the docile bodies and habituses of their staffs? To the lawyers they become and the legal profession they constitute? To the maintenance of hierarchy in the US legal academy? ... And I told them I wanted to emphasise the significance of the little things, the micropolitics of power, the detail of practices of everyday life in the law review office in the formation of subjects and cultures and values (Pether 2001: 126-127).

The second paper was on the uses of the Association of Legal Writing Directors (ALWD) Citation Manual, 'the product of an organisation formed by a feminised, marginalised and disenfranchised group of law teachers' (2001:127), a manual which:

refuses to follow the *Bluebook* [the standard reference text] in privileging a system of citation for law reviews that is different from the system it uses for practice documents (Pether 2001:128).

and thus opposes the hierarchy which privileges law reviews over practised law (Pether 2001: 128). It is important here to understand why these things mattered and what exactly Penny was attempting to change. The connection between the two papers is citation (Pether 2001: 116). Law reviews in the United States are edited by students, 'they teach and practise how to write the law', and the articles selected for publication 'are essential for tenure and promotion' (Pether 2001: 115). They demand particular kinds of citation and 'citation to legal authority is a coercive practice', profoundly embedded 'in the disciplinary processes of legal education' (Pether 2001: 117). The requirement that student editors and law review membership use these conventions 'consigns contingency to the textual margins ... rewards the capacity to marginalise complexity and likewise reifies rigid

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doctrinalism' (Pether 2001: 119).

But there is more: articles are selected, not by a process of blind review, but according to the status of the author. The top ten law reviews publish disproportionately in-house (Pether 2001:120-121). There were 'no meaningful criteria for evaluation other than strictures relating to citation and formatting' (Pether 2001:123). Article selection processes reproduce dominant masculine hierarchical values and notions of merit and those who succeed in this system are, not surprisingly, male (Pether 2001: 122). And yet, the frequency with which scholarship is published in the law reviews of elite law schools is of central importance to decisions about tenure and promotion, about salary rates and other bonuses. The gendered organisation and structuring of these processes is replicated in Penny's account of her attempts to teach the *AWWD* citation manual instead of the *Bluebook* (a product of the four most elite US law schools), a project that foundered at least in part on its feminised authorship but also on its challenges to the traditional hierarchical routes to success. Teaching students from this feminine authored text was likely to directly disadvantage students as they sought promotion and employment within the dominant masculine hierarchies of the profession.

What is most remarkable about what happened next is the impact and influence of Penny's theoretical work, her work on and with theory, and her innovative pedagogic approaches in the very context which she was insisting on deconstructing. By 2006 she was being invited to deliver a plenary paper on the issues at the Association of American Law Schools Conference in Vancouver. In April 2008, he was an invited joint presenter (with Professor Derrick Bell), at the Inaugural Roundtable on Law School Teaching and Learning, University Center for Teaching and Learning and Law School Research and Development Committee, University of Baltimore Law School. She took part in a widely published and available interview:



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Following an invitation from the Educating Tomorrow's Lawyers project of the Institute for the Advancement of the American Legal System at the University of Denver, I participated in an extensive video interview about teaching and assessment practice and ways to meet the teaching and learning challenges faced by the U.S. legal academy; that interview is available on IAALS ETL website at <http://educatingtomorrowlawyers.du.edu/voices/penelope-pether> (quoted from Penelope Jane Pether CV).

Her educational and deconstructive work continued then in the US context and at an international level always referring back to but moving beyond its beginnings in a particular and very specific Australian context. Here her focus was on unhappy students and legal professionals and on disenfranchised women staff. But it also extended well beyond these contexts and its primary focus and outcome was always to look for productive possibilities of change and to insist on talking about them, even to the uncomprehending, until they began to understand. Her work by now was truly part of – if not even broader in its impact than – what MacNeil and Hutchings described as:

... the cosmopolitical – and its issues of displacement, migration and diaspora. ... forging a triangulation that might be mapped as Birkbeck-Cardozo/Amhurst – Griffith, all the while participating in the institutional flows (of keynotes, collaborations, editorial boards, visiting fellowships etc..) as much as symbolic exchanges (of close readings, of the higher criticism, of grand theory etc.) (2001: 5).

### **5 Locating Effective Agents of Change: some personal recollections of strategic discourtesy and other embodied interdisciplinary interventions**

In the earlier sections of this paper I have traced and constructed a genealogy of Penny's work by re-reading and re-writing her textual and discursive interventions, exploring patterns and regularities in her published work, narrating her story through her readings and writings. In this final section of the paper I want to go back to the beginning, to her beginnings, and to explore the institutional raids she made on,

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and into, hierarchical structures and systems of power. Her strategies for identifying the possibilities for change were bold and sophisticated and she took all of us with her, identifying with considerable accuracy what we had to offer as agents of change, placing us strategically where this would be most effective, and indeed ‘troubling’, to established domains and regimes of power and knowledge.

It has really only been in the working on this paper that I have realised – with considerable amusement and fondness – just how effectively and consistently she did this. In her textual work, she used techniques from the literary, the rhetorical, and from critical and cultural theory to read the texts of law ‘against the grain’ and in deliberately un/disciplined ways. Theories of embodiment and of habitus and discipline were, as we have seen, central to this enterprise. But she also knew, as is clear from her work on the instructions to juries in rape trials, that discourse analysis, changing language or narratives, was not enough to effect change. Change required the performative effects of encounters in coercive social spaces between differently disciplined bodies, differently constituted habituses, different and diverse embodiments of gender, race, sexuality, age, ethnicity and class:

... the theorising and understanding of the corporeal and discursive issues at stake in their [women’s] relations with the state and the law, and the over-determination of those relations by other discursive and sexual practices in other organisational fields provides a place to start in re-thinking the politics of difference. Only when such issues are actively on the agenda in the places where literate subjects are made and lawyers and legal subjectivities are produced, so that meanings can be *embodied* differently, are modes of speech and interaction, genres of writing and interpretation, the fictions of legality, and the nature of legal force likely to change (Threadgold 1991:70).

Understanding these things then, Penny proceeded to put them on the agenda in places where it mattered, forcing differently embodied subjects to encounter, to challenge and to rewrite one another. The first Law and Literature Conference was held at Sydney University in 1990 and the Law and Literature Association of Australia was co-founded in 1989 the year before that conference by Penny Pether and Simon Petch.

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Much later, Penny would distinguish her own work in law and literature from that of Petch, which she saw as 'having generated a fundamentally humanist poetics of law that denies its essentially political investments' (Pether 2002: 520). Her own much more radical aim to use textual and intertextual analysis 'to destabilise transcendentalising liberal humanist valuations' (2002: 492) was already in place in 1990. This co-production then of a Law and Literature Society was almost certainly strategic, designed to 'trouble the waters', and to provide challenges to the taken for granted. The 1991 conference at Monash was published as *The Happy Couple: Law and Literature* in 1994. The book included 'a delightful quiz on Dickens prepared for the conference dinner by the Hon. Austin Asche' (1994:xvi). The two very different approaches to this new area of scholarship are still present in the title of the volume which reflects the liberal humanist and not the destabilising discursive and theoretical work in other papers who did not see the relationship between law and literature as being at all about happy couples: but the articles were published in one volume and began to speak to one another strategically in that context as they had at the conference.

In 1990, at the first Law and Literature conference, Penny had similarly located and invited to speak a number of people whose work was of the deconstructive, theoretical variety, pragmatically introducing us into the agenda of a nascent organisation as key agents of change. I accepted the invitation without any awareness of the two very different kinds of work going on in this conference space and was somewhat stunned by the very negative, even openly hostile, reaction to the theoretical paper I delivered (later published in *Law and Society* 1991). But the delivery began a series of conversations, not least with some senior judges (Justice Priestley in particular) that led to a number of radical interventions of which more below. The Law and Literature conferences continued. At Sydney University in 1992, at Darwin in the mid-nineties, international scholars, including David Caudill at Darwin, were invited plenary speakers and the agenda became gradually more radical. By 1999, the last conference I attended in Australia was at Beechworth in Victoria, again with international plenary speakers, including Costas Douzinas. The Australian work was by now well and

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truly known on the international circuits (the cosmopolis identified above) because Penny also made sure that the work travelled. She initiated many of the overseas engagements we all became involved in and again she selected us and took us with her as agents of change but now in a much wider context.

In 1996, we went to the US and Australian Law and Literature Conference at UC Berkeley. In 1998, it was the Law, Culture and the Humanities Conference at Georgetown. In 1998, Penny organised with Brooke Thomas a six month research project at the Humanities Research Institute, University of California, Irvine, on Comparative Multiculturalism. She herself attended one of the symposia, but helped to identify the major participants for Australia, New Zealand and Canada. Others came in for a series of symposia and conference events. In that same year, 1998, Penny was teaching at Cardozo Law School, where she invited me to work with her and her students. In 1999, she had us all invited to the Critical Legal Studies Conference at Birkbeck, University of London. In all of these places Australian work had an impact. It was more theoretical, more interventionist, more politicised than much of what it encountered and it effected changes performatively as Penny intended. There is space here for only one illustrative story from the 1996 UC Berkeley conference. Penny had insisted that there be a plenary speaker from both the US and Australian groups and she had asked me to be that speaker.

I had duly written a feminist theoretical paper about spousal murder, a subject I was working on at the time. When it came to the first 'plenary' after dinner on the first evening of the conference, I was stunned to discover that the genre required was rather more like the 'delightful quiz on Dickens' in *The Happy Couple* than what I had in mind. This particular liberal humanist masculine genre of 'after dinner bonhomie' was not one I could perform. On the other hand it was the genre for which the after dinner space was organised: there was no light and no lectern and no seating for the audience. Given Penny's critique of US Critical Legal Studies and Law and Literature work (2002), I am sure that I was again positioned here as an agent of change. Speak I had

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to; and to the paper I had written. I believe it was Peter Hutchings who helped to construct a makeshift lectern, and found a torch for me to read by – others arranged some seating and the audience attempted *manfully* to stay awake after an excellent meal and listen to a profoundly serious, very theoretical feminist paper. That the intervention worked is I think demonstrated by the many subsequent invitations to teach and speak in similar contexts that came our way, including Penny's roles as a member of, treasurer and program director for the association of *Law, Culture and the Humanities* and my own membership of the editorial board of the journal *Law, Culture and the Humanities*. Penny was also General Editor and Editor of the University of California Press journal *Law and Literature* and founding editor of *Law Text Culture*, both journals whose editorial boards include many of those who worked with her as agents of change. As Penny had written:

To make work in law and literature disruptive, an effective agent of change, in Foucault's words, we need to bring to mind disciplinary histories and the kinds of tendentious readings that the kinds of literary/ historical scholarship I have drawn on here are committed to. The work of many scholars in the law and literature field in the US is uninformed by the history of English Studies, the discipline that these scholars, drawn from the legal academy, stage border raids on (Pether 2002: 519).

And, speaking of equity and discourteous feminist readings:

Our strategic discourtesy is directed at the excessive insistence on the centrality of the doctrine of precedent and the techniques of case analysis and statutory interpretation which mask an unprincipled and unselfconscious performance of judgment as a species of priestly divination. It will involve reading precedent improperly – as intertextuality, as traces of bodies at work (Pether and Threadgold 2000: 140).

## **6 Speaking of Practices of Priestly Divination ...**

Penny always understood the power of judgment and the need to change judgment insofar as it presented as a practice of priestly divination. This is apparent in her reading of Justice Bollen's jury instructions (1999 and see above) and in many of her writings. She was not alone in recognising the need for education, training and change in this area. The Australian Institute of Judicial Education (AIJA) held a conference in 1995, in Ballarat, Victoria, called *Eureka: Equality and Justice*. It was funded by the Commonwealth Attorney General's Department and the Office of the Status of Women and attended by some 120 plus members of the judiciary from the Supreme Courts of Western Australia, South Australia, New South Wales, and ACT, Federal Court, Family Court, Industrial Relations Court, Victorian County Court, New Zealand High and County Courts and Victorian Magistrates. I was invited to give a plenary paper on 'Language and Difference'. It was a context in which I had come to work because of Penny. Between 1990 and 1995, she had run a number of CPD accredited workshops on legal writing, critical discourse analysis of legal texts, including judgments, and critical theory. They always involved an introduction to theoretical approaches of the kind she articulates above in her paper on ethics to law review managers and administrators, and a good deal of practical work on reading legal texts critically and against the grain. I was enlisted a number of times to introduce critical discourse analysis and critical theory. The Family Court of Australia ran its own workshops in 1994. This whole panoply of activities in which many remarkable women took the lead did produce some real changes in attitude and understanding among the judiciary at the time, although as Naylor (1997) points out many of these initiatives had been cut back or abandoned by the time she was writing. For me this work culminated in 1996 in a Seminar on Judgment Writing delivered with Justice L.J Priestley and run by the Australian Institute of Judicial Administration and the NSW Judicial Commission Judicial Orientation Program.

It was quite remarkable, when you think about it, that the kinds of

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legal organisation I have named in the paragraph above were prepared to use Penny herself and those she recommended from the literary/linguistic/critical theory context to help them work on their 'reasons for judgment' and their legal writing practices, learning as they did to understand the importance of habitus and embodiment in that work. That they did is testimony to her determination and commitment and to the authority and impact of her work. The engagements between Penny herself, myself and a small number of supreme and high court judges during this period was also a privileged and fruitful one. The judges concerned would send us examples of judgments they thought we might find interesting to work on and with – as we did in the paper we wrote together on equity. Penny might have, but I would certainly never have had access to this kind of information without their support and their understanding of the arguments we were then making about embodiment, habitus and texts.

I have already explored above some of Penny's struggles to belong in the US context in which she later found herself. We have also seen how she again took up a position of influence and had considerable impact in those debates – being a 'foreign body' did not stop her. In the same way as she had done in Australia, she now also found ways in the US context to engage with similarly privileged judicial groups and to make a difference. Thus, between 2007 and 2012, she continued her work on judicial education, and on appellate court reform and accountability. She was a member of a Task Force on Appellate Opinion Review, Institute for the Advancement of the American Legal System, 2011 - 2012 and contributed to the Task Force Report: *An Opinion on Opinions: Report of the IAALS Task Force on State Appellate Court Opinion Review*. She was an invited opening panel member, 'The Appellate Judge: What Makes a Good Appellate Judge?' at the National Conference on Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability, for the Institute for the Advancement of the American Legal System, at the University of Denver, in August 2011. She was an invited speaker at Judicial Education workshops at the Louisiana Judicial College Summer School in Florida in 2011. Her work was included as material for the 2010 Appellate Judges Education Institute

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(AJEI) Summit Appellate Judges Conference, attended by more than 100 appellate judges, 100 appellate lawyers, and 50 appellate staff attorneys from around the country and as teaching material for Yale's annual Global Constitutionalism seminar, attended by invitation by constitutional court judges from around the world. Her CV lists some eight journal articles, all written and/or published between 2004 and 2012 which she proposed reworking as a book called *Taking Liberties: How U.S. Appellate Courts became laws unto themselves*.

### **6 Coda**

She had however not yet finished learning, not yet finished with pedagogies, not yet finished with the education of different and more diverse groups. She trained to teach in the National Inside/Out Prison Exchange Program. Of this experience she wrote:

Nearly a year ago I met and began to work with, as part of my training by the National Inside-Out Prison Exchange Program, a group of remarkable men, many of them serving life sentences without parole, in the Pennsylvania maximum security prison at Graterford, outside Philadelphia. I had worked for some years in Australia investigating prison conditions complaints, but nothing in that experience had prepared me for the highly-educated and deeply-evolved human beings who work with Inside-Out at Graterford. It was the most profound experience of my life, introducing me to both the material reality and the study of the U.S. phenomenon of mass incarceration. Since then I have also begun to work with women students in an Inside-Out class at the Federal Detention Center in Philadelphia, and their engagement and intellectual generosity has taught me still more.

At the symposium where this present paper was first presented, Joseph Pugliese shared the following exchange with me. I am indebted to Joseph for being able to include it here. One of those women students wrote to Penny without knowing she had died. Joseph had to tell her.



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This exchange and her response follow:

Hello Penny,

It has been awhile since we have corresponded, but your always in my thoughts and prayers. I was just writing to let you know that I made the Dean's List for Fall 2013!! Also my English professor recommended that I apply to the Vassar College Exploring Transfer Program. I'm also going to start applying to different scholarships from the student affairs department have been sending me. If I ever need references, would you be willing to write me one or some? I'm enjoying school immensely. I'm now in my third semester. My approximate graduation date will be for Spring 2015 as long as I keep a full time schedule. I just wanted to keep you updated, because your program at the prison was why I decided to come back to school. I hope your illness has gone away and you're back to your vibrant self. Have a great day. Thank you again for everything.

Then I emailed her with the bad news, and she replied:

I'm so sorry to hear that!! Sorry for your loss and I'm sending my condolences. She is up in heaven looking down on me and pushing all of these different challenges, scholarships, and opportunities my way. God bless you and thank you for informing me of this tragedy. She will be deeply missed.

Penny speaks above of the impact this work had on her but she transformed lives and changed futures in this work taking us back to the theme I signalled at the beginning of this paper: the relationship between the practice of pedagogy, theory and social transformation.

## **7 Unfinished Work and Legacies**

As well as this kind of extraordinary legacy which lives on in the habitus and embodied realities of her students and those who worked with her, and the appellate judges project mentioned above, Penny left us with at least two important and unfinished projects: The proposed book on indefinite detention and her work on Culinary jurisprudence. I know that others are going to take forward at least the first of these.

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Penny's life and work is exemplary of the struggles and the issues which continue to beset us as we attempt to fight for social justice and fairness both within the academy and outside it in the other contexts with which it intersects. Every generation needs to engage with these again and again: they do not go away, they just reappear in different forms. Penny has left us with the theories, the methods and the tools to continue the struggle for as long as it takes – plus a whole range of wonderful examples of why it matters and how to do it.

The work of this symposium in her memory is a fantastic celebration of all that she gave us and continues to give us – as we read her, share her struggles, laugh with her and move forward with her. Let us never stop 'troubling the waters' – gently, ironically, with humour, but always firmly and dis-courteously – and above all with courage and a passionate belief in the possibility of change. She taught us never to give up. I am sure she is watching over all of this work, enjoying the challenges, relishing the disturbances, and anticipating the next steps towards still more radical legal and embodied futures.

### **Notes**

- \* Professor Emerita, Cardiff University

### **References**

- Bigelow J ed 1998 *Papers from the 1997 Symposium of the Australian Academy of the Humanities* The Australian Academy of the Humanities Canberra
- Bohringer K and Wilmshurst P 1991 eds *Australian Journal of Law and Society* Law and Literature Special Issue
- Cheah P, Fraser D and J Grbich eds 1996 *Thinking Through the Body of the Law* Allen and Unwin Sydney
- Davies M 1994 *Asking the Law Question* The Law Book Company Ltd Sydney
- 1996 *Delimiting the Law 'Postmodernism' and the Politics of Law* Pluto Press London Chicago Ill
- Freebody P, Muspratt S and B Dwyer eds 2001 *Difference Silence and Textual Practice Studies in Critical Literacy* Hampton Press New Jersey

## Terry Threadgold

- Foucault M 'Truth and Power' in Foucault 1980: 109-133
- Gilbert P 1989 *Writing Schooling and Deconstruction From Voice to Text in the Classroom* Routledge London and New York
- 1993 *Gender Stories and the Language Classroom* ECS816 Language and Gender Faculty of Education Deakin University Deakin University Geelong Victoria
- Foucault M 1980 *Power/Knowledge Selected Interviews and Other Writings 1972-77* Trans ed C Gordon Pantheon Books New York
- Graycar R and J Morgan 1990 *The Hidden Gender of Law* The Federation Press Leichardt NSW
- 1996 'Legal Categories Women's Lives and the Law Curriculum OR Making Gender Examinable?' *Sydney Law Review* 18/4: 431-450; Sydney Law School Research Paper No. 08/77.
- Kamler B, Maclean R, Reid J and A Simpson 1993 *Shaping up Nicely: The formation of schoolgirls and schoolboys in the first month of school: A Report to the Gender Equity and Curriculum Reform Project Department of Employment Education and Training* Canberra Deakin University Geelong Victoria
- and Rod Maclean 1996 'You can't just go to Court and Move Your Body: First-Year Students Learn How to Write And Read The Law' *Law Text Culture* 3: 176-209
- Lee A 1996 *Gender, Literacy and Curriculum: Re-Writing School Geography* Taylor and Francis London and Bristol
- and C Poynton eds 2000 *Culture and Text: Discourse and Methodology in Social Research and Cultural Studies* Allen and Unwin Sydney
- Maclean R 2010 'First Year Law Students' Construction of Professional Identity Through Writing' *Discourse* 12/2: 177 - 195
- MacNeil W and P Hutchings 2001 'Law's Cultural Mediations An Introduction by Way of Introduction' *Griffith Law Review* 10/2: 1-6
- Muspratt S, Allan L and P Freedbody eds 1997 *Constructing Critical Literacies Teaching and Learning Textual Practice* Hampton Press New Jersey
- Naylor B 1997 'Equality Before the Law Mission Impossible? A Review of the Australian Law Reform Commission's Report' *Equality Before the Law Monash University Law Review* 23/2:421 - 440

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- Pether P 1996 'Jangling the Keys of the Kingdom' *Australian Feminist Law Journal* 7: 61
- 1998a 'Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation' *Law Text Culture* 4: 115
  - 1998b 'Pursuing the Unspeakable Towards a Critical Theory of Power Ethics and the Interpreting Subject in Australian Constitutional Law' *Adelaide L Rev* 20: 17
  - 1999a 'On Foreign Ground: Grand Narratives Situated Specificities and the Praxis of Critical Theory and Law' *Law and Critique* 10: 211-236
  - 1999b 'Critical Discourse Analysis Rape Law and The Jury Instruction Simplification Project' *Southern Illinois University Law Journal* 24/Fall: 53-94
  - and T Threadgold 'Feminist methodologies in discourse analysis sex property equity' in Lee and Poynton 2000: 132-151
  - 2001 'Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories' *Griffith Law Review* 10/2: 101-135
  - 2002 'Measured Judgments: Histories, Pedagogies and the Possibility of Equity' *Law and Literature* 14/3: 489-543
  - 2006 'What are the Questions we need to ask before we teach?' Invited plenary address *Association for American Law Schools Conference on New Ideas Law School Teachers Teaching Intentionally* Vancouver June 2006
- Poynton C 'Linguistics and Discourse Analysis' in Lee and Poynton 2000: 19-39
- Ruthven K K ed 1991 'Beyond the Disciplines' *The New Humanities Occasional Paper No 13 Papers from the Australian Academy of the Humanities Symposium* 1991 Highland Press Canberra
- The Law Reform Commission 1994 *Equality Before the Law Women's Equality Report No 69 Part 11* Alken Press Smithfield
- Thornton M 1995 *Public and Private Feminist Legal Debates* Oxford University Press Oxford Auckland New York
- ed 2002 *Romancing the Toms Popular Culture Law and Feminism* Cavendish Publishing Ltd London Newport NSW
- Turner J N 1994 Preface in Turner and Williams 1994: xv-xvii

## **Terry Threadgold**

- and P Williams eds 1994 *The Happy Couple Law and Literature* The Federation Press Leichardt NSW
- Threadgold T 'Legal Practice in the Courts Discourse Gender and Ethics' in Boehringer 1991: 39-70
- 'Re-writing Law as Postmodern Fiction The Poetics of Child Abuse' in Turner and Williams 1994: 322-341
- 1998a 'Captain Cook's Shoes (From Professor to Administrator A Journey in Need of a Compass and a Clock' Bigelow 1998.
- 1988b 'Gender Studies and Women's Studies' *Knowing Ourselves and Others The Humanities in Australia in the 21<sup>st</sup> Century* Australian Research Council Discipline Research Strategies Volume 2 Discipline Surveys Prepared by a Reference Group for the Australian Academy of the Humanities Australian Government Publishing Services Canberra
- 2000 'Poststructuralism and Discourse Analysis' in Poynton and Lee 2000: 40-48

## **Cases**

*Mabo v Queensland (No 2)* (1992) 175 CLR 1

*Wik Peoples v Queensland* (1996) 187 CLR 1